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Beyond Partisanship? Federal Courts, State Commissions, and Redistricting

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Beyond Partisanship? Federal Courts, State Commissions, and Redistricting

by

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Dedication

To my Mother and Father and my Grandmother Geneva

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Beyond Partisanship? Federal Courts, State Commissions, and Redistricting

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My dissertation examines the influence of partisanship in decision making on redistricting in state commissions and judicial rulings. My central questions are twofold. First, do Republican- and Democratic-appointed federal judges engage in decision making that favors their respective parties? Second, what is the extent of partisan voting on bipartisan state redistricting commissions? These issues possess considerable substantive importance. Some states have considered moving redistricting responsibility out of the legislature and into state commissions, while some political scientists and legal scholars have suggested more vigorous court involvement in the regulation of redistricting. Implicit in many of these arguments is the assumption that federal courts and state commissions will act as neutral arbiters. But, very little social science research exists on the behavior of these institutions.

My investigation combines quantitative and qualitative evidence, using interviews I conducted of federal judges and redistricting commissioners across the country, together

with statistical analyses of court decisions and commission votes. I have 138 court cases from 1981 to 2006, totaling 414 observations or judicial votes.

I argue that federal judges are neither neutral arbiters nor partisan maximizers. Rather, federal judges act as constrained partisans. Judges do not necessarily favor their own party's plans in court cases anymore than they do plans created by both parties under divided government. But, when a federal judge reviews a redistricting plan drawn up by a different party, and where the judge's own party is the victim of partisan line-drawing, she will be more attuned to issues of unfairness in the process. Under circumstances where Supreme Court precedent is unclear, partisan cues become more salient for the judge, increasing the probability she will rely on partisan influences to declare the plan invalid. Interestingly enough, these partisan effects in judicial voting vanish in cases where the Supreme Court delineates unambiguous rules, such as litigation concerning 1 person 1 vote equal population claims.

My analysis of state redistricting commissions, based on the votes of commissioners and in-depth interviews with them, illustrates that commissions, like courts, are also not immune to partisan decision-making. Partisan factors tend to be the overriding concern of commissioners.

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Chapter 1 Introduction

THE POLITICS OF JUDICIAL BEHAVIOR AND STATE COMMISSION OVERSIGHT IN REDISTRICTING

Political fights in redistricting in the United States have been going on for over 200 years. Compared to the rest of the world, America's redistricting process is quite unusual. The U.S. Supreme Court's 2006 Texas redistricting case *Lulac v. Perry* (2006) typifies this uniqueness. While independent nonpartisan boundary commissions in the United Kingdom, Canada and Australia toil away in relative obscurity to produce redistricting plans through a process that is perceived by some political scientists as relatively nonpartisan (Courtney 2001; Johnston et al 2001; Johnston, Rossiter and Pattie 1996), the American process appears very different. As the United Nations sponsored website *aceproject.org* describes the American process,

> The redistricting process in the United States can be distinguished from redistricting elsewhere in the world in at least two very fundamental ways: the extent to which the process is overtly and acceptably political – legislators still have the responsibility for drawing electoral districts in most states – and the degree to which the American courts have intervened in the process. These two characteristics of the process are interconnected and have meant that redistricting is often contentious and that the result may be biased in favor of one political party over the other party (http://ace.at.org/ace-en/topics/bd/bdy/bdy_us July 8, 2006).

America's redistricting practices, thus, can be very partisan and very litigious. The majority party that controls a state legislature has an incentive to draw lines either to maximize potential gains in seats for their party or preserve their incumbent representatives. Foreign observers of American redistricting are more or less dumbfounded by the process's intensely partisan nature and Byzantine legal oversight (Courtney 2001).

The intense fights are not only political, but can be very personal as well, since oftentimes the legislator who is the victim of a partisan gerrymander probably has the same feeling as a plant worker who has his job axed. A line drawn the wrong way can cost the legislator her job. Moreover, the partisanship and political battles of redistricting are not only contained to state legislatures. The contentious nature of the process filters down to all the local governments that have to redraw lines. The most lurid example comes out of the St. Louis Board of Aldermen (city council) in 2001, where a city alderwoman went so far as to urinate in council chambers in an attempt to stop fellow aldermen from gerrymandering her out of her district (Schlinkmann 2001, July 18). Alderwoman Irene Smith was filibustering attempts by the Board to pass a plan that dumped Smith out of her district, and the Acting President of the Board refused to allow her to take a bathroom break without yielding back the floor ("How low can they go" 2001, July 19). Later in her filibuster, Smith had aides bring over a trashcan and held a blanket and quilt up around her as she allegedly proceeded to urinate in the bucket in the middle of council chambers.[1] (How low can they go" 2001, July 19). This example, while extreme, illustrates not only the degree of politics in the process, but also the extent to which the process can be personal in nature. Undoubtedly the British, with their neutral boundary commissions, do not envy the average American process of legislative redistricting. With American experiences such as the events surrounding the St. Louis

[1] All of this occurred as the television cameras in city council chambers were rolling, albeit while Smith was behind a blanket. A fellow alderman filed a complaint against Smith with the police. Smith was later prosecuted for the incident, but was acquitted. She denied she did anything untoward, telling reporters, "You were there, did you see a puddle?" ("Court case continued against alderman charged with urinating during floor debate" 2001, September 10).

redistricting, or the Texas Republican redistricting fight of 2003, or the Democratic gerrymander of Texas in 1991, or the Phil Burton Democratic gerrymander of California in 1981, the search by reformers for alternative methods for regulating redistricting in the United States is not unexpected. These alternatives include federal courts and state commissions.

Some political actors in the U.S. have attempted to check the partisan processes of the state legislatures' redistricting duties and local governmental boards' redistricting duties by resorting to litigation in the courts. This legal option has existed in federal courts since the U.S. Supreme Court's *Baker v. Carr* decision made such suits justiciable in 1962. Since then, litigation regularly comes to the courts, even long after a decennial redistricting in a state has occurred. For example, in 2006, years after the last Census, courts continued to be active in their regulation of redistricting. A three judge federal court in May of 2006 dismissed a Republican lawsuit filed against the state of Alabama (*Gustafson v. Johns* 2006), while another three-judge federal court in Georgia dismissed a Democratic lawsuit against the state of Georgia in *Kidd v. Cox* (2006). And, a federal panel in Mississippi dismissed a lawsuit against the state of Mississippi alleging racial discrimination in the drawing of districts (*Woullard v. Mississippi* 2006). On a higher level, the U.S. Supreme Court in *Lulac v. Perry* (2006) struck down a portion of the Texas redistricting plan while upholding the practice of mid-decade redistricting. The Court also upheld a Colorado redistricting plan in 2007 after years of litigation (*Lance v. Coffman* 2007).

Seeing no relief from the prospect of litigation, groups in a number of states are pushing for reforms in the way of bipartisan or nonpartisan redistricting commissions. In fact, many states have already turned over redistricting authority to bipartisan state commissions[2], including Alaska, Arizona, Hawaii, Idaho, Montana, New Jersey and others. Some states have back-up commissions that come to form only if the legislature fails to draw a plan. Many more states are in the process of considering a change in redistricting responsibility to a commission structure, including Florida, California, Indiana, Massachusetts, Texas, Rhode Island, New York, Colorado, Ohio, Pennsylvania[3] and others (Nagourney 2005; Sanders 2005).

The two primary rationales for states to adopt these commissions are that they may decrease partisan wrangling as well as stave off legal attack. The most visible reform effort is unfolding in California. Although Proposition 77, which proposed creating a three judge commission, failed, leaders in the state legislature who advocated its defeat in lieu of their own "reform" are considering legislation for a commission to redistrict after the 2010 Census. In Florida, where extensive litigation in the federal courts has occurred over redistricting, several groups attempted to place a reform measure on the ballot in 2006 creating a redistricting commission, but the State Supreme Court recently struck down that measure claiming it violates the two-subject rule for ballot referenda. Nevertheless, it is unlikely that the Florida Supreme Court's maneuver will deter further

[2] There are also some parallels at the local level. Some cities have bipartisan commissions that draw the boundaries of city council districts. Seattle is one example.

[3] Ohio and Pennsylvania have commissions, but Ohio's commission can be partisan (because it is made up of state officeholders) and Pennsylvania's commission is not independent because it can be made up of legislators, mostly.

attempts at reform. In Massachusetts, a redistricting fight resulted in the indictment of the state's former Speaker of the House for lying in federal court during a redistricting case. Now, some groups and lawmakers in that state are also advocating a move to a redistricting commission.

The roles of federal courts and commissions have become central to redistricting regulation. Yet, in spite of the mountains of political science studies devoted to the electoral or policy effects of redistricting plans, and in spite of the mountains of law review articles covering the jurisprudential arguments behind redistricting law, few studies have examined how and why courts and commissions make the decisions that they do in redistricting. Undoubtedly, some legal and political scholars argue that either commissions or courts offer less partisan arenas for the regulation of redistricting (Grofman 1990; Kubin 1997; Kousser 1998; Stokes 1998; Dorf and Issacharoff 2001; Issacharoff 2002; Buchman 2003), but little social science evidence exists to substantiate these claims.

Nevertheless, quite a bit of political activity has been generated on the idea that courts or commissions will offer a "better quality", or at least "more neutral" outcome for one party or another compared to a legislature. Over the last several decades, litigants have littered courthouses with redistricting lawsuits against states or local governments, searching for their own brand of equity which they thought was lacking in the legislative process. For their part, some states have attempted to stave off these litigious attacks and insulate themselves from the partisan pressures of redistricting by moving toward unelected state commissions or boards overseeing the redistricting process (Kubin 1997;

Buchman 2003). In a proposal combining the two, Governor Arnold Schwarzenegger of California suggested creating a redistricting commission composed of retired judges. My research looks at the most prominent alternatives to legislative redistricting and asks: are these alternatives any different from a legislature?

What factors influence the decisions of courts and commissions? While some political scientists, such as Herb Asher, have touted commissions as more viable alternatives to legislatures, other political scientists and law professors have viewed the courts as the best option for regulating redistricting (Buchman 2003, Issacharoff 1993). But very few systematic studies have looked into court and commission behavior in redistricting (*but see* Winburn 2006; Buchman 2003; Lloyd 1995).

This dissertation, in its broadest sense, examines how federal courts and state commissions deal with the intractable politics of redistricting. U.S. Supreme Court Justice Felix Frankurter once famously declared in the redistricting case *Colegrove v. Green* (1946) that "Courts ought not to enter this political thicket" 328 U.S. 549, 556 (1946). Frankfurter's views were based on two fears – that courts could lose legitimacy by becoming mired in partisan political disputes, and that courts would not have the requisite capacity and expertise to handle such disputes. The federal courts, nonetheless, entered the business of redistricting regulation with *Baker v. Carr* (1962). Have federal courts unwittingly become drawn into partisan political decisions on redistricting, or were Frankfurter's fears unfounded? The central questions of this dissertation are:

1. Are judges Neutral Arbiters, Partisan Maximizers, or something in between? When dealing with redistricting issues, do courts offer litigants neutral or partisan decision arenas or something else?
2. When state commissions regulate redistricting, do they operate on a consensual or partisan basis, and do they help state redistricting plans survive judicial scrutiny if they are challenged in court?

At their very essence, the questions tackle how these bodies deal with redistricting. To address these questions, I conducted a series of interviews with federal judges in order to generate hypotheses about judicial behavior and gain further insight into the thought process of judicial actors. I also collected data on all published redistricting cases in the federal district courts from 1980 to 2006 to quantitatively test the presence or absence of partisanship, as well as the effect of the law, case facts and other potential relevant factors to decision outcomes. To analyze commission oversight of redistricting, I quantitatively examined the votes of commissioners on state redistricting commissions in the 2000 round of redistricting, and surveyed select redistricting commissioners who sat on these commissions. This allowed me to decipher whether commissions offer a decision process that is a partisan or nonpartisan alternative to courts and legislatures.[4]

[4] Of course, studying the decision making process of courts and commissions will necessarily envelope other matters (such as procedures and expertise in courts and commissions), but the primary explanatory variable of interest in this dissertation for studying the decision making of courts and commissions concerns the role of partisanship, if any, in these institutions. Jeremy Buchman (2003) argues that bipartisan commissions create plans that entrench incumbents. He empirically proves this by illustrating that plans created by bipartisan commissions produce fewer marginal seats. However, is this really a product of bipartisan commissions working together to produce such plans? Is it their intention to create

NEUTRAL ARBITER, PARTISAN MAXIMIZER, OR CONSTRAINED PARTISAN?

The political science view of judges in its most unflattering perspective is that federal judges are partisan actors who decide cases based on their policy and political preferences. Cox and Katz (2002), in their study on judicial behavior on redistricting, portray judges a partisan maximizers, making decisions on cases to favor their own party at all costs. Some judges, of course, tend to deny the presence of partisanship in any of their decisions (Edwards 1998). And thus, this puts the political scientist in the unpalatable position of implying that judges are being disingenuous. On the other side of the spectrum, some law professors and judges view judges as being wholly neutral actors, impervious to partisan influence. This opposite view of judges puts law professors and judges themselves in the unpalatable position of denying empirical reality, since some social science research does indicate that political party can correlate with federal trial court decisions in various areas of the law. In particular, one social science study on redistricting supports the idea that judges are neutral arbiters in the redistricting process.[5] Only two studies on judicial behavior in redistricting have statistically tested decision making in these cases, and both studies come to opposite conclusions about judicial behavior.

Of course, few federal judges attempt to engage in overt partisan action. Many undoubtedly simply see it as their duty to act as the umpire to resolve these disputes. Some federal judges don't even want to have anything to do with redistricting. As one

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this? *Page v. Bartels* is a case where the commission voted strictly on a party-line basis and the losing party sued. If this case is the norm on bipartisan commissions, then the production of fewer marginal seats may not necessarily be inherently due to the bipartisanship of the commission.

[5] These studies are too numerous to mention here, and are discussed later. One such notable study on federal district courts was done by Rowland and Carp (1996)

federal judge told me, "[Federal judges] would rather not have the burden [of hearing these redistricting disputes], but there is no way to get around it, and courts are always the final arbiter."

State legislatures and the Congress seemingly dump these difficult and highly charged political decisions onto the courts, fairly or unfairly, and the lower federal courts are forced to respond to the redistricting litigation in light of their duties under *Baker v. Carr* (1962), *Reynolds v. Simms* (1964) and other Supreme Court precedent. And this legal precedent, according to some legal scholars and judges, has been far from clear over the years (Butler 2002), although some areas of this law are clearer today. In the vacuum left by uncertain Supreme Court precedent in redistricting, judges' partisan affectations may influence their perceptions of the fairness of plans – perhaps even subconsciously as suggested by the psychology literature (Chen and Chaiken 1999).

I argue that federal district judges are neither partisan hacks nor completely neutral arbiters. In the following chapters, I develop a model of the federal district judge as *constrained partisan* in redistricting cases – constrained by her own sense of justice and fairness and constrained by the substantive law. I illustrate in chapter 2 how certain aspects of redistricting law are unclear, and the law and facts of redistricting can be complex (Buchman 2003). In the face of complexity and ambiguity, I illustrate in chapter three how psychology has shown that people rely on past life experiences and potential biases to help make sense of complex and ambiguous information. In the case of redistricting, when case complexity and ambiguity are high, partisanship color judicial perceptions of the evidence in spite of judges own best efforts to fight this (Lodge and Taber 2000; Chen and Chaiken 1999). This is particularly the case when judges encounter plans drawn up by a different party from the judge (i.e. opposite party plans). In difficult cases, where no clear legal guidance exists, it is only natural for judges to do

the best they can to decide what is equitable and just, based on their own life experiences. When judges see their own party treated unfairly in the state redistricting process, it seems natural that they might be suspicious of the opposing party's redistricting plan and scrutinize it more thoroughly. They might be less willing to tolerate partisan politics. Furthermore, if the case is such that the law offers little guidance in how they should reach a decision, then judges have to rely on more non-legal factors to guide their decision, including the facts of the case and the judge's own conceptions of what's a fair and just result based on the judge's own past experiences with politics. These past experiences, including the judge's own partisan experiences, may color the judge's perceptions of the evidence. The social-psychological literature on the enduring nature of partisanship as well as the political science research on the role of party identification in judicial behavior suggest that it is naïve to think that judges can completely shake their partisan perspective (*see* Giner-Sorolla, Chaiken, and Lutz 2002). As one federal judge I interviewed said,

> "In my view, there is no way [for judges to divorce themselves completely from politics]. For most of whom, who have had political activities [before coming to the bench], there is no way you can remove that experience or personal biases, and it stays there… There is no federal judge who can remove himself from his own life experience."

Another judge, in response to the Supreme Court's decision in *Lulac v. Perry* stated,

"I was surprised that the Court did what it did, but a lot of it's just politics, even at that level."

Additionally, I argue that partisan influence is less likely to creep into judgment and perceptions of evidence when ambiguity is low – i.e. when legal principles are relatively clear. In these instances, federal judges will rely less on partisan shortcuts to help them decipher data.

I employ statistical models in chapter 4 and interview data in chapter 5 to help me set up and test a constrained partisan model of decision making. More specifically, using multivariate models, I test when and how partisanship and the law correlate to judicial decisions. I also examine whether state commission processes influence judicial decisions when their plans are attacked in federal court. In the end, I conclude that for much of the time, partisan influence in decision making only occurs under certain conditions – when judges are subjected to negative information about their party (when reviewing an opposing party plan) and when clarity in the law is lacking,

Consequently, what my research shows is a federal judiciary exhibiting some partisan decision making, but federal judges are generally not out to advance the redistricting plans of their own party, ceteris paribus. Their main goal is to follow the law, and if that is unclear, ensure fairness. As I stated, fairness can be a matter of partisan perspective and is more likely to come into issue when a federal judge sees her party railroaded or treated unfairly in the state redistricting process.

This sense of fairness in judicial decision making in this area of law also becomes more evident when one examines the impact of independent redistricting commission processes on judicial behavior. Judges tend to view plans drawn by independent commissions more favorably. This favorable review by judges may be because commissions make a better effort than legislatures to follow the law, but it also may be because commissions are perceived by the federal judiciary as fairer processes. And this fact is born out by both my quantitative analysis of court cases as well as my interviews of judges, where many suggest that independent commissions might be subject to lesser standards of review simply because they operate less like a legislature – less out of self-interest.

As for state commissions, it turns out that they do not necessarily operate on a consensual decision making basis. Commissioners often rely on partisan cues and party loyalty to help them make decisions and approve redistricting plans. But, the amount of reliance on partisanship depends somewhat on the institutional structure of the commission and the particular politics of the given state. And irrespective of how commissions operate, federal courts tend to find these plans more acceptable than legislative drawn plans.

IMPLICATIONS OF THE RESEARCH

This work has larger implications for understanding the processes of how we draw our electoral lines in America – for discovering how we choose to choose our representatives. Redistricting not only affects the composition of legislatures, but potentially contributes to incumbency advantages and increases polarization. So, the process for how lines are drawn becomes important for both practical and theoretical reasons. The advent of new computer technologies for redistricting over the last 25 years has increased legislative incentives for partisan gerrymanders, but not without some backlash. Congressional races have become less competitive, perhaps due to redistricting (McDonald 2006). The parties have become more polarized in Congress (Binder 2001). And, lawsuits continue unabated more than five years out from the last Census. In the search for a better redistricting process, scholars and states are rushing out to embrace other redistricting arrangements (calling for either stricter judicial oversight over partisan redistricting – an issue just decided by the U.S. Supreme Court – or the ceding of line-drawing control from legislatures to commissions). Federal courts play an integral role in how we arrive at the legislators we have. And the role of state commissions is increasing

as well. The core problem for some people in the U.S. may be an overly partisan decision making process; but the political science literature has not been clear about whether judges or bipartisan commissions oversee redistricting in the form of non-partisan or partisan actions.

Some scholars have looked with envy on the way Britain redistricts (Leonard and Mortimore 2001). Political scientist Donald Stokes, who himself served on New Jersey's 1990 redistricting commission, advocated for more states to adopt such a system, which he said was the right mix between the British system and the current practice among many American states of allowing legislatures to redistrict (1998).[6] Answering the questions I have proposed in this research would further the normative debate on how we redistrict and what institutions might be the most desirable (or, at least, most neutral) overseer of the process of redistricting.

In addition, however, this dissertation should speak to the larger questions of the role of courts in our political processes and the concerns over the demise of the Supreme Court's political question doctrine (Barkow 2002; Dorf and Issacharoff 2001; McCloskey 1962), a legal doctrine recognized as far back as *Marbury v. Madison*, which cautions the judiciary from becoming entangled in disputes that are purely political. Given this doctrine, to what extent should courts regulate the political process? While this is a normative question not resolved in my study, by showing when and how courts regulate the political process, my dissertation furthers the debate as to when intervention might be normatively desirable, and when it might not.

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[6] Stokes' wonderful experience on the commission was markedly different from Larry Bartels. Bartels was asked to serve on and chair the New Jersey commission for the 2000 round of redistricting. He was later sued by Republicans and others (*Page v. Bartels*) after he sided with Democrats on the commission in adopting a plan.

Finally, the dissertation should add to the research questions on existing theories of judicial behavior (Segal and Spaeth 1993, 2002; Epstein and Knight 1998). Most studies in political science rely on strategic and attitudinal models for studying judicial behavior. However, for federal trial courts, the attitudinal model appears insufficiently nuanced, because it assumes federal trial judges essentially decide cases based on their own policy preferences without regard to the law or Supreme Court precedent. Strategic models are not particularly suited for trial courts either, and sometimes fail to sufficiently appreciate legal variables. Only a few significant works employ social psychological theories to help explain judicial behavior (Rowland and Carp 1996). Therefore, I looked to social psychological theories in decision making to help me fully conceptualize the decision making process.

FRAMEWORK OF THE DISSERTATION

To test and prove the questions presented (1. Are judges constrained partisan?; 2. When and how do commissions rely on partisan voting?), I employ multiple methods of analysis, including the use of quantitative and qualitative data, in order to develop a story of how courts and commissions address redistricting issues. In chapter 2, I examine the legalities of redistricting in more detail in order to develop possible legal variables that might help explain judicial behavior. In chapter 3, I explore further the political science theories that might explain the hypothesis I have developed for judicial behavior in redistricting. In chapter 4, I quantitatively test the role of partisanship in judicial redistricting decisions. I have done this by collecting every federal district court case in redistricting from 1980 until 2006. This dataset includes around 400 votes of federal judges in redistricting cases. In chapter 5, I further test my hypothesis about judicial

behavior through a compilation of interview surveys of federal judges conducted over several months. This study, funded in part by the National Science Foundation, attempts to gauge how judges see their role in redistricting, and what issues they see as significant in these types of cases. This chapter will help elaborate on the hypothesis that judges rely on partisan sympathies *only* under certain scenarios. The chapter will also examine how judges view commission-drawn plans compared to legislative plans. In chapter 6, I address particular theories and hypotheses that explain commission behavior. Then, using a dataset of votes of plans by various commissions in the 2000 round of redistricting, I statistically measure the extent of partisanship in commission decision making, and explore other variables that may govern commission behavior. Finally, I offer a conclusion in Chapter 7, providing a broad picture of how commissions and courts operate in the area of redistricting and suggesting what these findings may mean for future state action in this area.

Chapter 2 The Legal Explanations of Judicial and State Commission Behavior in Redistricting: A Doctrinal Analysis of Federal Redistricting Laws

> The analytical lawyer… is not concerned with ideals; he takes the law as a given matter created by the State, whose authority he does not question. On this material he works, by a means of a system of rules of legal logic, apparently complete and self-contained… [T]he legal system is made watertight against all ideological intrusions, and all legal problems are couched in terms of legal logic.
>
> – *Schubert* 1965, p.159 *quoting Wolfgang Friedman* 1960.

INTRODUCTION

In this chapter, I examine the legal rules of redistricting. As you recall from chapter 1, I argue that judges act as constrained partisans in redistricting – constrained by the law and their own sense of fairness. I also argue that state redistricting commissions engage in partisan decision making, but that the institutional structure of the commission and the context of the politics of the state act as constraints. Here in chapter 2, I begin with the legal foundations and general guidelines for understanding federal court and state commission behavior. There are, of course, social scientific theories for judicial decision making and commission behavior[7], but I want to reserve discussion of these ideas for Chapter 3.

My purpose for reviewing the laws of redistricting is twofold. First, I submit that the law is an important factor in federal district court decisions on redistricting (and to a much lesser extent, commission decisions). There are some legal basics in redistricting that are reasonably clear, and under these circumstances, courts and commissions might

[7] For the courts, this includes pure attitudinal models, personal attribute models, strategic models and models that combine legal and non-legal factors.

be expected to follow the law more often.[8] The second purpose of this review, however, is to illustrate that many aspects of redistricting law are vague, amorphous, or contradictory. This means that judges cannot always be certain of what the law "is" so that they can apply it to the fact situation they are observing. Even if a particular judge does have an idea of what "she" thinks the law is, she cannot go wrong with whichever litigant she chooses to anoint as victor because the general uncertainty in the law among those in the profession means that practically speaking there is no way for her to misapply the law. Consequently, when making her decision, there are going to be other non-legal factors that come into play. The concept of judges considering legal and non-legal factors is more fully developed in chapter 3.

A great many legal scholars have penned articles arguing over the normative issues confronting courts in redistricting, and some of these arguments are addressed later in this dissertation. However, the focus of the chapter concerns the doctrinal issues and debates of redistricting. This should give the reader an idea of how the law bounds and constrains judges in redistricting. Before getting to the substance of redistricting law, however, it's useful to understand the Panglossian concepts under which the legal community strives to operate, i.e. sincere application of the law. Social scientists refer to this idealistic model of judicial behavior as the formalistic textbook legal model of judicial decision making.

As a social science model, the formal legal model is rather lacking, but it offers a starting point for looking at initial foundations for how courts arrive at their decisions.

[8] For example, federal district courts and state commissions have a clearer idea, relatively speaking, of the rule of one person / one vote which requires equal population districts. While questions still arise under this area of redistricting case law (for example, how equal is equal enough?), one might argue, as I do in this chapter, that the legal standards in this area are at least marginally clearer than in other areas of redistricting law. Of course, political scientists continue to debate the extent to which the law matters in judicial decision making. While my research does contribute to this debate, my research focuses on the nature of partisanship.

According to Frank Cross and Emerson Tiller, "… [M]uch of the [legal] scholarship simply assumes the sincere application of legal doctrine…. [and] many legal scholars explicitly discard the proposition that judges disregard legal doctrine in favor of partisan or ideological policymaking… even in the face of reputable empirical studies in political science" (1998, 2156). While the reality of social science findings illustrate that the legal model can be a poor predictor of judicial behavior, it is informative to review the model for several reasons. First, much of the legal profession argues that this process of decision making largely represents reality, including legal scholars[9] and the judges themselves[10], and so by ignoring it entirely, social scientists may also misrepresent the decision making process. Second, a quick review of this model allows me to rule it out as a complete explanation for understanding judicial behavior in redistricting. At the same time, while discarding this notion of decision making, this review allows me to incorporate notions of this process into a broader theory of judicial behavior in chapter 3.

[9] Hence we see the voluminous amount of legal scholarship after *Bush v. Gore* (2000) indicating shock and outrage directed at a Supreme Court decision that was not surprising to political scientists. (*see* Ackerman 2002; Tribe 2002; Dworkin 2002; Weinberg 2002; Radin 2002; Dorf and Issacharoff 2001; Sunstein and Epstein 2001). Law professor Margaret Jane Radin, in calling *Bush v. Gore* (2000) "a broad assault on the rule of law" (2002, 114), proclaimed that "Judges should be guided by law and legal principles, not by their personal political commitments" (2002, 111-12). She goes on to state that "… instead of deciding the case in accordance with preexisting legal principles … five Republican members of the Court decided the case in a way that is recognizably nothing more than a naked expression of these justices' preference for the Republican party" and that the Court's analysis "doesn't pass the laugh test" (2002, 114). Of course, there were plenty of sincere legal scholars on the other side, making the same charges against the analysis of the dissenting opinions in that case or the actions of the Florida State Supreme Court (Epstein 2001; Ceaser and Busch 2001).

[10] A number of judges I interviewed responded to my queries about how they would view certain redistricting scenarios by remarking that it depended on what the law was. Some of these very same judges noted that the personal experiences and backgrounds of judges may have some effect, but that judges, by and large, try to follow the law.

THE TRADITIONAL LEGAL MODEL

The legal model assumes that a judge reviews the facts of the case, chooses a legal category to place the case in, identifies the legal rule which applies to this category of cases, applies the legal rule to the facts of the case, and then issues a decision (Tarr 2003). This "deductive model suggests that judges decide by applying known rules to diverse facts" (Tarr 2003, 258). As G. Alan Tarr notes, if this model were true, then judges could simply be replaced by a computer, whereby facts could be inputted into the processor, and the computer could simply apply the appropriate legal rule (2003). This "static model" fails to account for instances where there is no precedent or legal rule, instances where contradictory precedent and statutes exist, or instances where more than one legal rule applies (Tarr 2003, 257). Another variant of this model, offered by Robert A. Carp and Ronald Stidham, describes the legal decision making model in a three step process. "(1) similarity is seen between cases; (2) the rule of law inherent in the first case is announced; and (3) the rule of law is made applicable to the second case" (Carp and Stidham 2001, 285). According to Edward H. Levi, under the legal model, judicial "rules arise out of a process which, while comparing fact situations, creates the rules and then applies them" (Levi 1949, 4).

In its most formalistic variant, the crux of the legal model presumes that judges discover what the law is by examining the relevant legal text, precedent, and perhaps legislative history. Regardless of the type of legal model employed, the overarching idea is that law constrains and directs the judge to her decision (irrespective of the judge's life experiences or other contextual and institutional factors operating on the judge). For courts, especially trial courts, the legal model probably governs a fair amount of cases. Carp and Stidham surmise that, "it is probably fair to say that in a majority of cases the facts, evidence, and controlling precedents distinctly favor one side" (2001, 314).

However, it is not infrequent that the law and controlling precedent are unclear. As Carp and Stidham note, "judges often find themselves in situations in which the facts and evidence are about equally compelling on both sides, or in which a roughly equal number of precedents sustain a finding for either party" (2001, 314). Under these circumstances, of course, the legal model begins to break down. Explaining judicial behavior becomes more complicated than simply applying the law. In these moments, it is only natural for judges to be influenced by their own life experiences and value systems, or by their own assessments of whether their decisions will be reversed or countermanded by another branch of government, or by interaction with their colleagues on the bench in multimember courts. These influences then factor into what the judge ultimately decides. Thus, uncertainty in the law creates problems for the judge in going about applying the legal model, and in these instances she must rely on her own conceptions of fairness and justice to decide outcomes. In many respects, this is the context in which federal judges find themselves in the area of redistricting law. As Carp and Stidham suggest, the law of redistricting, if discernable, may be a factor in trial courts (and the bulk of my data for this dissertation come from trial courts). In reviewing the law of redistricting, I address both those instances where the law may provide parameters for lower courts to operate under, as well as where the law offers only vague or amorphous legal parameters. Some of the following discussion can be quite technical, but necessary in order to understand the Supreme Court orders (or statutory orders, when referring to the Voting Rights Act) that lower courts face.

THE LEGAL MODEL AND REDISTRICTING: EQUAL POPULATION STANDARDS AND RULES

The most immediately cognizable requirement of redistricting law is that of equi-populous districts. In a series of early U.S. Supreme Court cases – *Baker v. Carr* (1962), *Gray v. Sanders* (1963), *Wesberry v. Sanders* (1964) and *Reynolds v. Sims* (1964) (and its companion case *Lucas*) – it started to become clear that the Court interpreted the Constitution to mean that states were required to draw equi-populous districts for their congressional *and* their state legislative seats. It's important to go over some of these early cases because they are still very frequently used as justifications by federal courts, particularly in many of the court cases considered in my redistricting study. After a cursory consideration of *Baker v. Carr* and *Gray v. Sanders*, I leave the weight of the analysis to a focus on *Wesberry v. Sanders* and *Reynolds v. Sims* because these two cases set forth the earliest and most substantial rules on equal population. Then I turn to a couple of interim cases from the 1970s, before concluding with the 1983 cases (and a coda from the 2000s).

Baker established the justiciability of redistricting cases. *Gray* then articulated the rule "one person, one vote." But this prophylactic rule was initially not a clear-cut legal rule that federal district judges could simply apply. In the beginning, the standard of "one person – one vote" was not a standard at all, but merely a catchy slogan (*see* Dixon 1971).[11] Two major legal questions remained unsettled for many years. First, how equal was equal? Did equal mean roughly equal numbers of people or exact equality? Second, were state legislative districts to be treated differently from congressional districts?

[11] Judicial scholar Robert Dixon said, "'One man, one vote' … is a slogan, not a political theory" (1971, 45)

The first question mentioned above does not become settled until the early 1980s. Even up to the present day, some disputes continue over the rule of equality (*see Vieth v. Pennsylvania* 2002, below).

While the debate over how much equality is required sometimes surfaces even today, the second question above, about whether to treat state legislatures differently, was answered rather quickly. After the *Wesberry* and *Reynolds* cases of 1964, the U.S. Supreme Court gave federal district courts a rule, if somewhat vague, that congressional districts would be held to stricter equal population standards than state legislative districts. In *Wesberry v. Sanders* 376 U.S. 1 (1964), the case dealing with congressional districts, the Court focuses in on the language of Article 1 Section 2 of the Constitution, which states that Representatives must be chosen "by the People of the several States." According to the Court, when this phrase is "construed in its historical context… [it] means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's" *Wesberry v. Sanders* 376 U.S. 1 at 7-8 (1964).

In *Reynolds v. Sims* 377 U.S. 533 (1964), the Court adopts a slightly different rule for state legislatures, basing their decision in this case on the 14th Amendment's Equal Protection Clause. This case involved a legal challenge to Alabama's malapportioned state legislature, where ¼ of the state's population, in theory, could elect a majority of the state senators and representatives[12] (O'Brien 2001). The first legal rule from the case consists of the idea that both houses of a state's legislature "must be apportioned on a

[12] *Lucas v. Forty Fourth Colorado General Assembly* (1964) was the companion case, along with four others, released the same day as *Reynolds*. Lucas involved a legal challenge to Colorado's state legislature. This case presented a trickier issue for the court. Unlike the case of Alabama, in Colorado a majority of voters in every county of the state (including metropolitan Denver) adopted a state legislative scheme where the state House districts were based strictly on population while the state senate was apportioned by county. The Supreme Court ruled that regardless of how the redistricting scheme was adopted, the system was unconstitutional because the state senate districts disregarded equal population concerns.

population basis" (*Reynolds* at 568). Writing for the Court, Chief Justice Warren declared that "Legislators represent people, not trees or acres" (*Reynolds* at 562).

In further defining the legal rule on requiring different equality standards for state legislative districts and congressional districts, the Court stated the following:

> We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement…. In implementing the basic constitutional principle of representative government as enunciated by the Court in *Wesberry*… some distinctions may well be made between congressional and state legislative representation. (*Reynolds* at 577)

Thus, under this new rule, mathematical exactness is not required when redistricting state legislatures. However, the Court qualified this new rule under the following conditions.

> So long as the divergences from a strict population standard are based on legitimate considerations incident to effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. (*Reynolds* at 579)

This qualification means that if states were going to depart from mathematical exactness, such deviations must be "incident to effectuation of a rational state policy." The Court does give some guidance in this area by creating a very long list of what *is not* a rational state policy.[13] But, many of the U.S. Supreme Court's prohibited reasons for deviation

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[13] Because Justice Harlan's dissent more concisely lists what are improper bases to deviation from population equality, I draw from his dissent in interpreting the majority's rule:

> In one or another of today's opinions, the Court declares it unconstitutional for a State to give effective consideration to any of the following in establishing legislative districts:
>
> (1) history;
> (2) "economic or other sorts of group interests";
> (3) area;

from equality are seen in countries such as Canada, Australia, and Great Britain as perfectly "rational" ways on which to base a system of representation.[14] Consequently, the U.S. Supreme Court's rule makes it quite probable that reasonable actors in the redistricting process (states and federal district courts), attempting to determine what is a

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(4) geographical considerations;
(5) a desire "to insure effective representation for sparsely settled areas";
(6) "availability of access of citizens to their representatives";
(7) theories of bicameralism (except those approved by the Court);
(8) occupation;
(9) "an attempt to balance urban and rural power."
(10) the preference of a majority of voters in the State.

So far as presently appears, the *only* factor which a State may consider, apart from numbers, is political subdivisions. But even "a clearly rational state policy" recognizing this factor is unconstitutional if "population is submerged as the controlling consideration . . . ." (*Reynolds*, Harlan *dissenting* at 682-83).

[14] Canadian and Australian courts have explicitly refused to follow the one person one vote logic, stating that democracy encompasses more than equal population factors (Daly 1998). For example, in the 1991 case *Carter v. Saskatchewan*, ([1991] 2 S.C.R. 158), the Canadian Supreme Court upheld deviations as high as +/- 25 percent, interpreting the section 3 right to vote provision under the Canadian Charter of Rights and Freedoms of 1982 in the following manner:

> Those who start from the premise that the purpose of the section [3] is to guarantee equality of voting power support the view that only minimal deviation from that ideal is possible. Those who start from the premise that the purpose of §3 is to guarantee effective representation see the right to vote as comprising many factors, of which equality is but one (Daly 1998, 303 *quoting Carter*).

Here, the Canadian court is less concerned with equal voting power per individual, and more concerned with effective representation. According to the *Carter* Court, "Such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of effective representation" (Fritz 1998, 468 *quoting Carter*). The impact of the *Carter* decision has been to increase voter equality in many provinces, but there have been few court battles over redistricting plans since *Carter* (Courtney 2001, 173). No one in Canada seems particularly exercised about electoral reform (Courtney 2001). According to John C. Courtney, "[N]either the number of court cases nor the participation of electoral reform interest groups has come close to approaching levels achieved in the United States" (2001, 173).

Courts in Britain, unlike the United States, are more constrained by the nature of the constitutional system (*see Ex parte Foot*, 1983 1 Q.B. 600). In Britain, independent commissions run redistricting, and courts worry little about theories in representation. For British courts to get involved in redistricting, only a "fundamental failure" by the commission "to discharge" its duties under the statutory guidelines would constitute a sufficient reason to overturn the report of a commission by court order (*R v. Local Government Boundary Commission ex parte Hart District Council* 1987 Queens Bench Division; *Re Philip Roy Gallie MP and Others* 1994 Court of Session: Outer House).

"rational state policy," are going to implement or sustain redistricting plans based on rationales the Supreme Court subsequently finds anathema. In some sense, "*effectuation of a rational state policy*" is no rule at all, but instead is whatever the Supreme Court wants it to mean. For state actors and federal district courts attempting to follow this legal rule, it becomes a bit of a guessing game as to what the U.S. Supreme Court finds is a "rational state policy."

Of course, the Court's long list of invalid justifications for deviation are somewhat useful for understanding how to apply the rule, but it nevertheless leaves one to wonder what might be a valid justification for deviation. The Court provides only one possible example of an "effectuation of a rational state policy" in drawing district lines – that is respecting political subdivisions.

> A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions…. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering. (*Reynolds* at 580-81)

But even for this rationale, the Court qualifies this potential justification by stating,

> However, permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population. Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-population principle in that legislative body. (*Reynolds* at 581)

Another rule that could be surmised from *Reynolds* was that legislatures would have to redistrict more often. The Alabama state legislature had not redistricted since 1901, even though the state constitution required redistricting every ten years (O'Brien 2001). After *Reynolds*, scores of states across the country began redistricting their legislatures (Cox and Katz 2002; McCloskey 1962).

The last important rule to come out of *Reynolds* was that of achieving "fair and effective representation" (*Reynolds* at 565), which the Court claimed was "concededly the basic aim of legislative apportionment" (566). What that phrase meant was not completely articulated by the Court. According to law professor Lucas Powe, the concept had the potential to clash with the rule of equal population: "The Court took a verifiable concept, equal population, and merged it with a subjective one, effective representation, and did so where on its own terms it could not be accurate, given loser-take-nothing elections" (Powe 2000, 248).

As the Supreme Court ended the 1964 term, the major legal rules were that (1) redistricting lawsuits are justiciable; (2) the Constitution requires representation based on "one person, one vote"; (3) congressional districts must be equal in population "as nearly as is practicable" while state legislative districts may deviate more; (4) state legislative districts must be based "substantially on population" (*Reynolds* at 578), such that any population variances must be "incident to effectuation of a rational state policy", an example of which might be political subdivisions, as long as deviations were not too much; (5) states must redistrict regularly (6) finally, apportionment must be geared toward achieving "fair and effective representation."

Justice Stewart described the new legal rationales as a process where "… the requirements of the Equal Protection Clause can be met in any State only by the uncritical, simplistic, and heavy-handed application of eighth-grade arithmetic" (*Reynolds* at 750). *However*, subsequent mounds of litigation over what the Supreme Court meant by districts "substantially [based] on population" or congressional seats that are "as nearly as is practicable" illustrate that the rule was not as simple and mechanical as Justice Stewart thought. If the rule were not so mechanical, it means that federal judges over time were basing their redistricting decisions, in part, on reasons other than the law.

CURRENT REDISTRICTING LAWS GOVERNING EQUALITY IN CONGRESSIONAL DISTRICTS

The uncertainty of how equal was enough to meet constitutional standards meant that the Supreme Court had to further refine equal population rules over the years. For congressional districts, the first major refinement comes by way of *Kirkpatrick v. Preisler* 394 U.S. 526 (1969), when the Supreme Court rejected Missouri's 1967 congressional redistricting plan because population deviations were as high as +/- 3 percent (with the biggest disparities deviating from 2.84% below to 3.13% above the ideal district, to be exact)[15] – varying in population from about 420,000 to about 445,000. In this case, the

[15] Maximum deviations in the United States are "derived by adding the percentage excess of the largest district above the ideal … to the percentage under the ideal of the smallest district…" (Issacharoff, Karlan and Pildes 2002, 172). The U.S. courts measure deviations differently from Britain, Canada, etc. The popular and legalistic literature outside the U.S. speak in terms of deviations only as districts relate to the mean ideal district, whereas in the U.S., maximum deviation sizes are measured by adding the largest variances of districts above and below the ideal district size. Thus, in Britain, a plan with maximum

Court rejects the notion that small variances in congressional districts could be considered legally "de minimis." The majority states,

> [T]he "as nearly as practicable" standard requires that the State make a good-faith effort to achieve precise mathematical equality… Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small…. Therefore, the command of Art. I, § 2… permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown. (*Kirkpatrick* at 530-31).

The majority places the legal burden on states to justify any deviations found in congressional districts. Missouri justifies their variances based on efforts to preserve distinct social and economic interests. Missouri also states that necessary political compromises among the two major parties came at the expense of further exactness. The Court rejects all of Missouri's justifications as violative of the principles enunciated in *Reynolds v. Sims*. The Court further states that in congressional redistricting, following political subdivisions is not a valid rationale for diverting from strict equality. The majority avoids the questions of whether congressional plans could be based on eligible voter population or could be devised to take into account projected population shifts (*Kirkpatrick v. Preisler* 1969).[16]

The Court was highly divided over the new standard. Three justices dissented, and Justice Fortas, who concurred in the result, disagreed with the new rule, "I cannot

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deviations of 25% would mean that one district is at least 25% from the ideal, whereas in the U.S., this same example could mean that one district was 10% below the ideal and another district was 15% above the ideal.

[16] Australian redistricting law requires redistricting plans to take into account projected population shifts so that halfway through the redistricting cycle, districts obtain substantially equal population sizes (Courtney 2001).

subscribe to the standard of near-perfection which the Court announces as obligatory upon state legislatures facing the difficult problem of reapportionment for congressional elections" (*Kirkpatrick* at 536). Fortas sees the possible valid exceptions to deviations in congressional district plans that the Court spells out as nonexistent and merely illusory.

> The Court now not only interprets "as nearly as practicable" to mean that the State is required to "make a good-faith effort to achieve precise mathematical equality," but it also requires that any remaining population disparities "no matter how small," be justified. It then proceeds to reject, *seriatim*, every type of justification that has been – possibly, every one that could be – advanced. (*Kirkpatrick* at 537, Fortas *concurring*).

Fortas' concerns about manageable standards appear to be true empirically. Social science evidence suggests that federal courts had little guidance as to what was constitutional in congressional redistricting until *Kirkpatrick* in 1969, and uncertainty continued to persist until 1983, when these standards were tightened further (*see* Cox and Katz 2002; Lloyd 1995). In 1983, the Supreme Court finalized congressional equality rules in *Karcher v. Daggett* 462 U.S. 725 (1983), when the majority rejected as unconstitutional New Jersey's *.69 percent* deviation in its congressional redistricting plan, despite the fact that such variances in districts were smaller than the margin of error in the Census. Like *Kirkpatrick*, the Court was very divided over this case. The underlying thrust, however, was that the Court viewed the New Jersey plan as a partisan gerrymander, and requiring ever stricter population standards was a way to strike down the plan while allegedly solving the partisan gerrymander issue. As such, the Supreme Court not only used the equal population rule to protect individual rights, but it also believed (misguidedly) that the rule could serve as a secondary purpose to combat

political gerrymandering. One judge opined to me, "By requiring 1 person 1 vote, [they think] it will limit partisan gerrymandering. I don't think it really does" (federal district judge).

In theory, the Supreme Court in *Karcher v. Daggett* left open the possibility that minor deviations could still be justified under some conditions:

> Any number of consistently applied legislative policies might justify some variance, including, for instance, *making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives*. As long as the criteria are nondiscriminatory,… these are all legitimate objectives that on a proper showing could justify minor population deviations. See, e. g., West Virginia Civil Liberties Union v. Rockefeller, 336 F.Supp. 395, 398-400 (SD W. Va. 1972) (approving plan with 0.78% maximum deviation as justified by compactness provision in State Constitution)…. The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions…. By necessity, whether deviations are justified requires case-by-case attention to these factors. (Karcher 740-41) (emphasis added).

Nevertheless, after *Karcher*, the debate over mathematical exactitude largely declined in Supreme Court opinions. No opinion directly on this issue of congressional district equality has come out of the Court since 1983. Thus, mathematical equality is the rule for congressional districts. A recent example of this rule in application at the district court level is *Vieth v. Pennsylvania* 195 F. Supp. 2d 672 (M.D. Penn. 2002), where the three-judge panel struck down the partisan Pennsylvania redistricting plan because it deviated in population by 19 people (and none of the justifications for the deviation proffered by the state satisfied the district court). One federal judge I interviewed mentioned this case and noted how she thought that the arguments over a miniscule 19 person deviation were

"silly" (federal district judge). In complaining about how the exactness requirement presents difficulties for local governments and voters, this judge said,

> It is an awful problem at the local level, because some precincts have 2 different congressmen, so they have to set up 2 machines. Another result is that these districts get moved around all the time. People often don't know who their congressman is….. **Frankly, I didn't even know who my own congressman is until I went to the polls**! (federal district judge).

The reality is that if congressional districts theoretically[17] deviate more than zero or 1 persons, this gives a federal district court an excuse to strike down the plan, unless the state sufficiently justifies the deviations to the court's liking.

CURRENT REDISTRICTING LAWS GOVERNING EQUALITY IN STATE LEGISLATIVE DISTRICTS

Since *Reynolds v. Sims* and *Lucas v. Forty-fourth Colorado General Assembly*, the development of equal population rules for state legislative districts has been a bit more tortuous. *Reynolds* suggested that federal courts would treat state legislative plans differently, and this is, in fact, what happens in the 1970s. The question, though, was how differently would state legislatures be treated? The first clear inclination of how this rule might be applied by the Supreme Court after *Reynolds* came in *Mahan v. Howell* 410 U.S. 315 (1973), when the Court upheld maximum deviations of 16.4 percent in Virginia's House of Delegates plan. Up until this time, the smallest maximum deviation

[17] I say theoretically, because the Census count is static, and given birth, death, and the movement of people in and out of a district, the actual deviations at the time the plan is reviewed by a court are unknown.

in a plan struck down by a court was 26 percent.[18] While the Supreme Court in *Mahan* stated that the 16 percent deviation in the Virginia plan "may well approach tolerable limits" (410 U.S. at 329), the state's plan was nevertheless constitutional. In later cases during the 1973 term, the Court upheld as constitutional state variations of 9.9 percent in Texas[19] and 7.83 percent in Connecticut.[20]

The conclusions to be drawn from these cases were that the extent of tolerable limits in state legislative district plans were somewhere between 16 percent and 26 percent. Of course, the size of this disparity in what was knowingly acceptable limits consequently left many federal courts and state legislatures with plenty of leeway for their own interpretations of what were fair limits on deviation sizes.

In 1977, the Court began to formalize the idea that state legislative plans which exceeded 10 percent in maximum deviations were more than *de minimis* constitutional violations, while plans that fell below 10 percent were "considered to be of prima facie constitutional validity" *Connor* v. *Finch*, 431 U.S. 407, 418 (1977). In 1983, the 10 percent rule became more solidified as the standard for state legislative redistricting plans

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[18] In *Mahan v. Howell* 410 U.S. 315 (1973), the Court stated, "The most stringent mathematical standard that has heretofore been imposed upon an apportionment plan for a state legislature by this Court was enunciated in *Swann* v. *Adams*, 385 U.S. 440 (1967), where a scheme having a maximum deviation of 26% was disapproved. In that case, the State of Florida offered no evidence at the trial level to support the challenged variations with respect to either the House or Senate…. The 16-odd percent maximum deviation that the District Court found to exist in the legislative plan for the reapportionment of the House is substantially less than the percentage deviations that have been found invalid in the previous decisions of this Court. ***While this percentage may well approach tolerable limits***, we do not believe it exceeds them. Virginia has not sacrificed substantial equality to justifiable deviations." (*Mahan* at 329) [emphasis added].

[19] *White v. Regester* 412 U.S. 755 (1973)

[20] *Gaffney v. Cummings* 412 U.S. 735 (1973)

in *Brown v. Thomson* 462 U.S. 835, 842-43 (1983).[21] Although the Supreme Court upheld Wyoming's 89 percent maximum deviation in one particular legislative district, the Court majority reiterated its standard of using an excess of 10 percent in maximum deviation as a prima facie case of unconstitutional discrimination.[22] Under this standard, once a plaintiff proves a state plan exceeds the 10 percent deviation, the burden then shifts to the state to justify such deviations.

The 10 percent rule, over many years, became seen as a safe harbor provision for states – an easy standard for courts to apply and states to follow. However, the recent Supreme Court case of *Larios v. Cox* 542 U.S. 947 (2004) has thrown this concept into disarray, as the Court (only Scalia dissented) made clear that even if states complied with the 10 percent rule, it would not provide them with a "safe harbor" to escape constitutional scrutiny. The facts of *Larios* had to do with Georgia Democrats in control of the state legislature who took advantage of the 10 percent rule as much as possible to overpopulate suburban Republican areas and underpopulate rural and inner city Democratic areas in an attempt to advantage Democrats overall.[23] Republicans sued in

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[21] Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. See, *e. g., Connor* v. *Finch*, 431 U.S. 407, 418 (1977); *White* v. *Regester*, 412 U.S. 755, 764 (1973). A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State (842-43).

[22] Incidentally, after the 1990 round of redistricting, in *Gorin v. Karpan*, a three-judge federal district court struck down Wyoming's new plan that had a maximum deviation of 83 percent. This case was not appealed to the Supreme Court.

[23] In describing the house plan, which had a maximum deviation of 9.98 percent, the district court stated, "The most underpopulated districts are primarily Democratic-leaning, and the most overpopulated districts are primarily Republican-leaning. Moreover, most of the districts with negative deviations of 4% or greater are located either in south Georgia or within inner-city Atlanta." (*Larios v. Cox* 300 F. Supp. 2d 1320, 1326). The state senate plan, which also had a 9.98 percent maximum deviation, had similar characteristics.

federal district court, using equal-population malapportionment arguments as a means for driving what seemed to be, in reality, a partisan gerrymandering claim.[24]

The three-judge district court sustained the state's congressional plan, but the court threw out the Democratic state legislative plan and constructed their own redistricting plan just in time for the 2004 elections. *Larios v. Cox* 300 F. Supp. 2d. 1320 (N. D. Georgia, Feb. 2004). The U.S. Supreme Court agreed with the lower court's opinion that the Georgia state Democratic plan, even though within the 10 percent margin, was unconstitutional. After the 2004 elections, Republicans ended up in control of both houses of the state legislature.

This seemingly new interpretation of the rule fostered new litigation in the Alabama case *Gustafson v. Johns* 434 F. Supp 2d, 1246 (S. D. Ala. 2006), where Republicans who were eager to repeat what happened in Georgia based their lawsuit on the *Larios* rationale.[25] Of course, in theory, the *Reynolds* rule for state legislative plans

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[24] Republicans used this legal strategy presumably because partisan gerrymandering claims have legal standards that are nearly impossible to satisfy, given *Davis v. Bandemer* 478 U.S. 109 (1986) and *Vieth v. Jubelirer* 124 S. Ct. 1769 (2004).

[25] The three-judge district court dismissed the Alabama Republican lawsuit on res judicata grounds. Res judicata basically means that once a litigant loses in court, she cannot go back and file the same lawsuit to get a second shot at the apple. This theory can apply to another litigant who did not participate in the original lawsuit if it can be shown that that litigant's legal rights were in privity with the original litigant and that the cause of action was the same. In this new Alabama case, filed after *Larios,* the litigants were different people. Thus, dismissal in the new *Gustafson* case under the legal theory of res judicata would only be appropriate assuming the law had not changed since the original Alabama redistricting lawsuit *Montiel v. Davis* 215 F. Supp 2d 1279 (S. D. Ala. 2002). The 11th Circuit recently upheld the district court's dismissal as appropriate in an opinion that has heretofore not been published (*Gustafson v. Johns* No. 06-13508 – U.S. Court of Appeals, 11th Circuit, January 9th, 2007). In this unpublished opinion, the 11th Circuit makes the remarkable claim that *Larios* does not represent new law, and thus the plaintiff's claim fails. In theory this argument has some truth. Practically speaking, however, with the underlying partisan gerrymandering issues in *Larios*, the fact that Georgia's redistricting plan drawn by the Democrats could be declared unconstitutional seemed like a new course taken by the Supreme Court, a course that Alabama Republicans tried to exploit. Curiously enough, it seems to me that the 11th Circuit's jurisdiction to even hear the *Gustafson* case seems dubious, since 28 U.S.C. §1253 requires a direct appeal to the U.S. Supreme

has been that districts must be based "substantially on population," such that any population variances must be "incident to effectuation of a rational state policy." In reality, a practice had developed in states over the 1970s, 1980s, and 1990s whereby federal district courts and the U.S. Supreme Court upheld, almost summarily, state legislative plans within the 10 percent deviations. But, it is clear that in *Larios*, the lower court and the Supreme Court were concerned about the state taking advantage of this legal leeway for maximum partisan gain. Thus, in the area of equi-population law, *Larios* essentially eviscerates the presumed safe-harbor rule, creating more doubt and less clarity as to what the rule is for state legislative seats.

Despite *Larios*, equal population law is reasonably clearer today than 40 years ago. Rules in this area of law provide federal district judges with fairly definite boundaries. The clearest rule is that states must redistrict after the decennial census to approximate some sort of equality in district sizes or else they'll undergo constitutional attack (that seems obvious from the 1960s redistricting revolution). States who fail to redistrict face almost certain wrath from federal courts.[26]

Moreover, it seems that after *Karcher*, states cannot draw congressional redistricting plans to deviate more than .69 percent, but must instead approach 0

Court from the decision of a three-judge district court. The 11th Circuit, in its opinion, claimed jurisdiction by relying on an exception to the statute created by the U.S. Supreme Court in 1975. The 11th Circuit summarily dismissed (too hastily I think), arguments that the 1975 exception became moot when Congress revised the statute in 1976.

[26] Perhaps Mississippi after the 1990 Census is a rare exception of a court allowing a previous decade's lines to be used in an election immediately following the Census. Mississippi has elections for state office on odd-numbered years. After failing to agree on a plan in time for the 1991 elections, a lawsuit was filed in federal district court, where a three-judge panel cited time constraints as reasons for allowing elections to proceed under the existing plan devised for the 1980s decade.

deviation as much as possible. Accordingly, even a 19 person deviation in a congressional redistricting plan (where districts contain hundreds of thousands of residents), such as was seen in *Vieth v. Pennsylvania* 195 F. Supp. 2d 672 (M.D. Penn. 2002), violates this congressional equality rule.[27] The *Vieth* holding was controversial, however, as one of the judges on the panel dissented, and the Supreme Court only addressed the merits of the partisan gerrymandering claims when the case was eventually appealed. Thus, conceivably there still remains some lack of clarity over how close to zero congressional districts must be, but this window of ambiguity (i.e. whether infinitesimal deviations are constitutional) is rarely the subject of much litigation.

For state legislative plans, *Brown v. Thomson* (1983) clarified the law of the 10 percent rule in some respects. Notwithstanding *Brown*, this rule, even as exemplified in *Brown v. Thomson* itself, remains open to subjective interpretation by federal courts.[28] This has become somewhat more of a problem since *Larios v. Cox* (2004).

Indeed, sporadic instances still exist in equal population jurisprudence where the rules are blurry enough such that judges must rely on their own sense of fairness in cases like *Vieth* or *Larios*. However, equal population precedent today is the clearest precedent of all redistricting law. As one federal judge noted to me in response to a question about the clarity of precedent in redistricting law,

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[27] *See Vieth v. Pennsylvania* 195 F. Supp. 2d 672 (M.D. Penn. 2002)

[28] In *Brown*, the U.S. Supreme Court said Wyoming's 89 percent deviation for one of its districts was constitutionally ok, yet in 1991, a federal district court struck down a Wyoming plan that had a maximum deviation of 83 percent. This example illustrates the uncertainty behind the legal rule.

"I don't think we're out there in the woods without a flashlight. Still, you get to a fork in the road with a flashlight, and you don't know which way to turn… But there are guideposts to get you to the finish line" (federal judge #4).

I think this perspective, while overly optimistic about all aspects of redistricting law, is particularly true as it pertains to equal population standards. Moreover, as I illustrate in later chapters, this characterization rings true in the empirical data.

DEFERENCE DOCTRINES

One overriding principle in all redistricting cases is the notion that federal courts should defer to state legislatures in redistricting whenever possible. According to the Supreme Court in *Voinovich v. Quilter* (1993) 507 U.S. 146, "It is the domain of the States, and not the federal courts, to conduct apportionment in the first place" (156). This admonition has been well established since *Reynolds* (1964) 377 U.S. 533 at 585. Judicial intervention is frowned upon in court precedent because it is an extraordinary step for a court to take against a state government. According to Justice Kennedy in *Miller v. Johnson* (1995) 115 S. Ct. 2475, "Federal court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that 'reapportionment is primarily the duty and responsibility of the State.'" (2488). This "deference doctrine" as I refer to it here is best thought of as the residuary of the once-formidable political question doctrine that courts invoked to refrain from delving into reapportionment disputes. Although the political question doctrine is still around – and in decline, according to some legal scholars (Barkow 2002) – after *Baker v. Carr* (1962), this doctrine was essentially eviscerated as it pertains to state legislatures and redistricting

(McCloskey 1962). The residuary of this rule seems to be the abundant rhetoric in the court cases about the need to show deference to state legislatives.

Perhaps this precedent causes some three judge courts to think twice before summarily throwing out the state's plan or enjoining the state from implementing its plan. In *Diaz v. Silver* (1996), 932 F. Supp. 462 at 469, for example, that three-judge trial court acknowledges this concept of deference, stating there is a "the strong public interest against interfering with the Legislature's task of redistricting." Most federal judges vote to uphold redistricting plans, as the quantitative data from chapter 4 will show.

Presumably, all courts must consider this deference doctrine. However, It's hard to know whether judges tend to uphold redistricting plans because 1). they want to follow the law and be deferential so they take this doctrine into consideration in their decision calculus; or 2). because they are interested in upholding the particular legislative plan for other non-legal reasons, so they pay lip service to this doctrine in their opinion. Even if the Supreme Court or the lower federal courts strike down the state's redistricting plan (as happened in *Lucas* and *Reynolds*), they apparently still pay lip service to this doctrine. With these issues in mind, understanding the effect of this deference doctrine is not necessarily discernable from an examination of the quantitative data of the case decisions by themselves. Nevertheless, for judges looking to avoid partisan entanglements in redistricting cases, the doctrine does offer an easy way out of deciding the substantive issues that can arise in redistricting. Given the rhetoric in the caselaw over the need to show deference, this doctrine could help influence and reinforce judges' perceptions of the law if they are already inclined to accept the legislature's plan.

VOTING RIGHTS ACT STANDARDS IN REDISTRICTING

Although equality standards in redistricting are sometimes clear enough for a federal court to apply, clarity in the law degenerates quickly in redistricting lawsuits concerning the Voting Rights Act or Racial Gerrymandering (Butler 2002). I will discuss separately the legal standards in both the Voting Rights Act and racial gerrymandering cases, but I will also stress, at various points, how these two areas of the law intersect and often contradict each other, thus making compliance on the part of states difficult and application on the part of federal courts variable (Butler 2002).[29]

Section 5 Claims

There are 2 sections to the Voting Rights Act (VRA) that are most relevant to redistricting: Sections 2 and 5. Section 5 requires certain states to obtain preclearance from the Department of Justice before implementing redistricting plans.30 States have the option of avoiding the Justice Department (DOJ) process by filing a declaratory judgment action in the District of Columbia. But, states normally opt for the route of DOJ because it's typically faster and less costly than filing a lawsuit in the District of Columbia (Hebert et al. 2000). Only covered jurisdictions (those states and locales that fall within the definitions of the statute) must seek preclearance.

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[29] As one law professor who specializes in redistricting law construes the problem, "legislators can be justifiably anxious that they will be 'damned by the Constitution' if they consider race and 'damned by the Voting Rights Act' if they do not. Moreover, even if they endeavor to carefully navigate the precarious course between the Constitution and the Act, their best efforts may yet be undone by the change of a single vote on the Court" (Butler 2002, 143).

[30] In *Georgia v. United States*, 411 U.S. 526, 531-35 (1973), the U.S. Supreme Court held that under the Voting Rights Act, redistricting changes in covered jurisdictions would be considered election law changes subject to preclearance requirements of Section 5 of the Act.

Effects Prong

In order to receive preclearance, state plans must satisfy a two-pronged review: an "effects" prong and a "purpose" prong. In considering a potential plan's effects, the Supreme Court interpreted Section 5 in 1976 to require a denial of preclearance to plans that "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"[31] The effect of the 1976 ruling means that minority positions cannot regress (go backwards, worsen, etc.) vis-à-vis electoral opportunities. In order to determine whether a future plan is retrogressive, the law requires a comparison to the benchmark plan. This means a state has to first determine what the benchmark plan is. Normally, the benchmark plan is whatever constitutes the current plan in place. For example, a legislature in a covered jurisdiction in 2001 looking to adopt a new plan would usually look to the plan passed ten years prior as the benchmark. If that plan is unconstitutional, then the benchmark plan becomes the last constitutionally passed redistricting plan. The Justice Department has a lot of say in what constitutes retrogression, since they preclear most plans. In making determinations on retrogression, the Justice Department looks at two things: 1. whether the plan cracks minorities, dispersing them too widely and diluting their influence; 2. whether the plan packs minorities into districts, over-concentrating them in fewer districts (Hebert et al 2000). But, legally determining what constitutes retrogression is not completely clear. According to one group of legal experts, "Clearly, determining what constitutes discriminatory fragmenting or packing is a difficult question that implicates fundamental issues about the nature of elections and representation…. [T]hese questions and issues often will be subject to legitimate, even heated dispute" (Hebert et al 2000, 17).[32]

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[31] *Beer v. United States* 425 U.S. 130, 141 (1976)

[32] The concept of retrogression for congressional plans becomes more complicated when a state gains or loses a congressional seat as a result of population shifts (Hebert et al 2000).

Purpose Prong

Section 5 also imposes a requirement that new districting plans not have "the purpose… of denying or abridging the right to vote on account of race or color, or [due to being in a language minority group]" 42 U.S.C. §1973c. While historically the DOJ interpreted the purpose prong broadly, the Supreme Court in 2000 limited the interpretation of this provision of the VRA to retrogressive intent only (*see Bossier Parish II* 2000). This leaves open the possibility that as long as minority political power does not regress, the covered jurisdiction can purposely keep the "effect" of minority power limited under the status quo. The purpose under this provision is not a question of whether the plan purposely discriminates, but rather whether the plan purposely engages in retrogression. As law professor Katharine Inglis Butler surmises, "Even if the change perpetuates existing discrimination, it is entitled to preclearance unless it actually increases the degree of discrimination" (2002, 171). If the federal district court or the DOJ reviewing the plan finds retrogression, preclearance is denied.

Section 2 Claims

While §5 applies only to covered jurisdictions, §2 applies nationwide. Congress adopted the current form of §2 when it amended the 1965 Voting Rights Act in 1982. Congress amended the VRA as a direct response to the Supreme Court case *City of Mobile v. Bolden* 446 U.S. 55 (1980), where the Court interpreted the original VRA statute in a way that the Congress disliked. Prior to *City of Mobile v. Bolden*, the test for

§2 violations consisted of a somewhat amorphous "totality of the circumstances" test (Butler 2002).

In *Bolden*, the Court ruled that a racial vote dilution case based on the 1965 Voting Rights Act could only be maintained if plaintiffs presented proof of discriminatory purpose in the redistricting plan irrespective of disparate impact or discriminatory results (Butler 2002). The Supreme Court treated the Voting Rights Act as simply reflecting the requirements of the U.S. Constitution. The *Bolden* case came in the wake of *Washington v. Davis* 426 U.S. 229 (1976), which held that to prove employment discrimination under the Equal Protection Clause, under facially neutral employment policies, a litigant had to prove intentional discrimination regardless of whether such policies had a disparate impact on minorities. Given the logic of *Washington v. Davis*, it was no surprise that the Supreme Court read the Voting Rights Act as requiring more proof than a showing that a facially neutral redistricting plan had a disparate or adverse impact on minority representation (Butler 2002).

The *Bolden* ruling in 1980, which cut the meat out of Section 2 enforcement, precipitated the Congress to take action to amend the VRA in 1982. But Congress could not simply institute a new test based solely on discriminatory results, because there was some fear in Congress that the new test might be interpreted by the courts as requiring proportional representation. Thus, the resulting language the Congress formulated was extremely vague. Like Section 5, this section states that minorities' right to vote cannot be denied or abridged. A denial or abridgment of the right to vote is defined as follows,

> A violation … is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election … are not equally open to participation by [minorities] in that [they] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice (Butler 2002 *quoting* 42 U.S.C. 1973(b) (1994)).

Basically, in these 1982 amendments Congress reinstates the "totality of circumstances" test for finding racial vote dilution that had been in place prior to *Bolden*. As Butler writes, "to aid interpretation of the Act's vague language, Congress did little more than refer the courts to the pre-Bolden cases" (Butler 2002, 159). Hebert et al note that the main question states face under the VRA is whether or not to create a majority-minority district. Unfortunately "[o]n its face, Section 2 does not provide a clear framework to answer [this question]…" (2000, 23). For guidance in application of the statute, many federal courts looked to a Senate Judiciary report which listed the factors to consider in a totality of the circumstances analysis.[33]

The Supreme Court attempted to clarify Section 2 in *Thornburg v. Gingles* 478 U.S. 30 (1986). In this case, the Supreme Court interpreted the 1982 amendments to require a three-part threshold inquiry. These three pre-conditions must be present before a court can proceed to further analysis on whether a §2 violation has occurred.

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[33] The factors include: (1) a past history of discrimination affecting voting; (2) the presence of racially polarized elections; (3) the use of election devices that enhance the opportunities for discrimination against minorities; (4) denial of minority access to a candidate slating process, if one existed in the jurisdiction; (5) the degree to which minorities still bear the effects of discrimination hindering their participation in the political process; (6) the presence of racial appeals in campaigns; and (7) the extent to which minorities have been elected to public office in the jurisdiction. (Issacharoff, Karlan and Pildes 2002). Two additional factors that have had probative value as part of plaintiffs' evidence to establish a violation are "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group . . . [and] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting or standard, practice or procedure is tenuous." (Issacharoff, Karlan and Pildes 2002, 733 *quoting* Senate Report at 207

1. "First, the minority group… must be sufficiently large and geographically compact to constitute a majority in a single-member district."[34]
2. "Second, the minority group must be . . . politically cohesive."[35]
3. "Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."[36]

At first blush one might believe that this seemingly straightforward test would leave little interpretation to the courts. If only one of these conditions is absent, (for example, if it is proven that the minority group is not politically cohesive), then the section 2 legal analysis ends and the claim presumably fails. However, intense debate surrounds how to define these preconditions, meaning that additional factors other than the "law" have to play some role in the decisions of federal judges trying to determine whether the state violated the Voting Rights Act.

A look at the first condition illustrates the potential for contradictory interpretations among various lower federal courts even after the Supreme Court's attempt to clarify the rules. A minority group must be sufficiently large to constitute a majority in a single-member district, but what are the parameters under which we define a majority? As Hebert et al notes, in order to see whether a jurisdiction meets the first condition, a court must know what constitutes a proper "population base" and what constitutes "sufficiently large" (2000, 27). To measure whether minorities can make up a

[34] *Thornburg v. Gingles* 478 U.S. 30, 50 (1986)
[35] *Thornburg v. Gingles* 478 U.S. 30, 51 (1986)
[36] *Thornburg v. Gingles* 478 U.S. 30, 51 (1986)

majority-minority district, a court has to know what it considers the relevant population. For example, is it enough that African-Americans constitute a sufficiently large population among a district's total population (perhaps 51 percent of the total population), or do African-Americans have to make up a majority of the voting age population in a district, or is the population base the number of African-Americans registered to vote? In terms of population base, a number of lower courts are divided over whether to use total population, the population of registered voters, voting age population, the amount of voters who turned up at the polls at the last election, "population adjusted for growth since the last Census," or in cases of Hispanic vote dilution, citizen voting age population (Hebert et al 2000, 27). The U.S. Supreme Court has never clarified this issue.

Even if the proper population base were clarified in the minds of a federal judge, there is still the issue of what defines a "sufficiently large" minority population. The *Gingles* court refers to an "effective voting majority", which is not the same legally as a simple arithmetic majority. (Hebert et al 2000; *Thornburg v. Gingles* 478 U.S. 30, 50 – 1986). "As a result, there has been some disagreement among lower courts as to the proper definition of 'majority' for purposes of *Gingles's* first prong" (Hebert et al 28, 2000).

Finally, even if federal courts could agree on a population base and a definition of majority, there is also disagreement on what satisfies the notion of geographical compactness. "Unfortunately, neither social scientists nor judges have universally accepted any clear definition of 'compactness'" (Hebert et al 2000, 31).

The second and third prongs of the *Gingles* test, which signify the presence or absence of racially polarized voting, are not any clearer than the first prong. The second prong asks whether a minority group is politically cohesive in its voting. Normally, the political cohesiveness of a minority group is not an issue.[37]

The third prong asks whether whites vote sufficiently as a block so as to usually defeat the minority's choice of candidates. There are guiding principles in this third prong that sometimes offer contradictory answers. For example, the federal courts do not have a simple statistical formula for measuring the second and third prongs (which constitute racially polarized voting). There are competing statistical methods for measuring racially polarized voting, and the Supreme Court has never set forth a precise social scientific model for measuring the issue.[38] Political scientist Daron Shaw, in his investigation into the accuracy of court measures of racially polarized voting, has noted that the techniques courts use to find polarized voting are relatively accurate, but that these techniques are

[37] One example where a minority group might not meet this requirement concerns Latinos in south Florida. In looking at Cubans and Central Americans, if it were shown that the two groups vote for different candidates (the Cubans for the Republican candidate and Central Americans for the Democratic candidate), a case with these facts would not pass the second prong.

[38] Because of the different statistical methods that can be employed to measure racially polarized voting, Hebert et al note that cases can often come down to a "battle of the experts" (2000, 35). Debate often centers on whether a court should use homogenous precinct analysis, bivariate regression, or multivariate regression to estimate the extent of racial polarization. Some federal judges and social scientists think bivariate regression models "tend to overestimate polarization by failing to consider non-racial factors, especially partisanship, that might explain high rates of same-race voting" (Buchman 65, 2003). See, for example, Judge Patrick Higginbotham's opinion in *Lulac v. Clements* 999 F.2d 831, 859-860 (1993). The Supreme Court has yet to resolve this methodological debate of what formula to use. Thus, in a "battle of the experts", it simply becomes a matter of which expert the federal judge or the three-judge panel chooses to believe. Other less defined factors to consider by the courts include such questions as how many elections should be considered, whether or not to examine exogenous elections, and whether or not the race of the candidate matters in determining whether racially polarized voting occurred.

"blunt instruments" that are incapable of measuring the "magnitude" of polarization in a district (1997, 71).

In addition, there are other issues that lack legal clarity. Intertwined with the arguments over proper methodology for measuring racial polarization are arguments over whether the cause of racially polarized voting is legally relevant for a finding of a VRA violation[39] (Hebert et al 2000, 31). Do voters vote the way they do in the district in question because of racial animus or are their behaviors due to political factors such as partisanship? This becomes a tricky question because for some minority groups, such as African-Americans, race is highly correlated with political party.[40] A court might be able to get around this problem by looking at primary elections only, but narrowing the examination of elections limits the analysis (Hebert et al 2001). A final source of debate about the third *Gingles* prong concerns how much white bloc voting is needed to show a violation. The Supreme Court has offered no guidance for lower courts on this issue. According to the *Gingles* Court, there is "no simple doctrinal test for the existence of legally significant racial bloc voting" 478 U.S. at 58 (1986).

As is apparent from the above analysis, the *Gingles* preconditions are not set forth in a clear formula for lower courts to follow. Some interpretation of the evidence is

[39] As Buchman describes the issue, a minority of the *Gingles* court, led by Justice Brennan, "declined to require multivariate regression on the grounds that requiring claimants to show a causal relationship, and not just a correlation, between race and voting behavior would reintroduce an intent-based standard, contrary to what congress had intended when it amended Section 2" (65, 2003).

[40] In a multivariate statistical model, issues of "multicollinearity between race and other explanatory variables, such as party identification and socioeconomic status, … can lead to an underestimation of race's influence on voting behavior" (Buchman 65, 2003).

required on the part of the federal judge, and that interpretation is likely to be influenced, consciously or unconsciously, by that judge's personal background and life experiences.

"Totality of the Circumstances" Test

The analysis does not necessarily end if the preconditions are satisfied. A federal court still has to conduct a "Totality of the Circumstances" test. *Gingles* noted that in addition to the preconditions, other factors in the Senate report (described in note 26 above) may be considered. However, *Gingles* never really stated to what extent the Senate report factors must be considered after the preconditions are found, and does not even call it a "totality of the circumstances test." According to Butler, although "lower courts continued to consider the Senate Report factors [after *Gingles*], … most cases turned on the presence or absence of the three *Gingles* preconditions" (161, 2002). Thus, even though the Supreme Court did not explicitly call for a totality of the circumstances test until *Johnson v. DeGrandy* in 1994 as part of a VRA analysis, many lower courts performed one. For instance, in the 1993 case *Rural W. Tenn. African-American Affairs Council v. McWherter*, the federal district court, in its explication of section 2 analysis, stated, "Once the elements have been established, plaintiffs must still show that under the totality of the circumstances a violation has occurred. See Jeffers v. Clinton, 730 F. Supp. 196, 209 (E.D. Ark. 1989)"[41]

What constitutes a "totality of the circumstances" test has been a matter of some debate. The Supreme Court added some clarity in *Johnson v. DeGrandy* (1994) when the justices held that such a test needed to be conducted after it was determined that the three *Gingles* preconditions were satisfied. Hebert et al (2001), in their booklet *The Realists*

[41] *See also, for example, Arizonans for Fair Representation v. Symington* 828 F. Supp. 684, 688.

Guide to Redistricting: Avoiding the Legal Pitfalls, make no mention of this test, but instead refer to a proportionality test. But if we assume the law governs court decisions, I think their position, as I expound further in the footnote below, runs contrary to precedent, including the recent U.S. Supreme Court case *Lulac v. Perry* 126 S.Ct. 2594 (2006).[42] As the law stands today, the *Gingles* preconditions are necessary but not

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[42] Hebert et al (2001) make no mention of the "totality of the circumstances" test in their guide for state legislatures. Instead, they substitute what they call a fourth prong to the test which looks at whether the number of majority-minority districts equals the proportion of minorities in the relevant jurisdiction. Herbet et al argue that if rough proportionality exists, then minority groups would not be able to pass this hurdle, and they would lose a VRA claim despite satisfying the *Gingles* preconditions (2001). There are two problems with their analysis. The first problem is theoretical. Hebert et al (2001) wrote a "Realists" guide to redistricting law. Nothing in the court cases speak of a "Fourth prong" for *Gingles*' tests. A quick search in Lexis Nexus of all Supreme Court cases, appeals court cases, and district court cases shows that no case mentions the words "fourth prong" or "four conditions" and "Gingles" because in theory, this rule does not exist in the "law" of the Voting Rights Act. If we are to believe what courts say in their opinions as a representation of "law", then I'm reluctant to state that such a prong "exists" in the strict legal sense. The second problem is that caselaw subsequent to the writing of this guide purport to give less weight to proportionality than Hebert et al suggest. In *Old Person v. Brown* (2002) on remand, the district court writes,

> The record before the Court amply support the finding of the Court of Appeals that on a statewide basis, proportionality within the State of Montana is lacking. However, given that Indian-preferred candidates have been elected to the Montana legislature from both of the House Districts at issue and from one of the two Senate Districts at issue in this case, the Court concludes that if proportionality is evaluated within the relevant geographic subset which this Court is called upon to assess on remand, the proportionality factor is satisfied. At a minimum, the question of whether proportionality should be assessed on a statewide basis or within the particular geographic subset before the Court for decision illustrates why **the presence or absence or proportionality is not determinative on the issue of vote dilution but remains an additional factor which the Court should consider under the totality of circumstances**. Old Person, 230 F.3d at 1130 n.16. The Court therefore finds it appropriate to review the Senate factors previously addressed by the trial court and the Court of Appeals in light of the evidence and arguments presented by the parties with respect to the 1998 and 2000 Montana elections and the 2000 federal decennial census. (182 F. Supp. 2d 1002 at 1011-1012) (emphasis added).

In *Lulac v. Perry* 126 S.Ct. 2594 (2006), the Supreme Court does seem to place great emphasis on the issue of proportionality. Nevertheless, as Kennedy explained in part III of the opinion in *Lulac* (and for which a majority of the court signed off on), proportionality "does not … act as a 'safe harbor' for States in complying with § 2" (126 S. Ct. at 2620) (Kennedy also references O'Connor's concurrence in *DeGrandy*, stating that proportionality "is *always* relevant evidence in determining vote dilution, but is never itself dispositive" 126 S. Ct. at 2620, *citing DeGrandy* 512 U.S. 997 at 1027-1028). Kennedy then goes on to discuss proportionality, as well as some other Senate Report factors. In the end, Kennedy and the majority conclude, "Even assuming Plan 1374C provides something close to proportional representation for Latinos,

sufficient to establish a §2 violation.[43] Rather, they only "raise a presumption of a [§2] violation."[44] Assuming the three factors are met, the inquiry moves to an examination of the "totality-of-the-circumstances."

As noted above, this "totality of the circumstances" test is largely based on looking at the Senate Report factors and making an overall judgment as to whether the redistricting plan is discriminatory in light of these factors.[45] Unfortunately, this final part of the legal test for a *Gingles* §2 claim is *enormously* subjective, and requires judges to draw on their own sense of justice to make a determination – albeit within the parameters of the Senate factors. Plaintiffs need not prove a majority of the factors occurred, or some combination thereof. It is totally up to the reviewing court to determine whether any one factor is sufficient to warrant invalidation of the state's plan. Judge Schreier of South Dakota describes the "totality of the circumstances" test in her opinion *Shirt v. Hazeltine*:

> Plaintiffs need not prove a particular number of the Senate factors or prove that a majority of them point one way or the other. Instead, §2 'requires the court's overall judgment, based on the totality of the circumstances and guided by those relevant factors in the particular case, or whether the voting strength of minority voters is . . . minimized or canceled out.' [*quoting the Senate Report* at 207]…. [Thus] 'the essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred

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its troubling blend of politics and race – and the resulting vote dilution of a group that was beginning to achieve § 2's goal of overcoming prior electoral discrimination – cannot be sustained." (at 2623).

While I suspect that Hebert et al is right to suggest that rough proportionality is an important factor in the "totality of the circumstances" test after *DeGrandy*, I also have to conclude that without further empirical evidence from Hebert et al, it's hard to say what really drives the "totality of the circumstances" tests, other than a judge's perceptions of fairness and justice.

[43] See *Johnson v. DeGrandy*, 512 U.S. 997, 1011 (1994)

[44] *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission* 366 F. Supp. 2d 887 (D.C. Arizona 2005)

[45] *Shirt v. Hazeltine* 336 F. Supp. 2d 976 (D. C. South Dakota 2004)

representatives." *Shirt v. Hazeltine* 336 F. Supp. 2d 976 at 1018 *quoting Gingles in part*, 478 U.S. at 47.

This "test", by requiring little more than the "court's overall judgment," heavily relies on the judge's sense of fairness and justice. This fact is not necessarily inherently bad or good. Judges make such decisions all the time. But litigants can prevail or fall based on what weight a judge assigns each of these Senate factors. Redistricting law expert Katharine Inglis Butler argues that in Section 2 claims, "the standards for a violation are ***much more subjective*** than those for 'one-person, one-vote' and section 5, and the relevant facts are more numerous and more likely to be in dispute" (2002, 156, footnote 73) (emphasis added).

In cases that have partisan implications and partisan litigants, and where both sides can claim good faith characterizations of the facts in dispute, it seems only natural that judges of different political backgrounds may, in good faith, arrive at different characterizations of the evidence, thus affecting their decision. More on this theory is discussed in chapter 3.

One final note about §2 claims is that these statutory claims are not required to go before a three-judge panel. Only complaints filed against state redistricting plans which allege a constitutional harm mandate the empaneling of a three-judge federal district court.[46] Appeals from three-judge district courts go directly to the Supreme Court. Circuit court interpretations of constitutional issues in most areas of redistricting law are virtually nonexistent. However, this state of affairs is not the case in VRA §2 claims. VRA §2

[46] *See* 28 U.S.C. § 2284(a). But there are exceptions to this rule. As the district court in *Duckworth v. State Board of Elections* describes the exception, "a single district judge may dismiss a complaint otherwise subject to § 2284(a) if the judge determines that the constitutional claims are insubstantial in that they are 'obviously without merit or clearly determined by previous case law.'" *Duckworth v. State Board of Elections* 213 F. Supp. 2d 543 (D.C. Maryland 2002) *citing Armour v. State of Ohio*, 925 F.2d 987, 989 (6th Cir. 1991) (*en banc*). Of course, whether a claim is "obviously without merit" is in the eye of the beholder.

claims can be heard by a single federal district judge, and those claims can only be appealed first to the relevant circuit court. Thus, various circuits potentially have varying interpretations of Section 2 VRA claims. In reality, however, most redistricting lawsuits involving statewide redistricting plans feature all sorts of claims. Consequently, the VRA §2 claims frequently end up being heard by a three judge panel.

RACIAL GERRYMANDERING (SHAW CLAIMS)

Racial gerrymandering cases, which came about in the 1990s and are based on Equal Protection analysis, place states in a precarious position of trying to comply with the Voting Rights Act while not running afoul of the 14th Amendment Equal Protection Clause. The genesis for these types of claims can be seen as early as *Gomillion v. Lightfoot* 364 U.S. 339 (1960), but the major Supreme Court case which brought forth a swath of racial gerrymandering litigation was *Shaw v. Reno* 509 U.S. 630 (1993). The *Shaw* case involved a narrow-sized district along an interstate in North Carolina that was no wider than the width of the interstate itself in many places. The state's leaders drew the lines in order to create a majority-minority African-American district. The Supreme Court struck down the district as an impermissible use of race and a violation of the 14th Amendment Equal Protection Clause. Later in *Miller v. Johnson* 515 U.S. 900 (1995), the Supreme Court deemphasized the shapes of districts. Instead, the Court made clear that in drawing district lines, a state could not use race as "the predominant factor motivating [their] … decision" 515 U.S. 900 at 916. A violation of the *Shaw* claim occurs, then, if "the legislature subordinated traditional race-neutral districting principles … to racial considerations" 515 U.S. 900 at 916. O' Connor, in her concurrence a year later in *Bush v. Vera* (1996) 517 U.S. at 993, clarified this point by stating that states can consider race

in their redistricting decisions, as long as traditional redistricting principles are not completely ignored in pursuit of racial considerations. In order to determine whether a district was drawn based on race, a court may consider the shape of the district[47], the comments of the legislators themselves and their staff, and the extent to which traditional redistricting practices are followed, such as compactness, contiguity, respect for political subdivisions and communities of interest, protection of incumbents, and other state redistricting rules specific to certain states (Hebert et al 59-64, 2001).

Buchman and Issacharoff are critical of the new standard that evolved in *Miller*. Buchman writes that with, the *Miller* decision,

> the Court replaced an 'I know it when I see it' standard, which could be made manageable by imposing a compactness requirement, with an 'I know it when I sense it' standard, which offers few clues for judicial application. It is unclear how lower courts will be able to identify a 'predominant factor' among the many considerations that enter into redistricting…. In short, 'exporting tort-like conceptions of causation' (Issacharoff 1995b, 57-58) leaves the term 'predominant factor' indeterminate, and as a result fails to constrain the judicial inquiry into redistricting processes (Buchman 66, 2003, *quoting Issacharoff 1995, in part*).[48]

Buchman also states that the "scope of *Miller*" after *Bush v. Vera* and *Shaw II* remained "an open question" (Buchman 59, 2003). But empirical evidence (which I present in a later chapter) belie Buchman's concerns, as more states began surviving racial gerrymandering claims after *Bush v. Vera* (1996) (most probably because the standards of what O'Connor would agree to became clearer). Furthermore, Butler's analysis of the *Bush v. Vera* case suggests that the standards were made somewhat clearer

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[47] As O'Connor notes in *Shaw*, "reapportionment is one area in which appearances do matter" 509 U.S. 630, 646 (1993)

[48] *See also*, p. 57, Issacharoff, "The Constitutional Contours of Race and Politics" *Supreme Court Review*, 1995: 45-70.

by this new case (*see* 206-213, 2002). Butler surmises that O'Connor's "separate concurring opinion [in *Bush v. Vera*] … resolves a number of issues (206-207, 2002).

Notwithstanding *Bush v. Vera*, some "unanswered questions" remain (Butler 233, 2002). And, with the departure of O'Connor from the Court, it is conceivable that further uncertainty in the law over *Shaw* claims may arise in the next round of redistricting simply due to O'Connor's position on the Court. But from an empirical standpoint, federal district courts are currently less likely to strike down plans based on racial gerrymandering after *Bush v. Vera*, which suggests that states are following the law because they have a clearer idea of what it is.

One important note to consider relates to standing. Only litigants who reside in the suspect district have a right to sue for violations of a *Shaw* claim.

TENSION BETWEEN SECTION 2 AND SHAW CLAIMS

There is a tremendous amount of tension and contradiction between state requirements under *Shaw* and state requirements under Section 2 and Justice Department guidelines under Section 5 (Buchman 2003; Butler 2002). "Shaw and its progeny introduced conceptual uncertainties and tensions between the Court's Fourteenth Amendment jurisprudence and its long-settled treatment of Section 2" (Buchman 50-51, 2003). The VRA, through its requirements that prohibit dilution of minority voter power, ensures that states with significant minority populations must consider race when redrawing district boundaries. At the same time, however, the *Shaw* claims assert that an over-reliance on race in drawing lines violates the Equal Protection Clause. This is a recipe for confusion. In the 1990s, through Justice Department pressure under Section 5 (for covered jurisdictions) and State desires to comply with an amended Section 2,

legislators created many new majority-minority districts (Buchman 2003). In addition, legislators (especially those in Southern states that were still controlled by Democratic state legislatures) wanted to maintain their partisan advantage through redistricting. Consequently, "Attempts to accommodate Section 2's requirements while pursuing partisan ends produced some of the convoluted maps that drew the ire of many commentators" (Buchman 50, 2003).

After *Shaw*, the states faced the legal conundrum of either DOJ denial of their redistricting plans under Section 5 and Section 2 liability or *Shaw* claims based on improper use of race. A perfect example of this dilemma was *Bush v. Vera*, where the state of Texas argued before the Supreme Court that it was required to draw a bizarrely shaped African-American district in order to meet its non-retrogression requirements under Section 5.[49] The majority of the Court answered this by writing, "nonretrogression is not a license for the State to do whatever it deems necessary to insure continued electoral success" *Bush v. Vera* 517 U.S. at 982.

The contradictory nature of these legal rationales that made it difficult for states to comply with the law were undoubtedly no less difficult for lower courts in their attempts to resolve the lawsuits. Butler concludes that while the Court majority in *Bush v. Vera* admonished states from taking the "Voting Rights Act made us do it" defense, states could escape judicial defeat if they were able to show their actions were based on "compelling state interests" (Butler 2002, 208-209). O'Connor and four dissenting Justices in *Bush v. Vera* viewed both a state's compliance with Section 5 and a state's reasonable concern for Section 2 liability as compelling state interests. The other four

[49] 517 U.S. 952 at 961, 965-66

majority justices only "assume[d] without deciding" that section 2 was a compelling interest (*Bush v. Vera* 517 U.S. at 979.

POLITICAL (OR PARTISAN) GERRYMANDERING

The last important category of the law of redistricting concerns political gerrymandering. Political gerrymandering issues, while evident in cases such as *Karcher* (1983), did not become justiciable controversies until 1986. Political gerrymandering claims typically attempt to follow the *Davis v. Bandemer* 478 U.S. 109 (1986) standard of alleging intentional discrimination against another political party (which is usually easy to prove) to such an extent as to have an enduring detrimental effect on the other party (this part of the claim is not so easy to prove). While political gerrymandering claims are justiciable in theory (at least for now),[50] the Supreme Court has never held that a redistricting plan is invalid due to impermissive political gerrymandering.[51] The difficulty lies in finding judicially manageable standards to govern these claims. Normally, these sorts of claims are simply added to the mix of claims listed in a complaint, perhaps either as an attempt to sway the court favorably or simply as a throw-away claim.

How does one measure and thus know when invalid political gerrymandering has occurred? The Supreme Court dealt with this problem in *Vieth v. Jubelirer* (2004),[52] when five justices rejected a claim that Pennsylvania's congressional redistricting plan was a partisan gerrymander. In the plurality opinion, four justices stated that these types

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[50] *Vieth v. Jubelirer* 541 U.S. 267 (2004).

[51] *Lulac v. Perry* 126 S.Ct. 2594 (2006) was the latest chance that the Court had to declare a plan invalid due to partisan gerrymandering, and they declined to do so. Instead, the Court relied on the VRA to strike down the Texas plan.

[52] 541 U.S. 267

of claims should henceforth be non-justiciable on the basis that no judicially manageable standards could ever be found to govern such claims. Justice Kennedy concurred in the result but wrote separately to state that he thought these claims should still be justiciable *Vieth v. Jubelirer* 541 U.S. 267, 306 (2004). He expressed the hope that at some point, judicially manageable standards could be found to help courts judge whether a state legislature impermissibly engaged in partisan gerrymandering.[53]

Given the jurisprudential history of partisan gerrymandering claims, the reality is that such claims are nearly impossible to win at the trial court level.[54] But this does not stop plaintiffs from suing under this theory. Suing on this flimsy legal theory allows plaintiffs to make party politics a more salient concern for the court. If plaintiffs accuse the state of partisan gerrymandering in their lawsuits, this helps color their case with the idea of fairness, and may persuade judges, based on other legal criteria, that the plan composed by the state actor is not fair (and possibly legally invalid).

CONCLUSION: THE LAW IN EXPLAINING JUDICIAL BEHAVIOR IN REDISTRICTING

As the above analysis suggests, in most areas of redistricting law, there is quite a bit of room for interpretation by the federal district courts. The doctrinal review cannot be entirely comprehensive, given the editorial and practical constraints of this study. The complexities and variances in the law are just too numerous to cover here. Undoubtedly, what the reader should find from the review of doctrine is the immense uncertainty in the law as it stands today. Some judges share this characterization of redistricting law. Others

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[53] *Vieth* at 309-310 (2004)

[54] As the majority notes in *Vieth* at 280 (2004), "[O]ver 18 years, … [the lower courts] have simply applied the standard set forth in Bandemer's four-Justice plurality opinion. This might be thought to prove that the four-Justice plurality standard has met the test of time – but for the fact that its application has almost invariably produced the same result (except for the incurring of attorney's fees) as would have obtained if the question were nonjusticiable: judicial intervention has been refused."

do not. Invariably, a number of judges in my interviews emphasized that their decisions were based on the law. A typical response along these lines comes from the following judge who said to me,

"From my perspective, the role of judges is whatever the Supreme Court says it is" (federal judge #12).

Another judge's description of her perception of redistricting law was as follows:

> "It seems to me that the Supreme Court and Congress have been clear, that the resort to the federal courts, it is the place of last resort when the peoples' elected representatives won't follow their statutory and constitutional responsibility. It is the process we use, short of getting out on the street with baseball bats [to settle the matter]. It's only when the peoples' representatives don't follow their sacred obligation [that the courts are forced to act]. We follow the law based on the facts. ***It's not what we want to do***, it's just what the law requires to be done." (federal judge #6).

The implication drawn from these two responses is that the law is pretty clear, and it's just a matter of the trial judge applying the law and the precedent set down by the U.S. Supreme Court to the particular facts of the case. It all sounds so easy.

There is no reason to question these judges' sincerity in their responses. However, one must also consider the fact that many federal judges have little or no experience in dealing with redistricting cases because they are so rare compared to all the other types of cases judges look at. As generalists, many judges do not have an intricate knowledge of the technical side of redistricting law (Buchman 2003), and it makes no rational sense for them to do so anyway, since these cases are so rare. Thus, some may not even be aware of the haziness in Court precedent. To borrow the analogy from the quote above about the judge in the woods, there may be guideposts pointing judges in the direction to the finish line, but the guideposts on some roads seem to provide signage pointing in two or more contradictory directions that get the judge to different finish lines.

Insomuch as judges might be neutral arbiters in redistricting, the law cannot be an insurance policy on that hope. That is why the suggestions of election law legal scholars such as Issacharoff, Karlan and others that I mentioned in Chapter 1 are all the more striking. These scholars are calling for more regulation of redistricting by courts. Federal courts, under their conception, would operate as correctors of the political competition market.

But, how do federal judges neutrally achieve this goal when presently they have few standards to go by outside of the equal population jurisprudence? In response, Issacharoff and others might argue that even though judges do not have redistricting laws to guide them in neutral decision making, there are other factors unique to the institution of the federal courts and the legal process which *can* guide them. Professional and other institutional norms of the legal profession, such as notions of justice, fairness, and due process (D'amato 1996)[55], as well as institutional realities of the federal courts (life tenure), could fill the gap – in other words, federal judges do not need a more precise and technical redistricting law in order to engage in neutral decision-making in redistricting. They need only rule for or against Republicans and Democrats in equal numbers commensurate with their own political background. Therefore, while the doctrinal analysis suggests that the federal law does not offer courts complete guides towards neutral decision making in redistricting, neutrality in decision making could theoretically

[55] Law Professor Anthony D'amato argues that justice is a concept that cannot be defined in words, but that it is "real" and that it is "objective" (1996, 168). He states that courts act as a "social device" to keep "justice-oriented actions in place and [change] unjust actions to just actions" (1996, 173). Furthermore, he believes that "[w]e have to take our sense of justice into account in predicting what courts will do" because "law and justice are not separate concepts but rather are inherently related to each other" (1996, 174-75). Justice foremost means, according to him, "[d]eciding cases according to their similarity to previous justice-outcomes (what in the law is simply the operation of 'precedent')" (D'amato 1996 174). Without getting into philosophical notions of justice, which is beyond the scope of this project, the point of noting D'amato's views is that legal scholars, lawyers and judges take this notion seriously. But, it is unclear what D'amato would consider a just decision when precedent is murky.

still occur regardless of the clarity of the law. Hence, the proposals among legal scholars for increased judicial regulation may not be problematic from a democratic standpoint. The only way to discover if judges are operating neutrally is to test this possibility empirically. This is precisely what I do in the empirical chapters that follow.

Federal judges are not the only institution concerned about the law of redistricting. Many of the redistricting commissioners I spoke with were acutely aware and concerned with following the law so as to avoid litigation in the federal courts. Some commissioners admitted to approaching public meetings as a way of preserving a record to insulate the commission from attacks of arbitrary decision making or unfair treatment of minorities. Many of these commissioners attended the National Conference of State Legislatures meetings (and undoubtedly were handed and probably glanced over Hebert et. el's *The Realists Guide to Redistricting: Avoiding the Legal Pitfalls*). Some commissioners described this conference as immensely focused on the legalities of redistricting and helping states avoid having their plans litigiously attacked.

Presently though, with respect to judges, the doctrinal analysis I have presented means that we cannot make automatic assumptions about their neutrality. The law can potentially matter to lower court judicial decisions (at least, that law which emanates from the Supreme Court). Certain areas of the law of redistricting offer some boundaries to lower courts. The question becomes, where the law offers no boundaries, are judges still neutral, or does partisanship have a role to play in judicial decision making? Chapter 3 will examine the social science bases for judicial decision making and commission decision making.

Chapter 3 Social Science Theories behind Judicial Behavior in Redistricting

In this chapter, I review the possible theories that might explain judicial behavior in redistricting. I use this chapter to rule out some theories and draw on others to develop my model of judicial oversight of redistricting. A model of commission behavior is constructed later in chapter 6 when the empirical data of commissions is also addressed. The underlying question presented in developing these models (of both commissions and the federal courts) is the role (if any) of party identification versus other factors in the decision making process. I argue that federal judges act as constrained partisans in redistricting. While some redistricting cases evidence partisan decisions, at other moments, federal district judges are constrained by precedent and other factors.[56]

DEVELOPING A SOCIAL SCIENCE MODEL OF JUDICIAL BEHAVIOR IN REDISTRICTING

Legal Realists, the Attitudinal Model, and the Strategic Model

The doctrinal analysis presented in chapter 2 is illuminating, because it illustrates to the reader that lots of particulars in redistricting law are left unresolved – left up to the discretion of the judge. How does a judge resolve these legal issues in the absence of clear precedent? Even in the best of instances, a law perhaps only provides some sort of general direction for a trial court decision maker. A trial judge also has to interpret the facts, consider motions by attorneys, and draw on not only her own notions of justice learned in her legal training but also her own life experiences.

[56] In contrast to the federal courts model, the overriding variable in the commission model of decision making is partisanship, but commission outcomes, while partisan, are tempered by political context and commission structure.

Because the "law" can sometimes be an indeterminate concept, one cannot rely on the legal model for a sufficient explanation of judicial behavior – including behavior in redistricting cases. For a fuller understanding on how federal courts regulate the redistricting process, one must turn to the social science literature on judicial behavior. Social scientists tend to focus more time on the social, political and psychological forces influencing the judge's decisions and less time on what the law and its indeterminacies say. This perspective on judicial behavior is not necessarily unique to social scientists, but rather has its origins in the legal realist movement of the 1920s (Hettinger, Lindquist and Martinek 2006). Legal realists in their most raw form dismissed the idea that the law governs legal decisions (Baum 2006). They are quick to point out that there is often more than one plausible interpretation of the law, thus requiring judges to consider extralegal factors in order to arrive at their decision.

Drawing on the legal realist movement, political scientists began to examine judges as political actors who made decisions based, in part, on their own political preferences (Hettinger, Lindquist and Martinek 2006). As early as the 1940s, political scientists were studying court decisions through the lens of political factors while downplaying the idea that law played the primary role (Pritchett 1948; Schubert 1965).[57] The behavioral approach to judicial decision making gained "increasing importance" in political science in the 1950s (Schubert 1965, 164); and by the end of the 1970s, was the

[57] Martin Shapiro, in explaining a new way of analyzing judicial behavior among political scientists, wrote "…. [T]he new jurisprudence shares with all modern American thinking about law the premise that judges make rather than simply discover the law. Without this premise there could be no political jurisprudence, for one of the central concerns of politics is power and power implies choice. If the judge had no choice between alternatives, if he simply applied the rule supplied him by the tablets and reached the conclusion commanded by an inexorable legal logic, he would be of no more interest politically than the IBM machine that we could soon design to replace him …." (Schubert 1965, 162 *quoting* Shapiro 1964, 294-95).

dominant approach to explaining judicial behavior (*see, for example,* Schubert 1965; Goldman 1966; Grossman and Tanenhaus 1969; Rohde and Spaeth 1976).

From the start, behavioralists noted the potential of drawing on different social science disciplines for help in explaining judicial decisions, including "…psychology (for the analysis of individual judicial attitudes) [a.k.a. the attitudinal model], sociology (for small-group analysis), and economics (for the analysis of rationality in decision making)" (Schubert 1965, 164). The leading psychological model of judging is the attitudinal model, which was employed by Schubert and further refined by Jeffery Segal and Harold Spaeth in their works *The Supreme Court and the Attitudinal Model* (1993) and *The Supreme Court and the Attitudinal Model Revisited* (2002). But there are other psychological models of judicial choice, including psychoanalytic models on personality, interpersonal influence in small groups, integrative complexity in decision making, cognition and decision making, and others (*see* Baum 1997, 137). Segal and Spaeth characterize their attitudinal model as the following:

> The attitudinal model represents a melding together of key concepts from legal realism, political science, psychology, and economics. This model holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshal voted the way he did because he was extremely liberal (Segal and Speath 2002, 86).

Segal and Spaeth (1993) argue that at least with respect to Supreme Court decision making, the justices' legal bases for their opinions are simply post-hoc rationalizations of their own preferences. In their 2002 edition, Segal and Spaeth revise their models to include strategic factors, but they largely come to the same conclusion that justices rely on their own preferences for making decisions, and that strategic concerns factor very little into the final decision. They argue that while there may be strategic action going on

in the cert process and so forth, there is very little strategic interaction among justices at the decision making phase (Segal and Spaeth 2002). Attitudinalists (Segal and Spaeth and their supporters) believe that the law offers little or no constraint on the actions of Supreme Court justices.

The other leading explanatory model of Supreme Court behavior is the strategic model (the rational choice models) proffered by scholars such as Epstein and Knight (1998) and Maltzman, Spriggs and Wahlbeck (2000). "Strategic judges consider the effects of their choices on collective outcomes, both in their own court and in the broader judicial and policy arenas" (Baum 2006, 6). There are basically two rational choice models: 1. the internal dynamics model of court behavior and; 2. what Segal and Spaeth (2002) refer to as "separation- of-powers" models. The internal dynamics strategic model could be likened to definitions of strategic voting among the general public (Shaw, McKenzie and Underwood 2005), where a judge on a multi-person tribunal acts strategically if she votes for a lesser preferred opinion so as to "avoid wasting her vote and facilitating the … [triumph] of her least preferred" opinion outcome (Shaw, McKenzie and Underwood 2005, 218). Thus, an internal strategic model would examine the actions between judges in their reaching a decision. Segal and Spaeth note that these types of models are not as prevalent as separation-of-powers models (2002). Separation-of-powers models consider the Supreme Court's action in the context of the possible actions of the other branches. Thus, the Supreme Court makes its decisions based on what it thinks the Congress (or perhaps the president) is going to do. Lawrence Baum argues that "strategic models have become highly influential, and a strategic conception of judicial behavior is now the closest thing to a conventional wisdom about judicial behavior" (Baum 2006, 7).

Problems with the Strategic and Attitudinal Models

Both the strategic and attitudinal models, however, have certain drawbacks, and neither is completely appropriate for understanding trial court behavior in redistricting. Rowland and Carp are quite critical of the rote application of these models to trial court behavior. In *The Politics and Judgment of Federal District Court*, these authors note how different the fact-finding role of the trial court judge is compared to appellate courts (Rowland and Carp 1996).[58] Unfortunately, the attitudinal and strategic models, while perhaps adequate enough for describing appellate court behavior, are less appropriate for studying trial courts.

> …[T]hese preference-based models do not adequately conceptualize the institutionally constrained judgments of trial judges. Particularly distressing is the persistent assumption – shared with their behavioral and rational-choice predecessors – that decisions are made in pursuit of personal goals or preferences on the basis of a decision calculus designed to maximize personal utility. To accept this assumption axiomatically is to create an unpalatable image of activist judges who, if they think they can get away with it, will consciously impose their policy preferences on their evaluations of disputed facts" (Rowland and Carp 1996, 157-58).

These authors point out that federal trial judges take an oath to follow Supreme Court precedent (Rowland and Carp 1996, 157).

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[58] "[T]o say that Supreme Court justices are motivated primarily by their constitutional policy preferences and that these preferences can be inferred from their 'votes' is fundamentally different from contending that trial judges' fact-finding or evidence evaluation is motivated by their personal preferences…. [T]he primary day-to-day focus of the trial judge is to establish facts and fit them to laws interpreted by appellate courts rather than to interpret ambiguous statutes and constitutional clauses." (Rowland and Carp 1996, 146). One could argue, however, that three-judge courts in redistricting may require more interpretation of law compared to single judge trial courts. These courts' decisions, if appealed, go automatically to the Supreme Court. Since very few redistricting cases involve a single judge, appellate caselaw on redistricting is sparse. And, as demonstrated in part I of this chapter, Supreme Court precedent in this area can sometimes be unclear.

To some extent, Rowland and Carp's criticisms could be viewed as excessive, especially if we consider the legal context surrounding redistricting tribunals.[59] Nevertheless, these scholars do raise some legitimate concerns. First, I want to point out the problems of transferring the attitudinal model to trial court behavior. Even if we were to assume the attitudinal model of Segal and Spaeth (2002) is the best explanation[60] political scientists have for describing the forces behind U.S. Supreme Court behavior[61], Segal and Spaeth (1993) have already acknowledged themselves that their model may not adequately transfer to lower federal court behavior. In the real world, an attitudinal model in its purest form appears to make little sense at the trial court level, for one has to assume that extremely intelligent individuals (attorneys, judges, clients, and law clerks) devote hours of time and spend thousands of dollars on irrational processes that have absolutely no bearing on the outcome of a case. It is also reasonable to assume that while Supreme Courts are free to ignore their own precedent, professional norms and legal rules ought to operate more rigidly on lower courts (more on this later). Thus, when the law (or precedent) is clear, one would think that lower court federal judges will be more inclined

[59] Decisions of these three-judge courts can be automatically appealed to the U.S. Supreme Court, and the high court has no discretion to refuse to take the case. It is required to reverse or uphold the three-judge panel's decision. If there are a high volume of lower-court decisions in redistricting that are appealed, the Supreme Court could choose to simply issue a summary affirmance. The process of bypassing the appellate courts gives the three-judge district court's action more weight and effect of a substantive nature on redistricting law. Published opinions of three-judge courts are frequently cited for their interpretations of the law by other three-judge courts when they encounter redistricting issues not directly addressed by the U.S. Supreme Court. Hence, there certainly is some opportunity to formulate higher conceptions of the law if a three-judge federal district court sees an opportunity they deem necessary to take. In the context of redistricting tribunals, one should be cautious about Rowland and Carp's portrayal of the problem of applying strategic and attitudinal models to trial courts.

[60] *But see* Perry (1991)

[61] I am leaving aside methodological concerns raised by some scholars about Segal and Spaeth's work, since such arguments are inapposite to my purposes here. I am not interested in debunking the attitudinal model, because I think it has some viability as I note further down. However, I think there are problems with plopping it down on the decisions of federal trial judges (*see, for example* Rowland and Carp 1996).

to follow the "law", because the price for not doing so includes reversal and professional embarrassment.[62]

There are similar problems in transferability of the strategic (or rational choice) model to lower trial courts and redistricting cases, in particular. The separation-of-powers models make less logical sense for trial court judges.[63] Furthermore, other constraints keeping trial judges from factoring in what the President, the Congress, or future Congresses will do include the difficulty in accurately calculating and predicting such action (*see* Segal and Spaeth 2002, 103-110). Even legal scholars, such as Cass Sunstein, who argue that they sympathize with the law and economics rational choice theories of

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[62] Following the law does not necessarily have to be an end in itself for the court, as there are strategic rationales for explaining why judges might follow the law (Baum 2006). Judges may want to please their fellow colleagues in the legal profession or the expectations of a wider public (Baum 2006, 7).

[63] In a survey of state trial judges in the 1970s by Donald Jackson (1974), state judges were asked about their interactions with 25 other groups in society (legislators, appellate judges, court personal, attorneys, the general public, etc), specifically asking about the importance to the judge of these groups' views of the "appropriate qualities and behavior of the trial judge." Jackson found that judges in the survey believed legislators views of their role to be only moderately important to less important. Jackson surmised that due to the rarity of interaction between state trial judges and legislators, legislators' lack of professional legal status, as well as judges' views about the independence of courts from the legislature, these trial judges are likely to not view legislators' opinions of how they should act as important. The group's views that trial judges believed were most important were those of appellate judges. The survey does not prove that the Epstein and Knight strategic institutional model as applied to trial courts has no validity, but the survey suggests (assuming judges in this survey were sincere), that federal trial judges are not likely to factor into their decisions the actions of the Congress (although undoubtedly anecdotal and isolated incidents occur). Even the rational choice (internal dynamics) view that federal appellate judges strategically think about how their decision will be viewed in the Supreme Court, and thus act accordingly, has been challenged. Cross (2005; 2004) as well as David Klein and Robert Hume have pointed out that the threat of reversal is not likely to mean much at the federal appellate level because only a very small percentage of appellate decisions are ever overturned by the Supreme Court. "The results provide no support for the hierarchichal strategy theory of judicial decision making…. Circuit court judges do not appear to worry about the risk of Supreme Court reversal when rendering their decisions" (Cross 2004, 34). At the trial court level, however, the threat of reversal carries more substance since federal appellate courts do not have the luxury of a discretionary docket. "[T]here is good reason to suspect that reversal is much more of a meaningful sanction for district courts than for courts of appeals" (Hettinger et al 2006, 26). There are several reputational and other reasons for district judges wanting to avoid appellate reversal (Hettinger et al 2006). And studies show that reversal has an effect on district judges (Smith 2006; Haire, Lindquist, and Songer 2003). Joseph Smith's study of the D.C. District Court finds that in civil rights cases, the more often a district judge's pro-plaintiff decisions were reversed on appeal, the more likely she would make pro-defendant decisions in the future, and the more often a judge's pro-defendant decisions were reversed, the more often she starting making pro-plaintiff decisions in the future (2006).

judicial decision making, feel compelled to call for more "perspective informed by insights about actual human behavior" in "approach[es] to the economic analysis of law" (Jolls, Sunstein, and Thaler 1998, 1473).[64]

The internal dynamic strategic models cannot be factored into trial court decisions, for obvious reasons, because there is only one judge. So, normally this model could not begin to explain trial court decision making. Of course, most redistricting cases are multi-judge trial courts, so one has to consider the possibility of strategic interaction. But upon considering this possibility, it becomes clear that big impediments to acting strategically exist for trial court judges. An important assumption of any strategic model of voting is that the relevant actors have the requisite knowledge in front of them to make a strategic choice (Blais and Turgeon 2004; Shaw, McKenzie and Underwood 2005). At the Supreme Court level, the justices spend time together deciding hundreds of cases over a long period of time, and also have the additional knowledge of hundreds of decisions over granting cert. In this environment, at least there exists an ability to get to know and better predict the action of your colleagues on the court. But, the extent to which Supreme Court justices engage in strategic behavior vis-à-vis their colleagues is a matter of dispute (*see* Segal and Spaeth 2002; Perry 1991). Perry found in his study of the cert. process of the Supreme Court that there is less strategic behavior "than we political scientists might expect" (1991, 144). Perry deduced from his interviews with law clerks

[64] Jolls, Sunstein, and Thaler (1998) argue for a more behavioral approach to economics while at the same time vouching support for the underlying notions of rational actor models. Some legal scholars have questioned whether Jolls, Sunstein and Thaler (1998) are really talking about economics and rational actors because they seem to jettison the necessary assumptions of the models (*see* Posner 1998; Rostain 2000). Rostain argues that Jolls et al's "new" behavioral approach to the law and economics studies is not new at all, but simply a "descendant" of a long established research of law and psychology (Rostain 2000, 983). It must be pointed out that the thrust of these legal articles centers less on elite decision making by jurists and more on studies in mass behavior and the law (as well as juror decision making).

and Supreme Court justices that Justices operated in relative isolation and that "there is little bargaining and strategy on the Court with regard to the cert process" (1991, 144).

The logic behind the strategic model starts to become less compelling for lower court judges. Federal appellate court judges work in randomly assigned groups of three. While one may get a chance to work with the same colleagues every now and then, there cannot be the same regularity and familiarity as exists at the Supreme Court (*see* Hettinger et al. 2006). Furthermore, appellate judges may lack time to consider strategic factors. Time came up in a discussion with one appeals court judge:

"I haven't talked to any of my colleagues on the appeals court. I know people are busy with their work [implying that they may not want to take such a case]. I know they [redistricting cases] are time consuming… But, they're not deemed a chore." (federal circuit judge #8).

Consequently, even if federal appellate judges had the ability to hone their skills in being able to predict what their colleagues might actually do, they have little time to acquire the knowledge necessary to engage in strategic action because they are too busy. And, in redistricting actions, trial courts are typically under increased pressure to try the case and render a decision in time for the election to proceed unimpeded.

Even assuming strategic action occurs at the federal appellate level, these aforementioned concerns about the possible lack of opportunity for strategic action at the appellate level should increase exponentially at the federal trial court level when we think about how redistricting cases operate. As recounted in chapter 2, a federal trial court in redistricting cases includes a panel of three judges: two district judges and one appeals court judge. Three-judge trial courts are uncommon and are currently reserved only for redistricting cases and some civil rights cases (Solimine 1996). While federal district judges occasionally sit by designation at the federal appeals court level, they rarely have

chances to interact in decision making processes with appellate judges, and almost never interact with their other district judge colleagues in collective decision making on cases. Given these conditions, we can assume that federal district judges would have less of a chance to acquire the knowledge of their colleagues necessary to operate strategically. Take, for example, the experience of one federal judge I interviewed when it came time for her to make her[65] decision in a redistricting case with her colleagues.

> I was surprised at the tentative conclusion arrived at by [Judge X] and [Judge Y]. I had a very fine law clerk who did work on the demographics. I tried to persuade them of what I regarded the facts to be and was not successful. During that time, I became disillusioned with the procedure (federal judge #21).

This judge was completely "surprised" by her colleagues' actions. She did not anticipate their reactions to the case. And how could she? The number of federal district judges and the rare instances that they work together on court cases militates against them becoming strategic actors.

Finally, the problem in general with the strategic and attitudinal models, as Rowland and Carp point out, is that they create a picture of federal district judges as disingenuous hacks on the political take, even though the institutional processes under which they labor are more restrictive than the U.S. Supreme Court or even a lower appellate court. What one federal appeals court judge told me in an offhand remark about the professional relationship with her district court brethren was quite revealing about the constraints of lower courts. Asked whether she liked hearing redistricting cases, the circuit judge said,

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[65] In order to help obscure the identities of the judges' interviewed for this project, I refer to all of them in the feminine gender.

"I welcome the opportunity to take on complex non-criminal cases at the appellate level. And it was with the other district court judges whose *papers I have to grade* (federal circuit judge #8)."

The circuit judge describes herself as sitting in a tribunal with district court judges whose "papers" she normally "grades".[66] If precedent is clear enough to be reasonably followed, district judges have to be conscious of their overseers so as not to get their hands slapped by the brandisher of the legal ruler.[67] When a circuit judge sits with two federal district judges in a redistricting case, the grader becomes the Supreme Court:

"Incidentally, [district] judge [X] and I went to Washington to hear the oral arguments of the case when it was appealed to the Supreme Court. (federal circuit judge #8)."

In the circumstance of redistricting cases, the circuit judge has to change roles slightly:

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[66] I want to point out that these judge's comments were made to me in a humble, matter-of-fact manner, and should not be interpreted as pretentious on the part of the judge.

[67] Cross has cogently argued that federal appellate courts don't necessarily follow precedent simply out of fear of reversal (2005; 2007). He illustrates that the probability of the Supreme Court taking an appellate panel's case is infinitely small (Cross 2005). In *Decision Making in the U.S. Courts of Appeal*, Cross writes, "The data are contrary to any hypothesis that circuit courts passively moderate their rulings to conform to the preferences of the Supreme Court" (2007, 122). Thus, such concerns have little explanatory value in understanding why appellate courts follow precedent. Rather, he suggests they follow precedent because they want to. Indeed, his criticisms of the strategic model's overvaluing of the risk of Supreme Court reversal are quite valid when considering the typical appellate court case. Three-judge redistricting courts operate under a less typical judicial process. Redistricting decisions of three-judge courts must be reviewed by the Supreme Court if the losing side decides to appeal (i.e. there's no discretionary review), and because litigants in these high profile cases are likely to appeal to the Supreme Court, presumably these three-judge courts would be more cognizant and concerned about the potential for reversal. At the end of the day, for my purposes, these judicial motivations – fear of reversal or earnest desire to follow precedent and "do the right thing" (Cross 2005, 384 *quoting* Feeley & Rubin 1998) – are not mutually exclusive. In some sense, a judge taking into consideration fears of Supreme Court reversal could also be characterized as taking in concerns of precedent and the law in her decision. But, the idea that positive political theory (PPT or rational choice theory or the strategic model) adequately accounts for trial court behavior seems dubious (as I explain in detail above), because the underlying assumptions of PPT suggest that trial judges would, in the absence of the risk of reversal, ignore evidence presented at trial and simply implement their preferred policy choice.

> McKenzie: "Do you think these [redistricting] cases have any particular challenges or problems that are unique to themselves, or are redistricting cases sort of like any other case you may encounter?"
>
> Federal circuit judge: "These are largely fact-finding and then applying the facts to the law – ….. to a large degree, it is in a subcategory of its own, but there are basic legal particulars that apply, rules of evidence…"

The circuit judge is noting the fundamental change in what she normally does (grading papers), to what she did in this redistricting case (trial work). I'm not suggesting the decision making process of a trial court is as easy to understand as it appears from her statement (I don't think she would mean to suggest it either), but there is an institutional difference.

Altogether, I submit that the attitudinal and strategic models provide an initial framework for thinking about the behavior of federal district judges in redistricting lawsuits, but they are perhaps better suited for explaining supreme and appellate courts. As I argue further below, trial courts are fundamentally different legal institutions that require a different perspective for understanding decision making – a social psychological perspective based on cognition.[68]

TRIAL COURTS AND SOCIAL PSYCHOLOGICAL MODELS OF JUDICIAL BEHAVIOR

Trial courts are the proverbial neglected stepchild in judicial behavior research. This is especially true in the area of the federal courts. When you compare the extant literature on federal trial courts to the voluminous research on appellate and Supreme Court behavior, not nearly as much attention is paid to the study of the district courts (Ringquist and Emmert 1999). And this complaint about the paucity of federal trial court

[68] Cognitive Psychology can also be helpful in understanding appellate and Supreme Court decision making as well (*see* Wrightsman 1999; D. Simon 1998; Gruenfeld 1995).

study seems to be a theme historically in the literature. As far back as 1978, William Kitchen in his qualitative research based on interviews of federal district judges writes, "In spite of the acknowledged significance of district judges, so little research on them has been conducted that there exists a serious gap in the literature of judicial behavior" (1978, 14). In this section, I look at some of the prior studies that use social psychological and cognitive psychological processes for understanding trial court behavior. Part of this overview will cover political science studies as well as studies published in legal journals.

Federal district courts (trial courts) are often distinguished as distinct decisional bodies when compared to federal appellate courts and the Supreme Court. What differentiates trial courts from other courts is the amount of factual evidence they listen to in order to render a decision. They establish what the facts are, and the factual record is almost always taken as a given in the appellate courts. According to one judge's monograph on the subject, "What distinguishes decision making in the trial court from the appellate process, and that is almost universally overlooked in philosophical disputes over decision making theories generally, is the uniqueness of the fact finding process" (Bartell 1986, 4). Trial courts represent, at least in theory both legally and psychologically, a fundamentally different decision process from appellate courts.[69] As a way of getting at the essence of trial-court behavior and the judicial mind, many public law students in the law reviews and the political science journals have turned to cognitive psychology (D. Simon 2004; Guthrie, Rachlinski, and Wistrich 2001; Viscusi 1999; Rowland and Carp 1996; Landsman and Rakos 1994; Main and Walker 1973).

It's certainly plausible to argue that psychological influences on judicial decisions appear throughout all levels of courts. In fact, the attitudinal model described above is a

[69] Baum (1997, 83) suggests that this difference has perhaps been "exaggerated," but he does not altogether reject this idea.

psychologically oriented model. But since trial courts are not institutionally or theoretically built to naturally accommodate the attitudinal model (Rowland and Carp 1996), other psychological models seem more appropriate.

Psychoanalytic models might also be applied to any of the various levels of federal courts. In presidential studies, George and George's (1956) psychoanalytic work on Woodrow Wilson (entitled *Woodrow Wilson and Colonel House*) is an excellent example of trying to understand the behavior of a single individual (*see, for example* Greenhouse 2005; Lasswell 1948).[70] But a mass study of trial judge behavior based on psychoanalytic models is impracticable for my purposes, and at any rate, is unnecessary since I am less concerned with idiosyncratic tendencies of a particular judge and more interested in whether partisanship, case facts, and other institutional and contextual factors have any effect on judicial decisions in the aggregate. In a variant of this research, Aliotta (1988) examined the testimony of U.S. Supreme Court justices confirmation hearings to construct a psychological content analysis where he used social background information to predict behavior on the high court. Some models by psychologists have examined how self-esteem might affect judicial behavior (Atkins, Alpert, and Zeller 1980).

Other social psychological models of judicial behavior include the interaction of individuals in small groups and how that affects decisions (Cross 2007; Sunstein 2000; Cross and Tiller 1998; Revesz 1997; Main and Walker 1973). These studies could be important for understanding judicial behavior in redistricting, because most redistricting disputes are decided by three-judge courts. Main and Walker (1973), in their study of three judge trial courts, found that when compared to single-judge trials, these courts had

[70] Linda Greenhouse's recent book *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* (2005) is almost like a psychoanalytic analysis into the inner being of a justice's mind.

a polarizing effect, causing members to move to more extreme positions in comparison to single judge trials.[71] Defining the ability to strike down state laws and congressional laws as "the most extreme power in the arsenal of the federal judiciary" (Main and Walker 1973, 218). According to their hypothesis, "If the finding that group induced attitudinal shifts toward extreme opinions can be extended to group decision making behavior, we would expect a judge to be more willing to wield his full authority and call for massive legal and social innovations when participating in group decision making" (Main and Walker 1973, 219). They found that three judge courts were much more likely to strike down statutes when meeting as a three-judge court. This study has some bearing on thinking about how three judge courts might deal with redistricting cases. However, the Main and Walker findings should be considered cautiously, as their findings don't actually prove the hypothesis they are suggesting (rather the findings are merely consistent with the hypothesis). Their analysis is only bivariate in nature and does not consider other potential factors that could be influencing the decisions of these courts. Because no multivariate analysis exists, it's unclear to what extent other factors might be driving this difference in decisions. For example, it could be that the factual nature of cases where the parties are requesting a permanent injunction are generally fundamentally different from those cases where the constitutionality of a statute is merely

[71] The reason for three-judge courts hearing the constitutionality of a law as opposed to a single judge, as the authors note, was a mere procedural artifact in this study (Main and Walker 1973). At the time, before the law changed regarding three-judge courts, there was no substantive difference in the cases. Rather, a three judge court would be convened if the parties, in addition to challenging the constitutionality of the statute, also requested a permanent injunction against the statute being enforced (Main and Walker 1973). If the litigants did not request a permanent injunction, but only challenged the constitutionality of the statute, a single judge heard the case. Since the Main and Walker study, Congress has passed legislation limiting the instances where three judge trial courts are convened. Redistricting is one of those instances.

questioned. Perhaps litigants are more likely to ask for a permanent injunction in cases where the facts are more egregious in nature.[72]

In more recent research, Cross and Tiller (1998) studied how the partisan group composition of three judge panels in the D.C. Court of Appeals could affect decisions of the tribunal. They found results that were consistent with their whistleblower hypothesis. Panels that were composed of only one party were less likely to follow precedent (but instead rule in a direction consistent with their own predilections) (Cross and Tiller 1998). However, panels that had a mixed partisan composition were more likely to follow precedent (in this case, the *Chevron* doctrine). This, Cross and Tiller (1998) surmised, resulted from a whistleblower effect, wherein the judge in the minority position had the potential to act as a deterrent and blow the whistle on the majority by calling attention to the failure of the majority to follow precedent. There is certainly the potential for group dynamics to have some sort of effect on redistricting trial panels.

Cognitive Psychological Models

Another model for explaining trial court behavior in redistricting cases is one rooted in cognitive psychology. Here, the link between attitudes and behavior of judges is oblique. In this conception of judicial behavior, "attitudes may serve primarily 'as information filters or intermediaries that influence the cognitive processes of perception, memory, and influence'" (Baum 1997, 139 *quoting in part* Rowland and Carp 1996, 150). In this line of research, there are many aspects of cognitive psychology that are considered for understanding a judge's decision and decision process – including use of

[72] It is also not clear whether there are cases in the dataset that include questions of unconstitutionality that are merely complaints that are "as applied" (complaints that the statute "as applied" was unconstitutional).

heuristics, motivated reasoning, and information processing to make judgments based on complex or ambiguous data (Baum 1997).

Rowland and Carp are some of the few political science scholars who look to cognitive psychology to explain the behavior of federal *trial* judges.[73] But in political science, the dominant models are the attitudinal model, the strategic model, and the historical institutionalist model (Maveety 2003).[74] Some psychologists have been acutely aware of the effect of psychological and social cognitive processes on judicial decision making at the trial level for years (Saks and Kidd 1980-1981; Diamond 1995). More recently, legal scholars (oftentimes teaming up with psychologists) have also shown heightened interest in this line of study of trial court decisions – made both by juries and by judges (D. Simon 2004; Guthrie, Rachlinski, and Wistrich 2001; Viscusi 1999; Kelman, Rottenstreich and Tversky 1996; Landsman and Rakos 1994). This area of research, in my opinion, offers a credible theoretical response to attitudinalists and rational choice theorists as well as a better answer for describing the empirical data that judicial behavior scholars see at the trial court level.

In this next section, I review Rowland and Carp's social psychological model of trial court behavior. Then, I branch out into an examination of the legal and psychological work on judicial decision making.

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[73] The attitudinal and rational choice models have been the dominant models employed by political scientists in recent decades to investigate judicial behavior. (*but see* Perry 1991).

[74] In an edited volume entitled *The Pioneers of Judicial Behavior* (Maveety 2003), the book was divided into these three models. No portion of the book containing "pioneers in judicial behavior" was devoted to work on social and psychological cognition models, because there is such little work in this area in political science.

Rowland and Carp's Social-Psychological Model of Judicial Decision Making

In *Politics and Judgment in Federal District Courts* (1996), C.K. Rowland and Robert Carp find (as in earlier studies) that trial judges appointed by presidents of different parties have different voting patterns. But rather than simply adopting an attitudinal theory to trial court decisions, these scholars attribute this partisan pattern less to judges' blind adherence to political preferences and more to the properties of social psychological processes of people. In order to understand why judges who strive for objectivity produce partisan voting patterns, the authors construct a social and psychological cognition model of trial court decision making that has important implications for thinking about how federal judges might approach redistricting trials. Since they are one of the few political scientists who have most recently proffered a trial court decision model based on a social psychological theory, a comprehensive treatment of their model warrants an in-depth review here.

Rowland and Carp begin a construction of their model of trial court decision making by incorporating "key aspects of agency theory" (1996). They describe the federal trial court operations in terms of clients, managers and guardians. The litigants and attorneys are the clients, the managers are the district judges themselves, and the "principal-guardians" are the appellate courts, "who shape organizational goals and 'police' the organization's behavior" (Rowland and Carp 1996, 153).

In thinking about the "organizational context" of trial judges as agents, Rowland and Carp then ask, "What is the psychological *process* by which a trial judge agent committed by oath to political neutrality contributes individually to the politicized polarization of judgments between presidential appointment cohorts?" (1996, 156). And the answer, they argue, lies in theories in cognitive psychology, social cognition, and information processing. (Rowland and Carp 1996). The authors point out that like

decision makers in other contexts (Tversky and Kahneman 1974; Simon 1986), judges sometimes face ambiguity and complexity when judging. "If we accept as axiomatic the inherent ambiguity of much legal information and the limited capacity of trial judges, then a theory of district judges' judicial judgments must account for the processes by which judges subjectively represent complex decision problems" (Rowland and Carp 1996, 156).[75]

Rowland and Carp (1996) argue that, consistent with prospect theory, judges engage in a two-staged decision process, where a judge first must frame what the question is and second must engage in an evaluative process based on that frame (Rowland and Carp 1996). They make two important assumptions about this process. First, judges are cognitive misers that labor under computational limitations. Second, judges "take seriously their commitment to an unbiased evaluation of evidence and interpretation of the law.[76] (This is not to say we assume that judges' decisions are purely objective; rather, we believe that they attempt to follow the law and evaluate the facts *as they see them*)" (Rowland and Carp 1996, 159) [emphasis in the original]. While political

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[75] Rowland and Carp describe what they call the "precursors of a cognitive model of judicial judgment":

> [B]ounded rationality and procedural rationality, cybernetic models of decision making and cognitive choice theories…. assume axiomatically that human decision makers (even those who wear robes) share cognitive limitations that inhibit their ability to respond directly to stimuli whose complexity exceeds their computational capacity (Simon 1986), or whose ambiguity … forces the judge to subjectively select manageable choice criteria and assign probable outcomes to alternative nonprobabilistic criteria. Thus, when the quantity or quality of information exceeds the human judge's cognitive capacity, complexity becomes the functional equivalent of ambiguity because both require the judge subjectively to recreate the choice problem by choosing manageable information from an information universe that is unmanageable. Under such circumstances, the conscientious judge must 'go about making his or her decision in a way that is procedurally reasonable in light of available knowledge and means of computation' (Rowland and Carp 1996, 156 *quoting in part* Simon 1986, 27).

[76] "…trial judges respect and adhere to the formal and informal norms contained in the judicial oath that binds them to fairness and objectivity …" (Rowland and Carp 1996, 159)

preferences may influence judicial judgment, this is not necessarily because judges are driven to act based on policy. Such a model, they argue, is "consistent with patterns of polarized judicial judgments on the district courts" (Rowland and Carp 1996, 157).

> If the factual components are unambiguous and unambiguously legal cues are congruent with principal preferences, the problem is institutionally framed for the judge, who need only evaluate on the basis of these criteria; if not, the judge must frame the dispute by constructing a cognitive representation of the perceived problem and evaluate alternative outcomes on the basis of these subjective representations (Rowland and Carp 1996, 157).

The Rowland and Carp framework is analogous to redistricting. The Supreme Court (the principal) has held that state legislative plans generally cannot deviate more than 10 percent. Here, the principal's preferences suggest that population deviations in excess of 10 percent from the ideal district may be suspect constitutionally. Under these instances the factual and legal components for a trial judge are likely to be unambiguous. On the other hand, the Supreme Court has never sufficiently resolved the disputes surrounding the application of *Gingles* factors referred to in chapter 2. Under the *Gingles* framework, federal district judges would have to figure out the appropriate *Gingles* frame before they could evaluate the Voting Rights Act claim.[77] Under the Rowland and Carp rationale, federal district judges would not necessarily be goal-oriented, in the sense that they would be looking to maximize their own personal policy goals by voting for or against their own party's interests in redistricting cases.

Thus, the decision making process of a trial judge is more complicated than a simple mechanical application of personal preference. In looking at the trial judge's

[77] Some circuits have resolved some of these questions in VRA litigation (this is because single judge VRA courts get appealed to the corresponding Circuit Courts, which then sometimes resolve these issues). But a number of circuits have not established frames of reference. And, for three-judge courts, since the next stop in an appeal is the Supreme Court – not an appellate court – circuit court precedent is only a theoretical constraint, not an institutional one.

decision process in this respect, Rowland and Carp are interested in how judges rely on their own memory and perception for processing information. Within theories of social cognition, the authors rely on schema theory for conceptualizing how trial judges make the decisions they do. Rowland and Carp look to psychologists like Lawrence Wrightsman to argue that schema theory is the proper conceptual framework for understanding how trial judges process information.

Intuitively, if we assume that most federal judges sincerely want to apply the law, Rowland and Carp's notions – that the partisan differences seen in federal trial court decisions are explained with cognitive psychology and the computational and information processes of the federal judges – appear reasonable. They are investigating an area that many legal scholars are interested in… the social and psychological determinants of decision making. Although lots of similar research is going on in political psychology, few major judicial politics scholars have latched on to these studies or the work going on in legal journals. There are several problems with the Rowland and Carp construction.[78] Therefore, in the next section, I look to legal scholars and psychologists to help further this psychological theory of judicial behavior, because this theoretical area is the most adequate rationale for explaining outcomes in redistricting cases.

[78] They seem to throw together a number of social and psychological theories without any coherence (prospect theory, schema theory, social judgment theory, etc.). And schema theory, which they use to explain judicial information processing (relying on work from psychologist Lawrence Wrightsman, who has written on psychology and the courts) has no shortage of critics, as they themselves admit. Certainly the theory has fallen out of favor in political psychology (*see* Kuklinski, Luskin and Bolland 1991). And, a number of co-authored works by legal scholars and psychologists and other works by psychologists have eschewed opportunities to employ schema theory (Saks and Kidd 1980-1981; Guthrie, Rachlinski, and Wistrich 2001; Viscusi 1999; Kelman, Rottenstreich and Tversky 1996; Landsman and Rakos 1994).

Legal Studies on Cognitive Psychology and Decision Making

Removed from the political science public law discipline, legal scholars have filled law reviews with discussions about psychology and judging (Simon 2004; Rachlinski 2000; Jolls, Sunstein and Thaler 1998; Kelman 1998; Posner 1998; Simon 1998; Diamond 1995; Gold 1986; Saks and Kidd 1980-1981). An entire symposium in the *Vanderbilt Law Review*, for example, was devoted to the "Legal Implications of Psychology" in 1998 (Langevoort 1998), and another symposium in 1986 in the *Southern California Law Review* involved the topic of the "Legal Implications of Human Error" (Langevoort 1998).

Moreover, legal scholars have also teamed up with psychologists to test hypotheses and publish original research dealing with cognitive psychological theories in judicial decision making (Mandel 2006; Wistrich, Guthrie, and Rachlinski 2005; Giner-Sorolla, Chaiken and Lutz[79] 2002; Guthrie, Rachlinski, and Wistrich 2001; Viscusi 1999; Landsman and Rakos 1994). These studies have important implications for understanding how biases in judgment may creep into judicial decisions despite judges' best efforts to prevent these psychological effects.

In a 1994 study, Stephan Landsman (professor of law) and Richard Rakos (professor of psychology) engaged in an experimental study of 88 Ohio state judges and 104 Cuyahoga County jurors called for jury duty to determine whether judges were better at dealing with biases than jurors. In fact, being exposed to inadmissible damaging evidence in the hypothetical fact scenarios "altered" judicial perceptions of the "central trial issues" (Landsman and Rakos 1994, 125). They stated that Judges, just like jurors, might be influenced by fact scenarios that are not necessarily admitted into trial. This

[79] These authors are all psychologists, but they published this work in the cross-disciplinary journal of *Law and Human Behavior*.

could apply to evidence of political fights over redistricting in the legislature or a commission that do not necessarily make it into the actual trial evidence in a redistricting case.

In a 2001 study entitled "Inside the Judicial Mind", two law professors (one with a Ph.D. in psychology) and a federal magistrate judge conducted a psychological experimental survey on 167 federal magistrate judges while they attended a judicial conference (Guthrie, Rachlinski, and Wistrich 2001). While deemphasizing models that predict judicial behavior based on political ideology or rational choice theories, these researchers found "a more fundamental source of systematic judicial error" (Guthrie, Rachlinski, and Wistrich 2001, 780). The researchers looked at five potential areas that could produce errors in judgment, including anchoring effects, framing, hindsight bias, representativeness heuristics, and egocentric biases.[80] To test these various areas, these judges were presented with a series of hypotheticals. The hypotheticals or questions were

[80] A definition of some of these terms is in order, namely, framing, and the representativeness heuristic. The representativeness heuristic might be employed by people in situations where the question calls for "the probability that event A originates from process B" (Kahneman and Tversky 1982, 4). Here, Kahneman and Tversky note that "people typically rely on the representativeness heuristic, in which probabilities are evaluated by the degree to which A is representative of B, that is, by the degree to which A resembles B. For example when A is highly representative of B, the probability that A originates from B is judged to be high." What Kahneman and Tversky assert is that in these situations, subjects will ignore "the prior probability, or base-rate frequency, of the outcomes" (1982, 4). The term "framing," in the Guthrie et al study (2001), refers mostly to prospect theory – how subjects who confront risky situations deal with the risk.

> "When people confront risky decisions – such as deciding whether to settle a case or to proceed to trial – they categorize their decision options as potential gains or losses from a salient reference point such as the status quo. This categorization, or 'framing' of decision options influences the way people evaluate options and affects their willingness to incur risk. People tend to make risk averse decisions when choosing between options that appear to represent gains and risk-seeking decisions when choosing between options that appear to represent losses" (Guthrie, Rachlinski, and Wistrich 2001, 795; *see also* Kahneman and Tversky 1979).

varied slightly so that one set of judges viewed a case with slightly different facts from a second set of judges.

The authors concluded that "wholly apart from political orientation and self-interest, the very nature of human thought can induce judges to make consistent and predictable mistakes in particular situations" (Guthrie, Rachlinski, and Wistrich 2001, 780). Guthrie, Rachlinski, and Wistrich (2001) make claims that allow us to understand how federal trial judges might approach redistricting lawsuits. They argue:

> …[H]uman beings rely on mental shortcuts, which psychologists often refer to as "heuristics," to make complex decisions. Reliance on these heuristics facilitates good judgment most of the time, but it can also produce systematic errors in judgment…. Psychologists suspect that even though judges are experienced, well-trained, and highly motivated decision makers, they are vulnerable to cognitive illusions…. Empirical studies demonstrate that cognitive illusions plague assessments that many professionals,[81] including doctors, real estate appraisers, engineers, accountants, options traders, military leaders, and psychologists, make…. [T]he conclusions drawn from psychological research on human judgment and choice likely apply to judges as well (Guthrie, Rachlinski, and Wistrich 2001, 780 and 781-82).

These assumptions help provide a framework for understanding judicial behavior in redistricting. From the psychological perspective, political ideology might not have a direct affect on judicial decisions (at least not at the trial court level). Furthermore, many judges are unlikely to think their behavior, when reviewed systematically with the behavior of hundreds of other judges, has any roots in political ideology or partisan leanings. One example of a judge's perspective comes from Judge Harry Edwards (1998) in his very spirited law review article, where this former chief judge of the D.C. Circuit Court argues that judges do not make decisions based on ideology. I don't think this judge is being disingenuous when he argues that judges do not make decisions based on

[81] The authors cite a number of recent studies in psychology journals on legal decision making and cognitive psychology.

ideology. But, if we look at judicial behavior from a perspective in cognitive psychology, judges' ideologies are likely to act as a filter and cognitive shortcut when judges are attempting to make decisions under uncertainty, especially in highly complex cases or where the law is ambiguous. If we think about judicial decision making more generally, H.W. Perry (1991) was alluding to the complex psychological processing fight between ideology and jurisprudence in his findings on the cert process at the U.S. Supreme Court. According to Perry,

> Contrary to the suggestions of most political science literature, justices' cert. decisions are not simply strategic calculations to effect a desired policy or doctrinal outcome. Nor, however, is the cert. process simply one of a series of jurisprudential judgments with political desires continually submerged. It is a complex decision process that involves both of these descriptions" (1991, 289).

In complex redistricting cases, where there is uncertainty as to applicable law, and where time is sometimes of the essence, due to an approaching election, judges have to rely on mental shortcuts to help them understand whether to attach liability to the redistricting actions taken by the legislature, or a commission, or a state court. According to psychologists Roger Giner-Sorolla, Shelly Chaiken, and Stacey Lutz, under situations where judges face 1) time pressures, 2) "cognitive load," or 3) "high case complexity", the "prior attitudes and beliefs [of judges] have been shown to influence legal decisions" (2002). Guthrie, Rachlinski, and Wistrich (2001, 781) take a quote from Judge Jerome Frank that is particularly useful for understanding judicial behavior: "As Jerome Frank put it, if judicial decisions are 'based on judge's [sic] hunches, then the way in which the judge gets his hunches is the key to the judicial process. Whatever produces the judge's hunches makes the law.'" It seems entirely possible that under certain situations in redistricting trials, a judge of one political orientation is going to arrive at hunches about

what she sees in the evidence which cause her to reach conclusions different from her colleagues.

DUAL PROCESS THEORIES AND JUDICIAL DECISION MAKING IN REDISTRICTING

The previous studies illustrate in general how biases might creep into judicial decisions unbeknownst to the judge. At this point, I want to propose a more specific approach in social psychology for understanding judicial decision making. A proper framework for understanding a trial judge's processing of information and the exercise of her judicial judgment can be found in dual process theories in social psychology. Dual process theories, generally, imply that more than one process is occurring when people process information, and these processes interact. "…[D]ry psychologists who champion dual-process models are usually not stuck on two…. [T]he only number they would not happily accept is one…. Indeed, it is almost a truism in modern psychology that 'the *explanation* of mental phenomena must always reside in the interaction and organization of multiple parts" (Gilbert 1999, 4 *quoting in part* Bateson 1979) [Emphasis in original]. These theories often apply to areas such as persuasion and impression formation, and presume that some information processing will require a lot of effort while other processing will not require much effort (Chen and Chaiken 1999).[82] Much work as been performed in political science on ideas of attitude formation and attitude change (Sniderman, Brody and Tetlock 1991; Zaller 1992; Cobb and Kuklinski 1997) Courtrooms are forums for judges to be persuaded or form impressions of evidence. Thus, it makes sense to consider these concepts in judicial behavior.

[82] For a better understanding of dual process theory and the various dual process models in the literature, see *Dual-Process Theories in Social Psychology* (1999), edited by Shelly Chaiken and Yaacov Trope.

Perhaps the best available dual process model for understanding judicial behavior in redistricting is the heuristic-systematic model developed by psychologist Shelly Chaiken (Chen and Chaiken 1999). Experimental tests of this process have been performed and published in *Law and Human Behavior* (Giner-Sorolla, Chaiken, Lutz 2002). The heuristic-systematic model assumes that humans process information and arrive at judgments using two processes – heuristics and systematic processing (Chen and Chaiken 1999). Heuristics are information shortcuts that humans use to make judgments and process information (Kahneman and Tversky 1982; 1974). As noted in the previous section, humans are thought to be cognitive misers – even people who wear robes may be cognitive misers – who want to process information quickly and efficiently. Heuristics are a way to process information whereby people "reduce complex problem solving to more simple judgmental operations" (Fiske and Taylor 1991). *Systematic* processing refers to more closely scrutinizing information being processed by the individual (Chen and Chaiken 1999).

The heuristic-systematic model of information processing occurs when people have a sufficient amount of time to devote to processing the information and they are motivated to do so (Chen and Chaiken 1999). But, there is a tension between wanting to process information quickly and efficiently and being motivated by other factors. These other motivations include the need for accuracy, the need to defend prior beliefs (the "defense" motivation), or the need to "hold attitudes and beliefs that will satisfy current social goals" such as going along with others in a decision in order to be collegial (Chen and Chaiken 1999, 77-78). These other motives will require more systematic processing of information in order to reach a decision that is accurate, or that defends one's beliefs, or that satisfy certain social goals. These motives are not mutually exclusive, and so a mix of these motives might exist in a person's mind (Chen and Chaiken 1999).

In the context of trial court decision making, where federal district judges are the bottom level in the federal court power structure, they see themselves as primarily factfinders who are charged with following the law of higher courts. Federal judges that I interviewed had the following to say about judicial motivations and their perceptions of the district judge's role in redistricting.

> We follow the law based on the facts. It's not what we want to do, it's just what the law requires to be done. (federal judge #6).
>
> I think [federal judges] make a very sincere distinct effort to follow the law. (federal judge #18).
>
> The role of the judge {judge pauses}…. I'm not a politician. I will follow the law. (federal judge #14).
>
> It's whatever the Supreme Court says it is, and there's not too much we can do about it (federal judge #13).
>
> From my perspective, the role of judges is whatever the Supreme Court says it is. (federal judge #12).

In this context, we look at the primary goal for district judges as following the law, particularly the precedent set down by the Supreme Court. This is what is taught in law schools and is part of the legal culture, as I detailed in chapter 2. Consequently, I argue that the primary motivation behind processing information from a trial is accuracy – following precedent. "The hallmark of accuracy-motivated processing is a relatively open-minded and evenhanded treatment of judgment-relevant information" (Chen and Chaiken 1999, 77).

It is possible the other two motives may coexist when judges are making judgments. Judges may examine evidence in light of prior beliefs and attitudes they hold about a state political party (a defense motivation),[83] and they may examine evidence

[83] In describing the "defense" motivation, Chen and Chaiken write:

based on a desire to get along with their colleagues on the three-judge panel. Chaiken and Chen (1999) argue that some degree of all three motivations coexist in people when they are the perceivers of information. Not only may these motivations coexist in people as they process information, but the people engaging in the processing and judgment of information may not necessarily be aware of what goal they are working toward. Chen and Chaiken stress that:

> "…[A]lthough we view heuristic and systematic processing as directed toward satisfying particular goals, we do not mean to imply that perceivers are necessarily aware of their motives, or of the biases that they might exert on their information processing. In fact, recent trends in the literature on attitudes and social cognition are leading to an increased appreciation of the power of motives to guide thought and behavior without perceivers' conscious knowledge of such influences" (Chen and Chaiken 1999, 80).

This means that federal district judges may process information with a certain goal in mind (for example, looking for evidence that reconfirms their view of how the Republican Party would act) without necessarily knowing that that is the process they are trying to achieve.

Another important point about this model is that both systematic processing and heuristic processing may co-occur, a characteristic which Chen and Chaiken (1999) argue sets their model apart from other dual process models. Even when the motivation for accuracy is high, both heuristic and systematic processing of information may occur,

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> When Defense motivation is high and cognitive resources are available, defense-motivated systematic processing is likely to emerge, characterized by effortful but biased scrutiny and evaluation of judgment-relevant information. Information that is congruent with one's existing attitudes and beliefs, such as research supporting one's position on abortion, will be judged more favorably than incongruent information will be (Chen and Chaiken 1999, 77).

which could inject bias (Chen and Chaiken 1999).[84] "[T]he judgmental implications of heuristic cue information may establish expectancies about subsequently encountered judgment-relevant information, which may then bias the nature of more effortful systematic processing of this information" (Chen and Chaiken 1999, 75). As a result, even when judges systematically examine evidence, heuristic cues can be establishing bases upon which they systematically process information which then can produce a biased[85] judgment. Even more importantly, Chen and Chaiken argue that this process where bias occurs is most likely to occur when information on the object is "*ambiguous*" (1999, 75).[86] This point is particularly relevant for situations that federal judges face in redistricting lawsuits. The scenarios may develop in two ways. In the first scenario, a judge engages in systematic processing (and heuristic processing of evidence) and through systematic and heuristic analysis, finds the law applicable to redistricting when the law is fairly clear (for example, the 10 percent rule for state legislatures), and then applies it. In the second scenario, the judge faces uncertainty in the law or the facts, and consequently employs heuristic and systematic processing that (among Republican and Democratic judges), could lead to diverging (or biased if one prefers that term) results.

This point about ambiguity and bias in perception and judgment was empirically demonstrated by Chaiken and Maheswaran (1994). They found that "participants exposed to the *high*-credibility heuristic cue elaborated upon the ambiguous information in more favorable ways than did those exposed to the *low*-credibility heuristic cue, presumably

[84] This concept diverges somewhat from the elaboration likelihood model (ELM) in that ELM presumes that heuristic and systematic processing occur separately, depending on levels of motivation (Petty and Cacioppo 1986).

[85] My intention is not to use the word "bias" in a pejorative sense, but merely as a scientific description of the though process.

[86] Chen and Chaiken write, "Such bias is most likely to occur in judgmental settings in which individuating judgment-relevant information is ambiguous and hence amenable to differential interpretation, or when no such information is provided but perceivers generate judgment relevant cognitions of their own" (1999, 75).

because high source credibility engendered favorable expectancies about the ambiguous individuating information" (Chen and Chaiken 1999, 75). If one were to analogize to redistricting cases, when faced with ambiguity, the heuristic cue is going to be, in part, the legislature that drew the plan. Democratic judges looking at the actions of a Republican legislature are less likely to find this cue credible (and vice-versa for Republican judges), and this can affect how the ambiguous information – factual or legal – is processed.

The veracity of the heuristic-systematic model has also been experimentally tested and confirmed in situations involving legal decision making of hypothetical juries. Psychologists Roger Giner-Sorolla, Shelly Chaiken, and Stacey Lutz (2002) tested the heuristic-systematic model in the legal field through an experimental study published in *Law and Human Behavior* of 184 female students who examined a hypothetical sex-discrimination case. Giner-Sorolla, Chaiken, and Lutz (2002) found that ideology had an indirect yet measurable effect on juror decisions (the female subjects). They stated that the findings of their study "***reinforces our conception of ideology as a biasing influence on the interpretation of facts…. primarily by coloring thoughts about the evidence***" (Giner-Sorolla, Chaiken, and Lutz 2002, 521 and 523) [emphasis added]. These findings are important, because as I later suggest in chapters 4 and 5, it appears that judicial perceptions of redistricting evidence may affect characterizations of that evidence and consequently the decision in the case. A judge's social background, particularly her psychological partisan attachments from her previous life experiences, can color her perspective of redistricting evidence.

The data I present in later chapters do not necessarily prove the supposition that federal trial judges engage in the heuristic-systematic model when deciding redistricting cases. That type of analysis is beyond the reach of the data and cannot be conducted by

examining the published decisions of court cases. However, the findings in chapter 4 are consistent with the theory that partisanship can act as a filtering heuristic that subsequently affects more systematic processing of the trial evidence and legal precepts. Compared to other models I have addressed, this psychologically-based theory of judging provides for a better understanding of my findings and my decision making model.

SALIENCE AND THE EFFECT OF NEGATIVE INFORMATION

Before delving into political science studies of psychology and the effect of partisanship, an important note must be made about the effect of negative information on information processing and judgment. Heuristic processing in the heuristic-systematic model is one way for bias to enter into judgment and information process. But, "[h]euristic processing can only occur if judgment-relevant heuristics are available in memory for retrieval and use" (Chen and Chaiken 1999, 82). One way to make retrieval of information from memory easier is to increase the salience of the information (Fiske and Taylor 1991). Salience does not necessarily increase the quantity of information recalled, but social psychologists have found support for the fact that salience effects do make recall of information easier, and help "increase the organization and consistency of impressions" (Fiske and Taylor 1991). Furthermore, salient information (or stimuli) that are negative are more salient than positive information (Fiske and Taylor 1991). And extreme stimuli are more salient than moderate stimuli (Fiske and Taylor 1991). A federal district judge examining a plan drawn up by the opposing party is more likely to experience negative and extreme stimuli during the trial. Thus, if hypothetically speaking, you were a Democratic judge overseeing a redistricting trial, where the Republican legislature pushed through a measure which caused your party (the Democrats) to flee to

another state, and where the law offered little guidance as to how to proceed, you might find the actions of the Republican legislature particularly salient. The salience of this portion of the evidence would allow you to more easily recall the evidence from the trial, making you more likely to engage in heuristic processing, and (given the heuristic-systematic model), this could affect your systematic processing of other evidence, leading to results that differ from your colleagues in the case.

PARTISANSHIP AS A PSYCHOLOGICAL ATTACHMENT IN JUDGING

The heuristic-systematic model opens the possibility for considering whether federal judges might employ partisan heuristics to help them process evidence and decide cases. If notions of partisanship do shape judicial perceptions of evidence (and ultimately have some influence on the outcome of a case), then it becomes important to understand the social psychological basis of partisanship. For nearly 50 years, since Campbell et al.'s (1960) *The American Voter*, many political scientists have viewed party identification as a psychological attachment. Steven Greene, writing many years later about ways to better measure and understand party identification and partisanship, notes that "the concept of group identity is central to Campbell et al.'s (1960) original conceptualization of party identification…. argue[ing] that persons look to political parties as meaningful social reference groups with which they identify" (2002, 182).[87] Greene says that although "[t]he authors of *The American Voter* were writing before the development of social identity theory", the concept of "self-identification" by party is "clearly in accord with,

[87] One of the points Greene is trying to make in the article is that political scientists have "considered party identification to be an attitude, yet used a measure more suited to assessing party identification as group belonging" (2002, 190). Greene thinks some of the standard measures of party identification "are not well based on social-psychological theory" (2002, 190). In my study, judge's party identification are measured not by a survey instrument but through public political knowledge of what party the judges belonged to. Of course, this leaves out the possibility of nuanced measures of partisanship among judges of each party.

social identity theory"[88] (2002, 182). In addition to the idea that party i.d. represents the concept group identification, "partisanship clearly fits the psychological definition of an attitude – a generalized and enduring positive or negative response to an object" (2002, 172). This is a somewhat self-evident concept that can be observed simply by tuning into one of the major 24-hour news networks to watch Republican and Democratic political commentators respond to and evaluate political events.

More recently, Alford, Funk and Hibbing (2005) produced research that showed modest support for the proposition that genes inherited by one's parents could shape a person's party identification. This would suggest judges' affective orientations toward certain parties, or anybody's affective orientations, could not be easily changed.

More generally, how does partisanship affect behavior? Political scientists have done research testing on the "cognitive consistency theory" to find out whether a person's partisan identification "functions as a perceptual screen" (Gerber and Green 1998). In a study of 603 residents of Long Island, Lodge and Hamill tested the ability of subjects with certain partisan orientations to recall and classify campaign statements (1986). What they found was that those participants who were partisan schematics – i.e. those people who scaled high in partisan sophistication, with high levels of interest in, experience with, and knowledge of the Republican or Democratic parties – were better able to recall campaign statements than those subjects who were not as interested or knowledgeable in the parties – unknowledgeable people were "aschematics" (Lodge and Hamill 1986). But, even more important for our understanding of judicial behavior in redistricting, Lodge and Hamill (1986) found that among schematics, Republicans were more likely to recall statements made by Republican congressmen, and Democratic schematic participants

[88] Greene, quoting Henri Tajfel (1978, 63), defines social identity as "that part of an individual's self concept which derives from his knowledge of his membership of a group (or groups) together with the value and emotional significance attached to the membership" (2002, 182).

were more likely to recall statements made by Democratic congressmen. In the end, they conclude,

> [P]artisan schematics… show clear evidence of stereotypy [sic] by remembering significantly more of the schematically consistent than inconsistent policy statements made by the congressman. Partisan schematics systematically distort the congressman's stance on the issues by imposing more schematic order on his policy positions than was actually present in the campaign message. This "restructuring" of memory, as distinct from veridical memory of the actual mix of consistent and inconsistent information in the campaign booklet, reflects a serious bias in the processing of political information. **The "simple act" of labeling a congressman as a Republican or a Democrat systematically affects what information about the candidate will be stored in memory and what information will later be available for informing one's evaluations** (Lodge and Hamill 1986, 518). [emphasis added]

Although judges' evaluations in court cases are different substantively from voters' evaluations, the Lodge and Hamill (1986) study underlines how party identification can bias judgment in ways that might not even be realized by the evaluator (*see also* Lau and Sears 1986). Perhaps one could argue that judges are less susceptible to these kinds of effects, since the subjects in this experiment were asked to engage in an explicitly political evaluative task. Judges are not generally asked to make a political evaluation. But, the study certainly suggests that judges trying to decide a complex redistricting case might be more easily able to recall facts that comport with their partisan worldview of events. And if judges were ever going to make a political evaluation, such an evaluation would most likely occur in a redistricting dispute.

This does not mean that people (including those in robes) cannot respond to new information. Gerber and Green argue that although partisanship is quite stable, "perceptual bias [that stems from partisan identification] seems not to prevent partisans from updating their evaluations in light of new information" (1998, 815). Gerber and Green were examining why and how party identification could change over time (1998).

They point out that partisans clearly characterize politics differently (Republicans are more likely to believe their candidate won a presidential debate) (Gerber and Green 1998). But, in order to understand change in partisan identification, they needed to address how people take in new information. They, like Fiorina (1981) and others of the "running tally" perspective on partisanship, focus more on the rational choice perspective of the concept and less on the psychological perspective. They argue that "in nonexperimental data…. evidence of selective attention and learning is surprisingly thin" because if, for example, one holds partisan "tastes" constant in "evaluations across political debates, we find … the Democrats, Republicans, and Independents were each more likely to claim that Reagan prevailed over Mondale after their second debate than after Reagan's dismal performance in their first encounter" (Gerber and Green 1998, 813). Gerber and Green note that when asked to evaluate whether the Democratic Party does a better job at handling the economy in 1990, NES panel data show that "[n]aturally… Republicans play the Cassandra to the Democrats' Pollyanna", but that by the time one gets to 1992, all groups move toward the more pro-Democratic interpretation of the party's abilities on the economy (1998, 814). Gerber and Green (1998), of course, are making a point about partisan change over time. For my purposes, it is important to note that in the voting public, Republicans will evaluate a presidential debate differently from Democrats even though partisans of all stripes can and will update their evaluations based on new information.

Despite Gerber and Green's concerns about the concept of partisanship acting as a "perceptual screen", their study still shows partisan bias can be a strong influence on perceptions of events and political learning.

In a study in *Political Behavior*, Larry Bartels (2002) points out that Gerber and Green's recent studies fail to consider a whole host of works relevant to the issue,

including a failure to include consideration of the classic work *Voting* by Berelson et al. (1954) or work by political psychologists such as the Lodge and Hamill (1986) piece mentioned above. Bartels (2002) uses the 1990-91-92 NES panel survey, the 1988 NES data, 2000 NES data, as well as the 1980 panel survey, and ends up revalidating a conception of partisanship proffered by the authors of *The American Voter*:

> … partisanship is not merely a running tally of political assessments, but a pervasive dynamic force shaping citizens' perceptions of, and reactions to, the political world. Partisan bias in political perceptions plays a crucial role in perpetuating and reinforcing sharp differences in opinion between Democrats and Republicans (Bartels 2002, 138).

Bartels does not believe the political science evidence points to unbiased political learning. Without wanting to get too involved in the debate over the Michigan and Rochester models of voting, sufficient evidence exists to suggest that ordinary people consume political information, and consume it in a biased format (Bartels 2002). For example, Bartels shows that in the 1988 NES surveys, Democratic respondents were more likely to significantly underestimate good economic numbers that had been reached after 8 years of the Reagan Administration when compared to 1980.[89] Despite objective evidence that inflation and unemployment were better in 1988 than 1980, Democratic identifiers, especially strong Democratic identifiers, were more likely to believe otherwise. Somewhat similar differences were evident among partisan identifiers regarding the Clinton years in the 2000 NES (Bartels 2002).

Having reviewed the heuristic-systematic model of information processing and the psychological notions of partisanship and its effects, I want to briefly focus on

[89] Bartels points to questions in the 1988 NES surveys asking people to rate levels of unemployment and inflation over the previous 8 years and state whether things were better or worse compared to 1980 (2002). Remarkably, or perhaps not remarkably given my line of argument here, "subjective perceptions of respondents in the 1988 NES survey only weakly reflected … economic realities" (Bartels 2002, 134). Democrat identifiers were "strikingly impervious to the good economic news" (Bartels 2002, 134).

motivated reasoning, partisanship, and decision processes from political science. Lodge and Taber (2000) described typical political decision makers through the use of a four-box typology based on directional and accuracy goals, categorizing the decision makers as intuitive scientists, partisan reasoners, classical rationalists, and low motivators. They suggested that people have varying degrees of these four typologies affecting them in their decisions relating to politics. "Citizens are always motivated, in some measure, to be accurate, but they are unable completely to ignore their preconceptions and prior affect. The constant tension between the drives for optimal accuracy and belief perseverance underlies all political reasoning" (Lodge and Taber 2000, 187). Echoing the Chen and Chaiken (1999) model, Lodge and Taber argue that people making judgments while operating under a partisan mode may not even be aware that they are doing so.[90]

Lodge and Tabor (2000) are hypothesizing about how citizens reason and arrive at the political attitudes or preferences for candidates. Their work has nothing to do specifically with judicial decision making. However, the piece is very general in its scope, and thus it is reasonable to export some of these ideas to thinking about the judge's judgment process. They go on to argue, as I suggest, that even people who attempt to be the intuitive scientist and take in new evidence are going to be cognizant of their prior attitudes towards objects, and thus any new evidence that is received by a person will be colored by that person's prior views[91] (Lodge and Tabor 2000).

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[90] "…[W]hen one is operating in partisan mode, the decision maker is seen as trying to build the best possible case for a preferred conclusion…. Whereas the scientific mode relies heavily on the self-conscious monitoring of procedures, the partisan mode is typically governed by unconscious processes, for were one aware of deliberately trying to reach a preordained conclusion, it would make a mockery of the decision process" (Lodge and Tabor 2000, 205-06).

[91] "…[C]itizens (in particular those with strong prior attitudes), whether acting as a scientist or partisan, are aware throughout the decision process of how much they like or dislike a candidate or issue…, *and* they can immediately sense the affective coloration of a new piece of information…. Knowing at the very moment that the evidence being evaluated is attitudinally congruent or incongruent with one's overall evaluation makes it difficult (if not impossible) to interpret and evaluate the evidence in an impartial way. Feelings become information. This being the case, we suspect that the ideal 'intuitive scientist' mode of

They say that "biased processing" of information is most likely among people who are very knowledgeable and sophisticated in terms of politics (Lodge and Tabor 2000, 211). However, the goal of accuracy in the decision can increase the prospect that information will be considered "evenhandedly" (Lodge and Tabor 2000, 211).

Although, as argued previously, judges have more motivation to approach their decision in a court case differently from the way a voter gathers information for the purposes of making a voting decision, judges are still human beings. And thus, there is nothing to suggest that judges, in forming perceptions of trial court evidence, would differ exceptionally from voters if the judges were called upon to make political evaluations about evidence on whether or not state action constituted unconstitutional or illegal redistricting of electoral lines.

A short note should be stated about state redistricting commissions. It is my expectation that party identification should also effect decisions in commission structures as well. In fact, partisan factors should be more important to commission behavior than to federal court behavior. More about this is addressed in chapter 6.

SOCIAL SCIENCE RESEARCH ON PARTISANSHIP AND TRIAL COURT JUDGING

The previous section reviewed the concept of partisanship and how partisanship can affect judgment, attitudes, and the collection of information. Voters make evaluations about candidates and policies and often employ a partisan filter to help in the task. As the case may be, there is also a tremendous literature on judicial behavior focusing on how a judge's party identification might influence her behavior (*see, for example,* Songer,

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processing is more likely to be found in undergraduate texts on the scientific method than in real-word decision making. The more common modus operandi, we think, is a decision process characterized by individuals' interpreting and evaluating information in subtle ways that lead them to reach or defend a particular, predetermined conclusion" (Lodge and Tabor 2000, 206-07).

Sheehan and Haire 2000; Cross and Tiller 1998; Rowland and Carp 1996; Songer and Davis 1990; Rowland and Carp 1983; Tate 1981; Goldman 1966, 1975). Some studies rely on the appointing president to determine party identification of the judge or simply to determine that judge's relative ideology.[92]

The significance of the appointing president – i.e. whether the president is Republican or Democrat – is widely observed in studies on federal appellate court decision making (Songer, Sheehan, and Haire 2000; Cross and Tiller 1998; Tauber 1998; Carp, Songer, Rowland, Stidham, and Richey-Tracy 1993; Songer and Davis 1990; Goldman 1975; Goldman 1966). But, research is somewhat mixed in trial court decision making studies. First I review federal district court studies that find no statistical relationship between partisanship and judicial behavior. Next, I discuss other research that does show a relationship between party of the judge and judicial decision. This review will help put in perspective expectations of how federal district judges might act in redistricting cases.

In one of the earliest studies on trial court behavior and partisanship, Kenneth Dolbeare (1969) looked at whether federal district judges were influenced by their political party in crafting urban policy. Dolbeare found no relationship between the political party of the federal district judge and that judge's decisions. More recently, a group of legal scholars published a study in 1995 in the *Journal of Legal Studies* in which they looked at all non-prisoner civil rights cases filed in three district courts over a one year period encompassing 47 federal district judges in the study (Ashenfelter, Eisenberg and Schwab 1995). Of particular note, their study differed from many political science studies in that they included published and unpublished decisions. These legal scholars

[92] While appointing president is a rough approximation of a judge's ideology, and it can be a good guide for determining the party of most federal judges, it is not a perfect measurement.

concluded that neither party identification nor appointing president had any relationship to day to day case outcomes of federal trial judges (Ashenfelter, Eisenberg and Schwab 1995). Given their null findings, they hypothesize that in many of these cases the law determines the judge's outcome (Ashenfelter, Eisenberg and Schwab 1995). They square their findings with the political science literature by suggesting that in those studies, which are typically looking at published cases, the published cases are probably cases of a "close" nature or noteworthy, where the outcome could go either way (Ashenfelter, Eisenberg and Schwab 1995). Consequently, as these scholars argue, it is quite natural in these "select few" cases that judges' views might help determine outcomes (Ashenfelter, Eisenberg and Schwab 1995, 281).

> In the select few cases that are appealed or lead to published opinions, individual judges have a greater role in shaping outcomes. In such close cases, this may not be disturbing. What should shape the outcome of indeterminate cases? Of courses, close cases often make policy, both for the courts and for the society at large. Our findings neither undermine that received wisdom nor suggest the unimportance of careful judicial selection. (Ashenfelter, Eisenberg and Schwab 1995, 281).

The vast collection of redistricting cases that reach federal court are published (Lloyd 1995). Consequently, even though these authors' findings show that federal judges decisions in everyday cases do not exhibit partisan influences, this does not mean we should expect such influences to be absent in redistricting cases.

Michael Giles and Thomas Walker examined federal district judges in their behavior in southern school desegregation cases in 1970 (1975). Their research indicated that partisanship had no effect on federal district judges' decisions in these cases (Giles and Walker 1975). While signs were in the expected direction, with Democratic judges favoring more segregation than non-Democratic judges, the relationship did not reach statistical significance. The fact, however, that their research only included one year of

study means that their findings can only provide a limited view of federal district court behavior.

C. K. Rowland and Robert Carp, in a series of studies over the years examining a host of published trial court decisions, have found a strong effect of "appointing president" on case outcomes. But, it depended on the class of cases and the time period studied (Rowland and Carp 1980; Rowland and Carp 1983; Carp and Rowland 1983; Rowland and Carp 1996). In some areas, they found behavior statistically linked to party affiliation was minimal in the 1960s but had increased by the 1970s (Rowland and Carp 1980). Ultimately, they conclude that "… presidential effects demonstrate the importance of appointment strategy and ideological criteria in defining the value-link between presidents and their appointees" (Rowland and Carp 1983, 127). In their 1983 study in *Political Behavior*, Rowland and Carp suggested that some policy questions such as those surrounding "redistricting" have "presented trial judges with an unprecedented quantity of complex cases to be resolved in the absence of clear legal guidelines" (Rowland and Carp 1983, 110). The absence of such guidelines, they imply, could invite reliance on partisan affectations by judges to make decisions. In a book published that same year, these authors have a section looking only at voting rights cases (Carp and Rowland 1983), and they found no differences in decisions between judges appointed by Republican or Democratic presidents. But, they only looked at such cases in the aggregate. Not all voting rights cases are redistricting cases, and furthermore they made no effort to separate out whether Democrat or Republican-appointed judges acted differently based on whether the outcome of the case would have positive or negative effects on either party. Most importantly, however, is that the Rowland and Carp studies of federal trial courts showed that, depending on the type of case and the time period

studied, judges' decisions in some cases were tied to partisan or ideological background while other cases showed no evidence of partisan decision making,

The above studies provide instances where the partisanship of the judge has no bearing on the decision, or where such bearing varies by case. There are, however, a lot of other studies that find a statistical relationship between the federal district judge and the judge's party affiliation or the party affiliation of the appointing president (Ringquist and Emmert 1999; Rowland and Carp 1996; Alumbaugh and Rowland 1990; Carp, Songer, Rowland, Stidham, and Richey-Tracy 1993; Carp and Rowland 1983; Rowland and Carp 1983; Rowland and Carp 1980; Kritzer 1978; Vines 1964).

In one of the earliest studies of published decisions in the district courts, Vines (1964) examined how district judges handled race relation cases involving African-Americans. He found significant differences between Republican-appointed and Democratic-appointed judges. Republicans were much more likely to favor integrationist policies in their decisions, while Democratic federal judges were more likely to uphold segregationist practices (Vines 1964). Since then, a number of other scholars have found statistical relationships between federal district court decisions and the partisanship of the judge, and some of those studies have already been recounted above. More recently, links have been found between trial court decisions on state abortion laws and the presidential party of the appointed judge overseeing the decision Alumbaugh and Rowland (1990). Alumbaugh and Rowland (1990) and Carp and Rowland (1983) argue that decisions based in part on partisanship come from the fact that the law in some areas is ambiguous, and that under this cloud of ambiguity and little direction in where to go, district judges fall back on facts, hunches, and their own values to help them come to a just decision.[93]

[93] Alumbaugh and Rowland (1990) argue that three conditions must be present in order to observe partisan patterns in federal district judge decisions.

And the influence of partisanship does not seem to be related to only published decisions. Ringquist and Emmert 1999 looked at the dollar amount of fines levied by federal district judges in Environmental Protection Agency (EPA) enforcement decisions. They examined both published and unpublished decisions over a multiyear period, and found that in terms of fine amounts, Republican-appointed judges doled out lower fines in unpublished cases than in published cases (Ringquist and Emmert 1999). In other words, in published decisions, Republican-appointed judges acted more like their Democratic counterparts, but in unpublished cases, Republican-appointed judges were more likely to issue lower fines to violators than their Democratic colleagues (Ringquist and Emmert 1999).

The thrust of the findings behind the various studies of federal district court decisions and the questions surrounding partisanship are not necessarily mutually exclusive. Ashenfelter, Eisenberg and Schwab's (1995) study finding no link between decisions and partisanship among published and unpublished decisions in federal trial courts are not necessarily contradictory to the Ringquist and Emmert (1999) findings of a partisan link in the levying of EPA fines in unpublished decisions. Kritzer thinks that the key to finding partisan differences may have to do with whether the case creates a politically salient decision choice or information set (1978). Thus, the reason some research findings show no partisan effects in federal trial court decisions is because there is little or no partisan component or partisan salience that a judge would even be influenced by (Ringquist and Emmert 1999; Alumbaugh and Rowland 1990; Kritzer

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First, the dispute category must be characterized by a degree of factual or legal ambiguity that creates the opportunity for the judge to invoke his or her own perceptions of fact and/or law. Second, the dispute category must evoke the platform-based policy commitments that secured the judge's appointment. Third, the dispute category must *not* evoke competing extra-judicial preferences that vitiate presidential appointment effects (Alumbaugh and Rowland 1990, 156).

1978). This idea would square with the notion held by most federal district judges that their daily activities have little to do with their party identification. Undeniably, federal district judges encounter numerous decisions they have to make on motions and verdicts in cases with little or no political salience. But redistricting cases are different. Many redistricting cases have obvious partisan ramifications, and thus judges are more likely to be aware of the partisan ramifications of their decision or the evidence they observe at trial.

PREVIOUS STUDIES ON JUDICIAL BEHAVIOR IN REDISTRICTING

Only four social science studies have employed any sort of a systematic review of federal court decisions in redistricting. All of these studies are discussed in further detail in the next chapter. But, in developing a theory of judicial behavior in redistricting, it is only necessary to review two here.[94] The two studies provide pictures of judicial behavior in redistricting that are polar opposites. Judges are perceived as either *partisan maximizer*s (always looking to improve the electoral chances of their party) or *neutral arbiters* (illustrating little or no preference for either party in their decision making).

The first important study is a preliminary analysis performed by Gary Cox and Jonathan Katz (2002) in their book entitled *Elbridge Gerry's Salamander*. In one of their chapters, they examine the decisions of court cases on redistricting from the 1960s (Cox and Katz 2002). They include both state and federal courts, as well as all different levels of courts. In another study in their book, they also look at judicial involvement in redistricting plans over time and the electoral effects of those plans (Cox and Katz 2002).

[94] The other two studies by Carp and Rowland (1983) and Weber (1995) are not particularly instructive studies for understanding whether party identification has some bearing on judicial decisions in redistricting – Carp and Rowland (1983) were only looking at the broader category of voting rights cases – but they will be addressed in the next chapter.

They come to the conclusion that the party identification of the judge has a significant effect on her vote and her oversight of redistricting plans. Judges, they argue, attempt to help out their own party through their judicial decisions (Cox and Katz 2002). In other words, the Cox and Katz model of judicial behavior in redistricting, in its most simplistic format, portrays judges as partisan maximizers – political actors who are looking to provide their party with maximum benefits in the electoral field.

There are severe limitations to this study, as I note in the next chapter, which hamper the generalizability of their study.[95] Moreover, in order to accept their findings and their theory as it would apply to the last 25 years, without further explanation, requires that we assume that judges are disingenuously hiding their partisan preferences and have little regard for what law (even though it appears that in some areas, as I point out in chapter 2, that the law of redistricting has attained greater clarity since the 1960s). For these reasons, this account of federal judicial behavior in redistricting, at least in terms of the last 25 years, has to be dismissed or viewed skeptically.

The other major study on judicial behavior in redistricting was Randall Lloyd's 1995 *APSR* article entitled "Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts." Lloyd examines federal district court redistricting cases published in the federal supplement from the 1960s until 1983 to determine whether Republican judges and Democratic judges engage in partisan decision making (1995). Lloyd characterizes the choices of the plans being reviewed by the federal judges in three ways. First, a judge might be reviewing a plan created by a state legislature that is off the same party as the judge. Second, a judge might review a plan

[95] In one study, the authors include both state court and federal court decisions in their analysis, as well as appellate and district court decisions, mixing apples and oranges (Cox and Katz 2002). They examine a very narrow time period (Cox and Katz 2002). Finally, they employ a very limited and parsimonious model that, while perhaps sufficient for the purposes of their larger study, is wholly inappropriate for reaching broader conclusions about judicial behavior in redistricting disputes (Cox and Katz 2002).

created by a different political party from that of the judge (i.e. a Democratic judge reviewing a plan passed by a Republican-controlled state legislature). The third possibility is that the judge is facing a plan that is a bipartisan plan or was a plan created in a process of divided government, where neither party controls the state legislature. This third kind of plan would constitute a nonpartisan plan because no party's ownership of the plan would be attached to it. Lloyd's basic conclusion in the study was that "in the end, partisan-created plans are more likely to be struck down than are nonpartisan plans" (Lloyd 1995, 418). This finding painted a picture of federal judges as relatively neutral actors in the decision making process. If judges upheld bipartisan plans or plans passed under divide government, but they tended to strike down partisan plans passed by either party, this empirical finding, in its most simplistic form, would support the notion that judges are neutral arbiters in the redistricting process – that they did not tend to favor either party in the process.

Again, the Lloyd (1995) findings, like Cox and Katz (2002), suffered a number of limitations which I set forth in the next chapter. Anecdotal evidence from recent court cases as well as anecdotal evidence from *some* judges interviewed (see chapter 5) belie this account. This is not to say that the Lloyd account was wrong, but even assuming that they were correct for the 1960s and 1970s, evidence of increasing polarization in politics across all levels of government suggests that his findings may no longer be applicable to current circumstances (Bartels 2000). Furthermore, the literature on cognition and decision making, both in the legal literature and in psychology, makes one cautious about concluding that judges *can* be neutral arbiters even after their best efforts to do so because of the natural biases that may occur in information processing.

TOWARD A MODEL OF JUDICIAL BEHAVIOR IN REDISTRICTING

How do judges make decisions in redistricting cases? The exhaustive examination of literature in this chapter and the doctrinal analysis of chapter 2 allow me to construct a model of judicial decision making and ground that model in the extant literature on psychological theories in information processing and decision making, including theories in judicial decision making.

At the outset of this final section, before laying out my model in particulars, I want to restate some of the points made in this chapter and the previous chapter as a way of introducing the construction of the model. First, I concluded earlier that rational choice (strategic models) and attitudinal models were inadequate constructs for examining federal district court decisions in redistricting.[96] While I cannot wholly dismiss these concepts, turning to theories in cognitive psychology helps one appreciate the psychological tension between judicial desires to "follow the law" and the nature of partisanship in everyday reasoning and processing of political information.

Second, after focusing on theories in cognitive psychology, I attempted to find the appropriate theory in the context of the current research. Legal scholars and psychologists have attempted to explain judicial decision making in terms of cognitive psychology, but aside from Rowland and Carp (1996), political scientists in judicial behavior have shied away from heavy reliance on theories in cognitive psychology, in part because they are extremely difficult to prove without access to readily available judges for experimental testing. Some legal scholars have had better success by conducting these experiments at federal judicial conferences (Guthrie, Rachlinski, and Wistrich 2001). In the end, I

[96] Attitudinal models, while certainly consistent with some of the theories suggested in this chapter, are too mechanical and not sufficiently nuanced for my purposes. Furthermore, such models are typically couched in ideological terms. And while ideology is correlated with partisanship, these concepts are no the same.

concluded that dual process theories were the most appropriate anchors for grounding my model of judicial behavior in redistricting.

Alas, the judicial behavior model I develop in my study does not test or prove judges are making decisions using dual process theories. Nevertheless, my model of judicial decision making is grounded in dual process theories in social psychology and cognitive psychology (namely the heuristic-systematic model), and my findings are consistent with such theories.

The third point I want to make is that, given research in social psychology and dual process theories, we might consider judicial judgment as perhaps two processes. Each of these processes can occur at the same time. Judges will engage in heuristics and systematic processing in varying degrees. (Chen and Chaiken 1999). Given the parameters of dual process theories, we should expect that although federal judges want to be unbiased in their judicial assessments (the intuitive scientist as Lodge and Tabor might call them), biases will nevertheless creep into their information processing (Chen and Chaiken 1999). It seems logical to predict that these biases could be partisan.

Fourth, in legal cases that are highly political, one would presume that biases that potentially would arise would include a judge's previous experiences in party politics and political orientation (Kritzer 1978). Why is this the case? "Salient cues in the current judgmental context that are relevant to a stored heuristic are potential external sources of the accessibility of the heuristic" (Chen and Chaiken 1999). A politicized case will more likely provide either Republican or Democratic cues that allow heuristic processing to interact or overpower systematic processing of evidence and law. Certainly, my interviews with federal judges suggested that some thought the process could be political. I want to reiterate an important quote made in the introductory chapter by a judge I talked to. Political biases potentially can creep into the process: "In my view, there is no way

[for judges to divorce themselves completely from politics]. For most of whom, who have had political activities [before coming to the bench], there is no way you can remove that experience or personal biases, and it stays there" (federal judge #1). This quote also implies another function of this decision process and is my fifth point. A judge's political bias may creep into perceptions of evidence and law even without that judge's awareness of it. The processing of information will sometimes be unconscious. Heuristics will be employed, and their use can amount to an "unconscious" process (Chen and Chaiken 1999). In looking at the "impact of subjective experiences on judgment … [Chen and Chaiken] argue that this reflects the unconscious activation and application of stored heuristics that pertain distinctly to these experiences" (Chen and Chaiken 1999, 73).

Sixth, when information or the law is ambiguous, judges will resort to their own biases and past experiences to help them process information (Chen and Chaiken 1999). This means that during these cases, partisanship may have a better chance of influencing judgment.

Seventh, because negative stimuli are more salient (Fiske and Taylor 1991), judges examining plans drawn up by the opposing political party will more easily recall the particulars of that information and more likely to be alarmed about such information. Judges of the same political party are less likely to be alarmed by such stimuli.

Eighth, although I've now constructed these copious concerns about partisan bias and how it might inject itself into proceedings, it's important not to forget the force of the law. Judges' goals are typically accuracy, and this requires faithful adherence to the law. When the law and precedent are clear, judges will normally follow it. There are 2 legal principles I'm particularly interested: 1. the cautioning of deference to the legislature and; 2. the principles of one person / one vote.

Finally, other factors should be considered in the model. The partisan composition of a three-judge panel may affect whether a judge dissents in a case. The type of legal case and the time frame being examined will be important to a judicial decision. The political and legal context of redistricting in the 1980s will be very different from the 2000s, and racial gerrymandering cases might be treated differently from equal population claims. Also, certain factual issues might lesson partisan bias. A state that has a redistricting commission might be seen by a judge has having a less partisan process, and thus a commission might lessen the probability that a judge's information processing includes partisan perceptions of evidence.

A MODEL OF JUDICIAL BEHAVIOR IN REDISTRICTING: CONSTRAINED PARTISANS

In terms of partisanship, judges face three choices in redistricting cases. They are either reviewing redistricting plans drawn up during divided government (neither party controls all portions of the state redistricting process), plans drawn up by the opposing party, or plans drawn up by their own party.

In terms of predictive models, federal judges might respond in three different ways when it comes to overseeing redistricting cases. Previous research on judicial behavior in redistricting portrays judges as either neutral arbiters or partisan maximizers. But it's possible that the story is more complicated. I argue for a predictive model in between the neutral arbiter and partisan maximizer. My model depicts judges in redistricting cases as ***constrained partisans*** – constrained by the law and by their own notions of fairness and justice.

First, I want to address what I'll call the Neutral Arbiter model. This concept of judicial behavior sees the judge as a neutral actor who simply dispenses even-handed

justice. In other words, this explanation assumes that judges will make their legal decision irrespective of the political party that drew the plan – that they won't try to punish the other party or favor their own party. To some extent, this explanation resembles the idealized model of legal decision making where judges listen to the facts, apply the law to the facts, and render their decision. One federal judge I talked to made it seem all too easy. A portion of this quote appears earlier in this chapter and aptly describes the judge as neutral arbiter. She said,

"It's only when the peoples' representatives don't follow their sacred obligation [that the courts are forced to act]. We follow the law based on the facts. **It's not what we want to do**, it's just what the law requires to be done." (federal judge #6)."

Judges do not necessarily have to follow the legal model, however, to be neutral arbiters. The only requirement under my neutral arbiter model is that judges do not unduly favor one party or another in their decision making. This model is not just a straw man, but instead is more plausible than political scientists might think. The Lloyd (1995) study seems to bolster this notion of federal judge as neutral arbiter in redistricting. And, other studies have found that federal district judges' decision, unlike decisions of their counterparts in the appellate courts and the Supreme Court, are not correlated with partisanship.

A second possible explanation to describe judicial behavior in redistricting is that of a judge as partisan maximizer. Much of the political science literature in judicial behavior recounted in this chapter suggests that Republican appointed federal judges do indeed decide cases differently from Democratic-appointed judges. Under this Partisan Maximizer model, we should expect judges to maximize partisan gain for their party whenever possible. This would manifest itself by way of a judge upholding redistricting plans that were drawn up by her own party at rates higher than divided government plans

and plans drawn up by the other party. Gary Cox and Jonathan Katz present some statistical evidence in their 2002 book which lends credence to this concept. This explanation, if correct, would suggest that judges are not particularly constrained by the law.

The final possibility for explaining judicial behavior in redistricting is the federal judge as *constrained partisan*. I posit that in order to understand the federal courts' behavior, we have to look at federal district judges as constrained partisans, constrained by the law and institutional norms of the lower federal courts. Frank Cross and Emerson Tiller argue that

> judges are committed to the neutral operation of the legal model of decision making but … the operation of that model is influenced and biased by differing evaluations of evidence and argument. Judges employ 'cognitive shortcuts to process imperfect information' under the legal model, and these shortcuts produce apparently political results (Cross and Tiller 1998).

For sure, many judges are committed to dispensing justice in a fair and equitable manner.[97] If Supreme Court precedent is clear, presumably federal district judges will follow the law, washing out partisan effects. But what if Supreme Court doctrine is uncertain, or factual evidence is ambiguous? The question for the judge facing uncertainty and ambiguity is whether or not to strike down the state's plan. The safe thing to do is defer to the legislature (the status quo option). In fact, redistricting opinions in the federal courts are replete with judicial platitudes about the need to show deference to the political branches in such political matters. Not surprisingly, federal courts uphold state plans quite frequently. Deference to the political branch is the default option, the institutional

[97] Even Supreme Court Justices, in general, are interested in following the law and not just their own personal ideological preferences. Writing about the Supreme Court, Perry states, "The justices have, and should have, strong feelings about certain issues that they adjudicate. They also have an extraordinary belief in the importance of institutional maintenance – both the institution of the Court, and the institution of the judiciary as a group dedicated to judging in a fair and nonpartisan way" (1991, 290)

norm. I theorize that if you're a district judge sitting on the bench looking at a plan drawn by your own party or crafted by a divided government process, your first inclination is to uphold the plan. You'll defer to the state legislature, the default option – the risk averse option (see footnote 43). If looking at divided government plans, these plans embody a compromise between the two major parties, and so partisan cues for the judge are weak, and issues of party unfairness are unlikely to surface. Again, negative salient information is likely to be absent for the judge (the perceiver of information). Under these circumstances, we would expect judges to exercise the legal notion of deference.[98]

At the same time, partisan considerations are most likely to come into play when a judge is reviewing a redistricting plan drawn up by the opposing party. Here, negative salient information is likely to be greatest. This means that during information processing and judgment, heuristics of a partisan nature may be present in helping one form opinions of the nature of the evidence. If a federal judge is hearing a case where her party is the victim of partisan line-drawing by the state government, and if groups in her party received the short end of the stick in the map-drawing, she's going to really scrutinize that plan. Here, she's going to be much more attuned to issues of unfairness in process. Given what we know about the strong psychological effects of party identification in all other areas of politics, it only makes sense that there may be at least some residual effects here. Certain actions by the state government are likely to be viewed in a partisan framework, increasing the salience of actions which the judge deems legally invalid. This is the model of a *constrained partisan*. The key event in these instances is a federal

[98] When a judge is reviewing her own party's plans, it's not a question of favoring her own party. Rather, it's an issue of overcoming the strong presumption of deference accorded to the state legislature's actions. The judge isn't going to be persuaded to deviate from the baseline model by arguments of unfairness coming from the opposite party. Thus, empirically, we would expect that there would be little statistical difference between decisions on divided government plans or same party plans.

judges' decision to strike down the plan of the opposite party, and in the following chapters I test this notion of the constrained partisan.[99]

[99] What should we expect empirically to find from the three models I just laid out? A constrained partisan should uphold divided government plans and same party plans at very high rates, while upholding opposing party plans at lower rates. If judges were partisan maximizers, then they should behave differently to their party's advantage. They should uphold their own party's plans at very high rates, and uphold opposing party plans and divided government plans at lower rates. If judges were neutral arbiters, then they should be doing one of two things. First, they might be upholding divided government plans at very high rates while striking down their own party's plans and opposing party plans. A second possibility is that they uphold all three types of plans at the same rates, and no variation exists.

Chapter 4: A Quantitative Analysis of Federal District Court Behavior in Redistricting Cases: 1981-2006

> "It's a highly political process, and it's really difficult to take the politics out of it in federal court…. My impression is that it's difficult to have politically neutral judgments and standards and it's a problem to being in court"[100].
>
> *–federal district judge, commenting on redistricting to the author, July 2006.*[101]

INTRODUCTION

The fight over mid-redistricting in Texas received wide publicity across the country. After the political fight ended, a legal battle ensued in federal court. A three-judge federal district court (*Session v. Perry* 2004) convened to hear the dispute. With these federal judges cognizant of the attention surrounding the case, the majority opinion began its factual recount of events with this caveat, "We decide only the legality of Plan 1374C, not its wisdom…. We know it is rough and tumble politics, and we are ever mindful that the judiciary must call the fouls without participating in the game" 298 F. Supp. 2d 451, 451 (2004). At the end of the day, the Court's initial decision split 2 to 1. The two Republican-appointed federal judges, while expressing concern about the legislature's choice of action, believed no foul had been committed by the Republican state legislature. The Democrat-appointed federal judge voted to strike down what he saw as an unconstitutional plan. Is the apparently partisan behavior of this panel indicative of federal courts across all redistricting cases? This is the question I seek to answer in this chapter. On the surface, the *Session v. Perry* federal court resembles the partisan actions

[100] This judge was at pains to express the fact that he was not an expert in this area of the law, and thus was only offering his impression.

[101] The anonymous quotes of federal judges were part of interviews conducted after the U.S. Supreme Court decision on the Texas redistricting case in 2006. More on the methods and results of this analysis appear in the next chapter.

of a state legislature. In fact, I argue that the story of redistricting and the federal courts is more complicated than the initial vote of this court suggests.[102]

In this chapter, I examine the behavior of federal courts in redistricting cases, with particular focus given to the level of partisanship of federal courts in this area of law. To accomplish this, I construct a dataset encompassing all 138 published three-judge federal district court cases involving a state legislative or congressional redistricting plan from 1981 to 2006. Few major quantitative studies of court behavior in redistricting exist, and the attendant results are somewhat contradictory. My research puts these studies in perspective. My findings show, consistent with the hypothesis posed in chapter 1 and the model discussed in chapter 3, that federal courts can potentially operate in partisan ways, but only under certain circumstances.

REDISTRICTING IN CONTEXT

Today in the U.S., there are only two alternatives to legislative control of redistricting: (1) state redistricting commissions; and (2) regulation by state or federal courts. A host of political leaders, good government types, and social scientists are pushing one or both of these alternatives to legislative control of redistricting as a way to spur electoral competition, reinvigorate elective government, or achieve other representative ideals. Yet, social scientists know little about how or why outcomes are affected by these alternative structures.

The dearth of systematic analysis of court behavior in redistricting cases has not stopped public law scholars from providing an enormous amount of normative discussion on the proper role of federal courts in these disputes. Some public law scholars have

[102] For example, two of the judges on the *Session v. Perry* court had also sat on the federal court that drew the same plan in 2001 that Republicans now complained kept the 1991 Democratic gerrymander in place. Of these two, one of the federal judges that voted to leave the 1991 Democratic plan largely intact was a Republican-appointed judge. This same Republican judge later voted to uphold the Republican mid-decade redistricting plan.

looked to the federal courts as a way to check state legislatures either from partisan zealotry or bipartisan incumbent protection schemes (Issacharoff and Karlan 2004; Buchman 2003; Issacharoff 2002; Dorf and Issacharoff 2001; Powe 2000; Ely 1980; Pritchett 1968). Legal scholar Samuel Issacharoff has even called for increased court regulation of redistricting to ensure more competitive electoral districts (2002). On the other hand, there are some public law scholars who express unease with the role of the courts in redistricting (Fuentes-Rohwer 2003; Rosenberg 1991; Bickel 1962).

The normative debate on the extent of court involvement in redistricting hinges in part on one's views as to the neutrality of courts in the process. Undoubtedly, courts face a difficult task in trying to divest themselves of the politics of these cases. This task has been further complicated by the uncertainty and fluidity of redistricting law over the last 20 years[103] (Butler 2002). A lack of clarity in the law means judges have to rely on non-legal factors, such as their own perceptions of justness and fairness. If courts are merely neutral actors that do not intentionally favor one party or another in the legal process, then their role in the process should predictably draw less ire from either political scientists or reformers. If federal courts play a partisan role in the process, this state of affairs raises legitimate democratic concerns about the regulatory fairness of the current redistricting system, especially since our representatives are determined, in part, on how we draw their districts (McKee, Teigen and Turgeon 2006). At the same time, as more sophisticated computer technology allows legislators to draw more politically perfect districts, and where redistricting contributes, at least in part, to a decline in electoral competition (McDonald 2006), it becomes important for political scientists to examine alternative regulatory structures for redistricting. A number of observers of the federal courts, including law professors Samuel Issacharoff and Pamela Karlan (2004), think

[103] Not all legal scholars agree that redistricting law is unclear (Ely 1980; Pritchett 1968). In fact, most redistricting commissioners I spoke with, as well as some judges, think the law of redistricting is pretty clear. Nevertheless, the fact that there have been debates about the clarity of redistricting law is perhaps evidence itself that the law (or at least certain aspects of it) has not been clear across time.

courts can help provide the regulatory structure to keep state legislatures in check and enhance electoral competition. This aspiration of Issacharoff's and others, of course, requires "neutral" regulators (i.e. judges) to dispassionately apply the rules of redistricting neutrally.

In this chapter, I attempt to statistically assess the partisanship of courts in redistricting cases, as well as examine other factors that might influence judicial decision making. The chapter proceeds in a straightforward manner. First, I briefly examine some of the broad political science theories that explain judicial behavior, and how those theories relate to the specifics of redistricting. Next, I peruse the normative literature on court involvement in redistricting and review the findings of the few quantitative studies that deal with federal court behavior in redistricting. In the third section, I review my main hypothesis delineated in chapter one. In furtherance of the development of this hypothesis, I draw on some of the holdings of the court cases themselves as well as interviews I conducted with federal district judges. I leave the fourth section to a re-explication of my model for explaining judicial behavior in these cases. In the fifth section, I take a closer look at the descriptive statistics of my dataset and present the findings of my multivariate model. In the sixth section I discuss variants of this model for different types of redistricting cases. In the seventh section, I take a closer look at the dissents of federal judges in redistricting. Finally, in the last section of the chapter, I offer conclusions about the neutrality of federal courts in redistricting.

DETERMINANTS OF FEDERAL COURT BEHAVIOR

As noted in the previous chapter, political scientists have shown that attitudinal characteristics influence judges' decisions (Segal and Spaeth 1993; Segal and Cover 1989; Schubert 1965; Pritchett 1948) above and beyond purely legal factors. The rhetorical explanation for this is simple: judges act on their own ideological preferences

to produce outcomes consistent with their attitudes. Along these lines are studies examining how the backgrounds of judges influence their decisions. These are referred to as "personal attributes" models. Perhaps most importantly, one background characteristic that has an enduring influence on peoples' political behaviors is party identification (Campbell et. al. 1960). This effect is no less apparent in judicial behavior studies (*see, for example,* Songer, Sheehan and Haire 2000).

For redistricting cases, there are actually two aspects of this party identification effect to consider on judicial behavior. First, the party affiliation of a judge can represent her potential to act in a liberal or conservative way. Social scientists have extensively documented the fact that federal judges (both in district court and the courts of appeal) who are Republicans have voting patterns that are quite distinct from Democrats in cases ranging from civil rights and liberties to economic regulation (Songer, Sheehan and Haire 2000; Cross and Tiller 1998; Rowland and Carp 1996; Brace and Hall 1995; Hall and Brace 1992; Songer and Davis 1990; Carp and Rowland 1983; Rowland and Carp 1983; Tate 1981; Goldman 1966, 1975). Thus, public law scholars and political scientists have persistently shown that federal judges appointed by Republican presidents can and do vote differently from judges appointed by Democratic presidents. In one journal article on federal district courts, Rowland and Carp show the strong effect of the "appointing president" (1983). They conclude, "Certainly the presidential effects demonstrate the importance of appointment strategy and ideological criteria in defining the value-link between presidents and their appointees" (Rowland and Carp 1983, 127).

This first aspect of party effect in judicial decision making can thus manifest itself as an ideological viewpoint on the part of a judge. For example, as I explain later in my model, we might start from the premise that Republican-appointed judges are more likely to defer to the redistricting plan adopted by the state, while Democratic judges might be more willing to strike down or correct deficiencies that they see in certain plans. Furthermore, we might also conclude that this rule may flip when it comes to racial

gerrymandering claims of the *Shaw v. Reno* variety. In such instances where racial gerrymandering has been alleged, Republican judges might be more likely to find such racial gerrymandering constitutionally suspect when compared to their Democratic counterparts.

This effect of party has also increased over time. We have seen increased partisan voting both in Congress (Binder 2001; Theriault 2006) and in the electorate (Bartels 2000) over the last 30 years. Judicial behavioralists also find a rise in partisan voting among federal district judges beginning in the late 1960s (Rowland and Carp 1996). They attribute this in part to "imprecise Supreme Court guidelines, ideologically based selection criteria [of federal judges by presidents], and increasing fact-finding discretion during the Burger years" (Rowland and Carp 1996, 34).[104] In redistricting, federals courts have faced both the problems of imprecise guidelines and ambiguous factual evidence, thus increasing the probability that partisanship might effect these decisions.[105]

There is a second way in which party effects can manifest themselves in judicial decisions on redistricting. Typically, federal courts encounter three types of state plans – those passed by a Republican dominated state process (where the legislature and governorship, for example, are both controlled by Republicans); those passed by a Democratic state process; and plans created by bipartisan compromise (where a plan came out of a state process in which each party controls one of the major branches of the

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[104] By way of fact-finding, the authors Carp and Rowland (1983) talk about increasing factual ambiguity in cases and the judges' need to rely on their own personal backgrounds to help shape their decisions.

> "For example, let us say that a minority employee is fired from her job. The employee claims that the real reason was gender and racial discrimination, while the employer asserts that the employee wasn't doing her job properly and had poor relations with her fellow employees. The judge in such a case would have to determine the facts by weighing such diverse matters as performance reports, eyewitness accounts of employee altercations, safety records, employment profiles of males who had been terminated, and so on. [Given these varied factors], such factual judgments are influenced by the judge's own personal background, experiences, and values…." (Carp and Rowland 1983).

[105] Carp and Rowland (1983) actually find no relation to partisan voting in redistricting cases, as I note later. And at the most general level, their findings are consistent with mine. However, their findings do not consider more refined measures of partisanship which are operating in these cases.

state government, or where the legislature's two houses are divided by party). Because of the unique political nature of redistricting cases, a court's decision can mean a direct loss for Republican or Democratic Party interests. Redistricting cases allow one to measure the rate at which Republican federal judges uphold state Republican plans, or at which Democratic judges uphold state Democratic plans, or at which Republican federal judges strike down state Democratic plans, and so on.

Of course, this second aspect of party effects might be more troubling to some legal scholars, because such actions could be considered as less legitimately rooted in either conservative or liberal doctrines of law. But, if one assumes that the legal standards in redistricting in some decades have been few and far between (Butler 2002), then one must assume that lower courts are forced to adopt standards that they believe are fair and just based on their own public policy analysis. Unclear Supreme Court guidelines mean that district judges will have to rely on a whole host of other factors, including increased importance on the facts of a case, and a judge's own life experiences. When guidelines are reasonably clearer, the effect of partisanship should diminish.

Other factors also guide the lower courts. These factors include Supreme Court precedent and other aspects of the law, the facts of the case, and other background influences on which judges might rely, all of which I touch on later.

A Lack of Consensus on Judicial Behavior in Redistricting

Despite a huge body of journalistic and doctrinal work on the federal courts and redistricting, scant effort has been devoted to empirical studies of what drives the courts' decisions in these cases. Randall Lloyd's (1995) *American Political Science Review* article appears to be the only work that empirically addresses the question of how much partisanship plays a part in judicial decisions on reapportionment. His "central concern… is whether party labels reflect a different influence on decisions from partisan reference-

group attachments" (1995, 417). Lloyd examines federal district court cases between 1964 and 1983, and his findings suggest that federal judges, regardless of their own partisan affiliation, tend to scrutinize and strike down partisan plans passed by either party (although the propensity is slightly higher if it is the party opposite of the judge that drew the plan). Thus, Lloyd contends that courts do not like partisan plans of any stripe. To a limited extent, Lloyd's findings seem to suggest that federal judges can, in fact, be neutral correctors of partisan processes.[106]

Unfortunately, Lloyd's findings stop at 1983, and his dataset only covers challenges to state legislative plans. My research covers the recent past, from 1981 to 2006, and thus has to ability to pick up more recent trends in court behavior. Furthermore, my dataset includes legal challenges to congressional plans as well.

Gary Cox and Jonathan Katz (2002) take a look at the role of courts in redistricting cases from the 1960s in their book *Elbridge Gerry's Salamander*. They conclude that judicial partisanship played a factor not only in judicial decisions on redistricting, but that such partisanship also affected the extent of party bias and responsiveness in election outcomes. In one of their chapters, they rely on a model with 30 observations to show that friendly courts (courts that, on the whole, were of the same partisanship as the state government passing the plan) had a tendency to uphold *congressional* plans passed by a legislature and governor of the same party. Of course, their study, based on a short timeframe and with only a single control variable, was not meant to be definitive. Rather, it was intended to support assumptions they make about judicial behavior in redistricting in later models. Clearly, they would probably be the first to point out that not only was their observation set small, but also the mixed composition of their observation set (including decisions from state courts, various levels of the

[106] I say "limited", because a fair reading of the Lloyd findings show that while federal judges strike down both their own party's plans and opposing party plans at rates higher than the baseline case (divided government plans), the propensity to strike down the other party's plans (the impact of the independent variable) is slightly stronger than one's own party.

federal courts, and the U.S. Supreme Court all in one model) creates an "apples and oranges" problem of comparing such diverse judicial decision making bodies.[107]

Carp and Rowland (1983), in a wide-ranging study on federal district court behavior, take a cursory look at cases dealing with redistricting and the right to vote and find no difference in decisions between Republicans and Democrats. Unfortunately, by lumping together the various sorts of voting rights and redistricting cases, without accounting for the different types of redistricting cases, this study fails to pick up the party differences emblematic of certain kinds of cases. As one digs underneath the surface of the data on court behavior in redistricting, there are large differences between Republicans and Democrats across certain types of cases.

Finally, Ronald Weber (1995) offers a descriptive analysis of court litigation in the early 1990s. Instead of looking at the partisanship of court behavior, his focus is on judicial activism and the increase of litigation due to new sources of law in redistricting. These new sources of law that allowed courts to further scrutinize redistricting plans included the 1982 amendments to the Voting Rights Act and the U.S. Supreme Court cases of *Davis v. Bandemer* (1986) (making political gerrymandering a valid legal claim) and *Shaw v. Reno* (1993) (making racial gerrymandering claims justiciable).

Despite the lack of empirical work in this area, there has been no shortage of theories or commentary on court involvement in redistricting from the public law

[107] In another chapter, Cox and Katz look at 532 congressional elections between 1964 and 1970 involving nonsouthern congressional districts. In this model, their results show that pro-Democratic courts oversaw plans that resulted in pro-Democratic bias and responsiveness (ditto for Republican courts). But unfortunately, alternative explanations for their results exist, given the nature of their dataset. As Cox and Katz (2002) acknowledge themselves, "over 80% of nonsouthern district elections in this period were contested under partisan Republican, mixed Republican, or bipartisan Republican plans" (24), creating the potential for spurious correlations. For example, one could plausibly explain the findings by arguing that Republican judges, having a tendency to be more conservative than Democratic judges, probably did NOT strike down state legislative congressional plans in an effort to show more deference to the legislature. Meanwhile, Democratic judges may have been more likely to side with the activist Warren Court. Given this assumption, the significance of Cox and Katz's court variable in their model would speak little to the motivations of the actual judges in the court decisions overseeing these plans, because Cox and Katz's dataset is heavily composed of nonsouthern Republican-passed plans. The difficulty would lie in disentangling partisan motivations and conservative/liberal ideological motivations.

community. Perhaps the most ardent critic of court regulation, as noted in earlier chapters, was Supreme Court Justice Felix Frankfurter. Justices Harlan and Stewart also participated in strongly worded dissents during the Court's early redistricting decisions. In the academic arena, as early as 1962, public law scholar Alexander Bickel was raising concerns about the court entangling itself in the politics of redistricting in his renowned book *The Least Dangerous Branch*. Judicial scholar Robert Dixon, while sympathetic to some court action, was also critical of the Supreme Court's initial standards of equal population districts (1968). "'One man, one vote' … is a slogan, not a political theory", writes Dixon (1971, 45).

More recently, law professor and political scientist Luis Fuentes-Rohwer (2003) and law professor Sanford Levinson (2002) have voiced concerns with the current legal regulatory structure courts have for managing redistricting cases.[108]

Some public law scholars have been rather praiseworthy of federal court efforts to monitor redistricting, including C. Herman Pritchett (1968), John Hart Ely (1980), Samuel Issacharoff and Pamela Karlan. Issacharoff and Karlan write, "Chief Justice Warren was right that courts must adjudicate these claims; they are especially appropriate issues for judicial review" (2004, 578) (*see also* Issacharoff 2002; Dorf and Issacharoff 2001; Grofman 1990).

The purpose of my review is not to be exhaustive, but merely to demonstrate that there is disagreement about the extent to which courts can neutrally monitor the redistricting process. Both sides seem to be operating on different assumptions. Issacharoff's call for more judicial regulation is based on the implicit assumption that federal courts are neutral actors in the system. Others, such as Luis Fuentes-Rohwer, see the courts as simply taking sides in political disputes to which there are few or no legal standards. To some extent, Issacharoff and Fuentes-Rohwer are both correct. Sometimes

[108] See also, for example, Persily (2003) and Gardner (2003). Persily is not per se opposed to court intervention, but is concerned about the amount of deference given to states.

party matters in judicial decisions; sometimes the decisions are rather neutral, as I explain in greater detail below.

A Model of Federal Court Behavior in Redistricting – constrained partisanship

In establishing the impact of partisanship on judicial behavior in redistricting, it is important to consider how the psychological attachment of party identification might color the perceptions of even the most fair-minded of federal judges. Certainly, as I expound on later, the institutional structures of the legal system also play a factor, but they (at best) only constrain the preferences of individuals. The psychological feeling of group attachment created by party identification can have a strong influence on one's views, as I noted in chapter 3. As Steven Greene notes, partisanship has two theoretical constructs: the "psychological definition of an attitude" as well as the social-psychological concept of group identity per *The American Voter* (Greene 2002, 172). The internal structure of attitudes constitutes "cognitive, affective, and behavioral components", whereby the affective component incorporates one's feelings, emotions and moods towards the object of reference (Greene 2002).

To the extent that we think of partisanship as some sort of social psychological concept of group identity (Campbell et. al. 1960) or some other social psychological phenomenon (Greene 2002), the fact is that the affective components of this psychological concept of partisanship can come into play (even inadvertently) for anyone's evaluations of some object. Thus, for those judges who do have strong partisan attachments to particular parties, it is unrealistic to think they can always divorce themselves from their own feelings about fact situations rooted in the partisan actions of state institutions.

Even some federal judges themselves acknowledge that a judge's background has an effect on their perspective in a case. The quote at the beginning of this chapter by a

federal district judge from a southern state sums up the thoughts of some of the judges I interviewed. This judge (#5), who was a Republican appointee, also remarked about another colleague who had had a lot of experience in hearing redistricting cases:

"All the cases filed by the liberal Democrats were filed in [*City X*]. He was the only judge in [*City X*] at that time. My belief is that if you asked him, he would say he is a good Democrat. And he seemed to hold in favor of the plaintiffs a lot" (federal judge #5).

According to another federal judge (#1),

"You see it glaringly [in redistricting], and you look at the background of the people, but it all goes back to their personal biases."[109]

By no means, however, are these opinions unanimous. Others played down personal backgrounds. As one Democratic judge put it,

"I would hope that we have been politically neutered after becoming federal judges and you don't try to draw lines to help your political friends. I would hope everyone would do that. Sometimes I get a little cynical." (federal judge #9).

A Republican judge reinforced the idea that the institutional structure of federal courts helps shield federal judges. She said,

"We are appointed for life, [and it] works. [It] removes you from the political process, and you're not looking over your shoulder [for the next election]." (federal judge #2).

On the whole, however, my interviews, as well as the psychological and judicial behavior literature on party identification, suggest that there is the potential for partisanship to play a role in these cases.

[109] A number of points were volunteered by judges without being prompted about partisan issues in decision making.

Consequently, I argue that judges engage in partisan decision making that helps their party in redistricting lawsuits… but only when attempting to give their party a fair playing field when their party is in the minority in a state. In other words, judges are *constrained partisans*. It's not unreasonable to assume that most federal judges are intelligent individuals who have a desire to dispense justice in a fair and equitable manner. Given this assumption, federal judges are not going to necessarily favor their own party's plans, ceteris paribus.[110] Rather, I theorize that partisan considerations are most likely to come into play when a judge is reviewing a redistricting plan drawn up by the "other" party. Thus, if a federal judge is hearing a case in which her party is the victim of partisan line-drawing by the state government, or groups in her party receive the short end of the stick in the political map-drawing, she is more inclined to find the redistricting plan unfair, and thus legally invalid.[111]

At an anecdotal level, a good manifestation of this hypothesis is the *Session v. Perry* (2004) case, where Judge T. John Ward, the lone Democrat on the three judge federal panel, found that the Texas Republican plan was unfair – so unfair that he voted to strike it down, while the two Republicans voted to uphold the plan. The two Republican judges' rationales for upholding the plan in *Session v. Perry* is perhaps less clear. Charles Backstrom, Samuel Krislov and Leonard Robins claim that, "It certainly is not edifying, or equitable, to argue as Judge Higginbotham occasionally suggests, that it is proper for Texas Republicans to gerrymander because Texas Democrats have long done so" (2006, 413). This interpretation of the majority opinion is not totally accurate,

[110] As the Republican judge (federal judge #2) was quoted previously, judges are appointed for life and do not have to worry about reelection. This fact reduces the pressure to engage in partisan decisions. On the other hand, a federal judge seeking appointment to the court of appeals or the Supreme Court may feel more pressure to conform to partisan influences.

[111] This very well could be an unconscious process in how judges come to view opposing party plans with a partisan bias. I don't test this proposition in this chapter. However, the data is consistent with this possibility. Certainly the interview data in chapter 5 suggest that the evaluation of evidence in partisan terms is an unconscious process.

since the majority did express their dismay with the partisan process. Regardless, under the circumstances, the Republican judges were less likely to view the plan as suspect.[112]

But a judge reviewing a plan passed by the opposing party will be more acutely aware of any issues dealing with unfairness to her own party. Negative information is more salient. Thus, Ward has a different reaction to the partisan actions of the Republican legislature and Republican governor in the 2004 case. This story plays itself out for Republican judges viewing Democratic plans as well.

In short, I believe the key act in these cases involves the decision to strike down a plan and that the probability a judge will do so is significantly increased when the aggrieved party shares the judge's party identification. This state of affairs is less likely to occur if redistricting law is relatively clear. This is, I should note, a perspective rooted in a psychological model of political behavior. Furthermore, it leads directly to a testable research hypothesis, which appears reasonable in light of some of my judicial interviews. For example, in response to a question about her/his general impressions of redistricting litigation, one Democratic-appointed judge responded with the following:

> It's political in a broad sense, and people who want to get elected prepare the proposals. All the court can do is to see if it is a one person / one vote situation

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[112] It is doubtful that Higginbotham was out to intentionally favor Republicans, because as a judge on the federal panel that initially drew a court congressional plan after the state failed to come up with one in 2001, he agreed with his two Democratic colleagues to draw up a court plan that Republicans saw as simply tinkering around the edges of a 1990 "Democratic gerrymander." The 2001 *Balderas* Court was facing a situation where the state government had failed to draw up a plan, because at the time, the Democrats controlled the state house and the Republicans controlled the state senate. Since the 1990 Democratic plan now violated equal population standards, in a technical sense, the Court found that 1990 plan invalid. Not wanting to radically redraw lines, the Court took a more conservative approach in order to add new districts and maintain equal population districts, and accepted the plan drawn by a political science professor which the court saw as the most neutral approach. The Court stated, "We eschewed an effort to treat old lines as an independent locator, an effort that, in any event, would be frustrated by the population changes in the last decade. ***Nonetheless, the districts fell to their long-held areas, a natural result of the process we have described***, much the same as the map drawn at our request by the State using Dr. Alford's neutral approach." *Balderas v. Texas*, 2001 U.S. Dist. LEXIS 25740 (E.D. Tex 2001) [emphasis added]. This decision by the court is consistent with my hypothesis (even if state Republicans later saw the decision as maintaining the 1990 Democratic gerrymander). A federal judge, generally speaking, would rather not get too involved in the politics of redistricting, and thus is more likely to uphold (or in the case of having to draw a plan, adopt) what the court sees as the most neutral plan. Conceivably, Higginbotham saw Dr. Alford's plan as neutral enough for him.

> and it's not offensive racially. And the other thing a court ought to look at in the gerrymandering involved in many of those [cases], is whether the proposal is so outrageous as to violate a constitutional gut reaction. That, of course, is what the recent Texas case is on. Constitutionally…. a redistricting proposal should not be too Republican or Democrat, or too one way racially. (federal judge #7).

This response suggests that federal judges may act based on a gut reaction. The antennae of a Republican judge looking at a Republican plan is not likely to find a plan violated a constitutional gut reaction. But when looking at an opposing party's plan, certain actions of the state might become red-flags. As the social psychology literature shows, positive information is less salient than negative information. The underlying rationale for the judge reviewing an opposing party plan is likely to be fairness and justness.

A purview of the text of opinions in my dataset offers an array of anecdotal quotations that also lend support to my research hypotheses about court behavior. These anecdotes allude to courts' concerns over the partisan actions of state institutions, irrespective of whether the lawsuit included a partisan gerrymandering claim. While judges are generally circumspect in their opinion writing, sometimes their opinions do divulge the existence of the partisan issues and motivations surrounding the litigation, as well as the judge's attendant frustrations, as this anecdotal data suggests.

In *Terrazas v. Slagle* 821 F. Supp. 1154 (W.D. Texas 1992), for example, one Republican judge during the course of the litigation was frustrated about the Texas Democratic state legislature's redistricting efforts, complaining,

> "In the absence of any laudable benefit to minorities, the Senate has only engaged in time-consuming partisanship. While such partisan goals may represent the policy choices of the Texas Senate, this Court finds it should not defer to those policies where doing so would result in postponement of the 1992 primary elections…." [In that same opinion, the court referred to the Democratic plan as advocating policies] "founded on purely partisan considerations." 1992 U.S. Dist. LEXIS 3674 (W.D. Texas 1992).

In an earlier opinion on the same case, the court had substituted its own plan in favor of the plans for the Texas State House of Representatives and State Senate. In an attempt to allay fears that the court was simply adopting a more Republican plan in favor of the 1992 Democratic gerrymander, the Court stated, *"Any partisan effects* [that help Republicans and hurt white Democrats] *resulting from this effort are apparently a natural and unavoidable consequence of the Court's emphasis on the interests of long-neglected minority concerns."* *Terrazas v. Slagle*, 789 F. Supp. 828, 838 (W.D. Texas 1991).[113] The partisan gerrymandering claim against the state was dismissed by the Court. This is perhaps unsurprising, as *Davis v. Bandemer* requirements are nearly impossible to meet. However, other more legitimate legal rationales remain at a court's disposal, and the district court in this case relied on those.

This same scene in Texas plays itself out in reverse 12 years later in 2004. As recounted above, Ward expressed his outrage at the Republican gerrymander of 2003 *Session v. Perry* 298 F. Supp. 2d 451 (E.D. 2004). In Ward's dissent, he stated,

> "The question presented is whether a state can, consistent with §2, intentionally dilute a minority group's voting rights in an existing opportunity district to obtain a partisan advantage while, at the same time, offset the effects by creating a new district in another party of the state (520), [and that he agreed with the majority that] "politics motivated many of the decisions involved in the case" (528).

Ward apparently was concerned about that partisan aspect of the plan, and he voted to strike down the Republican plan.

In *Pope v. Blue* 809 F. Supp. 392, (W. D. North Carolina 1992), the North the Carolina Republican Party brought suit against the state Democratic plan, with the Court describing the complaint as follows:

> "Democratic majorities in both the state house and senate prevented Republicans from having any influence in the redistricting process. The state's Republican governor was also unable to prevent Democratic gerrymandering, because North Carolina is the only state without gubernatorial veto power…. [As the Democratic

[113] This court decision was later reversed by the Supreme Court.

> court majority acknowledged] In creating the Plan, the Democratic majority rejected more compact plans that both Republicans and non-partisan groups had offered." 809 F. Supp. 392, at 395.

But the court majority, composed of two Democrats, rejected the complaint, stating, "While members of the minority political party in any redistricted state may be apt to bemoan their fate, they can take solace in the fact that even the best laid plans often go astray." (*Pope v. Blue* 809 F. Supp. 392) These judges seem to be unconcerned with the partisan acts of the Democratic state legislature. The lone Republican judge, on the other hand, voted to allow the lawsuit to proceed to trial, stating that he thought enough discriminatory intent and effect against the Republican Party had been shown to meet the *Davis v. Bandemer* standard.

What these 3 cases and countless others in the dataset suggest is that judges are acutely aware of the partisan implications of their decisions and the perceptions of their votes in their decision making. Nevertheless, judicial discretion means that they cannot always be so straightforward about how unfair they think opposing party plans are, and this circumspection in opinion writing means that looking at cases in isolation makes it difficult to determine to what extent judges vote against opposing party plans.

As I move towards further developing and testing an empirical model of judicial behavior in redistricting cases, it is worth restating that existing research suggests two alternative and competing perspectives. The first depicts a judge as a totally neutral actor in the process. From this perspective, looking at a set of court cases over the last 25 years, we would expect there to be little statistical difference between the way judges treated opposing party plans, plans created in a bipartisan process, or same party plans. This result would lend support to the legal theory of how courts operate (based only on the law and facts of the case). Such a result would also mean that there may be nothing to fear in requiring courts to increase their regulation of redistricting, as Issacharoff advocates.

The other perspective portrays judges as partisan maximizers, much in line with the political science view that federal judges simply act on their policy preferences (Segal and Spaeth 1993). If judges are always partisan maximizers, then one should expect judges to uphold the constitutionality or statutory validity of partisan plans passed by their own party at rates higher than bipartisan plans. Perhaps most importantly, my expectation lies somewhere in between these two perspectives, with partisanship determining judicial decisions only when the judge is with the aggrieved out-party.

DATA AND METHODS

To test my research expectations, I analyze all federal district court cases on redistricting for state legislative and congressional plans published in Lexis-Nexis (both those included in the Federal Supplement and those only published online)[114] from 1981 to 2006, constituting a total of 138 court cases (all involving three-judge panels), and resulting in an observation set of 414 judges' votes. The oldest case in the dataset is *Cosner v. Dalton* 522 F. Supp. 350 (D. Virg. Aug. 25, 1981), and the most recent case is *Woullard v. Mississippi* 2006 DistLEXIS 46561 (S. D. Miss 2006).

This particular time frame allows me to study redistricting cases in light of the landmark Supreme Court cases *Thornburg v. Gingles* (1986)[115], *Davis v. Bandemer* (1986)[116], and *Shaw v. Reno* (1993). After *Gingles* and *Shaw*, caselaw in redistricting (and especially the tension between VRA claims and racial gerrymandering claims)

[114] I obtained these cases by engaging in a case search through Lexis-Nexus. I entered the general search terms "redistricting" or "reapportionment" and more specific terms of "congressional district" or "house plan" or "senate plan" or "state legislature" or "legislature" or "legislative district" or "house district" or "senate district" or Voting Rights Act." I found that while a guided search of headnotes for "redistricting" captured most cases, it did not get all cases, and thus a more extensive search of words in the full text of opinions was required. This search, of course, yielded both relevant cases as well as a whole set of unrelated cases. I then went through each case individually, singling out the cases that have made it into my analysis.

[115] This case attempted to set guidelines and a threshold inquiry for courts attempting to judge whether state redistricting plans violated the 1965 Voting Rights Act and the subsequent 1982 amendments to the act.

[116] This case made partisan gerrymandering claims justiciable.

remained in flux through the 1990s (Butler 2002). The lack of a body of precedent from the Supreme Court for federal district court judges to follow arguably should have increased the use of non-legal factors in decisions.

In order to prevent confusion, I refer to singular instances in my dataset as "observations", and when using the term "cases", I am referring only to court cases, not individual observations (i.e. the votes of judges).

My universe of redistricting cases includes challenges to state legislative and congressional redistricting plans, regardless of the legal claim involved. A list of summary statistics is presented in Table 4-1, below.

By including such diverse claims such as racial gerrymandering claims, Voting Rights Act (VRA) claims, partisan gerrymandering claims, and equi-population claims, my universe thus allows for a larger n study. As you can see from the frequencies listed in Table 1, there were 203 Republican and 211 Democratic judicial votes in the dataset. Congressional complaints represented 49.3 percent of the observations.[117] Voting Rights Act claims constituted 42.8 percent of the sample, while racial gerrymandering claims and equal population claims were 18.1 percent and 46.4 percent, respectively.[118] Judges voted to uphold state plans 51.6 percent of the time.

[117] Some lawsuits included both attacks on state legislative plans and attacks on congressional plans, and where the courts treated these claims all in one opinion, they were considered only as three observations for the three judge court for analytical purposes. In other words, if there were claims against multiple plans (state house, state senate and congressional plan), and a judge voted against only one of these plans, that was considered a vote against the state (as opposed to one vote against the state and two votes for the state). Because the courts typically considered these claims in a seemingly omnibus fashion, it makes sense to model the analysis of their decisions by each published decision.

[118] These numbers add up to more than 100 percent because some cases involved multiple legal claims.

Table 4-1 Frequencies of the observations of judicial votes in the dataset

Characteristic of the judge observations	Percentages of the make-up of the observation set (frequencies in parentheses)
Total number of courts	138
Total Number of judicial votes (observations)	414
Percentage of votes for upholding state plan	54.6% (226 out of 414)
Republican	49% (203)
Democrat	51% (211)
# of case observations including complaints over congressional districts	49.3% (204)
# of case observations that deal with complaints over Voting Rights Act claims	42.8% (177)
# of case observations that deal with racial gerrymandering claims	18.1% (75)
# of case observations that deal with equal population claims	46.4% (192)
# of case observations where a commission is present in drawing the lines	23.9% (99)
# of case observations where the judge is of the same party as the party in control of the state redistricting process	33.6% (139)
# of case observations where the judge is of a different party from the party in control of the state redistricting process	34.8% (144)
# of case observations where no redistricting plan exists after a decennial census because of partisan deadlock in the state	13% (54)
Judicial Dissents	8.5% (35) of all judges 25% of all court cases
Judges who used to be legislators	9.2% (38)
Observations from 2001 to the present	23.2% (96)
Observations from 1991 to 2000	43.5% (180)
Observations from 1981 to 1990	33.3% (138)

Also, in order to further test effects of partisanship, I perform a statistical analysis of the dissents in redistricting cases. Remarkably, there were 35 total dissents out of 138

redistricting cases which means that dissents occurred in slightly more than 25 percent of all redistricting cases in my dataset. This figure is an unusually high number of dissents compared to three judge panels in appellate courts. In Hettinger et al.'s 2006 study on collegiality in the appellate courts, they found that for all court cases in the Donald Songer U.S. Court of Appeals database, spanning from 1960 to 1996, the percentage of dissenting opinions amounted to a mere 9.5 percent. Compared to the average case faced by an appellate court, federal district judges (and their circuit brethren sitting with them) in redistricting cases are almost three times as likely to issue a dissent. The model I construct should allow me to arrive at a better understanding of why judges might dissent in redistricting cases, and whether partisanship may foster this dissent.

I exclude cases involving disputes over state judicial districts or local electoral districts. The reason for this exclusion is that many local and judicial elections are non-partisan or less valuable politically, and thus not as likely to induce partisan behavior in a judge.[119] I also excluded cases involving Voting Rights Act claims before a single federal judge, which constitute only a handful of all cases. While keeping them in the statistical analysis does not change the results, the decisional dynamics of a court change if there is only one judge, because that judge does not have to compromise with other judges when coming to a decision

All cases represented final decisions on the merits of the case. In some instances, these included grants of summary judgment. Cases that were reversed and remanded by the Supreme Court were counted as a new case. Cases deemed "frivolous" by the court were included, because one person's frivolity may be another's legitimate legal concern. Preliminary orders were not included if the court issued subsequent decisions on the same case. Cases on remand from state court, which were sent back to state court, were not

[119] In addition, these sorts of cases must be excluded because many of these local cases that do come before federal courts are never published. However, because of the importance of cases that challenge statewide redistricting plans, there is a higher probability that most of these cases do in fact make their way into either the federal supplement (Lloyd 1995) or the online libraries of Westlaw and Lexis-Nexis.

counted unless such remand orders could clearly be interpreted as effectively dismissing the lawsuit (if, for example, the plaintiffs had no recourse in the state court).

Bivariate Relationships

Theories on judicial behavior and the psychology of party identification, along with the interviews of judges and the texts of some redistricting opinions, suggest that party identification can be important in shaping the decisional perspective of judges. Thus, I set about testing this proposition and others with some simple crosstabs. The results of these findings are listed in Table 4-2, below. Judges do indeed strike down more state plans of the opposite party (51%) than plans from their own party (38%). The crosstabs also suggest that in cases where commissions were present in the redistricting process, those plans withstood legal attack with greater frequency.

Table 4-2 Crosstabs for various independent variables against the dependent variable (dependent variable is whether a judge votes for or against a state plan)

TOTAL N= 414 # of observations in parentheses	Votes by Judges AGAINST the state plan	Votes by judges in FAVOR of state plan
All judge observations in data set	45.4% (188)	54.6% (226)
Republican judges	45.3% (92)	54.7% (111)
Democratic judges	45.5% (96)	54.5% (115)
Judge is of a different or OPPOSING party as that which controls the redistricting process in the state	51.1% (67)	48.9% (64)
Judge is of the SAME party as that which controls redistricting process in the state	38.1% (53)	61.9% (86)
Plans where the state is under divided government, including observations where a state failed to pass a plan.*	47.2% (68)	52.8% (76)
Plans where the state is under divided government (observations where the state failed to pass a plan have been removed)	30.6% (33)	69.4% (75)
Commission present in redistricting process	28.3% (28)	71.7% (71)
Racial gerrymandering cases	50.7% (38)	49.3% (37)
Racial gerrymandering cases – Republican judges' votes	63.4% (26)	36.6% (15)
Racial gerrymandering cases – Democratic judges' votes	35.3% (12)	64.7% (22)
Voting Rights Act cases – Republican judges' votes	26.1% (18)	73.9% (51)
Voting Rights Act cases – Democratic judges' votes	44.4% (48)	55.6% (60)
Percentage of the votes of Republican judges in Equal Population cases	49.1% (52)	50.9% (54)
Percentage of the votes of Democratic judges in Equal Population cases	52.3% (45)	47.7% (41)

* This crosstab can be misleading because these statistics include cases where the state failed to pass a plan. These observations represent the baseline in the logit models for the SAME party and OPPOSING party variables.

Multivariate Analysis – Predicting Whether the State Will Win Their Case

My main model is presented as follows:

Model 1: prob (Statewin)=1

Statewin = β_1 + β_2 (party id) + β_3 (opposing party) + β_4 (same party) + β_5 (commission) + β_6 (1990s case) + β_7 (1980s case) + β_8 (VRA case) + β_9 (racial gerrymander case) + β_{10} (equi-population X opposing party) + β_{11} (equi-population X same party) + β_{12} (congressional) + β_{13} (no plan) + β_{14} (judge was a legislator) + e_i

The dependent variable in this analysis is the win/loss record of the state in redistricting cases. This dichotomous variable is coded 1 when a judge votes to uphold a state's redistricting plan, and 0 when a judge votes to strike down a state redistricting plan.

The most obvious independent variable to be employed in this model is party identification (*party id*). "Republican and Democratic judges should have political values that are similar to the values of other political elites in their respective parties" (Songer and Davis 1990, 319). This variable should therefore closely mirror that of the appointing president. I assigned party identification based on the president who appointed the federal judge, unless I found corroborating evidence to the contrary. Information on the appointing president can be found at the federal government website http://air.fjc.gov/servlet/uSpage. *Who's Who in American Law* sometimes offered insight as to which judge had formally affiliated with a party. If this indicated a party affiliation that did not correspond to the appointing president, then that information was used for identifying partisan affiliation instead of appointing president. Republicans were coded as 0 and Democrats 1.

The explanatory measures of interest are dichotomous variables entitled *same party* and *opposing party*, which facilitate the estimation of whether judges' decisions in redistricting cases are based on partisan influences. These two variables correspond to whether the state government which passed the plan matches the party of the judge, and parallel the constructs of Randall Lloyd (1995). For example, if a state legislature is run

by Democrats, and the governorship of that state is also controlled by the Democrats (assuming the governor has a constitutional role in redistricting)[120], and the judge (the observation) is also Democratic, then *same party* would equal a score of 1 and *opposing party* would have a score of 0. If the state government is controlled by Republicans, and the judge is Democratic, then *same party* would equal 0 and *opposing party* would equal 1. If the state government were divided (there was bipartisan control), then both variables would receive zeros. Thus, a redistricting plan can have only one of three possible characteristics in relation to the judge in a case. It can be a plan adopted through a bipartisan process, through a process controlled by the opposing party, or a process controlled by the same party as the reviewing federal judge. In the model, bipartisan plans are used as the baseline measure.

Of the bipartisan plans, a small amount of these observations include state court-drawn plans. I see no reason why these observations need to be excluded from the analysis. These observations are usually coded as bipartisan because of the absence of obvious identifying partisan factors.[121] The same applies to states with bipartisan commissions.[122] I elect to keep these types of cases in the dataset, but the results are the same if run with only federal court reviews of state legislative plans.

Another background characteristic considered in the model, aside from party identification, is whether the federal judge is a former legislator. A few legislator-turned

[120] Some state constitutions do not allow the governor to veto redistricting legislation

[121] For the vast majority of observations, the state plan is the plan adopted by the state legislature or state commission. In some instances a state court drew the plan. If the state judiciary could be determined by partisanship, then this plan was counted as a partisan plan for one party or another. For example, in the Alabama case *Kelley v. Bennett* 96 F. Supp. 2d 1301 (2000), the federal court referred to the plan adopted by the state court as basically the Democratic plan. Another example is the Mississippi case *Smith v. Clark* 189 F. Supp 2d 529 (2002). This case involved the federal court reviewing the decision of a state court district judge, elected in a heavily Democratic district, who adopted the state Democratic Party's redistricting plan virtually without change, according to media accounts. The federal court panel, composed entirely of Republicans, was acutely aware of this situation, and pointed it out in their decision. In light of the objective circumstances, as well as the perceptions of the three-judge federal panel, this case was coded as an opposing party plan for these three judges. On the other hand, in state court plans with no obvious partisan side (and a nonpartisan state judiciary), those plans are coded as bipartisan.

[122] For those states with odd-numbered amounts of people on a commission, the variable was based on the party that controlled the most votes on the commission..

federal judges suggested to me in interviews that being a legislator helps them review redistricting cases. According to one of these judges,

> There are two judges on this circuit… both have legislative backgrounds, and I think they'd see themselves as more qualified to handle redistricting cases. I think they are more qualified. I'm not denigrating other judges. But, I think judges oughtta hold elected office before coming onto the bench. (federal judge #7).

It is not clear how such an experience might cause these judges to vary from their colleagues, but it is possible that former legislators might accord state legislative plans more deference (and thus uphold state plans at higher rates). Consequently, it seems appropriate to include this as a control variable.

I also employ a dichotomous variable noting the involvement of a redistricting commission in the line-drawing process, which I refer to as *commission* in Table 3. A "1" indicates the presence of a redistricting commission so that a positive sign suggests that the involvement of redistricting commissions helps states win redistricting lawsuits.[123]

As hinted at above, cases involving population variance (i.e. equal population) are distinguished from Voting Rights Act (VRA) and racial gerrymandering claims. The *equal population case* variable accounts 1 person 1 vote claims. Because law is relatively clearer in this area, one might expect states to do a better job at drawing equal population districts, thus enhancing their ability to survive court battles. But I make this claim with some hesitancy. And, even if state actors know what the law is, that may not necessarily be sufficient to persuade them to follow it. What is more interesting is the interactive effects this variable might have with other variables in the model.

I include two interaction terms in Table 4-3 for the variables *opposing party* and *equal population* as well as *same party* and *equal population*.[124] If judicial partisanship

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[123] This variable does not separate out the different types of commissions in states. Some commissions (such as Ohio, Colorado, Arkansas or the back-up commission in Texas), are composed of designated elected state officials, such as the lieutenant governor, attorney general, etc. In these instances, the commission make-up can be quite partisan, and does not ensure a plan is the result of a bipartisan effort.

[124] The alternative possibility would be to include a variable for *racial gerrymandering* cases and interact that with party identification. Republicans and Democrats have diverged on how to deal with those types of

can be mediated by the law (i.e. if clarity in the law will reduce reliance on partisan perceptions of evidence), then we should expect one of two possibilities when we see opposing party judges hearing equal population claims – a positive and significant relationship between this interaction variable and the dependent variable or no relationship at all.[125] If there were a negative relationship, this would not necessarily prove that judges are not following the law or are basing their decisions on partisanship (it could be that in these cases, states are drawing plans that hugely exceed allowable deviations), but a more refined test would be necessary to parse out the relationship.

VRA cases have vastly different legal requirements which the federal courts must consider compared to equi-population claims or racial gerrymandering lawsuits. Therefore, I include a *VRA case* variable to account for potential differences in decision making. Since VRA cases and racial gerrymandering cases are accounted for in the model, equi-population cases and partisan gerrymandering claims act as a baseline.[126]

Another control variable looks at whether the case included disputes over congressional redistricting plans (*congressional*). Congressional plans undergo more exacting scrutiny with regard to population variance disputes (*see Karcher v. Daggett*, 462 U.S. 725 (1983). Furthermore, many of the more infamous racial gerrymandering claims have emanated out of congressional redistricting disputes. In order to account for any differences, this dichotomous control variable was added, with those cases involving disputes over congressional districts scored "1".[127]

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cases. Certainly the results of the cross tabulations suggest this and there is the perception in the popular media that conservative judges are using this area of the law to strike down plans.

[125] A positive relationship might occur because the cases being heard by these judges happen to comply with the law, thus requiring them to uphold these cases.

[126] There are very few cases that are solely partisan gerrymandering claims. These cases are usually combined with other legal theories when state plans are legally attacked.

[127] In some instances, there are cases that involve both congressional and state legislative disputes. In many instances, parties might litigate state legislative districts along with the congressional claims, or the court might consolidate the claims into one case, issuing one decision. Where the court treated the legal claims in only one decision, and did so in an omnibus fashion, treating the congressional and state legislative claims interdependently, these cases still received a 1 for the congressional variable.

There are two variables (1980s, 1990s) to account for redistricting cases as they span across a three-decade timeline (The cases since 2000 operate as a baseline measure in the model). Given that redistricting law has been in flux over the last 25 years, it is reasonable to assume that courts are treating redistricting cases differently over time.

A final variable was created to control for court cases where the state failed to adopt a redistricting plan after the decennial census (*no plan*). This is the only legal variable in the main model. When no plan exists, the state defendants in the case almost never dispute the unconstitutionality of the redistricting plan, because the Supreme Court precedent since *Baker v. Carr* (1962) and other relevant Supreme Court redistricting cases from the 1960s is quite clear about state requirements to redistrict both congressional and state legislative districts after a decennial census, even if other areas of redistricting law are still murky.[128] Normally arguments in these cases center around whether the federal court should give the state government more time and defer to state processes.[129] When the federal court is overseeing a legal challenge in which no plan exists, this variable is referred to in the model as simply *no plan.*

RESULTS

Consistent with my expectations, the results in Table 4-3 indicate that party matters in the redistricting decisions of courts, but only some of the time. I find that when a federal judge is reviewing a plan crafted by the opposite party, that judge is significantly more likely to strike down the state plan. See Table 4-3, below.

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[128] The amount of variance allowed, however, is still sometimes a matter of dispute, even in recent times – *see Larios v. Cox* 300 F. Supp. 2d. 1320 (N. D. Georgia, Feb. 2004).

[129] Notable exceptions to this were federal courts in Mississippi and Massachusetts after the 1990 round of redistricting. The Mississippi federal court, which included Judge Charles Pickering, simply adopted the old 1980 plan for limited use in the 1992 elections, despite the huge variances in population, because the court felt there was not enough time to create a court plan without canceling the elections. In Massachusetts, the federal court simply declined to get involved. Massachusetts later adopted a plan for use in the 1992 elections after its legal challenge questioning reapportionment of congressmen among the several states failed.

Table 4-3 Models for federal judges' votes on redistricting cases: 1981 to 2006

	All Cases	1 person 1 vote state leg. districts	VRA claims	Racial Gerrymanders
Constant	3.06***	2.85**	3.81***	.044
	(.483)	(.958)	(.908)	(.733)
Party id. of judge	-.499	-.509	-1.47***	.700
	(.290)	(.747)	(.486)	(.675)
Opposing party	-1.93***	-.786	-1.95***	-1.65*
	(.441)	(.738)	(.600)	.728
Same party	-.398	-1.30	-.508	-.014
	.442	(.840)	(.573)	(.756)
commission=1	.863**	1.88*	1.32***	--
	(.336)	(.772)	(.441)	
1990s=1	-1.46***	-1.03	-1.93***	--
	(.349)	(.828)	(.592)	
1980s=1	-2.14***	-1.72*	-2.86***	--
	.378	(.812)	(.626)	
Congressional=1	-.798***	--	-.521	-.654
	(.276)		(.456)	(.589)
VRA case =1	-.090	--	--	--
	(.277)			
Equal population =1	-.515	--	--	--
	(.480)			
Equal pop. X opposing party	2.05***	--	--	--
	(.630)			
Equal pop X same party	.527			
	(.636)			
No plan	-3.01***	--	--	--
	(.583)			
Judge was a legislator=1	.126	.573	-.191	-.719
	(.427)	(.807)	(.732)	(1.00)
Size of deviation	--	-.022**	--	--
		(.008)		
Litigation after *Bush v. Vera*	--	--	--	1.57**
				(.593)
Log- likelihood	-214.486	-46.8502	-91.748	-41.982
Pseudo R^2	.248	.255	.215	.192
N	414	93	177	75

Standard errors in parentheses *p ≤ .05; ** p ≤ .01; *** p ≤.005
Dependent variable: whether the redistricting plan being examined by a federal court was upheld (1) or overturned (0)

In fact, holding all other variables at their mean, under circumstances where a federal judge is reviewing the plan of an opposing party, the probability that the federal judge will vote to strike down the state plan increases by nearly 45 percent (see Table 4-4).[130] In other words, the circumstance of a judge reviewing the opposite party's plan greatly increases the odds that she will vote to strike down the plan. Conversely, no similar effect is seen when federal judges are reviewing plans passed by their own party, as shown in Table 4-4, below.

Table 4-4 Predicted Probabilities for Model 1 – All cases 1981-2006

Independent Variables	Predicted Probabilities
Party identification of judge@	--
Opposing party	-44.6%
Same party@	--
commission=1	20.5%
1990s=1	-35.1%
1980s=1	-48.7%
Congressional = 1	-19.6%
VRA case =1@	--
Equal population @	--
Equi-population X opposing party	40.2%
Equi-population X same party@	--
No plan	-55.9%
Judge was a legislator=1@	--
N	414

Dependent variable: whether the redistricting plan being examined by a federal court was upheld (1) or overturned (0);
@ indicates that the variable was not significant;
A negative sign indicates the probability that a plan would be struck down, holding all other variables at their mean.

[130] I calculated the probability changes in likelihood of the dependent variable (Statewin) for changing the values of independent variables using w/ J. Scott Long's "prchange" command w/in his SPost package for Stata v7.0 (See: http://www.indiana.edu/~jsl650/spost.htm).

The reality is that federal judges are no more likely to uphold plans from their own party than they are to uphold plans produced in a bipartisan process. Furthermore, this opposing party effect that causes judges to strike down state plans disappears when the case centers on a dispute over equal population districts. The interaction term between equal population cases and the opposing party variable is positive and significant. This means that .even though judges typically strike down opposing party plans, in cases where judges are dealing with equal population issues, they are actually more likely to uphold opposing party plans. If one looks individually at these equal population court cases, they suggest that judges rely less on their partisan conceptions of the evidence and more on the substantive law.[131] However, equal population cases, by themselves, are not a significant indicator of whether a judge would vote to uphold or strike down a redistricting plan.

These results strongly suggest that the partisanship of federal judges in redistricting is constrained. If judges were crass, overt partisan actors, with their only goal being the maximization of their own party's interests, then presumably they ought to uphold their own party's plans at rates higher than bipartisan plans.[132] Yet, this is not the

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[131] A note should be made about the positive and significant relationship between opposing party judges and equal population cases. A closer inspection of some of these cases – namely the disputes over population deviations in state plans – reveals that a higher percentage of plans were being upheld by opposing party judges because the plans they reviewed were likely in the margins of tolerance allowable by law. For example, of 15 state plans reviewed by 15 opposing party judges, 8 of those voted to uphold the opposing party plan they reviewed and 7 voted to strike down. Six of the judges voted to uphold opposing party plans with deviation margins of less than 15 percent. Two other judges voted to uphold opposing party plans with a tolerance margin of 19.99 percent. Of those 7 opposing party judges who voted to strike state plans in equal population disputes, all the plans exceeded 10 percent. All of these judges complied with the law, but this anecdotal evidence provides a possible explanation as to why one might see a positive and significant relationship between state wins and opposing party judges hearing equal population cases.

[132] A perfect anecdotal piece of evidence to illustrate the point that judges care about fairness and are not always overt partisan actors can be found by way of the actions of several "same party" judges in partisan gerrymandering/equal population disputes. In *Farnum v. Barnes* 561 F. Supp. 83 (1983), three Democratic judges struck down a Democratically-drawn Rhode Island redistricting plan even though it deviated no

case. While judges are more likely to uphold their own party's plans than strike them down, there is no significant difference between their rates for upholding bipartisan plans compared to their own party's plans. Stated another way, federal judges are more likely to defer to a state's plan – especially bipartisan and same party plans. In these types of cases, no veritable partisan cues or signals are present in a form that would grab the attention of the reviewing judge. However, given my findings, it is reasonable to suspect that opposing party plans undergo more scrutiny by a judge, and thus they tend to be struck down more often.

The question for a state is this – How do we head off the axe of the federal judiciary? Many states have either adopted redistricting commissions or are seriously considering them. My research shows that commissions help states survive judicial scrutiny when their redistricting plans end up in court. Having a commission drawn plan

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more than 5.61 percent. The Democrats had initially failed to redraw lines for their state legislature after the 1980 census. Only after prodding from the *Farnum* court did they redistrict. It was during this time that the Democratic state legislature redrew lines to favor their party. After two citizens sued, alleging, among other things, equal population violations, the court found the following:

> The fact that the defendants' proposed Providence districts deviate from geographical, historical and political lines does not in itself mean that they are constitutionally prohibited by the mandate of compactness. Additionally, it must be shown that the district lines were drawn for the purpose of achieving a political gerrymander. The Court is convinced that a political gerrymander did in fact occur in this case. There is no legitimate, nondiscriminatory explanation for the way in which the Select Senate Redistricting Committee redrew the Providence district lines. *Farnum v. Barnes* 561 F. Supp. 83 (1983).

The court struck down a portion of the plan, finding that the state senate plan constituted a political gerrymander in violation of the state constitution. Similar actions can be found by Democratic judges in the cases *Larios v. Cox*, *Marylanders for Fair Representation* 849 F. Supp. 1022 (1994), and *Rural W. Tenn. African-American Affairs Council* 836 F. Supp. 453 (1993). In these cases, plans were struck down, even though they were within tolerable limits. Perhaps the significant characteristic in all these cases was that the minority party (the Republicans) had also alleged partisan gerrymandering. Although, as I suggest in my model, that most federal district judges, committed to fairness, are more likely to be sympathetic to unfair practices exacted on their own party, and more oblivious to their own party's actions when it is in the majority, sometimes evidence in a case is so overwhelming and unfair to a minority party that federal judges will recognize this and take action (more on this sentiment of judge's desires to ensure partisan fairness is examined in Chapter 5).

increases the state's probability of surviving judicial attack by nearly 20 percent. And, given what some judges have told me in interviews, this success rate is not surprising. Asked if her/his perspective on a case would change if a bipartisan redistricting commission adopted the state plan instead of the legislature, one federal district judge answered by likening the standard of review to that given to federal court reviews of the decisions of administrative agencies,

> If you had a transparent and bipartisan or nonpartisan [commission], to me the standard of review then is much more deferential. In [the state of X], if you appeal from an administrative agency or an administrative social security judge, we might look at the evidence that Mark is disabled, but two Doctors from the Social Security office say no, he can do work, and [based on this evidence] the administrative judge rules against Mark. This court may feel sympathy for Mark. But, [there is nothing the court can do]. If some evidence supports what the independent commission does, then I can't do anything. [There'd have to be something big for me to rule against it]. In other words, you'd have to have a runaway commission, or some vote buying or something. (federal judge #9)

Commissions create plans that are seen as more legitimate in the eyes of the court.

The results also show that cases which include complaints against congressional plans are almost 18 percent more likely to be struck down than other cases, holding all other variables at their mean. Furthermore, states that fail to adopt a redistricting plan face the prospect of the court striking down their existing plan. Having no plan increases the likelihood of negative court action by over 55 percent.

The party identification variable is in the expected direction, but (with a p value of just under .10) does not reach standard levels of significance. Nevertheless, the result does appear to corroborate the crosstabular finding in Table 4-2, suggesting that Democrats are more likely to strike down redistricting plans in comparison to Republicans. The lack of a strong level of significance of the variable, however, means the effect of this variable, on its own, is inconclusive.

Finally, the model shows that judges who are legislators do not necessarily vote differently from their other colleagues when it comes to deciding whether to uphold a state redistricting plan. Thus, former legislators turned judges are just as likely to give as much deference or scrutiny to a state's redistricting plan as their colleagues.

EXTENDING THE ANALYSIS

Model 2 – One Person/One Vote Claims

I endeavor further to investigate whether partisan factors are important only for certain legal claims for redistricting cases or were seen as important in all cases. In some cases, a more specific model allows me to test some legal variables. In model 2, I consider variables for equal population claims (lawsuits claiming a violation of the one person one vote standard). A bit of background is in order here. *Reynolds v. Simms* and a progression of cases that followed through the 1980s interpreted the Equal Protection Clause as requiring ever more equi-populous legislative and congressional districts. In the beginning, Supreme Court jurisprudence was not so clear. How equal was equal? Through subsequent cases, the Supreme Court slowly defined this rationale. State legislative districts would be allowed to vary more from the ideal district size, while congressional districts could not deviate from zero, in effect. Because the legal requirements were different for congressional districts and state legislatures, I focus attention on court cases involving equal population challenges to state senates and state houses. I use some of the variables from model 1. However, I add a legal variable that measures the size of a district's deviation from the ideal. Attacks on congressional districts are excluded in this analysis because the legal requirements for deviation differ.

In this model, if federal courts are following the law, we would expect that as the deviation in districts increase in a plan, the probability that a court will strike down the plan increases. Therefore, the sign for my *size of deviation* variable should be negative if federal courts are following the law. This variable is measured by using the maximum deviation in a state plan. If both state house and state senate plans were challenged, I took the larger of the two.

The results in table 3 indicate that deviation sizes in state plans have a significant effect on a judge's vote. In probability terms, as deviation sizes in state plans go from a ½ standard deviation below the mean to ½ standard deviation above the mean, a court's willingness to strike down state plans increases by almost 20 percent. Furthermore, the results show that equal population challenges to state legislative plans in the 1980s faced a significant danger of being struck down, but the same is not true for the 1990s (2000 cases operate as a baseline measure). This suggests that the law in this area became clearer not only to courts but also to states. Commissions also seem to help states survive equal population challenges. Perhaps commissions can get away with larger variances because they are seen as more legitimate by courts, as the deviations in population in these cases are less likely to be viewed by a court as the result of partisan decision making. Having a commission draw a plan increases the probability that a state will stave off an equal population legal challenge by 34 percent, ceteris paribus. Interestingly enough, partisan considerations are unlikely to come into play in equal population challenges of the last 25 years. The most likely answer is that as the law has become clearer in this area, federal judges are having to draw less on their own conceptions of fairness in their decision making.[133]

[133]The first model results showed that opposing party judges in equal population cases were more likely to uphold those cases (when, of course, divided government plans serve as a baseline measure). The findings in this second model are not contradictory. One must keep in mind that this model does not include

Model 3 – Voting Rights Act Cases

I can extend the analysis even further to include a voting rights measure. Unfortunately, VRA cases are not well suited for construction of legal variables for a multivariate analysis. There are just so many factors that the federal courts consider that any fact or legal nuance might influence a judicial decision in ways that cannot be accurately calibrated.[134] As demonstrated by the recent Texas case, there seemed to be wide disagreement on how to interpret the VRA, both within the Supreme Court (see Lulac v. Perry 2006) and in the three judge federal district court (see Session v. Perry 2004; Henderson v. Perry 2005). Therefore, I use an abbreviated version of model one, considering only political and contextual factors in the analysis. As reported in Table 3, party considerations play a significant part in the judicial decisions of these cases. While judges are not necessarily likely to favor their own party's plans, in instances where a federal judge is reviewing the plan created by the party opposite of the judge, the likelihood that judge will strike down the plan increases by over 40 percent. On the other hand, states can try to beat judicial ire by having a commission drawn plan. In VRA challenges, states with commissions have a 30 percent better probability of winning in court than those who do not, all things being equal. The results also indicate that states faced a rougher time in court under VRA challenges in the 1980s and 1990s compared to court cases after the 2000 round of redistricting.

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congressional districts. Additionally, as I noted in discussions of model 1, a closer examination of judges in this situation reveals that many of their upholding of opposing party state plans can be explained in legal terms, hence the divergence between the actions of the typical opposing party judge in a redistricting case and those opposing party judges who are dealing with clearer legal principles.

[134] Even if a lawsuit survives the initial judicial inquiry of the three Gingles factors, there is the second test of the "totality of the circumstances", which consists of a myriad of "senate factors" that a court can decide to weigh as much or as little as they like in their decisions. And the Gingles test has not remained the same, but has evolved considerably over time. This complicates the formulation of a reliable legal variable.

Model 4 – Racial Gerrymandering Cases

In the fourth and final model, I examine only racial gerrymandering cases. There are fewer cases here, so the analysis is perhaps merely suggestive. Nevertheless, it appears that federal judges are more suspicious of state plans drawn by an opposing party, as this variable is significant at the .05 level, although this is also a case of mostly Republican judges striking down Southern state plans drawn by Democratic legislatures with Democratic judges voting to uphold these plans.[135] It is also the case, however, that states became more successful at defending themselves against racial gerrymandering claims after Bush v. Vera 517 U.S. 952 (1996) and Shaw II 517 U.S. 906 came along. O'Connor's concurrence in Bush v. Vera resolved a number of issues for states that theretofore had remained unclear (Butler 206-207, 2002). Also, the final conclusion to the Shaw II case (at least until Cromartie in 1999) sent a message to states and lower courts that racially gerrymandered districts would not be upheld when facts were found by the court, as in Miller v. Johnson 1995, demonstrated that race was the "predominant" factor in drawing lines, and that race "subordinated traditional race-neutral districting principles… to racial considerations (Shaw v. Hunt 517 U.S. at 905). As the model illustrates, the trend after Bush v. Vera and Shaw II tended toward lower courts upholding state plans as states began to take seriously the racial gerrymandering claims.

COLLEGIALITY AND JUDICIAL DISSENTS – PREDICTING WHETHER A DISSENT WILL OCCUR IN A CASE

Equally important to the understanding of judicial behavior in redistricting is the tactic of judicial dissent. Judges do not operate in a vacuum on three-judge panels (Cross

[135] The party identification variable is insignificant due to the fact that it correlates highly with the opposing party variable. Most racial gerrymandering cases occurred in the South, run by state governments controlled in large part by the Democratic Party.

2007). First, dissents are important because they can help tell the story of collegiality among judges in redistricting cases. Do judges work together to come to an agreed outcome in these cases, and if not, why not? Answering this question will help us understand the nature of partisanship in redistricting decisions. Second, dissents are important for what they say, albeit indirectly, about the clarity of the law. Presumably, the clearer the law, the fewer dissents one should expect, as judges on a panel converge to a singular conception of the law and precedent. If the law is unclear, dissents should increase as judges diverge in their thinking about the applicability of the law to the facts.

Dissents are relatively uncommon among typical cases that are decided in three-judge panels in the federal appellate courts, representing less than ten percent of all cases in the U.S. Appeals Court database between 1960 and 1996 (Hettinger et al. 2006; *see also* Cross 2007).[136] But, this situation does not obtain in three judge trial courts in redistricting. There are nearly three times as many dissents found in redistricting decisions in my dataset (between 1981 and 2006) as in the appellate decisions studied by Hettinger et al. (2006).

Undoubtedly, in efforts to strive at collegiality in the federal courts (Edwards 2003; Higginbotham 1992) dissents cannot be very pleasant for judges. One judge I interviewed, who was of the opposite party of the other two judges, had the following reaction to winding up on the dissenting side of the case:

> Once it became apparent to me that my colleagues were taking a different approach, I disliked [the case] very much…. I was surprised at the tentative conclusion arrived at by [Judge X] and [Judge Y]. I had a very fine law clerk who did work on the demographics. I tried to persuade them of what I regarded the facts to be and was not successful. During that time, I became disillusioned with the procedure…. One of the things that was surprising to me was Judge [Y's]

[136] In Cross's study, dissent rates for First Amendment cases are 22.4% while Privacy cases render dissent rates of 19% (2007, 163). But, he found that other areas had lower rates – Civil Rights 11.1%; Criminal 8.3%; Due Process 12%; Economic 6.8%; Labor Relations 10.5% (Cross 163).

> indifference to the facts on liability…. [Judge Y is] just a very fine judge, a real legal scholar. I was really shocked that [she/he] could have the attitude [she/he] had. [Judge X] was a different story, and [she/he] didn't really surprise me. [Judge Y] thought my attitude was unworkable. (federal judge #21).

Interestingly enough, this judge did not account the diverging opinions in the case to the judges' differing partisanship, but rather suggested that the panel had simply arrived at differently conclusions. Nevertheless, this judge had found the entire experience sickening, and she remarked,

"I would think that these cases and my experience was atypical [among all redistricting cases]. I hope that the [X] case is not repeated elsewhere" (federal judge #21).

Unbeknownst to this judge, her experience was actually not uncommon, as the statistical numbers suggest.

Another anecdote emblematic of the levels of collegiality in redistricting cases – emblematic at least in fact if not in emotion between judges – comes from a written survey on redistricting cases that I mailed to select judges in my dataset (this survey also included a random sample of federal district judges nationally).[137] The survey included a number of multiple choice questions on redistricting decisions, redistricting law, and state redistricting commissions. At the end of the survey, I asked for written comments about what "the most memorable aspect of the case" was. One judge, who had dissented in a redistricting case, and who was also of a different party from the other two judges on her panel, responded to the survey question with the comment,

"The animosity among the Judges" (federal district judge).

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[137] This mail survey, which included sending out hundreds of questionnaires to federal judges, was conducted during the summer of 2007. The results and analysis of this survey are not included in this dissertation.

In the next question, I asked, "What do you think other federal judges should know in looking at redistricting cases that they might not get from reading caselaw?"

This same judge responded,

"The politics of the other judges on the panel." (federal district judge).

Finally, when asked in the survey if the judge would like to make any additional comments, she stated,

"Judges should not be in the redistricting business – it was the worst experience in my [X] year career" (federal district judge).[138]

Of course, many other judges I spoke with had more favorable experiences personally with the judges on their panel, even if ultimately a dissent was filed. So, I don't want to suggest that the two anecdotes used are necessarily representative of the emotions of judges on redistricting panels. Perhaps they are the extreme case, but I use them to emphasize my point about collegiality. At any rate, I cannot statistically prove what levels of collegiality or (alternatively) animosity existed on panels in the cases in my study from a personal perspective. Judges are very professional people, and my guess is that even in the most acrimonious panels, judges worked through to the extent that they could and conducted themselves in a professional manner. Analytically speaking, however, if one defines the term collegiality in terms of whether judges vote on an agreed outcome, I can make statistical inferences in attempting to determine what is driving dissent. In order to do this, I have constructed a multivariate logistic regression model to help predict when a dissent might occur, as follows:

Model 1: prob (dissent)=1

[138] I removed the number of years this judge had stated in order to help obscure her identity. However, she had been a judge many years.

$$\text{Dissent} = \beta_1 + \beta_2\,(\text{party id}) + \beta_3\,(\text{circuit judge}) + \beta_4\,(\text{majority party judge}) + \beta_5\,(\text{equal population}) + \beta_6\,(\text{VRA case}) + \beta_7\,(\text{congressional}) + \beta_8\,(\text{majority Ivy League judge}) + \beta_9\,(\text{extensive judicial experience}) + \beta_{10}\,(\text{judge was a legislator}) + \beta_{11}\,(\text{affect outcome}) + e_i$$

The dependent variable in this analysis is whether a judge votes to dissent in redistricting cases. This dichotomous variable is coded 1 when a judge votes to dissent in a case, and 0 when a judge votes (either by concurrence or by signing on to the majority opinion) for an outcome in agreement with the majority of the panel.

In formulating a model containing independent variables to explain dissents, I was informed by the work of Hettinger et al. (2006), although I have tailored my model for understanding redistricting dissents, and so I employ variables that they do not use and decline to employ others that they do use. The independent variables for this model can be grouped around three different sets (all of which are dummy variables). There are independent variables that center around personal attributes of the judges. Second, I include variables that account for the contextual factors of the particular redistricting case being reviewed. Finally, the third group of variables attempts to measure the partisan context of the case, including potential strategic contexts.

Among personal attributes, I take into account the party identification of the individual judge (party id) on the panel, where 1 is a Democrat and 0 is Republican. Additionally I consider whether there are two or more Ivy League judges on the panel. If so, perhaps these judges share camaraderie and are likely to work together to prevent dissent on the panel. If a judge who is an Ivy Leaguer has another Ivy Leaguer on the panel (or even 2 others), the variable is coded as a 1 and zero otherwise. Finally, I consider whether judges with extensive judicial experience might be less willing to issue a dissent. Judges who have been on the bench over 20 years, far removed from the politics of their initial appointment, and perhaps less geared toward further judicial

advancement, are perhaps more likely to act collegially and less likely to cause dissent among their colleagues. Thus, I have a dummy variable for accounting for whether judges have over 20 years of experience (1), and those with 20 years or less in the business are coded 0.

The second group of variables considers contextual factors of the cases. Certain types of cases might be more likely to engender dissent than others – particularly those with more significance or cases where the law is unclear. These variables include whether the case was a fight over congressional districts, whether the claims in the case stemmed from alleged Voting Rights Act violations (VRA case), and whether claims involved alleged one person / one vote violations (equal population). My specific expectations are that fights over congressional districts will result in more dissents, but cases involving equal population violations will result in fewer dissents, because there will be less discrepancies in what the law is in those cases. Voting Rights Act cases, one might presume, will increase dissent because the law in this area is so fluid. On the other hand, since the baseline measures here are racial gerrymandering cases, which are also likely to have higher dissent levels, we may expect that the VRA variable is insignificant given the context of the baseline measure in the model.

My contextual variables consist of the partisan make-up of the three judge panel and the strategic position a judge finds herself in. These are the two most interesting variables in the model. If a judge is in the majority party on a panel, we should expect that that judge is less likely to dissent. This contextual variable is called *majority party judge*. A judge whose party is the majority on the panel, one would expect, would be less likely to issue a dissent. The other contextual variable is a strategic one. Judges who are the lone figure representing their party on a panel, or a judge who is the third member of a straight party panel is in no position to affect the outcome of the case. It matters not

whether that judge dissents or votes with the majority, as the probability suggests that that judge's vote won't count. But, a judge who is in the majority party on a panel, if she were thinking strategically, should never wind up as the dissenter, because she could go either go with her Republican or Democratic colleague (affect outcome). Thus, one might expect judges in this position to be less likely to dissent.

RESULTS OF THE DISSENT MODEL

The model on predicting dissent further interesting insight into the behavior of federal judges. The findings offer what some federal judges might fear are troublesome results; however, the findings also offer hopeful results. According to Table 4-5, below, judges who are in the majority party on a panel are less likely to dissent in a case.[139] This fact, while not surprising, is interesting because it furthers the notion that partisanship is influencing the decisions of redistricting cases, especially the tough ones where judges felt the need to issue a dissent. In fact, the substantive impact of this variable is more than five times greater than any of the other variables in this model. Additionally, in high profile cases dealing with congressional districts, where bigger political fortunes are at stake, the probability of judicial dissent increases.

[139] As in the previous models, some might quibble that my estimates could be biased because there are instances where the same judges appear in these redistricting panels, and therefore these observations are not sufficiently independent of each other, a requirement for running a logistic regression. In order to head off this potential criticism, I ran a random effects logit to make sure I was not getting biased estimates, and my results remained the same.

Table 4-5 Model for predicting a dissenting judge in redistricting – All cases 1981-2006

Independent Variables	Logit Coeffecients
Constant	-.896@
	(.499)
Party identification of judge	-.834*
(Democrat = 1)	(.421)
Judge was a legislator	.358
	(.715)
Circuit judge	-.065
	(.433)
Majority party judge = 1	-2.49***
	(.617)
Equal Population	-1.36***
	(.473)
Majority Ivy League judge	.132
	(.650)
Congressional plan = 1	1.02*
	(.453)
VRA case =1	.513
	(.452)
Extensive judicial experience = 1	-2.09*
	(1.07)
Affect outcome	.196
	(.671)
Log likelihood	180.252
R^2	.304
N	412®

Standard errors in parentheses @ $p \leq .10$; *$p \leq .05$; ** $p \leq .01$; *** $p \leq .005$;
Dependent variable: whether a federal judge decides to dissent (1) or side with the majority of the tribunal (0);
® The years of experience for two judges are missing, thus, these two observations were excluded from the analysis, resulting in an N of 412 instead of 414.

Republicans were more likely to dissent than Democrats, but I don't see that as something inherent in federal judges, and it is just a function of the nature of panel composition.

On the other hand, there are some silver linings to these findings. First, judges were less likely to issue dissents in equal population cases. Equal population claims are fairly straightforward, and have been since the early 1980s (*see* chapter 2). Thus, because of the clarity of this area of the law, judges are less likely to come to a disagreement over the application of the law to the facts. Furthermore, federal judges who had extensive experience on the federal bench (more than 20 years experience) were less likely to issue a dissent than their less experienced brethren. If one examines the data more closely, there is no significant pattern in issuing dissents for judges with 20 or fewer years experience. However, after one's 20 year, dissents in redistricting cases become virtually non-existent. There were 35 total dissents in a dataset of 414 votes. Of the 414 judicial votes, 360 came from judges with 20 years experience or less. Of that 360, 326 votes were in the majority, and 34 were in dissent. Almost 10 percent of the votes (these are judicial votes, not panels, as I was referring to earlier in this section on dissents) were dissents. However, highly experienced federal judges reacted much differently. There were 52 judicial votes by judges with more than 20 years experience. Of these 52 votes, only one judge dissented. Clearly, judges with years of experience on the bench and long stretches of time between their first political appointment to the bench are less likely to give in to the urge to dissent and are more willingly to operate collegially. This suggests that if the federal courts wish to operate collegially in highly partisan cases such as redistricting, it seems that gray hairs and experience help smooth any ruffled feathers that arise due to ideological or partisan divergence on a case.

None of the other variables were significant. Judges do not seem to take into consideration strategic calculations in their decision to dissent. Furthermore, being an Ivy League alum with another panelist does not seem to matter in judicial efforts to help stop dissents. Finally, although one might expect Circuit judges to dissent less – based on the rationale that they might be seen more in a leadership position on the panel and more likely to try to forge consensus – being a Circuit judge on the three judge court held no special meaning for the judge or panel in terms of propensity to dissent. Voting Rights Act cases are in the expected direction, but the variable is insignificant.

THE CASE FOR FEDERAL DISTRICT JUDGES ACTING AS CONSTRAINED PARTISANS.

My research findings indicate that while federal judges are not the nonpartisan arbiters of redistricting as some legal scholars would like to believe, they are also not partisan maximizers. Indeed, federal judges face institutional constraints that can help deter overt partisan action. Clearly, many federal judges want to be fair to the litigants before their court. This statistical evidence, however, shows that federal judges strike down plans drawn by the opposite party at greater rates. The reason for this finding, I argue, lies in the fact that federal judges have a greater tendency to scrutinize more closely plans drawn by the opposite party. If partisanship is acting on a more subtle level, particularly when the evidence before the district court (statistical or otherwise) is conflicting, it becomes easier for the judge to conclude that such partisan plans drawn by the opposite party were unfair. At that point, the leap from unfairness to illegality is only a small one. Judges are also more likely to dissent if they are not of the same political party on the redistricting panel. But, dissents decrease after lengthy judicial experience,

and they also decrease when redistricting law is clearer and judges are better able to agree on what the law is.

While findings from my own study illustrate that there is a significant relationship between the partisanship of a judge and that judge's propensity to strike down a plan from the party opposite, my study (unlike Lloyd's) does not show that federal judges also tend to strike down partisan plans from their own party. Although Lloyds' results show that judges strike down opposing party plans at rates higher than same party plans, his findings still essentially preserve the notion that judges are more neutral actors. As he himself notes, "…in the end, partisan-created plans are more likely to be struck down than are nonpartisan plans" (Lloyd 1995, 418). His findings may have been the case 30 years ago, but more recent evidence appears to indicate that partisan decision making occurs in federal court cases involving redistricting, albeit in a subtle manner. This phenomenon may be due to the lack of clarity and guidance in the law over the period analyzed.

These findings have far-ranging consequences for the future of redistricting in America. It is clear that federal judges are *not* neutral actors in the process, even if they strive to be, because the process is so political to begin with, and partisan attachments can be very powerful influences (Campbell et. al. 1960). This fact has repercussions for how states and the Congress decide on a process for line-drawing, and what role the federal courts have to play in the process. Given these results, policymakers in the courts, the Congress, and the states should carefully consider calls by some public law scholars that federal courts should assume *more control and oversight* of redistricting in much the same way as they do in anti-trust litigation. Federal courts appear to be more neutral than state legislatures, but they are not devoid of partisan action.

On the upside for courts and legal scholars, it seems there is an important role for the federal courts to play in checking the partisan actions (both real and perceived) of state legislatures. Federal judges of one party act as a check on the redistricting process against the potential abuses of partisan state legislatures. Indeed, if chief judges of the circuits ensure that these panel compositions include judges of different partisan backgrounds, that may help control the potential for run-away decisions.[140] Regardless, this constrained partisanship in redistricting is not a feature of court behavior that should necessarily be viewed as a negative by students of the law and courts.

Furthermore, chief judges in federal courts may be able to stave off potential partisan disagreement among panelists by appointing judges who have been on the bench in excess of 20 years. Those judges with more years in their robes are infected with the type of black robes disease that is good for litigants and the public because it could foster greater consensus in redistricting decisions. Perhaps these judges are less likely to view partisan fights through their own partisan background – because of the distance in time away from partisan activities and psychological partisan attachments – and more likely to forge consensus.

With respect to state redistricting commissions, it appears that movement toward these institutions makes sense if you want to insulate your redistricting plan from successful attacks in the federal courts. More states have adopted or are considering adopting redistricting commissions over the last 25 years, and they therefore ought to get more attention from the federal courts and from our analyses.

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[140] On the other hand, openly choosing judges based on partisan background may reinforce partisan behavior and expectations. It is the case that the majority of the courts in my sample were of mixed origin, with 2 judges from one party and one from the other party. Law Professor Michael Solimine has argued that the make-up for the panel should be randomized as much as possible.

Chapter 5 Federal Judges' Perceptions on Redistricting

INTRODUCTION

In attempting to make sense of how federal trial judges tackle redistricting, a comprehensive analysis should entail judges' own experiences in the process. In chapter 3, I set forth a model for understanding how judges behave in redistricting cases. And in chapter 4, I illustrated how partisanship comes into play in certain ways in redistricting decisions – a picture of judges acting as constrained partisans. The quantitative data illustrate a statistical relationship between judges and their propensity to strike down redistricting plans drawn up by the opposing party under certain conditions. And this relationship, while not overwhelming, is also not insignificant. The relationship is particularly true for cases dealing with areas of redistricting law that are unclear. But are the findings in the quantitative data really an accurate illustration of judicial decision making or are they merely a kind of optical illusion? A spurious relationship? To quote one of my federal judges who quoted Mark Twain when I asked about statistical evidence in redistricting cases… "There are lies, damned lies, and statistics" (federal judge #5). The former chief judge of the D.C. Circuit court Harry T. Edwards (1998), in praising the work of judicial behavior scholar H.W. Perry, suggests that researchers actually talk to judges in conjunction with providing quantitative evidence of their research. In this spirit, I followed Judge Edwards' recommendations. The qualitative evidence that follows supports the conclusion that federal judges are influenced by their previous background and partisanship when forming perceptions of redistricting plans drawn up by an opposing political party.

In this chapter, I examine in-depth interviews of federal judges to better understand how judges might approach the subject of redistricting. The evidence

presented in this chapter suggests that the relationship we see in the statistical analysis of the quantitative data in chapter 4 is not spurious, but instead has some cachet. Despite the nonrandom sample, there is no reason to suspect that the spectrum of judges' views presented here is unrepresentative. The interviews also provide insight into the potential psychological processes that can confront the federal judge. The interviews are valuable not only as additional confirmation of what is seen in the quantitative data but also as a means of generating further hypotheses about the psychological processes of judicial decision making, especially when legal disputes are politically charged.

In the underlying theory behind my model on judicial behavior in redistricting, I suggest that these limited partisan influences seen in redistricting cases are an artifact of cognitive psychological effects on judges' decision processes. I argue that this can sometimes be an unconscious process that affects a judge's decision without her or him necessarily being aware of it. Sometimes the law does not point to a clear result (as was demonstrated in chapter 2). When the law is unclear, a judge may have to rely on the facts of a case to make a just judgment. If trial evidence can logically support the view of a redistricting plan as "egregious" and unjust, and a judge subsequently finds that evidence to be "credible," she is more likely to strike down that redistricting plan. Thus, the key to understanding trial court behavior in many redistricting cases is the realization that the evidence in a trial is driving much of the behavior. Of course, judges undoubtedly are concerned with ensuring justice and objectivity. As one judge recounted to me,

"I think they make a very sincere distinct effort to follow the law. They are very sensitive to following the law and not overreaching into the political realm" (federal judge #18).

Nevertheless, people from different backgrounds will review certain situations and arrive at a different perspective on events. In redistricting disputes, this process can

result in a different conception of justice by judges with backgrounds from different political parties. The reason this assumption is plausible is because in some instances, some judges may view the actions of the other party with increased suspicion, are more likely to be vigilant in protecting a fair process for the minority party, and thus more likely to find an opposing party plan egregious. The theories in cognitive psychology support the constrained partisan model of judicial decision making in redistricting, and that model is consistent with the quantitative findings.

Of course, my quantitative data in chapter 4 do not prove that the partisan effects we see *are* the results of judges' unconscious partisan perceptions of the evidence presented at trial. But, alternative models of judicial behavior fail to explain empirical reality. Preference-based models (that strategic or attitudinal-oriented judges are simply voting their partisan preferences) are inadequate accounts of behavior here, because otherwise different empirical results in the case data presented in chapter 4 would obtain. Under a preference-based model, we would expect judges to uphold their own parties' plans more than any other type of plan, and yet that is not the case. Rather, the significant relationship turns on whether a judge is considering redistricting plans drawn up by an opposing party. By an examination of judicial attitudes through in-depth interviews, judicial scholars can begin to understand why judges make the conclusions they do in these cases.

INTERVIEWS OF FEDERAL JUDGES – METHODOLOGY AND DATA

To better gauge the range of opinion and thought process on redistricting disputes, I rely on a non-probability sample of 22 "in person" in-depth interviews of federal judges. Aside from examining the outcome of cases, interviewing or surveying judges has

been a standard alternative method for understanding judicial decision making processes, both at the Supreme Court level (Perry 1991) and at lower court levels (Jackson 1974; Heumann 1977; Kitchin 1978; Gibson 1978; Ryan et al (1980) Scheb, Ungs, and Hayes 1989; Dobbin et al 2001). William Kitchin's 1978 study included interviews of 21 federal district judges. One of the major thrusts for his project was attempting to generate hypotheses about how federal district judges behave. Kitchin found no relation between background variables and political party and judge's role conceptions. But, given the fact that Kitchin is only examining 21 judge's interviews without additional data, we cannot be sure his results are reliable.

Taken in isolation, my interview sample of 22 judges can, at the very least, provide a window into the thought process of federal judges and can be used for generating future hypotheses about how judges act in redistricting. When used in conjunction with quantitative evidence, the "in-depth" interviews are even more valuable, supplying a better understanding of the psychology of judging in politically charged court cases.

Methodology for gathering data

The 22 in-depth interviews constitute a non-probability sample of federal judges and took place over a period of about 9 months. The first interview occurred on June 29th 2006 and the last occurred on April 12th, 2007. Although the sample is not random, the judges were not chosen haphazardly. I strived to get a diverse group in terms of political party and in terms of judges who have heard redistricting cases and those who have not.

Getting judges to talk to me was the hardest task in the interview project. I sent out letters to 133 prospective judges providing a general time frame under which I could

meet them – for example, "over the next couple of months." In the letter, judges were promised complete anonymity for their interview. This proved essential, because it was doubtful any more than a few would have volunteered to be interviewed. Some stressed this condition before allowing me to interview them. Some repeated back this condition during the interview, particularly when a sensitive issue was addressed. All judges referenced in this chapter are referred to as "she" in order to help obscure their identity. Facts of specific cases that a judge was directly involved in, if recounted here, have been changed in order to further ensure anonymity. Some information from quoted remarks used has been redacted so as not to reveal identities. Even so, such redacted portions are done so as not to obscure or remove out of context the information conveyed.

Approximately one or two weeks after mailing the letter, I called a judge's office requesting an interview. Some judges responded without the need for me to call. Two of the judges took me out to lunch. All of the judicial interviews except 2 were conducted in judges' chambers. The security surrounding federal judges is immense, and this is important for judicial scholars and court watchers of federal courts, because tactics suggested in some books I read about obtaining elite interviews cannot apply to federal judges. One 1980 book on fieldwork by then-Harvard professor Jerome T. Murphy suggested that if potential subjects did not respond to persistent interview queries, a last resort could be to go and hang outside the subject's office every day until they agreed to speak with you (Murphy 1980). According to this social scientist, "I once sat in front of a potential subject's office every day for a week until, sick of the sight of me, he consented to an interview…. Once you are inside the door, even aggressive, annoying tactics tend to be forgotten, if you are a skilled interviewer" (Murphy 1980, 82). This advice is nonsensical in today's time for going about interviewing federal judges, and it's a good way for a researcher to get arrested. Some federal courthouses will not let you in the door

of the building unless they are satisfied that you there on official court business (calling the judges' chambers before allowing me in). These seemed to be courthouses in smaller towns. Courthouses in larger cities typically had multiple layers of security within the building. I don't want to go into too much detail out of respect for federal judges and their security, but some of Murphy's tactics for getting interviews would not work for federal judges (perhaps they might work for state court judges, where security is less of an issue). Federal judges deal with high-level criminals and terrorists in their courtrooms, and so personal security is important for helping them maintain their independence and perform their job in safety. The *Justice System Journal* devoted almost an entire issue to courthouse security in America in 2007 (volume 28, Number 1), but my conclusion is that, at least with respect to federal courthouses, security appears to be sufficient. Undoubtedly, if I had tried to follow Murphy's advice, I would have been arrested. Consequently, sending a letter and following up with phone queries to the judge's office was the only option.

Of judges who received a letter and did not participate, by far most simply did not respond to my inquiries. Over 60 offices simply proffered no response to my written or telephoned inquiries (e.g., messages left with secretaries went unreturned). Another group of judge's offices stated they could not participate but gave no reason as to why (12 judges). Some judges, however, gave specific reasons for their nonparticipation. A number of judges offices said they were "busy" or out of town (16 judges), and others said they were "not interested" or "thanks, but we'll pass on that" (8 judges). There were 5 who declined to participate because they said they did not know enough about the subject. Occasionally, the employees of the federal judge could be quite short or incredulous, but the vast majority were friendly or professional. One employee at one

judge's office was even related to a famous public law scholar (whose name I cannot reveal due to anonymity requirements surrounding that judge).

Federal judges in Texas were better about returning my calls and responding to my inquiries. I can only speculate as to why response rates to interview requests were higher in Texas. Perhaps this was due to a certain respect or familiarity to the local state university as well as interest in the controversy that has surrounded the Texas redistricting fight. Some judges said they were not sure how helpful they would be because of faulty memories or because they had never heard a case before, but that they were happy to meet with me. Typically, once in the interview, these judges had more to say than they realized. All of the judges I spoke with were friendly and professional.

The interviews were conducted using a semi-structured format (Aberbach and Rockman 2002). An example of the framework of the questionnaire is included in Appendix "A." An effort was made to ask all judges mostly the same questions based on the attached questionnaire format, although some minor variation did occur (in both questions and in question order). For example, judges sometimes answered questions before they were asked. Some judges who had heard redistricting cases were asked to talk a bit more about their experiences with particular cases. Nevertheless, the goal was to get a range of opinions on the topics formulated in the questionnaire. Most revealing in general is that a number of judges in some answers used very similar language in describing their views.[141]

The interview questions were constructed in such a way as to broaden the findings of the quantitative findings of chapter 4 – namely, how do judges consider the politics of redistricting, and how might alternative institutions, such as redistricting commissions,

[141] The answers yielded in these interviews helped form the basis of a number of the questions that comprised a written survey that was later mailed and is the basis of a future project.

ameliorate this feeling? If one operates on the assumption that judges are not prevaricating partisan hacks, then simply asking judges whether they vote their partisan preferences would be insulting and fruitless. As the quantitative data illustrate, the voting patterns of judges in redistricting are more complicated than simple rote application of partisan preferences. Furthermore, the voting patterns suggest that judges are concerned with fairness in the redistricting process because they uphold redistricting commission plans at higher rates and because they view opposing party plans more skeptically.[142] Consequently, it was necessary to approach the subject from a different angle in interviews.

While a number of issues were addressed in the interviews, judicial perceptions on the following 5 topics were most relevant to my analysis in this chapter:

1. the clarity of redistricting law
2. judges' role perceptions in redistricting disputes (i.e., whether they thought their involvement was a "good" thing or a "bad" thing).
3. whether the fairness of the state process matters for a judge (i.e., does it matter if the entire redistricting process in the state is controlled by one party?).
4. perceptions on trends in states toward creating redistricting commissions.
5. the extent to which a judge's perspective might change when overseeing a redistricting commission as compared to a legislature.

[142] As I suggest in chapter 3, while many judges are undoubtedly concerned both about the fairness of the process and about redistricting plans that are outrageously partisan. However, because of a judge's own background experiences, that judge may have a different view of what is outrageously and unconstitutionally partisan, and a judge is less likely to believe her own party engaged in outrageously unconstitutional partisan gerrymandering.

By focusing on the following topics, we might better understand why we see the judicial voting trends in redistricting disputes. In addition, judges sometimes offered their own assessments about how politics may or may not play a role in judicial decisions.

Composition of the Interview Dataset

While the dataset of federal judges was not a random sample and was not geographically as diverse as one would desire, there were a fair cross section of federal judges representing diverse backgrounds. I interviewed 20 district judges and 2 circuit judges. The largest skew in the dataset was geographic. Some were chosen simply because of proximity to the University of Texas at Austin. Out of 22 interviews, 14 were of judges in the Fifth Circuit (from Louisiana and Texas), 2 from the Second Circuit, 2 from the Third Circuit, 1 from the D.C. Circuit, 1 from the Fourth Circuit, 1 from the Seventh Circuit, and 1 from the Ninth Circuit. Many judges were chosen because they had heard a redistricting case at some point (15 in the sample had heard some sort of redistricting case, either a statewide dispute or local case. Of these 15 judges, 11 of them had sat on a three judge court reviewing a statewide redistricting plan that was ultimately published in the federal supplement). Seven judges I interviewed had never heard a redistricting case before their court.

The political and demographic make-up of the interview set of federal judges included 11 Republicans and 11 Democrats, 19 men and 3 women, 21 white and 1 Hispanic, 12 active judges, 9 senior status judges and one retired judge. There are 11 judges appointed by Republican presidents, and 11 appointed by Democratic presidents (two of the judges were appointed by presidents of the opposite party). Four of the judges used to be legislators at one time in their political lives.

ANALYSIS AND FINDINGS OF JUDICIAL INTERVIEWS:

Clarity of the Law of Redistricting and Supreme Court Precedent

One important objective of the interview process entailed understanding how the judges I interviewed felt about the clarity of redistricting law, as this might have some bearing on their decision process. If a judge thinks precedent is unclear, what judicial tools does she use to arrive at her decision? If a judge believes precedent is clear, what is that precedent? As I already suggested in chapter 2, a number of areas of redistricting law are relatively murky. A few doctrines stand out. One person one vote constitutes a standard that is usually clear in application. The closer a plan approaches equal population, the more likely it will be upheld. Additionally, precedent leans toward courts exhibiting deference to the legislature. But many other standards are left up to the courts to ponder. These conclusions do not vary from the answers offered by many of the federal judges interviewed.

Generally speaking, a majority of the interview subjects did not feel redistricting law was particularly clear. According to Tables 5-1 and 5-2 (See below), at least 12 interviewees thought redistricting law was either somewhat unclear or very unclear in at least one area such as partisan gerrymandering or racial gerrymandering. Tables 5-1 and 5-2 paraphrase Republican and Democratic judges' responses on several of the subjects analyzed in this chapter.

Table 5-1 Paraphrases of Republican judges responses on redistricting

Partisan make-up	Clarity of the law	Does fairness matter in the state process?	Treat commission plans differently?	Role of courts in redistricting
R	SCOTUS not helpful	Yea, legislative intent	I wouldn't think so	Involvement good, ct must protect voting rights
R	Not clear			Stay out, but ct final arbiter
R	Yes and no	Does not matter	Goes into the judge's decision calculus	Decide based on law, not politics
R	No guidelines, [says judge, but then later says]: it did seem it was pretty clear to me	In theory, irrelevant, but…	More deference	Limited
R	Partisan gerrymandering is ambiguous, but one person one vote is too clear, too specific.	Absolutely. It matters what they produce	Depends on what SCOTUS said. I wouldn't be applying a different standard, but I think from a public view, a commission would look better and make the parties work together	Role of judges is whatever the supreme court says it is… Philosophically, having judges there will prevent some of the excesses.

Table 5-1 Paraphrases of Republican judges responses on redistricting, cont.

Partisan make-up	Clarity of the law	Does fairness matter in the state process?	Treat commission plans differently?	Role of courts in redistricting
R	Don’t know	It might, but intent matters	Maybe in borderline case, but not really	They’re politically charged cases, but our job is to hear constitutional cases
R	Pretty clear, except political gerrymandering	No opinion, but the Court is going that way	No, unless SCOTUS says so	Preference not get involved, but we're default mechanism
R	Not sure, but standards not as clear	[reality is, yes?] Whether I think something is fair or not depends on the outcome and not the process followed	Don't know	VRA gives judges role, struggle by judges not to let politics overtake standards
R	Redistricting criteria murky	Not sure what answer is	Don't know… but if process is fair, and not "crassly political or racial" then it's more likely to survive review	I would defer unless there is racial discrimination, because courts have gotten to the point where it's a legislative function
R	Not going to find clear Supreme Court precedent	Depends on statute, what I think is irrelevant	No difference… I'm a social contract kinda guy	Follow the law, not a politician… must have not just actual fairness but perceived fairness

Table 5-1 Paraphrases of Republican judges responses on redistricting, cont.

Partisan make-up	Clarity of the law	Does fairness matter in the state process?	Treat commission plans differently?	Role of courts in redistricting
R	"I thought that we were dealing with a pretty clear case"	Potentially yes.	No, I would've felt the same way.	It ought to be filed if appropriate and [you] receive it with skepticism. (some deference to legislature is appropriate)

Table 5-2 Paraphrases of Democratic judges responses on redistricting.

Partisan make-up	Clarity of the law	Does fairness matter in the state process?	Treat commission plans differently?	Role of courts in redistricting
D	Pretty clear.	Doggett's district is unreasonable.	Deference, like review from a social security hearing.	Umpire, secondary system to regulate legislature.
D	Little guidance from SCOTUS, but laws are clear enough for legislature to stay out of the gutter.	It should matter.	Give deference.	Rubberstamp, unless legislature really screws up.
D	Not clear.	Sure.	I don't think my perspective would change, because I think deference should be given [to the legislature].	Need to be deferential… they're elected, we're not.
D	Clear that courts cannot do much, can't ensure legislature passes best plan, just that the plan passes minimal constitutional scrutiny; but, not much guidance.	[Apparently, yes.]	Don't know.	Whatever SCOTUS says it is, but we couldn't just draw the lines in our 1p 1v case, we had to just send it back to the legislature under the law.

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Table 5-2 Paraphrases of Democratic judges responses on redistricting, cont.

Partisan make-up	Clarity of the law	Does fairness matter in the state process?	Treat commission plans differently?	Role of courts in redistricting
D	Law not unduly complicated.	When one party does the line drawing, it is an appearance of a lack of impartiality and many times does lack impartiality.	More reliability, they would be impartial.	Follow the law, don't overreach into the political realm.
D	It's pretty good, but the devil's in the details.	Yes.	Comm.. probably do a better job.	Resort to courts is the last resort, they just follow the law.
D	Depends… one man one vote objective but law is still to be developed about some way of fairness	Partisan leg by itself does not matter, but if it runs roughshod over the minority party.	Good chance of survival.	Oversight capacity and involvement is a good thing; should enforce min. standard of fairness.
D	hope my opinion was clear, judge has to rely on good lawyers.	If partisan leg? yea, I think it makes it suspect.	You'd be inclined to give deference	Do the right thing.

Table 5-2 Paraphrases of Democratic judges responses on redistricting, cont.

Partisan make-up	Clarity of the law	Does fairness matter in the state process?	Treat commission plans differently?	Role of courts in redistricting
D	There were precedents that had to be accommodated, and language of the statute is not crystal clear, but I got the message.	It's hard to deal with in the abstract.	It depends on how the commission was created.	It's a necessary evil.
D	[This judge was hesitant to make a guess about the state of the law, but later said law was unclear].	Yes.	Maybe in borderline case.	We are court of last resort.

Only 6 judges thought the law was "pretty" clear or very clear. Three judges did not know or have an opinion, and one judge's answer was nonresponsive. Most Republicans either did not think the law was clear, or thought that only some areas of redistricting law were clear. Only one Republican believed the law was clear with respect to her case, and three other Republicans gave answers to the effect that they didn't know or they were equivocal in their response. According to one Republican judge, standards at the Supreme Court seem to change from case to case.

> I think it's clear until you get to the next case. That's the problem. The Supreme Court says, "You did it constitutionally here, but in the next case, we might not find that way." So there is little evidence for the next case. There are some things that are elementary. But then they [SCOTUS] say politics is ok to use… unless it is so bad of a partisan gerrymander…. That leaves the door open for judges to overturn it. (interview, federal judge #1).

Another Republican judge had this to say about Redistricting law:

"I can say that I have found the redistricting criteria to be murky.… Do they really mean compact or do they not? Are we allowed to look at race or not? Whether you can have a single district versus a multi-district [system]" (federal judge #20).

Some judges emphasized the fact that certain aspects of redistricting law were unclear, while other aspects were clearer. One Republican judge noted, "Certainly with partisan gerrymandering, it's ambiguous, and no one knows what it is. So, it's not clear with references to partisan gerrymandering. One person one vote…It's too clear, too specific" (federal judge #12).

Some Democratic judges also thought the law was unclear. One Democratic judge had the following reaction when asked to comment on the clarity of the law:

"[Judge laughs]… I think the recent U.S. Supreme Court case sort of tells it all. It's not clear. What you have are three opinions in that case in a 5 to 4 system. I haven't really studied the Court's opinion, but you got a Republican 5 to 4 majority, and I think it's predictable on that score" (federal judge #7).

Another Democratic judge, operating in this Fifth Circuit, thought the law was unclear, and by way of example, she pointed to the trial court's split decision in *Lulac v. Perry*, saying,

> I don't think it's very clear. Just to allude to the Perry case…. Those are our finest judges on the panel. It's my understanding that they [the Supreme Court] went with Judge Ward's dissent. Higginbotham and Rosenthal are two of the smartest people I met and they got it wrong. You can't judge this outcome by one case, but if things were clear, they would have gotten it right first. The line is murky, and the Supreme Court has struggled mightily. (federal judge #4).

She is referring to the fact that before *Lulac* (the Texas case) was appealed to the U.S. Supreme Court, the panel split 2 to 1 in favor of the Texas legislature. The Supreme Court later struck down the Texas plan and reversed the three-judge trial court's decision. The panel had split along partisan lines.[143] However, if the law were clear, the panel would not have been in disagreement. Nevertheless, she also believed that judges weren't totally out there operating in the dark. Asked whether Supreme Court precedent offered any guidance in this area, this same judge answered,

"Some. I don't think we're out there in the woods without a flashlight. Still, you get to a fork in the road with a flashlight, and you don't know which way to turn… But there are guideposts to get you to the finish line" (federal judge #4).

This last comment is quite interesting, and it is not necessarily a contradiction from the judge's previous statement. Federal judges do have some case law or statutory framework to work with, but this framework doesn't always tell a judge how to decide the outcome of a case, only the parameters under which the decision is made. If nothing else, the constitutional caselaw and VRA statutes usually help the trial courts focus on what are the relevant facts, even if different courts arrive at different finish lines.

Other Democratic judges thought that redistricting law offered some minimal guidance for states:

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[143] The judge I was interviewing did not think the split along party lines was significant.

"I think the laws are clear enough that the legislature knows how to stay out of the ditch. You don't draw districts that are like a mile wide and 300 miles long" (federal judge #10).

This comment is an allusion to the Lloyd Doggett bacon strip congressional district that spanned from Austin to the Mexican border. The implication is that some plans are just so outrageous that it is "obvious" they don't comply with the law. As to Supreme Court guidance, this judge was less optimistic:

"First, it's a hard area to offer guidance. It's hard to enter the political thicket. Second, I think the Supreme Court is so conflicted with it [the issue], there's very little guidance coming out of the Supreme Court" (federal judge #10).

Finally, at the other extreme end of the spectrum were a couple of judges who thought the law of redistricting was fairly clear: "It's pretty good guidance. The devil's in the details" (federal judge #6). The judge then went on to use the North Carolina district that was no wider than a highway in some parts as an example of an unconstitutional district. This same judge also thought that the Texas redistricting plan was unconstitutional. But even this judge prefaced his statement by saying, "It's not an area of the law that can be settled because it's so fact driven" (federal judge #6).

The notion that some areas of redistricting law are unclear and that the Supreme Court has failed to offer clear precedent helps one make sense of the empirical findings of chapter 4. Areas of the law that are unclear require judges to judge the facts and arrive at a fair and just decision. If the law is heavily "fact driven," then judges' perception of the facts will help guide them toward a "just" decision (with varying conceptions of justice based, to some extent, on a judges' own personal background). The Texas case was a difficult case for the trial court, as it was twice remanded by the Supreme Court, each time with seemingly opposite instructions. Accordingly, the lack of clarity meant that judicial decisions in the case would be driven by the facts and judicial perceptions thereof. Amongst Democratic judges in my interview set, those with Democratic

backgrounds who commented on the Texas case were more certain that the Republican-controlled Texas legislature went outside its constitutional prerogative in crafting its redistricting plan. Whereas, Republican judges interviewed, were less likely to mention the Texas case, and those who did, generally speaking, were more indifferent about what the legislature did.

How Judges See Their Roles in Redistricting

Lots of research in judicial behavior has been done in the area of role theory, examining how judges perceive their roles as judges (Jackson 1974; Gibson 1978; Kitchin 1978; Scheb, Ungs, and Hayes 1989). In my interviews, I asked judges whether they thought judicial involvement in redistricting was a "good thing" or a "bad thing" and what these judges saw as the role of judges in redistricting. The law of redistricting tends suggests that courts exercise deference and caution in dealing with redistricting cases. *See, for example Reynolds v. Simms* 377 U.S. 533 (1964); *Wise v. Lipscomb* 437 U.S. 535 (1978). The Supreme Court has said, "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt." *Wise v. Lipscomb* 437 U.S. 535 at 539. As chapter four makes clear, most redistricting plans that land in federal court, after proceeding to the full merits, are eventually upheld by the court. Most of these plans that are upheld are plans that are derived from a divided government or were constructed by the same political party as that of the reviewing federal judge. A cynical view of these findings might interpret federal judges as simply upholding their own party's plans because judges are trying to maximize their own party's interests (although such an interpretation would not account for why divided government plans are upheld at higher rates). An alternative view might presume that federal judges perceive their roles in redistricting lawsuits as limited, and are loath to get involved unless they perceive a grave injustice occurring. Such a perception would

indicate that federal judges' views about their own roles are consistent with the Supreme Court caselaw regarding the general notion of deference accorded the legislature in such political matters. In this context, judges are more likely to perceive the opposing party's plan as gravely unjust, and less likely to believe plans created by their own party are unjust (and this may be an unconscious process and evaluation).

The interview data bolster the hypothesis that judges are less likely to strike down redistricting plans because they see their roles as limited. Of the 22 judges, 13 saw there role as limited, or saw the federal courts as courts of "last resort", or the final arbiters. While opinions varied among some judges, Democrats and Republicans were not really split on this issue. One Democratic federal judge was skeptical about the court's role, saying,

> I think we need to be deferential to what the legislative body has done. I don't think we ever ought to have a role as the redistricters per se. [The legislators] They're elected, and [the federal judges] we're not. At the same time, we have to be aware that they are not doing everything in entirely their own self-interest, but that they have the electorate in their hearts too (federal judge #7).[144]

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[144] This judge's views about his reticence in having a court draw lines can be seen in a story she recounted about a Louisiana redistricting fight in front of Judge Elmer Gordon West after the 1970 Census. As she recounted:

> Gordon announced in advance that he appointed a special master to prepare his own reapportionment. He decided that the entire legislative plan was unconstitutional from a racial standpoint. What the plan [in dispute] did was create multimember districts that diluted the black vote.
>
> Ed Steimel was the special master appointed. Gordon made the mistake of announcing in advance that he would adopt whatever was prepared by the special master. This violated the civil rules, because he wasn't even going to have a hearing. West just rubber-stamped it [the plan created by the special master]. Ed Steimel was a big business lobbyist, Council for a Better Louisiana…. It went to the Fifth Circuit, and it went back because the Court said he [Gordon] violated the rules. So when it came back, he had a hearing, and then rubber-stamped it again….
>
> Again, here's a district judge [Judge West] who has simply handed responsibility [for redistricting] to an unelected person to draw politically charged lines for legislative districts. That's the kind of illustration of how difficult this area is. West got this put in his lap, and he couldn't do it….
>
> Are courts really qualified to do this? I question whether they are. You ought to send it back to them [the legislature] if the lines are so bad, so that if you can't approve the plan, you send them back. Of course, sometimes it's like the integration of schools where a

Another Democratic judge had a somewhat similar viewpoint. When asked about what a the judge's role is, she stated,

> Figure out what the law is and apply the facts. My view is that given recent Supreme Court cases, they may be right, but they exacerbate the problem. I think [the law says that] you ought to defer to the legislature. If you have a Republican legislature, they ought to draw the lines. If you have a Democratic legislature, they ought to draw the lines…. I think that's where we are in the Court. Unless there's a Voting Rights Act violation, the legislature can do whatever they want. Unless they're just totally dominated by stupidity, it's not hard to draw lines to comply with the Voting Rights Act and the Constitution. What the judges do, unless the legislature really screws up, they got to rubberstamp it. (federal judge #10).

When asked if this is the way it should be, this judge responded,

"It's easy to criticize and hard to come up with a system. It'd be very hard for judges to get down into the weeds and start drawing lines" (federal judge #10).

This Democratic judge believes in deference to the legislature, but judges may justifiably step in if "the legislature really screws up."

Several other Democratic judges used the words "last resort."[145] Republicans also believed courts should only play a limited role. One circuit judge I interviewed who had sat on a three-judge court said,

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> judge is up to here with it, because they [the parties] never do it [never fix the issue]. Finally, the judge says, "I'll do it myself." (federal judge #7).

[145] One Democratic judge, who makes the application of the law seem too easy, describes the court's role in these terms:

> It seems to me that the Supreme Court and Congress have been clear, that the resort to the federal courts, it is the place of last resort when the peoples' elected representatives won't follow their statutory and constitutional responsibility. It is the process we use, short of getting out on the street with baseball bats [to settle the matter]. It's only when the peoples' representatives don't follow their sacred obligation [that the courts are forced to act]. We follow the law based on the facts. ***It's not what we want to do***, it's just what the law requires to be done.

"If it's a two party system, it's checked by the voters. But I think courts have gotten to the point where it's a legislative function, and unless [there is racial discrimination present], I personally would defer [to the legislature]" (federal judge #20).

Another Republican district judge, appointed by a Democratic president, also felt the courts had a limited role in the matter:

"I think they [the courts] serve a useful purpose in trying to make sure that the system operates [on] democratic principles. But we [the courts] have a limited role" (federal judge #16).

Finally, one Republican judge, who used to be a legislator, recommended that courts stay out of the process if possible:

> The role of judges is to stay out, whenever plausible, in deference to the legislative branch, and not to impose Court-ordered districts unless there's some unconstitutional treatment of some group…. Of course, it's always alleged unconstitutional treatment [and we have to determine whether it is]. With the recent Supreme Court opinion, instead of decennial redistricting fight, it might be an annual litigation boom. Most would rather not have the burden, but there's no way to get around it, as the court's always the final arbiter. (federal judge #1).

Other judges expressed fewer reservations about intervening. A Republican recognized the court's need to step in where "excesses" occur. While discussing the role of a judge, she made another very important point about partisanship and judicial perceptions.

> From my perspective, the role of judges is whatever the Supreme Court says it is. Philosophically, having judges there will prevent some of the excesses. And, when you have a situation where here, [in X state], and [over there, in Y state] all the houses are the same party, there is a tendency to overreach [on the part of the legislature]. That claim was made in our case, but there were a lot of Democrats that voted for the plan. So, there was some accord. So, it was not a straight line party vote. (federal judge #12)

This quote is quite important, not just because of the judge's conception of role orientation, but also because it illustrates how the judge was motivated in her case (where she was a Republican and the legislature was controlled by Republicans). She upheld the

plan, not because it was her party's plan, but presumably because she perceived it to be a fair plan. As I will note later in the paper, her Democratic counterpart on the panel came to opposite conclusions about the fairness of the plan that was created by the state legislature and she voted to strike down the Republican legislature's plan.

Deference was not the only concern of some judges when describing the proper role. A couple of Republican judges, when discussing a judge's role, talked in terms of the judge's struggle not to allow politics overcome judicial standards in such "politically charged cases.

Finally, several judges, both Republicans and Democrats, responded with this question by stressing that there role is whatever the Supreme Court says it is, and that all they do is follow the law. One judge said she's "not a politician", and that she will "follow the law." She also perceived here role as being someone who will listen to people's grievances, saying,

> Now, there are some instances where you get a feel for what's going on. In one case, there were some home grown political activists [and they just wanted their day in court]. Part of the role is [to act not just with] actual fairness but perceived fairness. And so I set aside a day and I let them come in and listened to them.
>
> And if you want people to follow the law, they need to believe that they have a place where their grievances can be heard, and sometimes that's all they want. (federal judge #14)

Judicial perceptions of their role are important in understanding why judges tend to uphold so many redistricting plans that are legally attacked.

Does Fairness in a Redistricting Plan Matter? – Partisan Conceptions of Fairness

There are no important redistricting cases that argue that "fairness" is required in redistricting. There are relevant court cases, so constructed, that might make up a body of law that could be viewed as "fairness" requirements. But no law or court case specifically

mandates that legislatures redistrict in a fair manner. As one circuit judge blatantly told me,

"I don't think fairness has any other thing to do about it. I think that may sound like puffery, but that's the real answer" (federal judge #8).

Nevertheless, in a trial setting, the fairness of the process can affect how a judge views the legislature's actions in regards to how it met other criteria. And notions of fairness are where partisan affectations can influence perceptions of evidence (Rowland and Carp 1996)[146], particularly when conceptions of the law are unclear and no judge is completely sure what the standards are. If we return to Republican federal judge #12's quote earlier in this chapter, she argues that courts do have a role to play in curbing "excesses." According to judge #12's experience with the case she heard, although the legislature was controlled by Republicans, the plan she upheld was fair, because some Democrats voted for the plan. However, her Democratic counterpart, who also sat on the same three-judge panel, had a totally different perception of the actions of the legislature when I interviewed her. She describes her frustration in the following way:

> It was frustrating to see how these lines were drawn that just didn't make sense, other than political sense.…
>
> [later in the interview] That's what's unfair about the whole system, is that they draw up a plan without input from the minor party. That's what I particularly saw in this case. The majority of the state legislature determines who's going to sit in Congress. (federal judge #13).

Here are two well-meaning judges, both of whom, when asked about the role of judges, made the same remark as part of their answer that it was "Whatever the Supreme Court says it is." How could they come to such opposite conclusions about the state legislature's plan they both reviewed? In fact, the Democratic judge had stated that her role was only a limited one, while the Republican judge felt courts had the right to

[146] As recounted in Chapter 3, Rowland and Carp argue that partisan affectations can shape perceptions of evidence in trial court settings, and this, I believe, is why there appears to be some partisan differences in decision making.

intervene to stop excesses by legislatures. Yet the Democratic judge voted to strike down the Republican state legislature's plan and the Republican judge voted to uphold it. Clearly, their perceptions about the fairness of the plan diverged. And, it is likely that their perceptions of fairness were formed somewhat by their personal background and life experiences.

A number of judges, both Democratic and Republican, noted the influence of life experiences and personal background characteristics. One Republican judge said about redistricting and the courts,

> In my view, there is no way [for judges to divorce themselves completely from politics]. For most of whom, who have had political activities [before coming to the bench], there is no way you can remove that experience or personal biases, and it stays there, and you see it glaringly, and you look at the background of the people, but it all goes back to their personal biases. (federal judge #1).

Another Republican judge was even franker. When asked about whether fairness mattered in these cases, she complained about the unfair treatment Republicans got at the hands of Democratic judges in Texas,

> Whether you think something is fair or not depends on the outcome and not the process followed. For example, in 1980 Bill Clements was governor, and the legislature was controlled by Democrats. But, Clements was able to use his authority to obtain a redistricting plan more favorable to Republicans than ever before. Then, litigants filed suit in Judge [X's][147] court to set that aside, and I thought that was unfair. And, the Fifth Circuit set that aside. But, in the meantime, the election was held using Judge [X]'s districts, and the outcomes were for the plaintiffs. Then when the plan came back [from the legislature], the incumbents used their influence to get the court to go along. We had a court set aside a legislature's outcome, and that seemed to me to be an unfair result.
>
> And then in this decade, the legislature punted to the court, and the court drew lines [using as a baseline the same plans from the 1990 redistricting. Then "Tom Delay" and his guys came in and drew lines in 2003]. **I thought there was a strong argument for undoing the injustice from 10 years ago.**

[147] Out of respect for the judge interviewed, I redacted the name of the judge he was referring to. However, the Judge was a well-known federal district judge in the Fifth Circuit for many years

> It's like the arguments in the Middle East, because you try to get back for the last retaliation…. [It's like redistricting] where there's been so much unfairness over the years. (federal judge #5)

Earlier in the interview, in talking about one of her colleagues who is also in the same circuit, the Republican Judge said,

"All the cases filed by the liberal Democrats were filed in [City Y]. He was the only judge in [City Y] at that time. My belief is that if you asked him, he would say he is a good Democrat. And he seemed to hold in favor of the plaintiffs a lot."

This Republican judge felt that there was a "strong argument for undoing the injustice from 10 years ago." Apparently, this judge saw nothing wrong in the Texas redistricting plan, but felt that Republicans had been treated unfairly in past court cases, and that the Delay plan rectified past treatment.[148]

Perceptions of fairness of redistricting plans often varied based on the prior party of the judge. For example, another Republican judge seemed to be not too concerned about the Texas case. She said it "just seems to be another political fight" (federal judge #15), but she downplayed the fact that the Texas redistricting might have been unfair, saying,

"It might, but it's hard to say. While it is a Republican controlled legislature and governor, there are some Democrats in the legislature, and you never know how much influence they have. What they did would matter" (federal judge #15).

Meanwhile, some Democratic judges in the Fifth Circuit had quite the opposite reaction to the Texas Republican Re-redistricting of 2003. One Democratic judge summed up her impressions of redistricting litigation, and the court's job, and then commented on the Texas case. This quote was recounted in an earlier chapter, but it is worth repeating here:

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[148] Michael Barone in his Almanac of American Politics gave the 1991 Democratic gerrymander of Texas the Phil Burton award because it was so good at insulating Democrats. Burton became famous in redistricting circles for engineering the Democratic gerrymander of California after the 1980 Census.

> It's political in a broad sense, and people who want to get elected prepare the proposals. All the court can do is to see if it is a one person / one vote situation and it's not offensive racially. And the other thing a court ought to look at in the gerrymandering involved in many of those [cases], is whether the proposal is so outrageous as to violate a constitutional gut reaction. That, of course, is what the recent Texas case is on. Constitutionally…. a redistricting proposal should not be too Republican or Democrat, or too one way racially. (federal judge #7)

Several other Democratic judges had similar conceptions of the Texas case:[149]

> Fairness and reasonableness are similar terms. What I know about the Lloyd Doggett district, that's unreasonable[150]…. But, you know the legislature can be silly because they're human beings. [You know, the Texas legislature only meets for a few months every two years]. What's the old expression? When the legislature is in session, you better lock up your wife and daughter and horse. People get the government they deserve, and if you vote for these reprobates, that's what you'll get. (federal judge #9).

One Democratic judge thought the Texas legislature's action damaged representative government. This quote, which was mentioned in chapter 3, bears repeating:

> All I know is what I read in the papers about the Texas case. But I cannot imagine a more damaging blow at the foundations of the republic which is representative government than what I've read in the paper about the Texas case….. how it was done…. federal assets used…. Democrats leaving the state for Oklahoma. What did the children think?" (federal judge #6).

Some Democratic judges felt, quite rightly, that the Texas plan was unfair, just as the Republican judges' perceptions, quite rightly, were that the plan was justified by undoing injustice from previous plans. Human nature means that judges will decide cases differently because of different life experiences, both political and otherwise, and many judges recognize this fact. The following Democratic judge touches on the same point that federal judge #1 earlier – that background influences matter – but this judge does not see them as overriding the law:

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[149] Another Democratic judge said, "I think it's really hard to have a judicial fix, because judges should have deference to political fights. But political fights ought to be showing more restraint. I think what Delay did was a total outrage. It was so partisan-driven." (federal judge #10). But it was unclear whether this judge would have voted to strike down the Texas plan. In his interview, he noted several times how the courts should show deference. Whether fairness should matter, he stated, "I think it should, but I don't think it necessarily does. I don't think fairness is the bottom line [as for the law]. I think you can redistrict as long as boundaries are not too irrational, or you dilute minority rights" (federal judge #10).

[150] Lloyd Doggett's district, after the initially Texas re-redistricting in 2003, was an elongated "bacon" strip that went from Southeast Austin all the way down to the city of McAllen on the Mexican border.

> I choose to believe certainly that at the district court level, every man or woman are doing their dead-level best to follow the law and to follow the facts as they find them…. That's the way the law works. One Fifth Circuit judge said a quote that I remember about what they do. "You know they're not last because their right, they're right because their last" But I do believe everybody does the best they can everyday.
>
> Someone who's been to prep school, and private schooling all their life, you know, a trust baby, I'm sure we have different experiences. Our life experiences will give us different perspectives. (federal judge #6).

Another Democratic judge said:

"And I would hope that we have been politically neutered after becoming federal judges and you don't try to draw lines to help your political friends. I would hope everyone would do that. Sometimes I get a little cynical" (federal judge #9).

Several judges mentioned that they were annoyed by the fact that the media in these cases typically point out what president appointed the federal judge.

> I know the public perception [sees it as political, because] the media [says] who appointed these federal judges, they always point that out. I don't know if that means there's an expectation of how it comes up based on who appointed them. The judges are supposed to not be political. (federal judge #15)

Some judges were less certain that previous background ever enters into judges' minds. Here are what a couple of judges stated on this point.

> We are appointed for life, [and it] works. [It] removes you from the political process, and you're not looking over your shoulder [for the next election]. (federal judge #2)
>
> There are some elections here [in Washington State] by partisan candidates, and generally in the legal community, that is not seen as a good thing. The tradition [here in Washington] is that when a partisan becomes a judge, he becomes nonpartisan. I used to be a County Chairperson of the Republican Party. When I became a judge in 1967 I became nonpartisan. You soon learn to think as a nonpartisan. In a partisan election system, whatever a judge does has the appearance of [bias]. (federal judge #11).

Along this same point, another Republican judge who sat on a redistricting panel with two Democrats felt that politics did not explain her colleagues' reluctance to see the facts of the case from her perspective:

> Judges often are political animals appointed to their position as a result of prior political activity. My experience has been… I think federal judges do not allow their prior political affiliation to have an influence on a decision. I don't think that because [Judge Y] and [Judge Z] were Democrats, that that explains their decision in this case. They just took the easy way out…. (federal judge #21).

This judge did not consciously see her decision as being a partisan one, and at a certain level, she is right in terms of the legal arguments and in terms of the dissent she issued. A portion of the case included a partisan gerrymandering claim by Republicans. She discounted this claim as insufficient, as did her colleagues.

However, how she characterized other experiences in the trial gave clues as to how she may have been affected by the politics of the process. Even though she dismissed the partisan gerrymandering claim of the Republicans, there is the possibility that the claim colored her perception of the overall legal status of the state's plan, which she saw as faulty. The politics of the parties in the case wasn't hard for her to take notice of. For example, she characterized the state's attorney, who was defending the state plan that she ultimately struck down, in the following manner:

"[The state's attorney] was a died-in-the-wool Democrat, and he was the lawyer in the case, and everyone relied on him. He's a go-to lawyer. He could represent anybody. But yes, he was a Democrat" (federal judge #21).

One of the prominent Democratic political actors involved in the case she referred to as an "absolute disgrace". Finally, she felt that a lot of the Democratic actors involved in the case had engaged in some political shenanigans which she thought were legally inappropriate.

All this is not to say that the judge was being disingenuous when she stated that party identification had nothing to do with the decision of the panel. Certainly, from my

interview and from a reading of the opinions in the case, there were other important concerns that factored into this judge's decision.[151] Nevertheless, it seems quite plausible that on a secondary level, her perceptions of the state's action were being driven by perceptions of the Democratic actors involved, many of whom the judge felt had engaged in political shenanigans. And these perceptions ultimately helped her shape her opinion of the legality of the state's plan. Thus, although the judge honestly saw her own decision in nonpartisan terms, there were political events in the dispute that affected her in ways that heightened her concern about the process more so than her Democratic colleagues, as her interview revealed. This judge was unsure why her two Democratic colleagues on the panel had a different view of the events:

> One of the things that was surprising to me was Judge [Y]'s indifference to the facts on liability and the acquiescence on [another legal matter][152]. [Judge Y]'s just a very fine judge, a real legal scholar. I was really shocked that [Judge Y] could have the attitude [she] had. [Judge Z] was a different story, and [she] didn't really surprise me (federal judge #21).

Apparently, the Republican judge was much more likely to be suspicious of the motives of the Democratic actors involved in the redistricting plan.

Of course, while judges might be affected by perceptions of fairness based on their own experiences in their political background, it's important not to forget that these judges also strive for objectivity and adherence to the law. In theory, some judges might look at a process where one party controls the entire process with skepticism, even if in practice judges judge their own party's actions less harshly (or are more likely to consider mitigating circumstances. As one Democratic judge said about reviewing a plan drawn by a political party that controlled the entire process "I think it makes it suspect." (federal judge #19).[153] A Republican district judge from the Ninth Circuit had a somewhat similar

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[151] I don't want to reveal too many facts so as to protect the identity of the judge. But, these other factors, while not partisan issues, they are paralleling the partisan dispute and they are such that one would expect conservative Republicans and liberal Democrats to end up on different ends of the legal debate.

[152] This matter has been redacted to protect the judge's identity.

[153] Another Democratic judge, when asked about whether a highly partisan legislature matters, said,

view that a process controlled entirely by one party potentially might be suspect.[154] He said,

"That's not necessarily a bad thing. [What matters is the legislative intent]. If the intent [in the legislative record] is to disenfranchise blacks, Hispanics, Democrats, then it's a suspect redistricting" (federal judge #11).

This Ninth Circuit Republican's comments illustrate that judges strive to be nonpartisan. Regardless of party, the federal courts have little patience for egregious partisan plans:

> I think it matters greatly based on whatever the facts are and if they're trying to get a result [that runs counter to democracy]. I think partisanship at that level is a threat to the Republic…. If it's just political, too political, and not within constitutional parameters, then strike it down. If it will hunt, let it go. (federal judge #6).

"No, not by itself, as long as they observe the Voting Rights Act, and also if they have a decent regard for the minority party. To run roughshod over the Democrats does not give one confidence in Democratic principles, and that is what gives a role for the courts" (federal judge #3).

Another Republican judge, when asked whether it matters if only one party controls the process, responded,

> Potentially yes. I'm not sure what federal constitutional right would be involved when you're talking about the state legislature. If you're talking about federal districts, you'd get into some area, right to petition and so forth. But as far as state districts, if it became so extreme that one party is essentially shut out of the right to have any role in state government [then it could matter]. There ought to be some federal constitutional right implicated. But, I've never heard that challenge. (federal judge #21).

[154] This Republican judge from the Ninth Circuit wasn't sure what to make of the Texas Redistricting case. Although she did not criticize the state legislature's actions, she seemed to suggest that the state is just more partisan than other areas of the country. When asked what she thought about the Texas case on redistricting, she stated:

> I don't know anything about it. But my only thought is Texas is a lot different from the rest of the country. When I went to federal judicial college [when I first became a judge], they were showing something about a rape case, and [one fellow from Texas said], "Rape? Down our way, that's not rape, that's just tough love"…. And Texas has partisan elections of judges? What kind of nutty thing is that? (federal judge #11).

After being apologetic and saying he did not want to "beat up" on Texas, the judge says shortly thereafter,

"The tradition [here in my state] is that when a partisan becomes a judge, he becomes a nonpartisan. I used to be a [_____] of the Republican Party. When I became a judge in [X year], I became nonpartisan. You soon learn to think as a nonpartisan..." (federal judge #11).

As a result, plans that are viewed as outrageously partisan are going to get higher scrutiny in the courts. But, what constitutes outrageousness can be a matter of perception.

To reiterate, the empirical evidence in chapter 4 shows that federal judges tend to vote to strike down plans of the opposite party at significantly higher rates compared to other plans. However, judges do not treat divided government plans any differently from plans drawn up by the same party as the judge. The interviews suggest that judges are more prone to act when they see the need to correct a perceived injustice or unfairness. However, while judges honestly want to interpret the law and correct injustice, sometimes their partisan leanings unconsciously affect their perceptions of the facts. If the law is unclear in every respect except for general notions of deference, then all judges might have to rely on is their own sense of fairness and justness. Part of this fairness depends on whether the minority party had input in the process, and of course, perceptions can differ amongst judges in whether a minority party had influence. This provides an alternative explanation to the idea that judges are simply voting their attitudes or partisan preferences.

As I conclude in the final chapter, normatively speaking this is not a situation that should be automatically disconcerting to lawyers or political scientists. First, as the quantitative data show, judges are not voting to strike down opposing party plans 100 percent of the time. It is important to note that *judges sometimes strike down their own party's plans or uphold opposing party plans*. There are number of examples where this is the case. For example, judge Grady of the Fifth Circuit, who was appointed by President Reagan, voted to uphold the Democratic gerrymander in the 1990 round of redistricting in Texas (and he did this largely on the grounds that he thought more deference should be given to states in their redistricting efforts). I am not arguing that all judges strike down opposing party plans. Rather, the statistical evidence shows that when facing an opposing party plan, there is simply a stronger propensity in those situations to strike down a state's plan than in other situations. And, as I have argued, this healthy

skepticism offers a check by the judiciary on runaway partisanship by a majority party. As long as three-judge panels include federal judges who hue from backgrounds in both parties, it creates the possibility that a judge from one political background might convince her colleagues or the Supreme Court of the unreasonableness of a redistricting plan. Ultimately, in the Texas case, the Supreme Court adopted the position of Judge Ward's dissent in the case.

Perceptions of State Redistricting Commissions in Court

As was reported in chapter 4, commissions have been treated differently by the federal courts in comparison to state legislatures. In fact, commissions seemingly are given more deference as courts are less likely to strike down plans drawn up by a commission. The interviews not only support this finding, but they also offer suggestions of why judges are less likely to find that commissions engaged in unconstitutional or illegal behavior.

Commissions may do better simply because judges think that they work better than legislatures in principle. In one of my questions, I asked what the judges I interviewed thought about the trend among states in moving toward adopting redistricting commissions. A couple of judges wondered why the legislature would give up its power to redistrict to a commission. According to one judge,

"I'm surprised I guess that legislatures would give up that privilege, that right because of the obvious – their skins are always involved. But it's the goo goo groups, the good government groups get involved to carry the day" (federal judge #7).

Yet, not one federal judge I talked to thought this trend was a bad idea. A few had no opinion,[155] but most said it was a good idea. Here is a sampling of what some judges said:

[155] For example, 12 judges openly stated that commissions for redistricting were a good idea, and another said it might be a good idea. One should keep in mind that no judge was directly asked whether or not they

> Generally speaking, [redistricting] it's a complex difficult task to form. I'm skeptical of the legislature doing it, given the quality and time [needed]. A commission is a very acceptable alternative. (federal judge #21).
>
> My belief theoretically, is that what they would do [would be] bipartisan, follow the law, and do a good job. My life experience tells me to believe a bipartisan commission could do a better job than a partisan legislature." (federal judge #6)
>
> It would be better if there were some permanent or semi-permanent people to apply those principles we talked about. You could have something where it would be a non-partisan or bipartisan commission. (federal judge #9).
>
> I have split feelings… First, the legislature obviously doesn't like the process… it probably doesn't like the product. On the other side, these blue ribbon commissions [that are bipartisan] work pretty well in other contexts…. It could be these states do not want to default to the courts, and by having a commission they can avoid [the uncertainty of] going to court… it's like having 2 kids fighting. Neither wants to go to their parents. They do rocks, paper, scissors to resolve the problem, so they don't have to go to their parents. Maybe some just don't trust judges. (federal judge #20).

Judges in the interview dataset tended to see commissions as a good idea, suggesting that they might view the work of commissions more favorably. In fact, as I recount in the next section, some judges (though not all) suggested that commissions might be subject to different standards from a legislature, or at least might be given the benefit of the doubt in some cases where the facts are close.

Judges Give Commissions the Benefit of the Doubt in Court

If judges view commissions more favorably, then might they treat commissions under a different standard – either factually or legally? In fact, among judges interviewed, 12 stated either that they would give a commission more deference or that having a commission might influence them favorably in a borderline case (3 Republicans and 8 Democrats).

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thought commissions were a good idea. Rather, they were asked about what they thought about trends in states in moving toward a commission. None voiced opposition to commissions or were concerned about the trend. Some judges just did not voice an opinion. One judge said, "I have no impression of that as a judicial [officer], unless it would come before me." (federal judge #14).

A Democratic judge described the amount of deference he would give in terms of deference given to administrative agencies:

> If you had a transparent and bipartisan or nonpartisan nature, to me the standard of review then is much more deferential…. In Texas, if you appeal from an administrative agency or an administrative social security judge, we might look at the evidence that Mark is disabled, but two Doctors from the Social Security office say no, he can do work and the administrative judge rules against Mark. This court may feel sympathy for Mark, but, if some evidence supports what the independent commission does, then I can't do anything. [There'd have to be something big for me to rule against it], in other words, you'd have to have a runaway commission, or some vote buying or something. (federal judge #9).

A Republican Judge noted that commissions are just simply more believable in a factual setting, saying,

"I would guess that if it were a non-partisan commission, it would be given more deference than a partisan legislature. [A court is] less [likely to believe the legislature's] their justifications for their lines. That's just a reality." (federal judge #16).

In total, six judges believed that a certain amount of deference should be given a commission (perhaps more so than a legislature).[156] These six judges used the word "deference" in their response. Additionally, two other judges said that a commission would give added reliability to the redistricting plan or would have a good chance of surviving scrutiny.

Another three judges thought commission plans might be upheld in a close call or borderline case. Here is a sampling of what these other judges thought.

> Probably legally it doesn't matter and shouldn't, although it might matter in the perception of the public. But perhaps in a close call, if you felt they were trying to be nonpartisan, you might give them the benefit of the doubt. (federal judge #15).

> It shouldn't affect you. You just see if it complies with the law. But it may affect you in intangible ways. If you have a good lawyer in a case, and just the opposite [on the other side], the guy I have confidence in will get my vote. The people [on

[156] Among Republicans only 1 thought a commission should receive more deference (this Republican was appointed by a Democratic president). Two other Republicans thought having a commission might matter factually if the case were a close call, simply because they might be less inclined to engage in illegal motives.

> a commission] who did it were not likely to have done it for a political reason. And, playing the percentages, they may have gotten it right…. I think it's intangible, but not legally entitled to more deference….You would be a little more optimistic about the legitimacy of what you were viewing. (federal judge #4).

Thus, amongst the twenty-two judges interviewed, half would be likely to give commissions more leeway or at least give them the benefit of the doubt factually.

As to the other half of judges, the responses varied. Some judges gave "don't know" responses or were equivocal about the issue. A Democratic judge who "firmly support[s]" the idea of moving toward redistricting commissions said she didn't know whether her perspective would change if a commission drew a plan:

"I don't know. Until something came before [my court], I wouldn't know. It's almost like asking how I would rule [before the issue came before me]" (federal judge #13).

A Republican judge gave the following response, which sounds like the standard would be the same as that given a legislature:

"It depends on what the Supreme Court said. I don't remember reading that you apply a different standard. So as a judge I wouldn't be applying a different standard" (federal judge #12).

But, then in the next sentence, the judge seems to throw doubt on her response by noting,

"But I think from a public [standpoint], it would look better and make the parties work together… (federal judge #12).

Another Republican-appointed judge said,

"My perspective… I don't have a basis for one without having seen a commission. I think no matter what, there's going to be politics" (federal judge #5).

Several judges (3 Republicans and 1 Democrat) unequivocally said that commissions would not be entitled to any more deference than a legislature:

"It would make absolutely no difference. Do you know the difference between social contract and natural law? I'm a social contract kind of guy" (federal judge #14).

No judges in my interview set thought legislatures should get more deference than commissions. Since half of judges in my interview would provide commissions with more wiggle room in legal disputes, this would mean that among judges I interviewed, in terms of probability, theoretically speaking, commissions would have a higher probability of being viewed favorably among judges interviewed in comparison to legislatures. As in other areas addressed in this chapter, the sentiments in these judicial comments echo the empirical findings. Commission plans have a better chance of surviving legal battles.

CONCLUSION

In this chapter, I demonstrated that Judges in my sample do not engage in rote application of their partisan preferences in redistricting. While partisan backgrounds can play out as one of many influences on their decisions (sometimes as an unconscious influence as the qualitative data suggest), the facts of a case and the judges' own notions of fairness will matter. Furthermore, having a redistricting commission present in the process can change the decision calculus for a number of the judges interviewed, even though no express provision in the law entitles commissions to more deference. But the inclination to give more deference comes about because a commission plan might alter the perception of the facts and the fairness of the case. Finally, I showed that these judges interviewed tended to view the courts role in the redistricting process as limited. This finding is also consistent with the empirical data that show that most redistricting plans are upheld.

These findings are interesting because they provide further evidence about how judges think about legal issues and decide cases. What is most interesting is the illustration of typologies of judges' views on redistricting. The interviews provide a fuller

picture of the quantitative data of chapter 4, showing how judges decide extremely political cases in the context of a politically charged atmosphere.

Chapter 6 An Appraisal of Party and Process in State Redistricting Commissions after the 2000 Census

INTRODUCTION

While the federal courts were initially the most active alternative to legislative control of redistricting, redistricting commissions have become of more interest to public interest groups and scholars. For example, political science professors such as Herbert Asher as well as legal academics have expressed interest in independent state redistricting commissions (Winburn 2006; Confer 2004; Kubin 1997). Groups such as Common Cause, the League of Women Voters and The Center for Voting and Democracy[157] advocate adoption of independent commissions for redistricting. The rationale behind these reform movements are that independent commissions are less likely to be embroiled in partisan disputes and are more likely to create fairer plans (Winburn 2006). Presumably, these commissions might be more likely to follow the law, and are thus less likely to draw a plan that will engender a lawsuit. Moreover, even if they are litigated, they are more likely to survive judicial scrutiny (Winburn 2006).

But scholarship is still divided as to what are the empirical effects of commission-drawn plans. Issacharoff has voiced concerns that commissions might simply operate as incumbent protection systems designed to entrench established politicians in their seats (1993).[158] Jeremy Buchman (2003) has found empirical evidence that redistricting commissions do not foster competition, but instead tend to create bipartisan

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[157] Also known as FairVote located at fairvote.org

[158] Issacharoff has argued,

> Despite the surface appeal of nonpartisan apportionment commissions and the limited success they have had in creating nonlitigated apportionment, they seem to be of limited utility. In the first place, forcing agreement through a nonpartisan apportionment commission may simply be an invitation for incumbents of both major parties to protect their own interests at the expense of the shifting interests of other groups. Moreover, reapportionment, even under a purportedly neutral commission, necessarily confronts the redistricting question in a context where the outcomes of the decisionmaking are regularly ascertainable (Issacharoff 1993, 1694-1695)

Issacharoff does not think that there can be a neutral commission, at least not in the United States.

gerrymanders. Furthermore, Jonathan Winburn (2006) has provided empirical evidence indicating that redistricting commissions fail to prevent litigation of redistricting plans in court.[159] These scholars are quite negative about the prospect of commissions solving America's redistricting battles.[160] But, the studies produced by these scholars only provide us with a limited view of redistricting commissions. These scholars provide little or no insight into what the commission process looks like. One could argue that, from a normative standpoint, the process for how one goes about doing something politically can sometimes be more important than the actual result reached.[161] After all, it is possible that a state commission could try to draw a "fair" plan[162], only to have that plan turn into a partisan gerrymander at the next election due to the uncertainties inherent in drawing lines and predicting future voting behavior. But, if the process that a state uses to draw a plan is "fair" (i.e. an equal opportunity to affect the plan), then one might argue that the citizenry of a state have less of a legitimate legal grievance against the plan created. Therefore, an important area of commission study is the decision making process itself. Yet, political science investigations into the inner-workings of commissions are wantonly dearth of empirical findings. Therefore, I attempt to look at commission behavior in-depth in this chapter, focusing primarily on the partisanship of the commission, but also

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[159] In chapter four, I demonstrated that commission-drawn plans appear to fair better in court than legislative-drawn plans. This effect I found is different from Winburn's. However, my findings do tend to take the steam out of some of the implications and criticisms that Winburn draws from his own findings.

[160] Some minorities are opposed to such commissions, because they fear commissions (especially small commissions) might disregard minority interests (Potter, Skaggs and Wilson 2006). According to a report sponsored by the League of Women Voters, the Campaign Legal Center, and the Council for Excellence in Government, "Removing redistricting from a state legislature to an independent commission may be seen by some in the minority community as stripping them of their voice in the redistricting process just as they are positioned to exercise influence" and so the report suggests that minorities be guaranteed representation on the commission and participation in the process (Potter, Skaggs and Wilson 2006, 26).

[161] One federal judge made exactly this point when talking to me about how she would judge a redistricting plan. This discussion is broached in chapter 5.

[162] Fair perhaps being defined as giving each party a fair chance to win a certain amount of seats given their relative party strength in the state. – i.e. something similar to the symmetry standard offered by Gary King, Bernard Grofman, Andrew Gelman, and Jonathan N. Katz in their amicus brief filed with the Supreme Court in *Lulac v. Perry* (2006). In that brief, King et al said that "The symmetry standard presents a 'substantive definition of fairness in districting' [because it] compares how similarly-situated political groups would fare hypothetically if they each (in turn) receive the same given percentage of the vote" (2006, 2-3).

on other factors as well. The nature of partisanship in commission decision making – when it occurs and when or if it doesn't – has important implications for policymakers in states considering adopting commissions. If commissions fail to deter cantankerous partisans, then some states and policymakers are not going to get the commission they bargained for. The presence of partisanship in decision making suggests that commissions might not be fair to one party or the other. The lack of partisanship and the presence of consensus would suggest an agreement among the parties which they deemed fair at the time they agreed upon it. Understanding partisanship in commissions is the primary motivation behind the research presented in this chapter. Other aspects of commission decision making will also be reviewed, including the extent to which commissions follow the law.

I begin this chapter by setting the political stage that currently surrounds redistricting commissions. I review some of the recent reform movements in states regarding commissions. Then I examine and categorize the different types of commissions that currently exist. Next, I delve into the literature on redistricting commissions and construct a model of commission behavior. In the fourth section, I provide an in-depth study into several case studies of particular commissions as a way of illustrating the various commission behaviors .In the fifth section, I take a comprehensive view of commission behavior in the 2001 round of redistricting. I do this by analyzing the votes of all commissioners sitting on redistricting commissions to measure the level of partisan voting. Also in this section, by way of understanding how commissions follow the law, I look at how well commissions follow the mantra of "one person / one vote" in comparison to state legislatures who draw lines. I then offer some concluding remarks about my study on commission behavior in the context of the broader literature. In the end, I find that partisan factors are often very prevalent in commission decisions, but that certain commission structures lend themselves to a partisan process.

RECENT ATTEMPTS AT COMMISSION REFORM

Some states have employed commissions as the primary or secondary sources of political line-drawing since before the 1970s. However, there appears to be a marked increase in commissions in the last couple of decades.

Idaho and Arizona switched from legislative line-drawing to commissions in the 1990s. Their newly minted independent commissions drew lines for the 2000 round of redistricting in their respective states. In Texas, after the 1991 Democratic gerrymander, Republican state Senator Jeff Wentworth of San Antonio began pushing for adoption of an independent commission to draw fairer political lines in Texas. Interest in his legislation picked up after the Texas redistricting fight in 2003. In 2007, chances for the bill looked better than ever when it passed the state Senate, but the legislation died after it became mired down in a state House committee.

The most visible efforts recently unfolded in California and Ohio in 2005. These propositions[163] failed, in part, because they were seen as partisan efforts to grab control of the legislature by immediately convening a commission and redrawing lines mid-decade. Arnold Schwarzenegger had supported the reform, which is not surprising since Republicans are a minority in the legislature. Democrats were supporting redistricting reform in Ohio, where they are a minority in the state legislature. A second effort in the state legislature of California in 2007 has been slow to materialize. California state legislative leaders who had advocated the defeat of the Terminator's reform plan in lieu of their own "reform", have not been able to garner the sufficient votes needed to push ahead. However, as of the spring 2007, the issue had not completely died, and was still being discussed in the legislature (Sanders 2007). In Florida, where extensive litigation in the federal courts has occurred over redistricting, several groups attempted to place a reform measure on the ballot in 2006 creating a redistricting commission, but the State

[163] The recent ballot referendum defeats have not stopped reform groups from continuing their efforts in these states.

Supreme Court in March of 2006 struck down that measure claiming it violated the two-subject rule for ballot referenda. (*Advisory Opinion to the Attorney General re: Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature* 2006).[164]

In Massachusetts, the bitterness over redistricting in 2001 resulted in the former Speaker of the House pleading guilty to obstruction of justice in January 2007 after confessing to lying in a previous redistricting trial[165] (Murphy and Ebbert 2007). In light of the caustic fight that occurred over the latest round of redistricting in that state, it was no surprise to see that groups in that state were advocating turning control of redistricting over to a commission (Lewis 2005). Other states considering reform include New York, Colorado, Pennsylvania, and Rhode Island (Nagourney 2005).[166] Redistricting expert and political scientist Bruce Cain told the New York Times, "It seems like it's poised to become, for the reform community, the equivalent of McCain-Feingold" (Nagourney 2005, A19). This has not occurred yet.

The two primary rationales for states to adopt these commissions are that they may decrease partisan wrangling as well as help states survive legal attacks. The question is whether these commissions provide the desired relief. In earlier chapters, I noted how beneficial it is for states to have commission-drawn plans before federal courts, because these plans are seen by federal judges as more legitimate legally and normatively. This chapter assesses the process of commission decision making, with an emphasis on how

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[164] The State Supreme Court reasoned that the rule was violated because the ballot measure proposed creating a commission *and* creating new standards for drawing legislative districts.

[165] After pleading guilty and leaving the federal courthouse, former House Speaker Thomas M. Finneran told reporters, "If I could erase that lapse in judgment, I would do so in a moment. But I cannot undo it, and the wound I have inflicted on myself will be with me and will hurt for the rest of my life." (Murphy and Ebbert 2007)

[166] Interestingly enough, Colorado and Pennsylvania already have a commission process in place for state legislative seats. Undeniably, the movement for reform in those states stems from the bitter legal battles over congressional lines drawn in those states.

partisan dynamics, among other factors, play a role in the decision making of commissions.

TYPES OF REDISTRICTING COMMISSIONS IN THE STATES

Studying the independent commissions in various states is somewhat difficult because they vary dramatically in scope and construct. Furthermore, there seems to be some variance among scholars as to which states actually have commissions and what their roles are in the redistricting process. Thus, categorizing these state commissions furthers the analysis of their behavior. Table 6-1 lists commissions by composition and by independent authority.

There are 21 states than have redistricting commissions (not including Maryland or Oregon). Some states refer to these commissions as apportionment or redistricting "boards", but I use this term interchangeably with commission in this chapter. Responsibility and power over redistricting can be separated into three categories among state commissions. Most of the state commissions (or boards) have primary responsibility for redistricting with minimal or no state legislative involvement. In this chapter, I refer to these commissions as "permanent commissions." As Table 6-1 illustrates, 12 (or 13 if you count Iowa) permanent commissions have full responsibility over redistricting. Of these 13 states with permanent commissions that have full responsibility, 7 states require commissions draw both congressional and state legislative lines. Those states are underlined in the table. Of these 13 states, 6 states only allow their commissions to draw state legislative lines (and congressional lines are drawn by the legislature).

Table 6-1 Types of American Redistricting Commissions**

	Bipartisan commissions	Commissions constitutionally composed of elected statewide officials	Partisan commissions	Nonpartisan	There is no requirement that a commission exist
Permanent Commissions	Hawaii, Montana, Washington, Pennsylvania, New Jersey, Missouri, Idaho, Arizona	Ohio, Arkansas	Colorado[a], Alaska		*Oregon?*
Advisory Commissions	Vermont, Maine			Iowa*	*Maryland?*
Back-up commissions	Connecticut, Illinois®	Texas, Oklahoma, Mississippi, **Indiana**	Illinois®		

*Iowa has more authority as an advisory commission than Maine or Vermont, as detailed in the chapter. However, because the commission needs the cooperation of the state legislature, it is not as powerful as other state commissions listed on the top row.

**States that are underlined have commissions that draw both legislative lines and congressional lines. States listed in bold have commissions that are *only* responsible for drawing congressional lines.

[a]Colorado is listed as a partisan commission. One could argue that it approaches the possibility of a bipartisan commission. There are 11 members and no more than six can be from the same party. However, such a process almost guarantees a partisan outcome because of the way the members are appointed to the commission.

®Like Colorado, Illinois seems bipartisan (and in fact, during the first round of negotiations, it is bipartisan). There are initially equal numbers of Republicans and Democrats. However, if neither side reaches an agreement, the State Supreme Court provides one Republican and one Democratic name, and after drawing by lot, the commission is augmented by one member, thus ensuring a partisan commission.

A second category of states have commissions that are only advisory in nature. In other words, the commission draws up the plan, but the legislature can choose to ignore

the plan. Maine (and to some extent Vermont)[167], have this type of commission. Because these commissions cannot bind the legislature to a redistricting plan, their importance is rather minor in the redistricting process.

A final category of commissions act as back-up entities to the state legislature. In some 6 states, a commission only takes on redistricting duties if the state legislature fails to act after a certain period of time. Four of the states only act as back-up commissions for state legislative districts. Such was the case in Texas in 2001 when the legislature failed to enact a redistricting plan. Texas' Legislative Redistricting Board then proceeded to adopt a plan for the state house and state senate. However, because the board had no authority to adopt a plan for congressional districts, that issue went to the federal courts where a three judge panel drew the districts, which in turn, set the stage for the 2003 Texas redistricting fight over congressional districts. On the flip side, Indiana's back-up commission only deals with congressional districts. Connecticut's back-up commission has authority for drawing lines for both state legislative and congressional districts.

Finally, I'd like to address the issue as to whether Maryland or Oregon should be on the list. Neither state has a statutorily or constitutionally based redistricting commission. In Maryland, the redistricting process is controlled by the governor, and if she wants to appoint an advisory commission, it is completely up to her discretion. After the 2000 Census, Governor Parris N. Glendening created a commission to construct a plan, but he was under no obligation to do so, and was under no obligation to accept their recommendations. No statutory or constitutional commission exists in Oregon either. In that state, if the legislature fails to draw a state legislative plan, the responsibility falls to the Secretary of State. It seems a bit of a stretch to refer to the Secretary of State as a commission, since a commission usually implies more than one person. She is certainly

[167] Although Buchman (2003) calls the Iowa commission advisory, its role is a little more involved than advisory. This commission will be discussed in greater detail later on.

welcome to create a redistricting commission to advise her, but she is under no requirement to do so.

Classifying these commissions is important because previous scholars offer some conflicting answers as to which states have commissions. For example, despite the dubiousness of categorizing Maryland and Oregon as states with commissions, Winburn (2006) counts both Maryland and Oregon as having commissions in his multivariate analysis. Additionally, Buchman (2003) lists Oregon as a commission in his book. Furthermore, Buchman (2003) includes Michigan as having a commission (even though their commission was dismantled after the 1990 round of redistricting that ended in a legal debacle); and Buchman (2003) fails to include Idaho or Arizona (despite the fact that both commissions were in operation for the 2000 round of redistricting). Finally, it is somewhat odd that neither Buchman (2003) nor Winburn (2006) list Indiana as having a commission, which is clearly an oversight on their part. Winburn (2006) relies on the National Council of State Legislatures (NCSL)[168] for his list and Buchman (2003) relies on Kubin (1997) in part for his list.

In addition to commission responsibilities, compositions of commissions vary widely, as Table 6-2 illustrates, below.

[168] The NCSL does list Indiana as having a commission.

Table 6-2 Commission composition (# of members in parentheses)

Number of commissioners in each commission	Commissions constitutionally composed of elected statewide officials	Equal Numbers of Republicans and Democrats (cannot hold elective office)	Bipartisan commission with tiebreaker appointed (by the commission itself or a third party)	Partisan commissions	Nonpartisan
3	Arkansas (3) Oklahoma (3)				Iowa (?)*
4		Washington (4)			
5	Texas (5) Ohio (5) Indiana (5) Mississippi (5)		Montana (5) Vermont (5) Pennsylvania (5) Arizona (5)		
6		Idaho (6)			
9			Conn. (9) Hawaii (9)	Illinois (9)®	

Table 6-2 Commission composition, cont.

Number of commissioners in each commission	Commissions constitutionally composed of elected statewide officials	Equal Numbers of Republicans and Democrats (cannot hold elective office)	Bipartisan commission with tiebreaker appointed (by the commission itself or a third party)	Partisan commissions
10		Missouri st. senate (10)		
11			New Jersey st. legislative commission (11)	Colorado (11)
13			New Jersey congressional commission (13)	
15			Maine (15)	
18		Missouri st. house (18)		

* Since faceless bureaucrats draw lines, there is no set number on this commission.
® Illinois initially has 8 members and morphs into a partisan commission of 9 if the four Republicans and four Democrats cannot agree to a plan.

Commission compositions range from just three members (Arkansas) to 18 members (Missouri state House commission). Some states require equal numbers of Republicans and Democrats, others do not. Some states require that members of the commission cannot hold state office or cannot be members of the legislature; other states require that members come from a certain state office position in order to sit on the commission (or board). Significantly, only three states have commissions with *exactly* equal numbers of Republicans and Democrats on both sides – Washington, Idaho, and Missouri. In these states, the drawback to having an even-numbered commission is that there is the potential for commission deadlock if no one from either party crosses over and supports a plan. The upside, however, is that no party can gain an advantage over the other in the process. The benefit of having a bipartisan commission with a tiebreaking chair is that it helps prevent deadlock and facilitates the resolution of a plan. The drawback comes from the fact that if the chairperson, who is chosen by the commission or by a judge or judges, turns out to be a partisan chairperson, or is a chairperson uninterested in obtaining substantial unanimity, then the state can end up with a very partisan process.

MODELING REDISTRICTING COMMISSION BEHAVIOR

No systematic analysis of decision making in commissions currently exists. In the realm of political science, the biggest study on commissions comes by way of Jeremy Buchnman's (2003) *Drawing Lines in the Sand: Courts, Legislatures, and Redistricting*. Buchman's (2003) major finding with respect to commissions is that they result in bipartisan gerrymanders.[169] He is less enthusiastic about commissions compared to other

[169] If most commission plans end in a bipartisan gerrymander, that certainly appears to be an unintended consequence for those commissions which contained rampant partisan voting.

scholars such as Herb Asher. However, Buchman's point is less about "fairness" of process or reducing the level of partisanship in redistricting and more about what types of substantive electoral plans are made by commissions. The major problem with his study is that there are really too few commissions which aspire to the goals he assigns to them. There are major differences in commission structure, and his model doesn't really answer the questions he poses. Counting Montana, Arkansas, Texas, and others in his model does not prove that commissions such as Arizona's IRC or Iowa's commission will produce bipartisan gerrymanders.

Jonathan Winburn (2006) has research indicating that commissions fail to stop litigation. But, in some states, it is unlikely any sort of process will avoid litigation. The more important question for states, which I address and Winburn does not, is whether commission plans withstand scrutiny better in Court. Furthermore, the assumption behind Winburn's statistical analysis is somewhat problematic due to his characterization of commissions. He labels Montana, New Jersey, and Alaska as neutral commissions when clearly they were anything but neutral in 2001 (2006). Even more curious, Winburn did not categorize Missouri as having neutral commissions, even though its two commissions are arguably some of the most neutral in structure (if not in practice) among all commissions (Iowa's and Arizona's notwithstanding).

There is a larger body of research in the legal literature on commissions, but most of this research is normative or jurisprudential in focus (Harrison 2006; Betts 2006; Elmendorf 2005; Mosich 2005; Confer 2004; Barnes 2003; Nichol 2001; Kubin 1997). There is a sense among some scholars that these state commissions offer several benefits, including: 1. providing a remedy for a "fair" redistricting; 2. divesting politics from the process, and 3. reducing the amount of litigation over redistricting. In addressing one of these questions, I look at the extent to which politics are divested from the process. I ask,

to what extent do commissions vote on a purely partisan basis? In contrast to the previous scholarship, I try to examine the behavior of commissions with the understanding that some commissions are constructed substantially different from others. Thus, these differences are important to note before one can paint a broad picture of commission decision making. Furthermore, I look at how competitiveness of a state might drive redistricting behavior on commissions.

My model assumes that partisan voting generally governs commission behavior. I discussed extensively in chapter 3 the sociological effects of partisanship on decision making, and those concepts are equally as applicable to commissions as to judges, if not more so. Commissioners who are elected officials have an electoral incentive to align themselves on a partisan basis in commission proceedings. The effects of partisanship extend to independent commissioners who are not elected officials, in part because of the social pressure and strong psychological attachments of partisanship (Campbell et al 1960). And, many of the commissioners owe leaders in one of the parties for their appointment to the commission.

However, there are other factors at work in influencing the commission. One such factor is the competitiveness of the state. In competitive states, where either party has a chance at control of the legislature, the particularities of lines will be more important, and thus agreement on a plan more difficult. In such a situation, one would see more disagreement on the commission in competitive states. In noncompetitive states, the party on the losing end is more likely to accept her fate, and only argue points on the margins. In order to measure competitiveness, I use Ceaser and Saldin's (2005) "New measure of party strength" in the states for 2000.[170] Their measures provide a rough approximation

[170] A score of 50 means equal party strength. Higher scores than 50 denote a more Republican state and scores lower than 50 denote a more Democratic state. For example, in 2000, Massachusetts, with a score of

of competitiveness that allows me to explore the relationship between commission voting and the competitiveness of the state.

Finally, the structure of the commission also matters. I argue that in tiebreaking commissions, the choice and actions of the tie-breaking chair can have an impact as to whether the commission breaks down into partisan voting or reaches a consensus. . This seems like an obvious point, but it is an important one because of the proposed reforms in some states that call for odd-numbered commissions. Unfortunately, these questions are not as easily answerable with one large statistical model. For one thing, there is not a large enough set of cases in my dataset to statistically model this idea about the effects of the tiebreaker commissioner. But, the qualitative and quantitative evidence suggests that the actions of this commissioner has an effect on whether the commission breaks down into partisan voting or reaches unanimous or near unanimous agreement.

I should address the data that I draw on to test the model in this chapter. Part of the analysis draws on interviews of redistricting commissioners in the states of Alaska, Washington, Idaho, New Jersey, and Montana. All of Alaska's interviews were conducted by phone, and the others were conducted in person. I also draw on research from all newspaper articles found in Lexis Nexis during the time frame in each state when the commission was meeting and deciding.[171] Not all of these articles are cited in this chapter (there are hundreds of them), but I do refer to a number of these specifically in this chapter.[172] In addition, for many of the commissions, I rely on the minutes of commission meetings and other commission documents (either collected online or

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31.4, was the most Democratic state in terms of party strength under their measure. Idaho was the most Republican state, with a score of 69.1

[171] I typically used the search words of the name of the commission for that state, or typed in "redistricting" and "commission" or "board."

[172] I also rely on articles housed online for the Honolulu Star Bulletin at their website.

obtained directly from the commission). This research also allowed me to construct a dataset of the votes of all redistricting commissioners which I use to make a few statistical analyses. Finally, data on population deviations in state plans was found on the NCSL website.

REDISTRICTING COMMISSION ACTION IN THE SEVERAL STATES AFTER THE 2000 CENSUS

I begin my analysis of commission behavior by examining individually each of the politics of the 19 commissions from the 2000 round of redistricting. I exclude advisory commissions from this process because their actions are somewhat meaningless. While these commissions' plans may place some sort of moral pressure on the state legislature to adopt their plan, there are practically no other restraints that the legislature has to follow with respect to the advisory commission plans. In the context of where I focus my research in this dissertation – i.e. an examination of the alternatives to legislative redistricting – their study becomes less interesting and less relevant.

Previous political science studies on commission behavior have examined whether the presence of a commission had any electoral or legal effects. These studies lack a proper depth in accounting for the varied structure of commissions in the states, tending to treat commissions as neutral (i.e. bipartisan) or partisan. Commission structure and composition vary widely. An aggregate analysis of commission decision making by itself would be insufficient for providing a comprehensive understanding of the process. Therefore, before proceeding with aggregate analyses, I first delve into a detailed examination of what went on in individual commissions in the 2000 round of redistricting. This detailed analysis is essential to making broader conclusions about such behavior. As I proceed through an analysis of each state, I list the final votes of the

commissions in each state in Table 6-3 in order to present a broader overview of all commission behavior in terms of partisanship on one page. Of course, each commission typically takes a number of procedural and substantive votes before their final vote on a final plan (or the last plan voted on, if no final plan is adopted). But the final votes represent the final product of the commission, and in this way, Table 6-3 offers an easy way to compare commission votes across states and across plans.

Table 6-3 Votes on final plans in state commissions from 2000 round of redistricting

State commissions	Votes for a final plan	Votes against a final plan	Rs for plan	Rs nay	Ds for plan	Ds nay	Ind.* for	Ind. nay	Absent/ Abstain
Alaska (5)	3	2	0	2	3	0			
Arizona (5) (St. leg. plan)	5	0	2	0	2	0	1	0	
Arizona (5) (congressional plan)	4	1	2	0	1	1	1	0	
Arkansas (3)	3	1	0	1	2	0			
Colorado (11) senate plan	6	5	0	5	6	0			
Colorado (11) house plan	10	1	4	1	6	0			
Conn. (9) st. senate	9	0	5	0	4	0			
Conn. st. house	8	0	5	0	3	0			1Dem
Conn. congress	9	0	5	0	4	0			
Hawaii (9)	8	0	4	0	4	0			1Dem
Idaho (6) st. leg. plan	4	2	1	2	3	0			
Idaho (6) congressional plan	4	2	3	0	1	2			
Illinois (9)									
Indiana (5)	3	2	0	2	3	0			
Missouri st. house commission (18)	9	9	9	0	0	9			
Missouri st. senate commission (10)	5	5	5	0	0	5			
Montana (5)	3	2	0	2	3	0			
New Jersey st. leg. commission (11)	6	5	0	1	5	0	1	0	4Rs abs. in protest
New Jersey congressional commission (13)	13	0	6	0	6	0	1	0	

Table 6-3 Votes on final plans in state commissions from 2000 round of redistricting

State commissions	Votes for a final plan	Votes against a final plan	Rs for plan	Rs nay	Ds for plan	Ds nay	Ind.* for	Ind. nay	Absent/ Abstain
Ohio (5)	4	1	4	0	0	1			
Pennsylvania (5)	5	0	2	0	2	0	1	0	
Texas (5)	3	2	3	1	0	1			
Washington congressional plan (4)	4	0	2	0	2	0			
Washington st. leg. plan (4)	4	0	2	0	2	0			

*Independent on commission

The analysis that follows organizes commissions first by permanence or back-up. I look at all permanent commissions before focusing on back-up commissions, since permanent commissions will always have an impact on the final plan, whereas back-up commissions may never meet if the legislature agrees on a redistricting plan. Within each of these categories, I will break up the states between bipartisan commissions, state-elected officials commissions, and partisan commissions. Iowa's process will be analyzed last.

Permanent Commissions (Bipartisan)

Arizona

Out of all the redistricting commissions in this study, no other state – save Iowa – has constructed such an elaborate process to remove partisan inclinations in commission behavior. The commission was established by a constitutional amendment approved by voters in the November 2000 elections. The Arizona commission – the *Independent*

Redistricting Commission, or I.R.C. as it is known in the state – has been beset by legal battles in state and federal court over groups unsatisfied with the commission's results.[173] However, the initial proceedings of the commission in adopting the final congressional plan and final state legislative plan were virtually unanimous (see Table 3) (Arizona Independent Redistricting Commission Transcripts October 12, 2001, p. 155; Arizona Independent Redistricting Commission Transcripts October 14, 2001).

The uniqueness of the Arizona commission compared to all the others derives from the method of selecting commission members. The members of the commission cannot be politicians, members of a party organization, or lobbyists, among other requirements.[174] The state attempted to create a merit-based process devoid of people with established partisan connections (while still recognizing partisan slates of members). Candidates for the commission apply for the job. After receiving all applicants, the state's "Commission on Appellate Court Appointment reviews the pool of applicants and winnows it down" (Barnes 2003, 578). Then legislative leaders pick two people from each party, and those four members review applicants that are not registered with a party and choose an independent person as chair. (Barnes 2003).

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[173] The commission survived multiple VRA lawsuits from the Navajo Nation and other minority groups in federal court (these cases in my dataset in chapter 4), but the commission has faced hurdles elsewhere. The DOJ denied preclearance to their plan based on section 5 to the VRA. In state court battles, the commission has labored over disputes dealing with the state constitutional provisions of the commission that require competitive seats be established. The legal problems that the commission faced had to do with the fact that the constitutional provisions required that they initially create districts across the state in a grid-like pattern of equal population (Barnes 2003). Following this requirement, at some points, led the commission into making plans that were open to attack by VRA section 5 allegations of retrogression (because, obviously, minority groups are not always geographically dispersed in a grid-like pattern) (Barnes 2003).

[174] No applicant, within the prior three years, could have held public office or be an officer in a party (even a precinct committeeman), an employee of a candidate's campaign, or a paid lobbyist (Barnes 2003). Also within the previous three years, no potential commission candidate can have changed his or her party registration. No two commission members can be from the same county in the state. All of these provisions were designed to try to remove partisanship and parochialism from the process (Barnes 2003).

In terms of diminished partisan wrangling on the commission, this process seems to have had the results desired by the founders who constructed the constitutional amendment creating the commission. The votes on final plans among commissioners were not especially partisan. While the state legislative plan passed unanimously, only one commissioner voted against the congressional plan, and it is clear from her comments that the motives behind her vote were not overtly partisan.[175] Her comments suggested that commissioners held each other in high regard, which could not be said of some of the other commission proceedings in other states. Commissioners were able to come to some sort of an agreement. They were commissioners who did not wholly owe their position on the commission to the political party leaders that selected them. Moreover, Arizona, with a Ceaser and Seldin party strength score of 61.2 for Republicans, was not a competitive

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[175] If you take, for example, experiences of the Missouri House commissioner I quote from another section and compare that rhetoric to comments made by the sole Democratic dissenting commissioner here in the Arizona commission, you get a sense of the diminished level of partisanship on the Arizona IRC. Commissioner Andi Minkoff, when noting that she intended to vote against the congressional plan, prefaced her "nay" vote by saying the following during the commission hearing:

> Mr. Chairman, I'm going to vote against the motion. It's probably one of the most difficult things I've done since I came one the Commission. I'll vote and tell why. First of all, I'm extremely proud to be a member of this group. The four people I've worked with are the best…. We all worked hard. And I think everybody came to this task with the idea to do the very, very best job we could for the people of Arizona in keeping with the requirements of [proposition] 106…. The reason I'm voting against the map is because…. As I see it we have one competitive district out of eight. When we hear from people who voted for this proposition and why they voted for it, I think we let them down. I think we were obligated to create one more competitive district in Maricopa County…. We've not done it…. I feel very uncomfortable voting against this. When I came on the commission and filled out my application, interviewed before I was selected, my most important goal was to create choices for people in Arizona [so that] when they voted… they felt like their vote counted for something. I really wanted to do that. I don't believe this map does it in the Maricopa County area. I respect the differing opinions of my fellow Commissioners. I respect all the work that went into it. I can't vote for it (Arizona Independent Redistricting Commission Transcripts October 12, 2001 148-150).

The very next person to speak in the minutes was Minkoff's Democratic counterpart on the Commission, and he said that while he appreciated her comments, he had to disagree with her. If you read some of the other commission transcripts of that year, the commission does not sound like a runaway partisan morass, but appears to be a thoughtful process.

state for Democrats, and so perhaps there was also less motivation to engage in partisan maneuvering given the state of affairs of where the parties found themselves.

Hawaii

Hawaii's *Reapportionment Commission* has 9 members. Eight members are appointed by the political leaders of each state house (each leader picks two people to serve on the commission), and then these eight select a ninth member as chair. None of the commission members can run for the legislature or Congress for at least two election cycles (Hawaii Constitution, Art IV).

In 2001, the most controversial issues for the commission had to do with "canoe" districts and treatment of nonresident military dependents for population purposes. Canoe districts were so-called because they stretched from one island leaping over water to another island – the idea being that in order for a representative to reach her constituents, she'd have to jump into a canoe and ride to the next island.

Both issues were decided based on the chairman, who voted one way at one point in the process and then later changed his mind. The four Republicans and four Democrats had selected a Democrat as chair. The issue of canoe districts and counting nonresident military dependents were intertwined. Most of the nonresident military dependents were on the island of Oahu, and the effect would be that Oahu would gain more representatives if they were counted – something that both Republicans on the commission and neighboring islanders opposed (Omandam 2001, October 12). Counting the nonresident military dependents also meant that the commission would have to create "canoe" districts to satisfy equal population requirements. On the other hand, the commission

could avoid having to draw canoe districts if they simply excluded nonresident military dependents from the population count.

The commission initially decided to include nonresident military dependents in the population count. This preliminary plan was opposed by Republicans but passed on a party line vote, with the Democratic chair voting with the Democrats ("Redistricting plan serves partisan aims" 2001, August 12).[176] After adopting a plan that included the nonresident military dependents, the commission traveled around to public hearings in the state, where there was an outcry at the hearings about the "canoe" districts (Sommer 2001, September 26). A group in Maui threatened legal action (Omandam 2001, October 5). By mid-October, the chairman had changed his mind, he said, after he reviewed the state constitution and encountered strong opposition to such districts at the public hearings (Omandam 2001, October 12). In the end, the canoe districts were left out of the final plan, and both parties adopted the plan.[177] (Omandam 2001, December 1).

Hawaii was a strong Democratic state in 2001, so presumably there was not too much that Republicans could do to improve their position electorally via redistricting. However, the canoe districts were a sticking point, and that issue was solved in large part by the actions of the chair. The vote for the final plan could have easily been along party lines, but, it turned out unanimous, with both parties praising the plan. Moreover, Hawaii's commission seemed to be the only instance among all commissions where

[176] Counting the nonresident dependents had the effect of artificially inflating the voting strength of state residents living on Oahu, where the military bases were located. Thus, Oahu would benefit from increased representation in the state legislature, at the expense of the outer islands such as Maui and Kauai. It was thought that the increase in representatives on Oahu would benefit Democrats.

[177] The newspaper reported the Oahu chairman of the Democratic Party of Hawaii Jimmy Toyama as saying about the plan, "Overall, the commission did well to listen and get rid of canoe districts and for keeping communities intact as much as possible" (Omandam 2001, December 1). The Republican vice-chairman of the commission was also quoted as saying that she thought the plan adopted by the commission was the most reasonable (Omandam 2001, December 1).

public opposition at public hearings caused a commission to make a major change in the course of their plan.[178]

Idaho

Idaho is one of only three states that has a bipartisan commission with equal numbers of Republicans and Democrats. The only other states are Washington and Missouri. Idaho adopted this commission, the *Commission on Reapportionment* as it is officially called, through constitutional amendment in 1994, and politicos had high hopes for the commission. In October of 1999, a full year before the Census count was to begin, a Spokane newspaper reporter wrote the following explanation for why voters in the state adopted the commission: "Voters changed the state constitution in 1994, hoping to avoid the multiple lawsuits, frenzied negotiations and battles for political lives that had marked the process in recent decades" (Russell 1999, October 29). This was not to be.

Although Idaho's commission did not end in complete disaster or deadlock (as Missouri's did), the commission's plans were continuously litigated and challenged for years. The commission was able to come up with a congressional plan and a state legislative plan. Democratic commissioner Tom Stuart crossed party lines to support the congressional plan, and Republican commissioner (and former state senator) Dean Haagenson crossed party lines to support the state legislative plan (see vote in Table 6-3). But the initial compromise on state legislative districts did not avert legal battles in the state courts.

Much of the legal fight came from residents and municipalities of eastern Idaho (and, to a lesser extent, Republicans) who were upset with the way districts were drawn

[178] There are a number of instances in Montana and Washington of commissioners making small changes to plans based on public input in 2001, but not on the scale as seen in the Hawaii commission.

in that part of the state. The dispute arose, in part, because the commission began drawing lines in the panhandle of the state, and by the time the commission got to the eastern part of Idaho in the lower part of the state, they had boxed themselves in cartographically, and had to accept district lines that were not particularly compact (Haagenson interview, August 24, 2006).[179] What compounded the problem was the fact that the eastern part of Idaho was losing population, and this issue frustrated the commission in their efforts. One of the Republican commissioners, Kristi Sellers, was from the eastern part of the state and was not happy with the plan devised by the commission.

The plan was legally challenged and went up to the state Supreme Court, which tossed out the commission's plan and ordered the commission to devise a new plan. After this happened, Republican commissioner John Hepworth, who had tired of all the bickering in the commission, quit in disgust and said he had fulfilled his job and wasn't going to participate in the commission anymore. He was repulsed by the entire process (John Hepworth interview July 23, 2006).

The new Republican commissioner installed for the second try at redistricting was Derlin Taylor. The commission began to draw new lines for the state legislature in 2002. In a phone interview in July 2006, Taylor told me he found the entire process frustrating, as he was beset by constant phone calls from legislative leaders (including the Republican leader who appointed him), trying to get him to vote their way on the commission. And, as an attorney he felt like no one on the commission wanted to follow the State Supreme Court ruling (Derlin Taylor phone interview July 2006). Derlin told me that he predicted the new lines would be tossed out by the state courts. After the

[179] Legislative districts in Idaho are multimember – where two state representative districts are nested in state senate districts.

commission agreed to new lines, those lines were promptly challenged again, and again the State Supreme Court threw out the citizen commission's plan.

The commission went back to work a third time and drew a new plan. Again, this plan was challenged in court – by county governments in eastern Idaho. This time, the court case wound itself through the legal process more slowly in the state courts. It was not until December of 2005 that the State Supreme Court upheld the commission districts and dismissed the lawsuit attacking the third plan drawn (Miller 2005, December 29).

In the end, the Idaho commission was not completely paralyzed to act (like Missouri's), and it was just bipartisan enough to get a plan passed three times. Commissioner Haagenson described his vote in siding with the Democrats as a situation where someone had to break the deadlock, and he felt like it was his duty to do so (Haagenson interview, August 24, 2006). He said he endured a lot of criticism from party leaders for his vote (Haagenson interview, August 24, 2006). But, from my interviews with 6 of the 7 people who sat on the commission at one time or another, it seems that while there were a lot of partisan disagreements on the commission, the commissioners were professional in their dealings with each other. And among Democratic commissioners, there was a sense that no matter how lines were drawn, Republicans were going to control the legislature and win both congressional seats. It may have been this fact (that control of the legislature did not hinge on the plan adopted) that pushed Republican Commissioner Haagenson to side with his Democratic counterparts in adopting a state legislative plan. Likewise, Democratic Commissioner Stuart sided with the Republicans because it was unlikely the Democrats would win either congressional seat. Certainly, as will be shown in the aggregate analysis, commissions in less competitive states voted for adopted plans in higher percentages (i.e. more agreement and less disunity).

Missouri

Missouri, like Idaho and Washington, has an even-numbered commission. The difference, however, is that Missouri has two separate commissions for the state house and the state senate referred to as the *House Apportionment Commission* and the *Senate Apportionment Commission*. Furthermore, Missouri's commissions, In contrast to Idaho and Washington, do not have authority over congressional seats. The state legislature drew congressional lines in 2001.

In the political context of the 2000 round, an important point to make about Missouri is the competitiveness of the state during this time. Ceaser and Saldin (2005) scores of party strength for both parties are about even.[180] Republicans controlled the state senate 18 to 16 while Democrats ran the house 87 to 75, which meant that control of either house hinged on what these commissions did (Sloca 2001, August 23).

In addition, with 18 and 10 members respectively, Missouri's two commissions are considerably larger than that of Idaho and Washington. In order for a plan to pass either commission, the plan must receive seven-tenths of the vote, which means that more than one partisan has to cross party lines to pass a plan. Missouri also has a back-up commission to the commissions, and this back-up, which is composed completely of state judges, is referred to as the Missouri Appellate Apportionment Commission.

The 2001 commissions in Missouri did not get off to a good start after a dispute arose about the Democratic governor's choice of a Republican commissioner offered by

[180] With a score of 50 representing equal party strength on their score, Missouri ended up at 51 – this score is barely tilting Republican and is an illustration of the competitiveness of the parties in that state (Ceaser and Saldin 2005).

the state Republican Party.[181] Those appointments occurred in late March of 2001. The appointments dispute was ultimately resolved in the courts in early May, and the process then began.[182]

Commissioners faced a deadline of August 28th, 2001 for finishing their plans, and they missed those dates. By late August, neither commission had a draft plan yet. AP reporter Paul Sloca covering the proceedings wrote that "political bickering shut down work" in the senate commission (Sloca 2001, August 25). On August 27th, the day before the deadline, the house commission rejected three plans (one by Democrats and two by Republicans) and the senate commission rejected five plans. (Sloca 2001, August 27). Sloca quoted Republican house commission member Norman Harty as complaining, "We're acting like a mob, not a committee…. We're not arguing about fairness, we're arguing like a bunch of children out in the school yard" (Sloca 2001, August 27). In the end, it is difficult to say whether Missouri could have come to an agreement if it had no requirement that a supermajority of redistricting commissioners agree and the commission was smaller (like in Washington State). With so many people on the commission and a supermajority requirement, there are a lot of commissioners' concerns to satisfy.

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[181] Appointment to the commission is somewhat unusual compared to other commissions. Although it appears that commissioners cannot be members of the legislature (which is what brought about the dispute when a sitting member, along with another Republican, was offered to the governor for his choice to be made), this point is somewhat unclear. What is clear is that while the parties provide the governor with two choices for each spot on the two commissions, the governor has a say in commission composition. Each major party submits two choices to the governor for the senate commission and two choices from each of the state's nine congressional districts for the house commission, and then the governor selects from among the two choices for each respective commission. Republicans tried to limit the governor's choice for a seat on the house and senate commission by offering up a sitting member of the legislature, along with a partisan Republican aide as the governor's only alternative. However, the governor chose that sitting legislator instead of the partisan aide. After the Republican legislator promptly resigned his seat on the commission, legal wrangling erupted as to who got to appoint a successor (Ganey 2001, March 30).

[182] The senate commission started giving public hearings in April. Both commissions held four public hearings around the state in total ("Legislative redistricting making slow progress" 2001).

With both commissions deadlocking on plans, the responsibility for redistricting the state legislature fell to the Missouri Appellate Apportionment Commission. There are technically two panels for the house and senate seats, but the Missouri Supreme Court chose the same six judges (3 Republicans and 3 Democrats) for each panel. To their credit, this panel came to a unanimous decision on the state senate map. However, the panel split 4 to 2 in approving the house map, with two Democratic judges casting the dissenting votes. This is not surprising given what we know about judicial decisions in earlier chapters. While these commissions were not court cases, the action on the house map illustrated that judges sometimes cannot escape the politics of redistricting. Needless to say, Republican political leaders in the state were elated over the house map (Bell 2001, December 14). The judicial panel's chairman would not discuss how the panel came to its decision (Sloca 2001, December 13). Judge Ronald R. Hollinger, one of the Democrats who voted against the house plan, simply said to one reporter, "It probably speaks for itself. I didn't agree with the House map…. I did not think that it was a politically fair redistricting as to the House." (Bell 2001, December 14).

While the judges' votes appeared partisan for one plan, one could interpret their ability to actually pass a plan as an example of the diminished partisanship of judicial panels compared to the initial Missouri commissions.[183] Nevertheless, given Judge Hollinger's comments, these judges were more political than what the legal community strives for.

[183] The downside to the judicial commission was that deliberation and decisions on the plan were made entirely in secret and were not transparent. But, that may also have been a reason as to why the judges were able to come to an agreement.

Montana

The *Montana Districting and Apportionment Commission*, as it is officially called, has five members. Four of the commissioners are chosen by the majority and minority leaders of the state houses. The four members then choose a fifth. In the 2000 redistricting round, members were unable to choose a chair, and constitutionally this responsibility fell to the state Supreme Court. The state Supreme Court ended up choosing a Democratic activist as the chair – Janine Pease Pretty-On-Top. Consequently, the final vote on the commission plans for the state house and state senate were 3 to 2. In fact, almost every vote in the commission throughout the entire process was 3 to 2, even minor procedural votes. This commission's process was in stark contrast to its nearby neighbor Washington – where nearly every vote in the entire process was unanimous. You cannot blame the Democrats who controlled the commission for the plan they devised. Certainly, the chair, in an interview she gave me, indicated to me that she felt that after her Native American peoples had suffered years of discrimination, she wanted to create a plan that she thought was fair (Janine Pease Pretty-On-Top interview, August 17). As one can imagine, what she thought was "fair" did not line up with what the two Republican commissioners thought was "fair." If the Supreme Court had chosen a more consensus-minded candidate for chair, certainly the outcome of the commission could have been very different. This is not a criticism of Commissioner Pretty-On-Top, who is sincerely devoted to her cause and had every legitimate right to push for the redistricting plan she felt was best, but rather is a commentary on the role of the Montana State Supreme Court and its motivations.[184] Moreover, the process in Montana, taken together

[184] When the Supreme Court chose the chair, it refused to release its deliberations on the selection. Some justices dissented, feeling that the public had a right to know what other people were considered for the chair and what went into the decision process (*In Re the Selection of a Fifth Member to the Montana Districting and Apportionment Commission* 1999)

with other state experiences listed in this chapter, illustrates that consensus is not always a priority in a bipartisan commission, even though reformers often tout this as a by-product of commission behavior.

New Jersey

New Jersey has two separate commissions for their state legislative seats and their congressional seats. There are 10 (or 11) members on the *New Jersey Apportionment Commission*, which is the commission that deals with state legislative seats. The *New Jersey Redistricting Commission* redraws congressional districts and has 13 members. Both operate somewhat differently.

The state legislative commission is supposed to meet first with equal numbers of Republicans and Democrats, and in these initial meetings, if they cannot come to a consensus on a plan, the state Supreme Court's Chief Justice chooses a tie-breaking chair. Naturally, the parties in 2000 could not come to an agreement, and the Chief Justice, who was appointed by a Republican Governor, chose Larry Bartels as the tie-breaking chair. The fact that this commission disintegrated into partisanship and the congressional commission did not was a function, in part, to the philosophies of the two chairs.[185] Bartels came into the process with a goal for creating competitive districts, and he selected the plan he thought would create the most competitive districts (which happened to be the Democratic plan). Republicans balked, with four boycotting the final vote. The

[185] The New Jersey legislative commission, unlike the congressional commission, operates in complete secret and is not subject to the open records laws of the state. Therefore, it was impossible to obtain transcripts from the proceedings of the commission. Practically no other commission in the country operates in such a nontransparent way. Furthermore, while some people in the state Capital were quite helpful in retrieving documents for me from the congressional commission, there were some bureaucrats in the state Capital who were unhelpful and seemed somewhat suspicious of my motives for wanting documents from the state legislative commission. Several of the state legislative commissioners were happy to talk to me, however.

Republican commissioners then sued Larry Bartels in federal court, whereupon a three-judge panel upheld the plan. The bitterness of the Republicans and their experience with Professor Bartels is evident in my interviews with some of them. However, Bartels did not take it personally: "I think the complaints and the high tempers are pretty understandable given the importance of what's at stake" (Marks 2001).

The congressional commission had a completely different experience. One commissioner explained to me how lovely the proceedings were, and how it was such an honor to serve on the commission (Elizabeth Randall interview January 2007). All commissioners came to a consensus on a plan and it passed 13 to 0. Part of the result of the vote was simply due to the nature of the politics surrounding New Jersey's congressional delegation of 7 Democrats and 6 Republicans. The final plan was largely an incumbent protection plan. Members of the congressional delegation from both parties were leaning heavily on these commissioners to come to an agreement. Republican leaders in Washington were also applying pressure on the commissioners to quickly agree to a plan (Bill Baroni interview September 2006). Republican commissioner Gary Stuhltrager, who had also served as a state legislator, was quite disgusted with the pressure coming from the Republicans in Washington (Gary Stuhltrager interview, September 4, 2006). The congressional commission had the benefit (or drawback) of following the work of the state legislative commission, and Republican leaders were fearful the congressional commission would end badly as well (interview with Bill Baroni September 2006). Some Republicans on the commission, however, were wanting to do more to get more congressional districts favorable to Republicans and were not interested in protecting the existing Republican incumbents. In the end, the Washington pressure on some of these Republicans worked and all came to an agreement with the Democrats.

However, one has to wonder how much the chair's actions also contributed to the consensus reached in the congressional commission. Political Science Professor Alan Rosenthal told me that he had a different philosophy from Bartels about chairing the panel (Alan Rosenthal interview, September 7, 2006). Rosenthal thought it was important to sit back and urge the two parties to come to an agreement on a plan and be a facilitator on getting agreement, and only to take a side in the end if neither party comes to an agreement.

Thus, the experience of the two different commissions in New Jersey is due in part to the philosophies of the two chairs. One chair was interested in promoting a competitive plan that he had designed, while the other chair was less involved, and more interested in facilitating agreement and consensus among all parties. Whether one type of chair is more normatively desirable than the other is beyond the scope of this study. And, regardless of the merits of either method of chairing a commission, it did not seem that either Bartels or Rosenthal were necessarily promoting any sort of partisan agenda (as the chairs in Montana, Illinois and Alaska had done). Rather, one chair was more interested in a competitive plan and the other was more interested in a consensus plan that all commissioners could agree on.

Pennsylvania

Pennsylvania had a memorable round of redistricting after the 2000 Census, in part because the Republican-controlled state legislature drew congressional districts that, according to Democrats, represented constitutional violations of political gerrymandering. This dispute went all the way through the federal court system and resulted in the U.S. Supreme Court case *Vieth v. Jubelirer* (2004). Although the Supreme

Court declined to say that Pennsylvania had engaged in unconstitutional partisan gerrymandering, the Court upheld the legal theory as justiciable. It was this case which the Supreme Court referenced the first time it sent the Texas case back down to the three-judge panel for them to revisit.

In light of the bitter fight over congressional redistricting in the state legislature and the federal courts, it is interesting that the state legislative plan created by the bipartisan *Legislative Reapportionment Commission* generated little opposition. [186] In fact, the state legislative plan passed the bipartisan commission unanimously (See Table 3) (Strawley 2001, November 20).

The state's commission, which deals with state legislative redistricting, is comprised of five people, including the minority and majority leaders of the state house and state senate (or their designees), and a fifth outside person who acts as chair. The four initial members get together to choose this outside chair (the fifth member). The chair cannot be a public official.[187]

The 2001 plan passed with full support of the commission (O'Toole 2001, August 21). There was some partisan bickering on the panel, but with the chair's help, the commission seemed to have pleased most people of both parties. Chairman Frank Montemuro basically told Republican leaders of the House and Senate on the commission that they could carve up Eastern Pennsylvania, while he let Democratic leaders have full reign to carve up Western Pennsylvania (Bull 2001, September 26). Democratic leaders took this opportunity to purge a few maverick Democrats, which then precipitated

[186] Lawsuits against the state plan, mainly by an aggrieved incumbent state legislator and some municipalities, were dismissed by the State Supreme Court.

[187] If the four party members cannot agree on a chair within 45 days of convening, then a majority of the state Supreme Court chooses the chair. In the 2001 redistricting, the four members of the commission chose a retired Supreme Court justice as chair.

lawsuits after the plan was adopted.[188] Montemuro also encouraged both sides to come to as much common ground as they could on plans. (O'Toole 2001, August 21). As an editorial in Hanover's *The Evening Sun* summed it up, Montemuro, as chairman and tiebreaker on the commission, basically had a goal of incumbent protection when overseeing the production of the Reapportionment Commission's plan. Chairman Montemuro "openly admitted that was among his goals" ("We can still fight for 2nd Senate seat." 2001, October 8).

As Table 3 indicates and as I reiterate throughout this chapter, a number of states' commissions came down on party line votes on plans. Pennsylvania is different in that respect. What are the factors that contributed to unanimity? Parties in less competitive states (where less is at stake) might be more inclined to agree on a plan. Pennsylvania, while competitive in 2000, was not as competitive as other states that had commissions – such as New Jersey or Missouri. In 2000, the state leaned somewhat Republican, and according to Ceaser and Saldin's (2005) measure of party strength, was about as Republican as Connecticut was Democratic.[189] But there may be a better reason for the unanimity other than the presence or absence of competitiveness in the state.

For several reasons, it seems this unanimous vote was due in part to the chairman of the committee. He took the novel approach of allowing each party full control to divide up a geographic region of the state. This is a tactic no other chair followed in all the other commission processes. Additionally, instead of driving the commission, news

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[188] State Democratic legislator Ralph Kaiser, upon seeing his maverick friend David Mayernik's district "zapped" into oblivion by Democratic leaders, had the following comment, "They cut him up like a Thanksgiving turkey" (Bull 2001, September 26). Mayernik, of course, later sued over the plan.

[189] Republicans controlled the legislature, but the House was fairly evenly divided in 2000 (http://www.fairvote.org/?page=328). Ceaser and Saldin (2005) gave Pennsylvania a score of 55.6 (with 50 representing equal strength among both parties).

reports indicate that he took a back seat and nudged party leaders to work together toward common plans.

Washington

The *Washington State Redistricting Commission*, as it is formally named, is composed of four citizen members (appointed by the party leaders of each house) and a non-voting chair, selected by the four members. The commission draws both state legislative seats and congressional seats.[190] Like Missouri and Idaho, Washington has an even-numbered commission. In 2000, Washington had a vastly different outcome compared to Missouri or Idaho. Washington avoided the partisan deadlock that Missouri encountered and the legal morass in the state courts that hampered Idaho's commission. Indeed, the commissioners I interviewed on this commission were very proud of their work and were very eager to promote the process and recount the events that led up to their final plans.

The commissioners almost missed the deadline on congressional districts. But, as many of the commissioners told me, the fear of the unknown of what the courts would do helped them come to an agreement on a plan.

Out of all the commissions studied (including Arizona but excluding Iowa), Washington's Redistricting Commission really was the most nonpartisan in every respect. One of the commissioners attributed it to the personalities on the commission as well as the political climate and political culture of the state. Even among state commissions that reached a consensus, Washington was not the norm. To be sure, there were partisan disagreements, but all the members, at some point, were willing to

[190] Like Idaho and New Jersey, Washington's state house districts are nested in its state senate districts.

compromise in various areas to come to an agreement and avoid the prospect of the task being shipped into the courts. Having an even-numbered small commission required close contact and compromise.

In addition to political culture and the composition and numerical structure of the commission, another important feature was the resources each side had to run statistical analyses for their own plans. The commissioners had their own partisan staffs that were paid for by the commission, and this staff could run numbers on plans.[191] These resources put members on this commission on equal footing to negotiate over numbers and lines. The end result was a commission that was able to reach a consensus on nearly everything. One of the hardest problems, as both Republican and Democratic commissioners told me, was trying to agree on what numbers to use (in terms of the political effects of various plans), since each side had their own data on previous elections and predictive models that they were using. Initially, working off different numbers made negotiating difficult (Dick Derham interview August 8, 2006; Dean Foster interview August 3).

What contributed to the ability of the commission to come to an agreement? Certainly the small size of the commission made it easier to negotiate. Additionally, the commissioners were partisans but were not seeking office. The political culture of the state and the fact that it was not extremely competitive also probably contributed to the ease in negotiations. Of most importance, in my view, were the personalities of the commissioners which may have contributed to the ability of the commission to come to an agreement on a plan. All of the commissioners noted to me how they got along well together, and these expressions seemed genuine. There's no way to create a commission structure that ensures you get the right kind of personalities to form consensus, but

[191] This set-up was unlike Montana, where commissioners of either party had to establish their own outside resources.

certainly having fewer commissioners could facilitate greater consensus. Finally, another contributing factor to agreement may have been fear of the courts. Nearly all the commissioners told me they were concerned about the process being turned over to the courts and the uncertainty attendant with such a result.

Permanent Commissions (Elected State Officials)

Arkansas

In Arkansas, the *Board of Apportionment* is made up of the governor, the secretary of state, and the state attorney general. In 2001, those positions were held by Republican Mike Huckabee, Democrat Sharon Priest, and Democrat Mark Pryor, respectively. Democrats controlled the board, but Democratic members of the board did their best to claim that the process was not partisan, even going to the extent of removing a Democratic aide from the redistricting process who had told an audience of Democrats that he was trying to help elect Democrats in the plan being drawn up.[192] And, Governor

[192] The Arkansas Democrat-Gazette, in an editorial entitled, "We are shocked, shocked", as a play on the old famous line from *Casablanca*, thought the whole incident was rather humerous, and also thought it strange that Hukabee would be stunned that an aide to the Secretary of State might consider politics when helping the Secretary devise a redistricting plan. A portion of the editorial runs as follows:

> WHAT A surprise: Some Democratic apparatchik working in the Arkansas secretary of state's office has confided to his fellow Democrats that the object of redistricting is to elect Democratic candidates. "Our ultimate goal," Ron Maxwell confided at a meeting of the White County Democratic Club, "is to try and draw districts that will give Democrats a chance of winning Senate seats." Like what else has redistricting ever been about?
>
> Is anybody surprised? Well, Mike Huckabee says he is. "I was stunned," says the governor, "to read such partisan comments regarding this process." Gosh, you'd think we lived in a two-party state in which each tries to gain the advantage by drawing legislative boundaries favorable to its candidates. Which wouldn't be exactly an innovation in American politics. The word Gerrymander dates back to the first years of the Republic.
>
> But Mike Huckabee is "stunned" to discover that there may be politics involved in politics, and wants Arkansas' secretary of state to "publicly disavow these inflammatory comments . . ."

Huckabee reacted to the development by claiming he was "stunned" that politics might be considered in the process (Blomeley 2001, July 17). For his part, the aide stated that "By its nature, redistricting is a 'partisan process' because the members of the Board of Apportionment belong to political parties…. [and that Secretary of State] "Sharon [Priest] is not going to forget the people that put her in office" (Blomeley 2001, July 17). The Secretary of State then reassigned the aide to other duties and disavowed his comments. (Jefferson 2001, July 20).

Of course, the aide's comments turned out to be nothing other than true of the Arkansas process (See Table 3). Towards the end of the process, Huckabee tried to offer his own plan, but Attorney General Mark Pryor called Huckabee's proposal a "gerrymandered" plan (Blomeley 2001, September 25). The two Democrats on the board voted down Governor Huckabee's plan and then proceeded to adopt their own plan, which passed 2 to 1 (Jefferson 2001, September 26). The Arkansas commission, like all the other redistricting commissions made up of statewide elected officials, adopted a plan supported by only one party. As the aide to the Secretary of State suggested (even though she later removed him), it's only natural to assume that each of these politicians, as statewide leaders of their parties, are going to be responsive to their own parties and their voting blocs.

For her part, Sharon Priest promptly did, and, even more impressive, kept a straight face while she was doing it. "Our ultimate goal," she assured a reporter, is not to gerrymander districts in favor of her party but "to try to be fair." We'll believe it as soon as she fires her gabby aide, or at least demotes him. How dare he speak the truth! ("We are shocked, shocked: A glimpse behind the curtain" 2001, July 20).

Ohio

Ohio's reapportionment of both congressional districts and state legislative districts are done by a commission called the *Apportionment Board*, which is a body composed of mostly statewide officeholders. These board members are the governor, the state auditor, the secretary of state and one state legislator from each political party. In the 2000 round[193], the board included four Republicans and one Democrat.[194] In the 1990s, the Board's plans were perpetually subject to challenge in federal court, and they were struck down on numerous occasions. This time around, in order to help better their chances in court, the Board, with Secretary of State Kenneth Blackwell in the forefront, established a website, held multiple public hearings, and set up 10 regional mapping centers around the state so that "citizens" could try their hand at drawing lines[195] (Rowland 2001, August 10).

Similar to Arkansas, the Ohio Board voted to approve their redistricting plan by a party-line vote, with the four Republicans voting "aye" and the lone Democrat voting "nay." (See Table 3). The board proceedings were not without partisan controversy either.[196] But, it is not surprising that the Board voted along party lines, given its

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[193] The Board held its first meeting on August 2, and had a deadline for submitting a final plan by October 5th (McCarthy 2001, August 9).

[194] Governor Robert Taft (R); State Auditor Jim Petro (R); Secretary of State Kenneth Blackwell (R); House Speaker Larry Householder (R); and the lone Democrat – Senate Minority Leader Leigh Herrington (McCarthy 2001, August 9).

[195] After promoting more hearings and an open process, hardly anyone actually showed up at the public hearings, and those who did were either elected officials or political activists (Hallett 2001, August 22). According to one news account, "The five-member board encountered confusion and indifference to the decennial process…. Only about 20 people showed up at each of the three venues" (Hallett 2001, August 22).

[196] Late in the process, Democrats accused Republicans of trying to "buy" NAACP support for their plan, when it was reported that the redistricting coordinator for Ohio's chapter of the NAACP also owned a consulting company that Republicans on the Apportionment Board contracted with to help them draw district boundaries (Ohlemacher 2001, September). The lone Democrat on the board stated that the development was "a conflict of interest that gravely impacts the integrity of the apportionment process" and he called, not surprisingly, for adoption of the redistricting plan to be "delayed" until the contract was investigated (Leonard 2001, September 28).

composition. The state is not exceptionally competitive for Democrats in 2000 – Ceaser and Saldin score party strength there at 55.7, a reasonable advantage for Republicans – but statewide elected officials really have little incentive to placate Democratic legislators, since a majority of the board does not even sit in the legislature.

Permanent Commissions (Partisan)

Colorado

Colorado has an 11 person *Reapportionment Commission* that oversees state house and state senate districts.[197] In the composition of the commission, no party shall have more than 6 persons. Still, this rule is not helpful because the process of appointment virtually guarantees a partisan commission. No accommodation is made for a potential nonpartisan tiebreaking chair. Rather, each of the parties in the two houses of the legislature chooses members (totaling 4), the Governor chooses 3 members, and the state supreme court chooses 4 commission members. In the 2000 round, Democrats held a 6 to 5 majority on the commission. While the commissioners largely agreed on a state house plan (see Table 3), the state senate plan was more controversial, and the vote fell along party lines 6 to 5 (Reapportionment Commission minutes 2001, November 27). Colorado's composition virtually ensures a partisan result if a party wants to exercise their full authority on the commission.[198] The state supreme court could try to ensure that its picks are more nonpartisan and fair. One might presume that a court, devoted to

[197] Congressional districts are drawn by the state legislature, and those districts have been the subject of extensive federal litigation, including multiple cases that made there way to the Supreme Court over the last few years.

[198] Gene R. Nichol, Jr., who served on the Colorado commission in 1991, said that while the redistricting process in the Colorado legislature was about "100 percent political", the Colorado Reapportionment Commission was "about 98 percent political" (2001, 1030).

preserving objectivity and justice, would see its job in the commission process as finding a consensus-builder. That certainly did not appear to be the case in the 2000 round.

Alaska

I categorize the *Alaska Redistricting Board* as a partisan commission, because there is little assurance that the majority of the commission will act in a nonpartisan or bipartisan manner. Only through luck could the commission engage in a bipartisan action, and that would depend, in part, on who the state Supreme Court Chief Justice's pick was, and whether the Chief Justice, if she's in a position to be the tiebreaker, really wanted to play a constructive role in the process through her commission nominee.

Alaska, like Idaho, adopted a constitutional amendment placing control of redistricting into a citizen commission in the 1990s. In previous decades, the Governor was in control of redistricting, and the adopted plans often resulted in lawsuits. Every plan adopted since Alaska became a state has been challenged in the state or federal courts (Harrison 2006). The executive director of the 2000 Alaska commission Gordon Harrison (2006) wrote a law review article in which he lamented the partisan nature of the commission in the 2000 round. He suggested that the structure of the Alaska commission ensured a partisan process and outcome (Harrison 2006).

The Republicans controlled both houses in 2001, so they appointed two of the commissioners. The governor, who appoints two more commissioners, was a Democrat in 2001. The Chief Justice appointed a Barrow resident. The Supreme Court was somewhat geographically limited in its selection because at least one of the five appointments must come from each of the four judicial districts in Alaska. If Chief Justice Dana Fabe had been interested in forming a bipartisan commission, she would

have needed to be strategic in her choice. Instead, the Chief Justice appointed commission member Leona Okakok, who was described to me by Republican Commissioner Bert Sharpe as someone who was "not an independent" (Bert Sharpe interview June 15, 2006). Sharpe said he went into the process rather naively, going around to hearings, with the commission staff developing a plan, only to be blindsided at the last minute by a Democratic interest group plan in the last week of proceedings.[199] Sharpe saw the last three days of the proceedings as partisan.

The plan was challenged in the state Supreme Court after it was adopted, and the Court ordered the commission make changes to the plan. Sharpe said that after the Court stepped in to order changes, the final product "was a good plan" (Bert Sharpe interview June 15, 2006). He added, "After looking back on it, the end result I don't think was all that bad." (Bert Sharpe interview June 15, 2006).

It is interesting to note that in my phone interview with Democratic commissioner Vicki Otte, she did not see the board or its actions as particularly partisan, asserting,

"I don't think the decisions we made were based on partisanship. So, I don't think it was that partisan" (Vicki Otte interview July 19, 2006).

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[199] Sharpe told me in a phone interview on June 15, 2006:

> "I went in their wide-eyed and bushy-tailed [he repeated this several times in the interview]. It [the process] was a revolutionary change for the good and started out that way until the last three days when things imploded. We had an executive director and staff and rented facilities. We traveled all over the state. We split up to [hold public hearings all over] the state, and at least 2 of us would attend the public meetings. I personally went to 15 locations around the state…. And we got good public input, and the staff we had was excellent. Based on public hearings, we would give the staff input and have them shift things around…..
>
> Two days before the deadline, a group headed by an attorney brings in a plan they devised and asked us to adopt that plan. We didn't know if population accounts were right or districts took account of political or geographic concerns. The two governor's appointees and the Chief Justice's appointee voted for the plan."

However, Democratic commissioner Julian Mason thought that politics was inevitable:

"I'm of the view, one way or another, that redistricting is inherently political, and people have their own political views. As we moved ahead, all of us had our own points of view" (Julian Mason interview June 26, 2006).

The state Supreme Court Chief Justice had an opportunity in 2001 to appoint an independent to the commission that could form a consensus among the members. There is no guarantee the Chief Justice would have that chance in 2011. If a party controls one house and the Governor's office, that party will be able to control the redistricting board, irrespective of who the Chief Justice appoints to the commission. This commission structure, without a formal bipartisan framework in place, is structured to produce partisan decisions (Harrison 2006).

Back-up Commissions (Bipartisan)

Connecticut

Connecticut has a 9 member back-up commission, entitled the *Reapportionment Commission*, which comes into formation if the legislature fails to enact a congressional or state legislative redistricting plan.[200] This commission operated more or less successfully, and so the operation of this commission warrants some additional attention.

[200] In Connecticut, the legislature must approve a redistricting plan by a two-thirds vote of each house by September 15 following the year of a decennial census. If the legislature fails to meet this timeline, the Speaker of the House, the President of the Senate, and the minority leaders of both houses each appoint 2 members to a reapportionment commission, and this commission, within 30 days, selects a ninth member who must be a citizen member, or "elector" of the state (Connecticut Constitution, Article III, Section 6). The commission then has until November 30th to turn a redistricting plan into the Secretary of State's office. Aside from the 9th member, there is no prohibition on members belonging to the legislature.

In 2001, Connecticut's General Assembly failed to enact a redistricting plan[201], and this responsibility fell to the reapportionment commission. Unlike many other back-up commissions or permanent commissions in other states, Connecticut's bipartisan back-up commission came to unanimous agreement on three different redistricting plans. However, this outcome was not self-evident from the start, and was not accomplished without some help from the State Supreme Court and the person chosen as the ninth member.

The back-up commission was formed shortly after September 15, 2001, and a month later they chose the same public member as had served in the previous redistricting of 1991, former Republican House Speaker Nelson Brown who served in the 1950s. After the commission chose this 79-year-old former Speaker, the papers described the tie-breaking member as "an objective and level-headed politician" (Winters 2001), and "fair-minded and a good choice for the politically delicate task of redistricting" ("Former House Speaker Brown again to lead redistricting panel" 2001).

The commission narrowly avoided the deadline for drawing state legislative districts. With a constitutional deadline of November 30, 2001 looming, the commission adopted a state senate plan unanimously on November 26. (See Table 3) (Connecticut Reapportionment Commission Minutes 2001, Nov. 26). A few days later, on November 29, the commission unanimously adopted state house districts on a vote of 8 to 0.

However, commissioners were not able to reach agreement on congressional redistricting during the constitutional timeline allotted to the commission. Part of the deadlock stemmed from the fact that Connecticut was losing a congressional seat, and incumbent Democratic Congressman James Maloney would have to run against longtime

[201] The redistricting committee, which is a constitutional committee made up typically of the same people as those who end up serving on the commission (minus the public member) and is composed of equal numbers of each political party, failed to come to agreement on any plan to present to the legislature.

incumbent Republican Congresswoman Nancy Johnson.[202] This confrontation caused Republicans and Democrats to be divided as to what to do with the new district. Democrats were pushing a compromise plan that gave Maloney an 18,000-vote plurality[203], while Republicans were pushing for a 12,000 vote Democratic advantage in the hopes Johnson could still survive (Dixon 2001, December 2). One reporter quoted the Republican House minority leader as saying, "We feel the courts are much more likely to be fair" (Daly 2001, December 1). Interestingly enough, the deadlock was not necessary given the fact that the commission was an odd-numbered commission. At least nominally, Republicans controlled the commission. However, the party leaders of the House both stated that the final commission result would either be a unanimous plan or no plan at all ("House leaders close to a deal on redistricting" 2001). Under the state constitution, congressional redistricting next falls to the state Supreme Court, which has the option to punt the issue back to the commission.

Shortly after the constitutional authority for the commission ran out, commission members sought authority from the state Supreme Court to go back to work on a bipartisan plan.[204] The Court gave the commission two more weeks. But as that two-week court-ordered deadline approached, it appeared less and less likely that the commission could agree upon a plan, in part because "pressure from incumbent[s]" Maloney and Johnson was being applied to the commission "behind-the-scenes" (Dixon 2001, December 18). This is similar as to what was happening in New Jersey, except that here it

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[202] Republican state Senate Minority Leader Louis Deluca, who was co-chairman of the committee, predicted as early as September that getting agreement on a congressional plan would be difficult (Daly 2001, September 5).

[203] For most of the day on November 30th, Democrats had pushed a plan with a Johnson/Maloney district that had a 28,000 Democratic voter-registration advantage.

[204] Members had apparently made some progress on possible congressional plans before time ran out for the commission ("Court must allow panel to finish work" 2001). The main sticking point had been the Johnson and Maloney district.

was having the opposite effect, because neither Maloney nor Johnson wanted their party to cede ground.

With only a few days left, Democratic Senate President Kevin Sullivan lashed out publicly, stating to the papers, "House Republicans have come back and said today, to paraphrase Damn Yankees,' whatever Nancy wants Nancy gets" (Dixon 2001, December 18). That same day, the state Supreme Court ordered the parties back to court (Daly 2001, December 18). When the parties appeared in court on December 19, two days before the court-imposed deadline, the Chief Justice "scolded" commissioners and said that if they failed to come up with a deal, the Court would take "a fresh look at the whole state" (Dixon 2001, December 20). "We may very well have a different approach to this problem" the Chief Justice said from the bench (Dixon 2001, December 20). Up to that time, negotiations were mostly about the configuration of the Johnson/Maloney district, while the other districts had been worked out. The state Supreme Court appeared to signal that all those agreements would be ignored and incumbents would not be spared if it were up to the Court. Not surprisingly, the commission was able to come to an agreement in time – and it was unanimous.

There were several factors that militated against this commission arriving at a partisan voting pattern. First, it appears that former Speaker Nelson Brown did not simply vote along with Republicans; otherwise, the party could have controlled the commission. At the same time, he apparently was not going to vote for a Democratic plan either. Second, the state Supreme Court undoubtedly had some measurable influence on pressuring the commission to reach a consensus position in the wake of their threat to shake up incumbents' congressional districts. Unlike other State Supreme Courts, it seems Connecticut's Court was most concerned with pushing for a consensual process. Advocates of state redistricting commissions, who aspire to consensual-minded plans,

would definitely find Connecticut's State Supreme Court far more constructive in the 2001 process compared to other state Supreme Courts like Montana, Alaska, and Illinois. Third, it seems reasonable to assume that the less competitive nature of Republicans in the state legislature meant that, at least in theory, there was less for them to lose in the process.[205] Connecticut was the only back-up commission in the 2000 round of redistricting to eschew partisan deadlock and partisan decision making.

Illinois

When Illinois's legislature failed to draw state legislative lines in 2001, that responsibility fell to a back-up commission, which in many ways, resembled the permanent commission for legislative seats in New Jersey. Four Republicans and Four Democrats were picked by legislative leaders to come up with a state plan. The leaders of the parties in each house pick one legislator and one public member for the commission. The 8 members then have a period of time to come to an agreement on a plan. Unlike New Jersey, the state Supreme Court only has partial influence over who the tiebreaker is. If no agreement between the parties is forthcoming, the state Supreme Court picks one Republican and one Democrat to act as a possible tiebreaker on the commission. Then, a lottery is performed to see which nominee is chosen to be the tiebreaker. In 1980, the nominee's name was drawn out of a hat once owned by Abraham Lincoln.

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[205] Unlike the two parties in Missouri, New Jersey, or Montana, where state legislative fights were contentious, Republicans had little chance of capturing either house in Connecticut, where Democrats controlled 100 of the 151 seats in the state house and 21 of 36 seats in the state senate (http://www.fairvote.org/?page=297; *see also* Daly 2001, November 29). According to Ceaser and Saldin scores, Connecticut at a score of 45.7 leaned about as much Democratically in party strength as Pennsylvania leaned Republican.

In 2001, the Democrats won the lottery. The state Supreme Court's Democratic pick was former Chief Justice and Mayor of Chicago Michael Bilandic. The choice of a tiebreaker again had a huge effect on whether the commission reached a consensus. In this case, Bilandic had been a former Mayor of Chicago in the late 1970s, and had been heavily involved in the Democratic political machine of Chicago.[206] He had also been the states' Supreme Court Chief Justice. However, given his strong Democratic past in machine politics in the Windy City, the state Supreme Court should have known that their Democratic nominee wasn't going to do anything other than vote with the Democratic party line. And not surprisingly, upset Republicans filed a lawsuit after the Democratic plan was passed on a party line vote of 9 to 8.

When the case got to the state Supreme Court, the Justices split along party lines, with the 5 Democrats voting to uphold the map drawn by the Democratic-controlled commission and the 2 Republicans voting to strike down the map as unconstitutional. Like other states with tie-breaking commissions, what made a significant difference as to whether the commission ended in partisan rancour depended on the conduct and intentions of the tiebreaker.

Back-up Commissions (Elected State Officials)

There are several states that have back-up commissions composed of elected state officials – Texas, Oklahoma, Mississippi and Indiana. After the 2000 Census, neither

[206] During his 1978 race for reelection, Bilandic had the support of notable Democratic machine bigwigs like Ed Kelly of the 47th Ward. Ed Kelly's tactics on behalf of Bilandic in his race for Mayor, as documented by the Better Government Association of Chicago, illustrated the tough political culture that Bilandic arose out of. The idea that Bilandic would be the least bit impartial to Republicans seems difficult to swallow, which leads one to wonder what the intentions were of the state Supreme Court.

Mississippi nor Oklahoma[207] had to resort to a back-up commission for state legislative seats. Both Texas and Indiana's back-up commissions did meet, and these commissions, like the permanent commissions composed of statewide elected officials (Arkansas and Ohio), voted almost completely by the party line when approving their plans.

Indiana

Indiana's back-up Redistricting Commission came into being after the legislature failed to draw congressional districts. Unlike the other three back-up commissions composed of state elected officials, (Tx., Ok., Miss.), Indiana's commission has no responsibility for state legislative lines. It only draws congressional lines. There are no provisions in the law for the commission to be balanced among the parties.[208] Four of the members come from each house of the legislature. And, the governor chooses the Fifth tie-breaking member, also from the general assembly. In 2001, Republicans controlled the state senate, but Democrats controlled the state house and the governor's office. Consequently, Democrats had no incentive to come to an agreement with Senate Republicans in the fight over a congressional redistricting plan because they knew they could run out the clock in the legislative session and then control the back-up commission (Smith 2001, April 9). This scenario is exactly what happened. The back-up commission

[207] Oklahoma's *Apportionment Commission*, as it is called, is composed of the Attorney General, the state Treasurer, and the state Superintendent of Public Instruction (Oklahoma Constitution, Section V-11A). Of all the states, this board's composition is somewhat of an odd array of state officials. It is unclear why the Superintendent of Public Instruction would be slated to serve on such a back-up commission.

[208] The Indiana commission is statutorily based. The Indiana law regarding the commission states that the commission shall "consist of the speaker of the house, the president pro tem of the senate, the chairman of the senate and house committees responsible for legislative apportionment and a fifth member who shall be appointed by the governor from the membership of the general assembly."

met, and Democrats outvoted their Republican counterparts 3 to 2 in passing their preferred plan (Sundheim 2001, May 10).

Texas

In Texas, if the state legislature fails to devise a redistricting plan for state senate seats or state house seats by the end of the 2001 session, that duty devolves to the Legislative Redistricting Board, composed on the Lt. Governor, Comptroller, Speaker of the House, Attorney General, and Land Commissioner. Republicans controlled four spots on the board, with House Speaker Pete Laney the lone Democrat. The final votes for the house and senate plans were 3 to 2. The close votes, to some extent, obscure the level of partisanship on the votes. Acting Republican Lt. Governor Bill Ratliff opposed the plans and voted with Laney, but he did so not necessarily in solidarity with Laney. Instead, he had his own plans that he wanted adopted. Attorney General John Cornyn proffered a state house plan, and Land Commissioner David Dewhurst put forward his state senate plan. Not all Republicans[209] in the legislature supported the Cornyn proposal or Dewhurst proposal, but these plans garnered the necessary votes in the commission. Laney called the house plan, which targeted his district, "an incumbent punishment plan for Democrats" (Shannon 2001, July 25).

Like the other commissions made up of statewide elected officials, the Texas commission (or board) voted for a plan mostly on party lines.

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[209] Republican State Senator Jane Nelson voiced concern about an amendment to the state senate plan proposed by Attorney General John Cornyn because of the way the amendment affected her own district. "'Whatever you do, do not take a Vegomatic to the constituents that I represent and chop them up,' she had pleaded with the board" (Shannon 2001, July 25). Republican State Senator Jeff Wentworth of San Antonio had urged the commission adopt Ratliff's plan and stand firm against "radical Republican partisans" (Shannon 2001, July 25). But, the Vegomatic was turned on anyway.

Nonpartisan Commissions: Iowa

Iowa's commission consists of the Legislative Service Bureau, which is assigned to draw lines after the census with the aid of a computer, but without the use of incumbent or party information. The commission presents its plans to the state legislature and the legislature either has to accept or reject the plans.[210] They cannot be altered. Iowa's commission is the most nonpartisan out of all the commissions, as it basically consists of bureaucrats who plug population numbers into a computer which then creates a map. In this way, the Iowa model is very similar to British and Canadian boundary commissions. They have a set of rules that they have to follow, but party and incumbency cannot be considered in the line-drawing.

In 2001, the Legislature rejected the first plan drawn by the Legislative Service Bureau, but the second plan was accepted.

However, the transferability of the Iowa model to other states may be limited. First, the fact that Iowa's geographic landscape is rather monotonous, without large areas of mountains or deserts, means that worrying about communities of interest are minimal. Similarly, the state has a small minority population, and thus concerns about the Voting Rights Act are also minimal. There is no need to ensure minorities have a seat, because there numbers are rather small and dispersed. It is unclear whether states like Texas or California could implement such a commission without encountering heavy legal opposition from minority groups if such a commission failed to properly consider minority districts (which would be somewhat difficult to do if one is only operating off of population figures). Iowa, however, is certainly unique among commissions in the states.

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[210] If the legislature rejects two plans, it obtains the authority to modify a third plan presented by the commission, but a new map has to come into being by September in the year after the Census or the State Supreme Court takes over and imposes its own map.

State-by-State Conclusions

In this section, I provided a state-by-state account of redistricting commission behavior before offering a broader overview of commission behavior. I did a state-by-state review because a broader statistical analysis can miss some of the important details. And, this problem is due in part to the lack of a larger number of observations for running a more comprehensive statistical analysis. The state-by-state account did offer some useful observations. First, it seems that redistricting boards that contain statewide elected officials are almost always likely to devise plans based on a straight party vote. Second, on bipartisan commissions with a tie-breaking chair, the personality of the chair is hugely important in determining whether a partisan plan or a consensus plan is passed. Third, as is apparent from Table 3, a fair amount of the commissions decided plans based on a straight party vote. It does seem that partisanship in voting and behavior is quite prevalent in commission decision making. In the next section, I take some of this data and perform some broader statistical analyses that help further this point.

COMPREHENSIVE OVERVIEW OF STATE COMMISSION BEHAVIOR

In addition to the state-by-state analysis, I present a broader overview of partisanship and other factors in commission behavior with some limited statistical analyses in this section. Some state commissions do manage to form consensus plans. However, as this statistical analysis will show, just because states create bipartisan commissions does not mean that partisanship will go away. What the analysis also indicates is that there are several other factors at work in commission behavior.

Competitiveness

One of the factors discussed in the state-by-state analysis was the extent to which the competitiveness of a state might have an effect on commission behavior. More specifically, does support for the final plan on a commission decrease as the competitiveness of a state increases? It would seem that the more competitive a state is, the more that hinges on every line drawn in a redistricting plan. One wrong line might cost a party control of the legislature. Under those circumstances, are we likely to see more divided votes on commissions?

To test this possibility, I began with the "percentage of support for each final plan voted on in all state commissions from the 2000 round" as the dependent variable. Looking at the level of support for a plan that passes a state commission gives us a rough approximation of how divisive the plan was politically, especially for those commissions that are bipartisan in composition. Using the "strength of party" score in that state (taken from Ceaser and Saldin 2005), I create a dichotomous "strength of party" variable for those states that are fiercely competitive (1) – those states that hover close to the 50 score on the Ceaser and Saldin 2005 score/scale – and those that have a dominant Republican or Democratic party (0), represented in the Ceaser and Saldin score as a state with a party strength score of either a 46 or lower or a 54 or higher. Then, I ran a Pearson correlation between "strength of party" (which I am using as a proxy for competitiveness) and "percentage of support for each final plan" (which I use as a proxy for the amount of bipartisan support a plan received).[211]

[211] I could not simply use the amount of bipartisan support for a plan as the dependent variable, because there were some commissions were there was only 1 Democrat. And, some commissions passed Republican plans, while others passed Democratic plans. This made formation of an dependent variable for measurement somewhat difficult.

The results indicate a strong correlation between the amount of support a plan garnered within a commission and whether or not a state has parties that are about even in strength or lopsided in strength (See Table 6-4, below).

Table 6-4 Correlation of support for a final plan and whether the state has a dominant party

	Pearson Correlation
	-.467*
N	24

*Significance at the .05 level

As states become highly competitive, commissions become more divisive, and support for the final plan tends to drop. We saw this divisiveness happen, for example, in Missouri, Illinois, New Jersey, Indiana and Arkansas, where all the 2000 measures of Ceaser and Saldin (2005) party strength between the parties were close. But, these results are still quite tenuous, and so one should be cautious as to how one interprets this correlation. For instance, one could easily argue that in 2000, Arkansas, while competitive at the national level, was not particularly close in terms of party strength at the state level.

Regardless, the other states were close in both numbers in the state legislature and in terms of the Ceaser and Saldin score, and if one runs the correlation by labeling Arkansas non-competitive, there is still a strong correlation between the two variables.

Testing the Influence of Partisanship on the Voting Behavior of the Commission

In order to determine the level of overall partisan voting on commissions, I correlated the individual votes of commission members with party identification.

Accomplishing this task was made somewhat difficult in that some plans were Democratic plans while others were compromise plans or Republican plans. I settled on a dichotomous dependent variable that would give me a good estimation of partisan voting.

Using news accounts and other data (such as interviews) of the votes on plans, I identified the vote by each commissioner as a vote for Republican interests or not. In short, any votes by commissioners (Democratic or Republican) against Democratic plans were assigned a 1 (which represents a vote for Republican interests). Any plans that were compromise plans were also assigned a value of 1 (as this theoretically could represent a vote for Republican interests). The more compromise votes there are in the dataset (or the more cross-over voting by Democrats), the more likely that partisanship is not going to be too significant of a factor. Finally, any votes that represented support for Democratic interests where assigned a value of 0.

My independent variable was whether the commissioner is a Democrat (1) or a Republican (0). Excluded from the analysis were independents who had no official party affiliation (such as Larry Bartels and Alan Rosenthal).

The results (in Table 6-5, below) were a strong correlation between being a Republican and voting for a Republican plan.

Table 6-5 Correlations of party identification of commissioner and voting for GOP interests

	Pearson Correlation
All Cases	-.588***
N	177

****p<.001
Dependent variable: 1 = vote for GOP interests
Independent variable 1 = Democrat

Equal Population

While much of the focus on this chapter has been on the absence or presence of partisanship in commission behavior, an equally important point to address concerns questions over commission effectiveness in court. In chapter 4, I found that commission-drawn plans faired better in court than other types of plans (particularly those drawn by a state legislature). Part of the reason, I hypothesized as to why commissions do better in court was the suggestion that commissions are more conscientious about following the law. This hypothesis also was supported anecdotally by some commissioners I spoke with, many of whom were concerned about how their plans might fair in court if sued. Commissioners in Montana and Washington, for example, were concerned about suits from minority groups under the VRA (or wanted to placate such groups), and thus sought to create a record in public hearings to illustrate that minority concerns were taken into account in the process. Presumably, the level of partisanship of a commission did not have much of an effect in federal court, because regardless of what type of commission, the mere presence of a commission process was a significant factor in the model in

chapter 4 as to whether a redistricting plan won the approval of a federal judge.[212] Thus, do commissions fair better in court because they draw more legally sound plans?

One way to test this theory more systematically is to examine how states with commissions faired in drawing equi-populous districts compared to those states with legislatures. Were states with legislatures, for example, more likely to draw less equi-populous districts? In testing this proposition, I looked at plans drawn in the 50 states. I constructed a dependent variable where those plans that deviated more than five percent received a 1 and those that deviated less than five percent received a 0. Some small states have commissions, but small states often have problems creating compact districts and equalizing population. Thus, to take into account the difficulty faced by small states in drawing equal population plans, I included a variable as to whether the state was a small state – defined as any state with two congressmen or less. My independent variable of interest is whether the state has a commission or not. Since the dependent variable (whether the state plan is more or less than 5 percent in deviation) is a dichotomous variable, I employed logistic regression to analyze the statistical relationship of these independent variables to population variances of plans. I examined the effect of commissions on population variance in two ways, running two models. First, I ran a model that only looked at bipartisan commissions (excluding commissions that did not have independent chairs or were commissions composed of elected state officials). In a second regression analysis, I looked at all states that had commissions draw lines in the 2000 round (regardless of the type of commission). Table 6-6 shows a model for state

[212] This, as is suggested in interviews with federal judges, may be due to the fact that a commission oftentimes, even if partisan, represents a process where the minority can be heard.

senate plans. Table 6-7 examines state house plans.[213] The results of this analysis are listed in Table 6-6 and Table 6-7 below.

Table 6-6 Deviations in Senate Plans in Legislatures and Commissions

	Bipartisan commissions	All commissions
Constant	.613*	.681
	(.377)	(.409)
Small states	2.29**	2.39**
	(1.14)	(1.14)
Commission	-1.38*	-1.10*
	(.79)	(.690)
Log- likelihood	55.356	55.925
Cox and Snell R^2	.161	.151
N	50	50

Standard errors in parentheses; * p <=.10; ** p <= .05; *** p <= .01
Dependent variable: 0 = deviations less than 5 percent and 1 = deviations more than 5 percent

According to the results of an analysis of state senate plans and their deviations in Table 6-7, small states tend to have larger variations in population size in their state senate districts. More importantly, it appears that states with commissions tend to have drawn state senate districts with less variances in population. However, these results are mixed, because when running the same model for state house districts, no significance was found in any of the variables (see Table 6-7). While it appears commissions drew

[213] Since Nebraska only has a one-house legislature, it was run in both models for state house and state senate.

more equal population plans for state senate districts than legislatures, they had no effect on state house plans. Given these results, no conclusive answer can be given as to the ability of commissions to follow the law better than state legislatures when drawing lines. Future research should thus be performed on a larger dataset to come to more conclusive results – research that is beyond the scope of this more limited study.

Table 6-7 Deviations in State House Plans in Legislatures and Commissions

	Bipartisan commissions	All commissions
Constant	.405	.310
	(.372)	(.396)
Small states	9.08	9.05
	(28.3)	(28.7)
Commission	-.91	-.310
	(.81)	(.700)
Log- likelihood	64.103	64.103
Cox and Snell R^2	.231	.214
N	50	50

Standard errors in parentheses; * p <=.10; ** p <= .05; *** p <= .01
Dependent variable: 0 = deviations less than 5 percent and 1 = deviations more than 5 percent

CONCLUSION

The results of the study of this chapter indicate that commissions can be very partisan institutions. However, certain commissions such as Iowa and Arizona offer more

potential for consensual nonpartisan redistricting commissions, if that's what states are looking for. And, tie-breaking commissions that take some care in selecting the tie-breaking member can hope for a better opportunity for both parties to reach a consensus on a plan. What about the possibility that state commissions do a better job at following the law than state legislatures? Although some evidence suggests that state commissions may follow equal population rules better than state legislatures, there is no conclusive answer to this question. The end result is that, depending on how you define a state redistricting commission, there are plenty of partisan-acting commissions in the states. However, as evidenced by some states, this does not have to be the modal commission if a state desires a more consensus-oriented process to redistricting.

Chapter 7 Conclusion

The story of redistricting and gerrymandering in the United States is not a new phenomenon (Carson, Engstrom, and Roberts 2006). In the 19th Century, gerrymandering was routine in some states (Carson, Engstrom, and Roberts 2006). And the history behind gerrymandering was not limited to the United States, but occurred in other countries such as Canada (Courtney 2001) and Great Britain (Leonard and Mortimore 2001). Those systems eventually moved control of redistricting out of the legislature and into nonpartisan boundary commissions. Few people in America are advocating the creation of nonpartisan commissions[214], in part because there is a sense that no commission in the United States could be nonpartisan. However, there are policymakers[215] and academics[216] who are advocating increased federal judicial regulation or increased use of bipartisan state commissions. The concern over the methods of redistricting in the United States and the roots of the reform movement have to do in part with decreasing competitiveness in congressional elections (McDonald 2006) and increasing polarization in Congress (Binder 2001; Theriault 2006). Redistricting is seen as part of the force behind these phenomena. The alternatives to legislative redistricting are seen as less partisan and thus better able to confront these issues.

However, if there is a sense that these alternative institutions are less partisan than legislatures, there is little social science research to back up this claim. Partisanship does

[214] Even among many reformers, there is a belief that American politics is different, and that partisanship cannot be removed from commission proceedings, and thus can only be contained.
[215] Like state senator Jeff Wentworth in Texas or Pennsylvania state Rep. Sara Steelman to name a few.
[216] Like Samuel Issacharoff or Herb Asher, among others.

have a role in these processes as well, but the answer is somewhat more complicated, as this dissertation has illustrated.

THE FEDERAL COURTS AND THE ROLE AND/OR ABSENCE OF PARTISANSHIP

In my research on the alternative methods to redistricting regulation, I've endeavored to understand how these alternative institutions respond to redistricting and whether partisanship has a role in these processes as it does in the legislature. In restating the major findings of chapters 4 and 5 here, I found that while federal courts are not as partisan as some scholars would suggest (Cox and Katz 2002), they also are not as reliably nonpartisan as other scholars would imply or suggest (Issacharoff 2002; Lloyd 1995). My statistical analysis of three-judge federal district court decisions going back the last 25+ years illustrates that partisan effects in judicial decision making are strongest when a federal judge of one party is reviewing the redistricting plans drawn up by the opposite party. But, partisanship does not have the same effect on decision making when a federal judge is reviewing her own party's plans or a state's compromise plan. In addition, it's important to note that I found no evidence of partisan decision making when federal courts were reviewing cases where federal law was reasonably clear – cases that dealt with potential violations of the principle of equal population. Finally, judges tended to uphold plans that were drawn by redistricting commissions (broadly defined) at rates higher than other types of plans. In the judicial interviews of chapter 5, qualitative evidence also pointed toward some of the rationales behind why the numbers came out the way they did.

And ultimately, these findings make sense. Some political scientists might be surprised to find that partisanship does not play a larger role in judicial decision making.

On the other hand, some lawyers, legal academics (and perhaps federal judges themselves) might be surprised to find that partisanship *sometimes* (and I mean to stress sometimes) correlates with a district judge's decision in the case. But, creating a rationale for explaining the patterns observed in my study is not difficult. The vast majority of federal district judges are very professional people who take their job seriously. Through law school training and socialization in the legal profession, these federal judges undoubtedly strive to provide fair and objective decision making based on legal principle.

But, political scientists have found that partisan attachments in people are psychological in nature and they are enduring. And these attachments, as I suggested in chapter 3, can shape judicial perceptions of facts and law, even without the federal judge realizing this herself. Of course, judges strive for accuracy when processing the information they receive on a case. Thus, if the law and precedent are reasonably clear in a case, federal district judges will tend to decide that case based on the law. In redistricting, two aspects of the law stand out particularly. The rule of equal population is rather easy to administer most of the time, and so we should expect to see little or no partisan effects when cases turn on these questions. Furthermore, the redistricting precedent favors judges giving deference to the legislature. Thus, when unsure about the law, a federal judge is likely to maintain the status quo and defer to the legislature. This is particularly the case, I argue, when judges face challenges to redistricting plans drawn up by their own party or drawn up between both political parties as a compromise plan. In these cases, I speculate that the question of partisanship or party may not even register for the judge – it may not be particularly salient on their minds. A judge is less likely to be suspicious of these plans, and therefore the safe option for the judge, if the law is unclear, is to defer to the legislature as precedent suggests.

However, federal judges reviewing opposing party plans may approach the constitutionality or legality of the plans from a different perspective. If your party has received the short end of the stick in the political map-drawing, it seems completely reasonable to think that you would scrutinize the plan more than your fellow colleagues who are of the same party as the legislative or commission members who drew the plan. Thus, you are going to be more suspicious of the plan. In these circumstances, a federal judge's partisan leanings may help her shape her own perceptions of what happened. If a federal judge is looking at an opposing party plan, it means that her party is in the minority in the state legislature or the state commission. Consequently, she is going to be attentive as to whether her own party (which is the minority party in the legislature or on the commission) got a fair shake in the process. This may not exactly be a conscious decision process either. As the social psychology literature suggests, some models of higher-level information processing assume that some people may not even be aware of the various influences and biases on their processing of information and their judgment.

I would argue that the federal judge reviewing the opposing party plan is more likely to identify or empathize with the aggrieved party. And this higher level of scrutiny[217] means that the probability increases that she will find something unconstitutional or illegal with the plan and strike it down.[218] This story of judging, if not directly provable from the data presented, is certainly consistent with the findings in this dissertation.

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[217] I am not referring to legal terms of scrutiny

[218] It is important to remember that not all federal judges reviewing opposing party plans strike down those plans. Scores of federal judges uphold plans drawn by the opposing party. But the general tendency, taking a number of other factors into account statistically, demonstrates that judges are more prone to strike down a redistricting plan if that plan was drawn by the opposing party.

From a normative standpoint, this judicial skepticism I found in the statistical analysis about the activities and/or shenanigans of the opposing party I believe is a good thing. Our American system of government expects, at least in theory, the federal courts to look after minority rights, because some branches or levels of government are not always as uniquely placed to do so. And so, federal district judges who are reviewing the legality of an opposing party plan, in the face of uncertainty in the law, are likely to ensure that at the very least, the minority party in state government receives a fair process before having a new redistricting plan foisted upon them. At the same time, states operate in their own unique sphere in our constitutional system, and the federal courts recognize this in redistricting precedent which cautions them against overturning the majority will of a state legislature. The fact that deference to state legislatures is typically manifested through federal judges reviewing their own party's plans and divided government plans, or that federal judges reviewing opposing party plans are more likely to uphold the views of the minority – those facts should not be anathema to federal judicial sensibilities *if* judicial panels overhearing redistricting cases contain the sentiments of both the major political parties, as represented by the past life experiences of the federal judges. In other words, the findings in my statistical data should not be alarming to political scientists or federal judges if the administrative heads of the Circuits are willing to place federal judges of both parties on these three-judge panels.

Therefore, if we assume my findings are accurate, one suggested reform that would further the fairness of the process to litigants would be to randomize the partisan make-up of these panels so that if in the first redistricting case that requires a three-judge court in the relevant Circuit, the Chief Judge of the Circuit appoints (by random selection) 2 Republicans and 1 Democrat for the panel, then in the next case that requires the impaneling of a three judge court in that Circuit, the Chief Judge would appoint 2

Democrats and 1 Republican (and so on and so forth). Having both political parties represented on the panels helps increase the probability that different political perspectives are at least considered by at least one of the individual judges on the panel. This structure ensures that if one of the judges dissents, there is a chance that the U.S. Supreme Court may act on this dissent.[219] Such an instance happened with John T. Ward's dissent in the Texas redistricting case.

Such a suggestion, however, is not without controversy. Law professor Michael Solimine (1996) argues that these three-judge courts should be completely randomized without regard to political party. He argues that placing judges on the panel based on their political party only reinforces the notion that they have partisan roles to play and thus increases the chances that they will then decide the case based on partisan identification. While this fact is certainly a concern, I think Solimine disregards the reality of federal judicial decision making under uncertainty in such highly political cases. If judges' previous life experiences and views, as the social psychology literature on judging suggests, and my research here suggests, shape their perceptions of evidence, then randomization of judges will not solve the issue Solimine is seeking to solve because a process could result in a panel that is all of one party.

The fact is that federal judges do a pretty good job as it stands in overseeing redistricting. Even though the media like to frequently point out which president appointed which judge in these cases, the federal courts are not as partisan in their decision making as the media and political scientists might suspect. When the law is clear, judges do not ignore the law to enact their own partisan preferences. My suggestion

[219] Even though the U.S. Supreme Court can be very ideological in their decisions (Segal and Spaeth 1993), they are usually more primarily concerned with legal policy than they are with the promotion of partisan decisions (one only has to look to Earl Warren, John Paul Stevens, David Souter, and others for evidence that previous party affiliation does not reliably predict partisan voting on the U.S. Supreme Court compared to ideology).

about ensuring that the panels are diverse politically simply is only put forward as a way to ensure that the aggrieved minority party challenging the redistricting plan in question has a federal judge that understands their perspective in court, if nothing else.

Another aspect of these findings concerns the high number of dissents in these cases. Federal courts, as we learn in Civics 101, do not have an army to enforce their opinions. To compensate, courts seek legitimacy and hope to maintain that legitimacy through the forcefulness and logic of their arguments in their opinions. Furthermore, the force of their arguments is more powerful if they speak with one voice. Dissents might encourage people to hedge their bets so that they can return to court another day and win the next round without exactly complying with the court's will. Indeed, this concern is why federal judges such as Harry T. Edwards (1998), the former Chief Judge of the D.C. Circuit, have advocated the desirability of consensual judging in court decisions. And yet, redistricting cases suffer from extremely high dissent rates compared to other cases (Hettinger, Lindquist and Martinek 2006).

However, my findings also showed that federal judges with extreme amounts of experience on the bench (those judges who are light-years away from their initial appointment) are much less likely to dissent in redistricting cases. And, if you run my statistical model by looking at only those judges with more than 20 years of experience, you find that all partisan correlations in voting completely drop out. Partisanship has no significance in voting among judges with extensive experience. This finding is significant because one could argue that it reaffirms the Hamiltonian view of federal judges in our constitutional system articulated in Federalist Paper #78. Life tenure does give judges a certain amount of independence. This independence, though, does not appear immediately in redistricting cases, but only emerges after a considerable amount of time

and experience on the bench.[220] Given this independence based on experience, another reasonable reform that the Chief Judges of the Circuit could implement that would increase consensual decision making and reduce the chance that partisanship might influence one's decision processes, would be to only appoint judges with extensive experience on the bench – more than 20 years experience – to three-judge redistricting panels. This reform might result in more tribunals that come to a consensus and eschew partisan influences.

Finally, there is the issue of how judicial decision making might be swayed by state commissions. The statistical data presented in chapter 4 illustrated that redistricting plans drawn by state commissions are less likely to engender opposition by federal judges. Federal judges are more likely to sign off on plans drawn by commissions. This reality may be, as suggested in chapter 5, due to the fact that unlike legislatures, commission processes appear to be fairer and less likely to engage in self-serving interests and are more likely to be bipartisan in process, if not bipartisan in result. This fact is important for states looking to protect plans from litigious attack in federal court. Aside from the reality of state commission behavior, the idea that an independent board or state commission has drawn a plan may have a positive effect on judicial perceptions about the fairness of the redistricting process.

Judges are not Partisan Maximizers, but they are not neutral arbiters either. Like everyone, they bring personal life experiences to the bench, and these experiences can help shape the information they process and the judgments they make. Nevertheless, it seems reasonable to assume that the vast majority make every effort to be fair and objective overseers of the law. In this sense Judges, unlike state legislatures and some

[220] Of course, it could be that these judges are just so old and tired that they are uninterested in fighting with their colleagues, and so the easiest thing to do is to go along with the tribunal.

state commissions, are constrained partisans. They are constrained by law and by their own conceptions of fairness, justice, and objectivity.

THE OPERATIONS OF INDEPENDENT REDISTRICTING COMMISSIONS

As the evidence from chapter 6 shows, just because a state has an independent board or commission for drawing redistricting plans does not mean that the governmental body will produce a politically "fair" or consensual plan by way of a "fair" process. By way of "fair", I am referring to a plan that would result in parties being given the chance to capture an amount of legislative seats relative to their strength in the state through a process that ensures some sort of bipartisan consensus or a check on the majority's will in the commission. This conception of "fairness" is often what reformers want out of a commission. But, almost none of the commissions require equal numbers of partisans or even a process that ensures any partisans of a particular party. Many of the commissions from the 2000 round of redistricting approved plans on a party line vote. Partisanship correlated strongly with whether or not a commissioner supported a plan. Recent studies of commission effects (Buchman 2003; Winburn 2006) indicate that such institutions create bipartisan gerrymanders and fail to reduce litigation of redistricting in court.

But, most of the current commissions in states are structured so as to encourage a partisan result. Even-numbered commissions, like Missouri, have the potential to deadlock and produce no plan if members believe the courts will give them a better option than they can get from the other party. Odd-numbered commissions break down into partisan voting if the relevant body that picks the tie-breaking member fails to pick a chair or tiebreaker who will work for consensus. The only two commissions that really attempt to remove partisanship from the process are Arizona's merit-selection

commission and Iowa's nonpartisan bureaucracy-based commission. Only Iowa's commission attempts to come anywhere close to the nonpartisan commission model of Britain, Canada, or Australia. Like these countries, Iowa's Legislative Service Bureau cannot consider voting histories when constructing districts. Iowa's commission, like these countries, faces a number of regulations which cabin the possibility that partisan factors might be considered.

The arguments against the nonpartisan commissions in the United States stem from the belief that America's politics are too partisan to have a nonpartisan commission – that the process is inherently political. In reality, no state has ever tried to implement a nonpartisan commission. Accordingly, comparisons and analyses to boundary commissions in other English common law systems are speculative at best.

Criticisms that current commissions fail to stem litigation (Winburn 2006) obscure the fact that commission plans actually fair better in court than legislative-drawn plans. Any garden-variety attorney can file a lawsuit about anything. Redistricting will always gore someone's ox and precipitate a lawsuit. Thus, stemming the flow of litigation is impossible, unless we were to take on the English system where lawsuits over the boundary commission's redistricting plan are nearly impossible to make (*see* R v. Boundary Commission for England ex parte Foot 1983 1 Q.B. 600). As long as equal population claims and the Voting Rights Act remain unchanged, courts will allow redistricting claims to proceed. Commissions, as it appears from my research, give states a better chance to succeed in litigation if it happens.

THE ALTERNATIVES TO LEGISLATIVE REDISTRICTING

The purpose of this research was to arrive at a better understanding of the alternatives to legislative redistricting. Many scholars advocate the benefits of these alternative regulatory structures – the commissions and the courts – but previous research (excepting Lloyd 1995) has done little to help us understand how these alternatives actually make decisions. Based on what these reform advocates seem to be longing for, which is the removal of politics from the process, that removal does not happen on bipartisan commissions or boards of statewide elected officials. In the federal courts, partisanship does not operate at a maximum, but in some instances party background does correlate with federal district court decision making. The federal district court instances of relying on partisan perceptions for deciding cases are less pernicious than one might expect, and perhaps are actually beneficial to the system as I argue.

At the end of the day, do the federal courts and commissions get us "beyond partisanship" as I ask in the title of this work? The short answer is no. It would be naïve to think that most of the commissions currently in existence in the states or the federal courts can escape the psychological enduring attachments of party identification (Campbell et. al 1960). Bipartisan commissions as exist in the states can become very partisan processes, and federal courts sometimes decide cases along party lines. But, if policymakers want a less partisan process and a more consensual process, certain steps can be taken, either administratively in the federal courts or structurally in the composition of commissions, which will help further those goals.

Appendix Sample Questionnaire

Have you ever heard a redistricting case before? How many?

What are your general impressions of redistricting litigation?

Do you think you would like hearing a redistricting case?

Is your feeling that the involvement of judges is a good thing or not a good thing, or what?

What, in your opinion is the prototypical motivations of the litigants behind these lawsuits? What is the underlying beef behind these lawsuits?

Some Legal Scholars claim the law in redistricting is not very clear. Do you agree or disagree with that, or what do you think?

Do you think the fairness of the process – however you want to define fairness – do you think the fairness of the process should matter at the state legislative level, for example, if the entire state were controlled by only one party?

In the last decade, a number of states have moved redistricting control from the legislature to bipartisan redistricting commissions. What are your impressions of this trend?

Would your perspective on a redistricting dispute change if a bipartisan commission instead of a legislature had crafted the state's redistricting plans?

What do you find is most frustrating about dealing with a redistricting case? [Or what do you think your colleagues find most frustrating about a redistricting case?

What do you think about a three judge court?

I know you haven't heard any redistricting case yet, but do you think these cases have any particular challenges or problems that are unique to these cases, or are redistricting cases sort of like any other case you may encounter?

In your view, are the challenges for federal courts different in local redistricting disputes compared to lawsuits attacking congressional plans or state legislative plans?

We just had this Texas redistricting case go before the U.S. Supreme Court. In light of the types of things we've been discussing, do you have any thoughts about the recent case that came down?

Is there anything I haven't asked that I should have asked?

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