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## Reforming the Maryland Redistricting Process

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# REFORMING THE MARYLAND REDISTRICTING PROCESS

Erich Herbermann\*

## Introduction

Every ten years the process of redrawing state congressional and legislative district maps occurs to revise boundaries to ensure each district has an equal population. Though the redistricting process differs between most states, the resulting maps are usually challenged in the courts. Recent redistricting cycles have earned Maryland the distinction as being one of the most gerrymandered states in the country. In Maryland, the Democrat led legislature has the last say in both the approval of congressional and legislative redistricting maps which has led to gerrymandering issues. When the redistricting process is viewed as partisan, and the resulting maps are viewed as gerrymandered, citizens feel they are being cheated out of the ability to have meaningful representation. It's critical to restore faith in the redistricting process and provide a system that ensures more neutral/nonpartisan maps are drawn. Other states, including Colorado, California, and Michigan, have reformed their redistricting processes to put independent bipartisan commissions in charge of redrawing neutral district maps. Maryland should look to these states processes and constitutional language to better address its own gerrymandering issues. The first step in this process for Maryland would be giving citizens the opportunity to vote on a ballot measure to amend the state Constitution language regarding the redistricting process for both state and legislative districts to mandate the use of independent bipartisan commissions to draw and issue into law district maps. This revised redistricting process would provide more neutral outcomes by diminishing partisan influence of political parties and special

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interests. Additionally, this would prevent a legislature controlled by one party from bypassing the will of the people.

Given the political importance of redistricting, there are those that strongly support reform and those that do not.<sup>1</sup> Most redistricting processes are controlled by the state legislature which every ten years redraws the state's district lines out of self-interest to create "safe" seats that can ensure reelection.<sup>2</sup> The struggle between the partisans in the majority trying to keep power, and the partisans in the minority interested in resetting the balance of power, is the situation we find in Maryland's current legislative system.

Part I of this article briefly discusses the current redistricting system used in Maryland as well as past attempts at reforming the state's redistricting process. Part II will explore the redistricting processes that have been reformed in California, Colorado, and Michigan. Part III provides an analysis of where the Maryland system fails, as well as a comparison of the redistricting systems implemented in California, Colorado, and Michigan. This section will also explore possible solutions to Maryland's redistricting issues based on what worked in other states that have implemented independent redistricting commission and used them to ameliorate gerrymandering. Finally, Part IV provides a summary of the findings of this article.

## **I. Maryland redistricting**

The term redistricting is used to define the process by which congressional and state legislative district boundaries are drawn. These boundaries are redrawn every ten years after completion of the United States Census. In this section I describe the current legislative and

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<sup>1</sup> Angelo N. Ancheta, *Redistricting Reform and the California Citizens Redistricting Commission*, 8 HARV. L. REV. 109, 109-10 (2014).

<sup>2</sup> *Id.*

congressional redistricting process in Maryland as well as what recent reform efforts have occurred and resulting litigation.

#### *A. The Current Process*

The current redistricting system in Maryland provides two distinct processes for drawing legislative and congressional maps.<sup>3</sup> The legislative redistricting process requires the Governor to submit proposed plans at the start of the legislative session.<sup>4</sup> Once plans are submitted, the legislature may adopt, modify, or ignore the Governor's proposed plans.<sup>5</sup> If the state legislature does not successfully pass a joint resolution (without the possibility of a gubernatorial veto) to redraw the state legislative lines within forty-five days, the Governor's plan becomes law.<sup>6</sup> The congressional redistricting process charges the legislature with drawing new congressional maps which are submitted to the Governor for approval.<sup>7</sup> If the Governor vetoes the proposed maps, the legislature can override that veto with a three-fifths vote from the elected membership of both chambers.<sup>8</sup>

#### *B. Recent Reform Efforts*

On January 1, 2021, Governor Larry Hogan issued an executive order establishing a Citizens Redistricting Commission, which he put in charge of drawing fair legislative and congressional maps for Maryland for the 2022 elections.<sup>9</sup> The commission consisted of nine

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<sup>3</sup> *Redistricting Systems: A 50-State Overview*, NATIONAL CONFERENCE OF STATE LEGISLATURES, (March 3, 2021), <https://www.ncsl.org/research/redistricting/redistricting-systems-a-50-state-overview.aspx>.

<sup>4</sup> *Id.*

<sup>5</sup> MD. CONST. art. III, § 5.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Joanne Antoine, *Governor Hogan Announces Citizens Redistricting Commission*, COMMON CAUSE MARYLAND, (January 1, 2021), <https://www.commoncause.org/maryland/press-release/governor-hogan-announces-citizens-redistricting-commission/>.

members: three Republicans, three Democrats and three independents.<sup>10</sup> Through his executive order, the Governor gets to appoint three of the nine members. These three members must include one member from the Republican party, one member from the Democratic party and one independent member. The remaining six commission member positions are filled via a public application process wherein two members registered with the Democratic party, two members registered with the Republican party, and two independent commission members are selected.<sup>11</sup> The selection of members is intended to produce a commission independent from legislative influence and reasonably representative of the state's geographical, racial and gender makeup.<sup>12</sup> Governor Hogan presented the nine independent commission members on April 15, 2021.<sup>13</sup> Both the legislative and congressional maps drawn by the independent commission were presented to the public for comment, and then submitted to the legislature for approval.<sup>14</sup> Both maps were rejected and replaced with maps drawn by the legislature.

Similar results have been witnessed in New York's attempt to create an independent redistricting commission to draw that state's maps in 2021. New York's redistricting commission was comprised of five Republicans and five Democrats.<sup>15</sup> In New York, the legislature was able to bypass the commission after a deadlock prevented the commission from coming to an agreement on the state's legislative and congressional maps.<sup>16</sup> The legislature drawn maps gave Democrats a huge advantage in the state and was approved along partisan lines which resulted in

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Bennett Leckrone, *Hogan's Redistricting Commission Announces Members*, MARYLAND MATTERS (April 15, 2021), <https://www.marylandmatters.org/2021/04/15/hogans-redistricting-commission-announces-members/>

<sup>14</sup> <https://wtop.com/maryland/2021/10/in-maryland-2-separate-redistricting-commissions-look-to-redraw-the-legislative-map/>.

<sup>15</sup> Jon Campbell, *"Designed To Fail"- NY's Redistricting Mess Was A Decade In The Making*, GOTHAMIST (February 3, 2022), <https://gothamist.com/news/designed-to-fail-nys-redistricting-mess-was-a-decade-in-the-making>.

<sup>16</sup> *Id.*

an increase of three Democratic leaning seats, a decrease of three Republican leaning seats and a decrease of one highly competitive seat from the old map.<sup>17</sup> On May 3, 2022, the New York Court of Appeals struck down the congressional redistricting map drawn and previously enacted by the legislature on April 27, 2022.<sup>18</sup> The Court required the map to be redrawn with the assistance of a neutral expert.<sup>19</sup> The lack of authority granted to the New York redistricting commission resulted in the egregiously biased maps.<sup>20</sup>

If the legislature can bypass the commission's maps, then the commission is not truly independent. Commissions like those used in Maryland and New York that lack autonomy and instead require the approval of the legislature are known as Advisory Commissions.<sup>21</sup> The main issue with these Advisory Commissions is that elected officials still retain the power to adopt or reject the proposed new district lines.<sup>22</sup> These redistricting commissions haven't been made truly independent and even when they keep legislative partisans off the commissions, the political creatures can still attack the process. Independent redistricting commissions offer a better model for mapping states political representation than letting incumbents choose their voters. They just need to build a strong system that keeps the self-interested politicians from sabotaging the process.

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<sup>17</sup> *Id.*

<sup>18</sup> WHAT REDISTRICTING LOOKS LIKE IN EVERY STATE, <https://projects.fivethirtyeight.com/redistricting-2022-maps/new-york/> (last visited 5/2/2022).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1813-15 (2012)

<sup>22</sup> *Id.*

### C. Resulting Litigation

On February 19, 2022, the group called Fair Maps Maryland filed suit, challenging both the congressional and legislative maps that the Maryland legislature had issued into law.<sup>23</sup> On March 25, 2022, Maryland Senior Judge Lynne Battaglia agreed with the plaintiffs' arguments that the congressional map violated the state Constitution's equal protection guarantee, among other provisions, by diluting Republican voters' electoral power. The Judge ruled the district lines overwhelmingly favored the Democratic party in violation of the state Constitution and ordered lawmakers to draw a new plan by March 30, 2022.<sup>24</sup> The delay in adopting a final congressional map has delayed the state's primary election and left both campaigns and voters in limbo.<sup>25</sup> On April 4, 2022, Governor Hogan approved the newly submitted congressional map drawn by the Democrat controlled legislature.<sup>26</sup> The new map will most likely result in a congressional delegation that will look a lot like the current one.<sup>27</sup> Unfortunately the new maps maintain the partisan status quo. They contrast to the more neutral maps drawn by the Citizens Redistricting Commission which respected natural boundaries and the geographic integrity of jurisdictions, communities, and neighborhoods which would have yielded more competitive districts.<sup>28</sup> The newly approved maps were viewed as a vast improvement over the maps the

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<sup>23</sup> *Lawsuit challenges Maryland's newly passed legislative redistricting map*, 2 ABC WMAR BALTIMORE (February 11, 2022, 6:50 PM), <https://www.wmar2news.com/news/local-news/lawsuit-challenges-marylands-newly-passed-legislative-redistricting-map>.

<sup>24</sup> Alexa Corse, *Maryland Judge Throws Out State's Congressional Map*, WSJ (March 25, 2022, 2:43 PM), <https://www.wsj.com/articles/maryland-judge-throws-out-states-congressional-map-11648233798>.

<sup>25</sup> Meagan Flynn, *Maryland Judge says she cannot approve congressional map unsigned by Hogan*, THE WASHINGTON POST (April 1, 2022), <https://www.washingtonpost.com/dc-md-va/2022/04/01/maryland-hogan-congressional-map-gerrymandering/>.

<sup>26</sup> *'Tremendous victory': Hogan signs new congressional redistricting map into law after appeal dropped*, WBALTV11 (April 4, 2022), <https://www.wbaltv.com/article/maryland-congressional-redistricting-map-appeal-withdrawn/39628879#>.

<sup>27</sup> Azi Paybarah, *Gov. Larry Hogan Approves New Maryland Congressional Map*, N. Y. TIMES (April 4, 2022), <https://www.nytimes.com/2022/04/04/us/politics/maryland-redistricting-larry-hogan.html>.

<sup>28</sup> *Id.*

Democrat controlled Maryland Legislature originally produced which a judge called an “extreme gerrymander” and had thrown out.<sup>29</sup>

## II. Reform in Other States

Redistricting commissions are currently used in fourteen states as the primary means of drawing legislative and congressional district maps. Missouri, Arkansas, New Jersey, Ohio, and Pennsylvania use politician redistricting commissions.<sup>30</sup> Alaska, Arizona, California, Colorado, Hawaii, Idaho, Michigan, Montana and Washington use non-politician redistricting commissions.<sup>31</sup> Politician redistricting commissions are formed by a set number of politicians or their designees to draw both legislative and congressional maps.<sup>32</sup> The number of politicians on the commission varies per state. While politician commissions are not truly independent in that they are not isolated from influence of elected officials, they are autonomous in their ability to approve maps into law without approval of the legislature.<sup>33</sup> Non-politician redistricting commissions are made up of a group of citizens who submit applications to be selected for the commission. The non-politician redistricting commissions focus on separation of the commissioners from elected officials and the ability to put district lines in place without legislative approval.<sup>34</sup> These commissions oversee the drawing of legislative and congressional maps. The approval process of these commission drawn maps varies per state.

The non-politician commissions used in California, Colorado and Michigan are focused on below because they closely resemble the Maryland commission structure and have shown

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<sup>29</sup> *Id.*

<sup>30</sup> REDISTRICTING COMMISSIONS, [https://ballotpedia.org/Redistricting\\_commissions](https://ballotpedia.org/Redistricting_commissions) (last visited 5/4/2022).

<sup>31</sup> *Id.*

<sup>32</sup> *See* Cain, *supra* note 16, at 1816.

<sup>33</sup> *Id.*

<sup>34</sup> *See* Cain, *supra* note 16, at 1817.

success in their implementation. This section will discuss the formation, map drawing/approval process, results and criticisms of the independent redistricting commissions used in California, Michigan, and Colorado.

*a. California's Independent Redistricting Commission*

In 2008, California's Proposition 11 was approved by California voters to amend the California state Constitution to alter how districts were redrawn during the redistricting process. Proposition 11 was the result of a 2008 ballot initiative to install an independent redistricting commission in the state.<sup>35</sup> A fourteen-person commission called the Citizens Redistricting Commission now draws maps for both legislative and congressional districts. This fourteen-person commission is comprised of five Democrats, five Republicans and four independents. Selecting its members involves a two-stage process.<sup>36</sup> Applications are prescreened by the California state auditor based on threshold requirements. All surviving applicants after prescreening are invited to submit a supplemental application which is reviewed by an applicant review panel. The panel selects 120 of the most qualified applicants in three sub pools of forty Democrats, forty Republicans and forty independents. Then the panel narrows the pool down to sixty of the most qualified applicants of which twenty are Democrats, twenty Republicans and twenty independents. This list of sixty names is given to the state legislature where the Senate and Assembly may each strike four applicants from each of the three pools of twenty. Thus, allowing eight total strikes from each of the three pools, leaving twelve members in each pool. Then the state auditor randomly selects eight members from the three pools to serve on the commission. Finally, the eight members chosen by the state auditor are required to select the last

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<sup>35</sup> Rebecca Green, *Redistricting Transparency*, 59 WM. & MARY L. REV. 1787, 1806-07 (2018).

<sup>36</sup> CALIFORNIA COMMISSION SELECTION, <https://wedrawthelines.ca.gov/commission/>, (last visited April 9, 2022).

six members from the remaining pool.<sup>37</sup> These final six members consist of two applicants from each of the three pools.<sup>38</sup> The final commission totals five Democrats, five Republicans, and four independent members.<sup>39</sup>

When maps are formed, the commission must take into account ranked criteria. Article 21 of the California Constitution lists the following redistricting criteria in order of priority:<sup>40</sup>

(1) Districts shall comply with the United States Constitution.<sup>41</sup>

(2) Districts shall comply with the federal Voting Rights Act (42 U.S.C. Sec. 1971 and following).<sup>42</sup>

(3) Districts shall be geographically contiguous.<sup>43</sup>

(4) The geographic integrity of any city, county, city and county, local neighborhood, or local community of interest shall be respected in a manner that minimizes their division to the extent possible without violating the requirements of any of the preceding subdivisions.<sup>44</sup>

(5) To the extent practicable, and where this does not conflict with the criteria above, districts shall be drawn to encourage geographical compactness such that nearby areas of population are not bypassed for more distant population.<sup>45</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *California State Auditor Randomly Draws the Names of First Eight Commissioners to Serve on the 2020 Citizens Redistricting Commission*, WE DRAW THE LINES CALIFORNIA (June 3, 2020), [https://www.wedrawthelinesca.org/names\\_of\\_first\\_eight\\_commissioners\\_to\\_serve\\_on\\_the\\_2020\\_citizens\\_redistricting\\_commission](https://www.wedrawthelinesca.org/names_of_first_eight_commissioners_to_serve_on_the_2020_citizens_redistricting_commission).

<sup>40</sup> *See* Ancheta, *supra* note 1, at 122-23.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

(6) To the extent practicable, and where this does not conflict with the criteria above, each Senate district shall be comprised of two whole, complete, and adjacent Assembly districts, and each Board of Equalization district shall be comprised of 10 whole, complete, and adjacent Senate districts.<sup>46</sup>

The remaining criteria reflect the priorities of California law in structuring districts.<sup>47</sup> These additional criteria include contiguous districts, keeping cities, counties, neighborhoods and communities of interest together as much as possible and geographic compactness.<sup>48</sup> The criteria are ranked to help resolve conflicts among competing factors. The commission must abide by these criteria when drawing maps.

The California commission was designed to promote transparency with the public regarding how decisions are made.<sup>49</sup> Before maps are drawn, the commission holds pre-map input hearings around the state to receive input from the public.<sup>50</sup> In these meetings, citizens can discuss key points of interest regarding their communities for the commission to consider. After the hearings conclude, the commission draws first drafts of each map. Then input hearings on the draft maps are held to get public input. After these meetings conclude, second drafts of the maps are made addressing the public's comments.<sup>51</sup> Second meetings on the second draft maps are then held shortly after for one final opportunity for public input. Final maps must then be drawn and approved by the commission wherein three of the five Democrats, three of the five

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See Green, *supra* note 36, at 1806.

<sup>50</sup> CAL. CONST. art. XXI, § 1-3.

<sup>51</sup> *Id.*

Republicans and three of the four independents must vote to approve the maps before they can be adopted.<sup>52</sup>

The commission has overall satisfied expectations to produce districting plans that are viewed as fair and neutral to each major party. Maps drawn by the commission are producing more competitive districts over time compared to the legislature's drawn maps.<sup>53</sup> There are more competitive districts which impact the ruling party in the state. This may indicate the commission's independent map outcomes have helped move the needle to more neutral redistricting outcomes.<sup>54</sup> The commission has closely adhered to constitutional criteria, producing boundaries that were more compact and more competitive than the lines they have replaced.<sup>55</sup> Since the commission was created, it has largely succeeded in removing legislative self-interest from the map-making equation.<sup>56</sup> Partisanship was constrained by the structure of the commission's members and the map drawing process was opened up to the public for greater public scrutiny and participation, resulting in maps that always complied with federal and state requirements.<sup>57</sup> In addition, comparisons of the commission's maps with the previous legislative maps have shown that the commission's districts were generally more compact, more competitive, better at advancing minority rights and more successful in maintaining cities, counties and communities of interest.<sup>58</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> Eric McGhee, *Assessing California's Redistricting Commission: Effects on Partisan Fairness and Competitiveness*, PPIC (March 2018), <https://www.ppic.org/publication/assessing-californias-redistricting-commission-effects-on-partisan-fairness-and-competitiveness/>.

<sup>54</sup> *Id.*

<sup>55</sup> See Cain, *supra* note 16, at 1827.

<sup>56</sup> See Ancheta, *supra* note 1, at 110.

<sup>57</sup> *Id.*

<sup>58</sup> See Ancheta, *supra* note 1, at 136.

Despite the success of the California commission, there were criticisms regarding ethnic diversity in the application process used to select its members, especially in 2010.<sup>59</sup> The diversity of the applicant pool was brought into question when 74% of the voters who applied to the commission were non-Hispanic white.<sup>60</sup> However, once the fourteen commissioners were selected, they identified as four Asian American members, three Hispanic members, three White members, two African-American members, one Pacific Islander member and one American Indian member.<sup>61</sup> In addition, accusations of partisan influence during the public hearing process have surfaced when political groups show up to the public hearings and testify as ordinary citizens in support of configurations that coincide with the partisan interests of certain groups.<sup>62</sup> However, it is important to note that legal and geographical restraints with fixed numbers of single member districts create inevitable tradeoffs.<sup>63</sup> One party is always going to argue that lines could have been drawn better to empower its particular voters.<sup>64</sup>

#### *b. Colorado's Redistricting Commission*

Colorado's independent congressional and legislative redistricting commissions were established by Amendments Y and Z to the state Constitution in 2018 to oversee the drawing of Colorado's congressional and state legislative district maps.<sup>65</sup> The Amendments were given birth when voters approved a ballot initiative to make the commissions a reality. These amendments called for two separate commissions to be created. One commission was created to oversee the

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<sup>59</sup> *California Citizens Redistricting Commission*, BALLOTPEDIA (last visited April 9, 2022), [https://ballotpedia.org/California\\_Citizens\\_Redistricting\\_Commission](https://ballotpedia.org/California_Citizens_Redistricting_Commission).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> See Ancheta, *supra* note 1, at 110.

<sup>64</sup> *Id.*

<sup>65</sup> COLORADO INDEPENDENT REDISTRICTING COMMISSIONS, <https://redistricting.colorado.gov/> (last visited April 9, 2022).

drawing of legislative maps and a second commission was created to oversee the drawing of congressional maps.<sup>66</sup> Each commission is comprised of four Democrats, four Republicans and four independent members. Each commission must include at least one member residing in each current congressional district and at least one from the Western Slope.<sup>67</sup> Each commission must, to the extent possible, reflect Colorado's racial, ethnic, gender, and geographic diversity.<sup>68</sup> The member selection for each of the congressional and legislative commissions involves a separate process, although each process consists of the same steps. Applications for commission seats are submitted to a panel of three retired Colorado Supreme Court justices or appellate court judges of different political parties.<sup>69</sup> The process begins with individuals applying via online applications.<sup>70</sup> Nonpartisan staff then make an initial applicant pool after reviewing the applications and determining which candidates satisfy the qualifications.<sup>71</sup> The judicial review panel then randomly selects 300 Democrats, 300 Republicans, and 450 independent citizens from the initial applicant pool to establish a selection pool of 1,050 people.<sup>72</sup> The judicial review panel then reviews applications and narrows the pool down to fifty Democrats, fifty Republicans, and fifty independents to establish a pool of 150 people.<sup>73</sup> The judicial panel then randomly selects six commissioners consisting of two Democrats, two Republicans and two independents from the 150-person pool.<sup>74</sup> Then four legislative leaders select ten applicants each from the initial applicant pool and submit them to the judicial panel.<sup>75</sup> The judicial panel selects four

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> COLORADO SELECTION PROCESS, <https://redistricting.colorado.gov/content/commissioner-selection-process> (last visited April 9, 2022).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

commissioners, one from each legislative leaders proposed applicants.<sup>76</sup> Finally, the judicial panel selects two commissioners from the original pool of 450 randomly selected independent citizens.<sup>77</sup> The final selected commission must comprise four Democrats, four Republicans and four independent members.

The criteria the commission must follow, when drawing districts, consist of:

- (1) Districts shall abide by the Constitution of the United States.<sup>78</sup>
- (2) Districts must comply with the Voting Rights Act of 1965.<sup>79</sup>
- (3) As much as possible, districts must preserve whole communities of interest and whole political subdivisions, such as counties, cities and towns.<sup>80</sup>
- (4) Districts must be as compact as reasonably possible.<sup>81</sup>
- (5) The commission must maximize the number of competitive districts.<sup>82</sup>

During the map drawing process, the nonpartisan staff must first develop a preliminary plan.<sup>83</sup> This preliminary plan must be presented to the commission and published no earlier than thirty days and no later than forty-five days after the commission has convened.<sup>84</sup> The commission then holds public hearings throughout the state on the preliminary plan to receive input from the public.<sup>85</sup> At the conclusion of the public hearings, the nonpartisan staff must

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> COLO.CONST. art. V, § 48.1.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> COLO.CONST. art. V, § 44.4.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

consider the recommendations of the commission and the feedback from the public when creating no less than three staff plans for the commission to consider.<sup>86</sup> At this stage, the commission can adopt a final plan from the plans submitted or request, in a public hearing, that the nonpartisan staff create additional plans or amend the current plans. The final plan requires approval of eight of the twelve commission members, including at least two independent members.<sup>87</sup> The final plan is then submitted to the Colorado Supreme Court for review.<sup>88</sup> The court must rule on these maps within one month of submission.<sup>89</sup> If the court approves the maps, they become law. If they reject the maps in whole or in part, the maps are returned to the respective commission for revisions.<sup>90</sup> The court must approve revised maps by the end of the year.<sup>91</sup> These maps are not subject to legislative approval, a governor's veto, or veto referendum petitions.<sup>92</sup>

Both legislative and congressional maps were approved by the Colorado Supreme Court in 2021, with reactions to them being mixed amongst Colorado politicians.<sup>93</sup> Independent review of the new congressional and legislative maps by the Princeton Gerrymandering Project gave Colorado's new maps an "A" rating for promoting competitiveness and partisan fairness.<sup>94</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Colorado Amendment Y, Independent Commission for Congressional Redistricting Amendment (2018)*, BALLOTPEDIA (last visited April 9, 2022), [https://ballotpedia.org/Colorado\\_Amendment\\_Y,\\_Independent\\_Commission\\_for\\_Congressional\\_Redistricting\\_Amendment\\_\(2018\)](https://ballotpedia.org/Colorado_Amendment_Y,_Independent_Commission_for_Congressional_Redistricting_Amendment_(2018)).

<sup>93</sup> Gabrielle Franklin, *Is Colorado's latest redistricting map fair? Politicians are split on the answer*, FOX 31 COLORADO (October 7, 2021), <https://kdvr.com/news/politics/is-colorados-latest-redistricting-map-fair-the-answer-is-partisan/>.

<sup>94</sup> David Meyers, *What's the status of redistricting in your state?*, FULCRUM (March 7, 2022), <https://thefulcrum.us/Elections/Redistricting/whats-the-status-of-redistricting-in-your-state>.

*c. Michigan's Redistricting Commission*

Michigan adopted an amendment to Article IV of the Michigan Constitution, establishing an independent citizen redistricting commission to draw both legislative and congressional maps.<sup>95</sup> Article IV was the result of a ballot initiative to create the commission and take sole redistricting power away from the legislature.<sup>96</sup> The commission is comprised of four Democrats, four Republicans and five independent members.<sup>97</sup> The Secretary of State releases applications to the public at the beginning of the year. Some are also mailed to 10,000 random registered Michigan voters.<sup>98</sup> The Secretary of State randomly selects thirty Democrats, thirty Republicans and forty independents from the public submitted applications and thirty Democrats, thirty Republicans and forty independents from the randomly mailed applications.<sup>99</sup> The legislative leaders may strike five applicants each from any pool, up to a maximum of twenty strikes by the four legislative leaders from the pool of 200 applicants.<sup>100</sup> The Secretary of State randomly selects four Democrats, four Republicans and five independent applicants from the remaining pool of 180 applicants to serve as members of the commission.<sup>101</sup>

The Michigan commission must draw maps according to the following criteria in order of priority:

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<sup>95</sup> MICH. CONST. art. IV, § 6 (13).

<sup>96</sup> *Court Declares Michigan Independent Redistricting Commission Constitutional*, MICHIGAN LEAGUE OF CONSERVATION VOTERS (last visited April 9, 2022), <https://michiganlcv.org/cases/court-declares-michigan-independent-redistricting-commission-constitutional/>.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Michigan*, ALL ABOUT REDISTRICTING (last visited May 4, 2022), <https://redistricting.ils.edu/state/michigan/?cycle=2020&level=Congress&startdate=2021-12-28>.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

(1) Districts shall be of equal population as mandated by the United States Constitution and shall comply with the Voting Rights Act and other federal laws.<sup>102</sup>

(2) Districts shall be geographically contiguous. Island areas are considered to be contiguous by land to the county of which they are a part.<sup>103</sup>

(3) Districts shall reflect the state's diverse population and communities of interest. Communities of interest may include, but shall not be limited to, populations that share cultural or historical characteristics or economic interests. Communities of interest do not include relationships with political parties, incumbents, or political candidates.<sup>104</sup>

(4) Districts shall not provide a disproportionate advantage to any political party. A disproportionate advantage to a political party shall be determined using accepted measures of partisan fairness.<sup>105</sup>

(5) Districts shall not favor or disfavor an incumbent elected official or a candidate.<sup>106</sup>

(6) Districts shall reflect consideration of county, city, and township boundaries.<sup>107</sup>

(7) Districts shall be reasonably compact.<sup>108</sup>

Once the maps are drawn, they must be open to the public for forty-five days to be commented on. Adopting a map requires a majority vote of the commission including at least two commissioners who affiliate with each major party. If no majority is reached, each commissioner may submit one proposed plan for legislative districts and one proposed plan for congressional districts to the full commission for consideration. Each commissioner ranks the

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<sup>102</sup> MICH. CONST. art. IV, § 6 (13).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

plans submitted according to preference. Each plan is assigned a point value. The commission then adopts the plans with the highest point value. Within thirty days of adoption, all resources used to create these plans must be published for public access. The commission's approval advances the maps into law.<sup>109</sup>

After both the congressional and legislative maps were approved by the commission in 2021, the Michigan commission's work was met with positive feedback. According to redistricting experts, the maps drawn by the commission were seen to be fairer and more neutral, resulting in five competitive districts, compared to three competitive districts the year prior.<sup>110</sup> However, not everyone was pleased with the commission's maps. Three lawsuits were filed alleging violations of the Voting Rights Act, partisan fairness and that the commission split local municipalities in a way that violates the Michigan Constitution.<sup>111</sup>

### **III. Improving Maryland's Redistricting System**

Redistricting commissions used in California, Colorado and Michigan have shown that citizen-based commissions, whether overseeing the drawing of maps or drawing maps themselves, produce fairer maps than do partisan legislatures. Governor Larry Hogan made an attempt at creating a bipartisan commission with public hearings to draw congressional and legislative maps for Maryland, but the state legislature ended up ignoring the commission and drawing its own maps that benefited the state's Democratic majority. Looking to the success stories of California, Colorado and Michigan can guide Maryland in assessing which steps need

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<sup>109</sup> *Id.*

<sup>110</sup> Jane Timm, *Success stories: Michigan, Virginia adopt new maps after creating redistricting commissions*, NBC NEWS (December 30, 2021), <https://www.nbcnews.com/politics/elections/success-stories-michigan-virginia-adopt-new-maps-after-creating-redistricting-n1286760>.

<sup>111</sup> Colin Jackson, *One Michigan redistricting lawsuit down, two remain*, MICHIGAN RADIO (February 4, 2022), <https://www.michiganradio.org/news/2022-02-04/one-michigan-redistricting-lawsuit-down-two-remain>.

to be taken to make an independent commission a focal point and stakeholder in the redistricting process, so that the legislature cannot bypass the commission to draw its own partisan maps.

#### *A. Failure of the Maryland System*

The Maryland redistricting system, as written in the Maryland Constitution, gives the legislature the last word on which legislative and congressional redistricting maps are put in place. Since the Maryland General Assembly is controlled overwhelmingly by one political party, this opens the door for Maryland to be highly susceptible to gerrymandering. Though Governor Hogan proposed the independent commission, via executive order, to lead the state's congressional and legislative redistricting processes in 2021, his commission's redistricting map outcomes still needed to be approved by the Democrat-controlled legislature. There was no mechanism in place to prevent the legislature from drawing its own partisan maps if it happened to dislike the plans proposed by the commission. California, Colorado, and Michigan amended their state Constitutions to include provisions that would give the independent commissions in those states authority to remain an essential part of the map drawing process, regardless of what the legislature thought, and thereby eliminated the legislature from having sole control over the maps that were eventually approved in each state. Essentially, the current Maryland system allows the state's legislature to ignore the Maryland commission's maps because it does not mandate the commission's participation in the process used to approve those maps.

#### *B. How the Maps are Approved*

The redistricting commissions used in California, Colorado and Michigan focus on transparency, partisan equality, and public input. Each commission is designed to open up the map drawing process to empower citizens to make redistricting decisions by creating structures

that ensure citizen participation and that limit decisions made outside the public view.<sup>112</sup>

Participation and transparency help drive a democratic process by providing a check on the self-interest of each state's dominant party, and this can help produce better maps.<sup>113</sup>

The Constitutions of California, Colorado, and Michigan provide legal guardrails that require their independent redistricting commissions to participate in the map drawing process in each state from start to finish. In California and Michigan, the state Constitution empowers the state's independent redistricting commissions to have sole authority in drafting the maps, taking criticism into consideration, and ultimately voting on the maps in-house before they become law. Colorado requires the commission to draw the maps to be submitted to the Colorado Supreme Court for final approval. If the Colorado Supreme Court does not approve the maps, they are sent back to the commission with notes attached for revision.

### *C. Where We Go from Here*

The independent redistricting commissions examined thus far have provided a valuable framework for what redistricting reform should look like. However, any reform must be adapted to meet the priorities of the jurisdiction and the politics of the state.<sup>114</sup> Planning redistricting reform is thus a function of two key factors: (1) defining the mechanism and goals of reform, and (2) assessing the legal and political landscape to define the best path towards reform.<sup>115</sup> Depending on what pushback comes from the current Maryland legislature, the path to reform could take one of two avenues: (i) aggressive reform or (ii) intermediate reform.

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<sup>112</sup> See Ancheta, *supra* note 1, at 127.

<sup>113</sup> *Id.* at 128.

<sup>114</sup> *Id.* at 136

<sup>115</sup> *Id.*

i. Aggressive reform

The key point we see in the success of the California, Colorado, and Michigan independent citizen redistricting commissions is they each contain a mechanism for the commission-drawn maps to be put into law. In both California and Michigan, the commission has the final say over which maps are adopted as law. This is critical because it takes the legislature out of the redistricting process completely. The commission draws the maps, then issues the maps, which then become law. This mechanism is derived from the amendments to the state Constitutions dictating what powers these states' redistricting commissions have. In Colorado, the Colorado state Constitution lays out a slightly different approach of requiring the Colorado Supreme Court to have the final say on the redistricting maps before they are put into law. However, the state Supreme Court cannot simply reject the maps provided by the commission and replace them with its own. The state Supreme Court must send the maps it does not approve back to the commission with comments and then must allow the commission to revise its maps for resubmission. This process keeps the main map drawing power primarily with the independent bipartisan commission and away from the partisan legislature. More importantly, it keeps the commission in the process of map drawing and helps to open the door to better communication regarding how better maps should be drawn.<sup>116</sup> To have a similar impact on Maryland's redistricting process, there needs to be a process set forth in the Maryland Constitution that requires the state's redistricting commission to maintain map drawing control.

The shift from a legislative-run redistricting process to an independent redistricting commission in California, Colorado and Michigan stemmed from a ballot initiative in each state

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<sup>116</sup> See Cain, *supra* note 16, at 1840.

that was approved by the state’s citizens in order to introduce a constitutional amendment to dictate the formation, qualifications, and duties of an independent redistricting commission that would oversee each state’s redistricting process. Maryland currently only uses ballot initiatives for veto referendums, which provides the only access the state’s citizens have to any form of initiated statewide direct democracy.<sup>117</sup> This veto referendum enables Maryland citizens to force a statewide popular vote on laws that have been passed by the legislature.<sup>118</sup>

An amendment to the Maryland state Constitution can be proposed and put on the ballot by a legislative referral or by a constitutional convention.<sup>119</sup> When a bill is proposed in the General Assembly by a legislator, the General Assembly votes on the bill.<sup>120</sup> The bill needs a three-fifths majority in the House and in the Senate in just one legislative session to move forward. After an amendment receives a three-fifths majority, it goes directly to referendum in the next general election and is then to be voted on by Maryland’s voters.<sup>121</sup> A majority of voters must vote “yes” for it to pass. According to Section 2 of Article XIV of the Maryland Constitution, a question as to whether to hold a Constitutional Convention is automatically placed on the statewide general election ballot every twenty years.<sup>122</sup> To win approval, the number of people voting “yes” must be over 50% of the total number of voters who vote overall.<sup>123</sup> Any proposed amendments resulting from the convention must be voted on by Maryland’s citizens wherein a majority is needed to pass. With only two avenues to amending

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<sup>117</sup> *Veto Referendum*, BALLOTPEDIA (last visited April 9, 2022), [https://ballotpedia.org/Veto\\_referendum](https://ballotpedia.org/Veto_referendum).

<sup>118</sup> *History of Initiative & Referendum in Maryland*, BALLOTPEDIA (last visited April 9, 2022), [https://ballotpedia.org/History\\_of\\_Initiative\\_%26\\_Referendum\\_in\\_Maryland](https://ballotpedia.org/History_of_Initiative_%26_Referendum_in_Maryland).

<sup>119</sup> MD. CONST. art. XIV, § 1-2.

<sup>120</sup> *How to pass a constitutional amendment?*, MARYLAND CAMPAIGN FOR ENVIRONMENTAL HUMAN RIGHTS (2022), <https://mdehr.org/amendment/how-to-pass-a-constitutional-amendment/>.

<sup>121</sup> *Id.*

<sup>122</sup> *State constitutional conventions*, BALLOTPEDIA (last visited April 9, 2022), [https://ballotpedia.org/State\\_constitutional\\_conventions](https://ballotpedia.org/State_constitutional_conventions).

<sup>123</sup> *Id.*

the Maryland Constitution, the best choice would likely be gathering support within the legislature to propose an amendment implementing an independent redistricting commission into Maryland's law. Success with legislative referrals have been seen in Alaska, Hawaii, Idaho, and Virginia in pushing for state constitutional amendments for independent redistricting commissions.<sup>124</sup>

Another option worth pursuing if the independent citizen redistricting commission is not an option is implementing a well-balanced politician redistricting commission to lead the map drawing process. This serves as a compromise if stripping politicians out of the redrawing process is too difficult for a state legislature to accept. These politician commissions can serve as an alternative to taking sole power of approving maps away from the legislature and instead introduce a more balanced system. A well-designed politician commission can be a valid reform alternative.<sup>125</sup> The premise of a political commission is that redistricting is a political enterprise that ideally leads to bargained compromise between stakeholders.<sup>126</sup> New Jersey uses a similar politician redistricting commission which consists of equally sized contingents of Democrats and Republican appointees chaired with a tiebreaking member selected by the commissioners themselves or by the state Supreme Court if the commissioners cannot agree on a candidate.<sup>127</sup> New Jersey uses separate political commissions for drawing congressional and legislative maps.<sup>128</sup> The congressional commission consists of twelve members who are appointed by the two majority and two minority party leaders plus the two chairs of the state Democratic and

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<sup>124</sup> *Creation of Redistricting Commissions*, NATIONAL CONFERENCE OF STATE LEGISLATURES (December 10, 2021), <https://www.ncsl.org/research/redistricting/creation-of-redistricting-commissions.aspx>.

<sup>125</sup> See Cain, *supra* note 16, at 1817

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

Republican parties, each of whom get two selections.<sup>129</sup> The thirteenth tiebreaking member is selected by the twelve commission members or by the state Supreme Court in the event of a stalemate.<sup>130</sup> The tiebreaker is restricted from having held political office in New Jersey for the last five years.<sup>131</sup> The legislative commission are selected by the two state party chairs who get five appointments each.<sup>132</sup> The eleventh tiebreaking commission member is selected by the other ten members or by the state Supreme Court in the event of a stalemate.<sup>133</sup> Both the legislative and congressional commissions must adopt the map which receives a majority vote.

This New Jersey political commission model requires the two-party delegations of each commission to submit competing plans that address state specific goals including creating competitive seats, minimalizing party bias, and retaining voters in the same districts to the degree possible.<sup>134</sup> This should promote competition for the tiebreaking vote and lead to maps that better adhere to the state goals.<sup>135</sup> Similar to the California, Colorado and Michigan redistricting commissions, the power granted to the New Jersey commissions is given by the New Jersey state Constitution. To implement a similar system in Maryland, the state Constitution would need to be amended via legislative backing or Constitutional Convention to ensure the politician commission was a focal point in the map drawing and approval process and ensure the legislature cannot bypass the commission.

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<sup>129</sup> *Id.* at 1838

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

ii. Intermediate reform

In areas where the legislative body is unlikely to give up control of the process and there are no direct democracy mechanisms to work around the legislature, reform towards an independent commission may be impossible.<sup>136</sup> In these cases, intermediate reform is a better path forward because it is less threatening to legislative powers.<sup>137</sup> This intermediate reform could consist of the passing of law to require open meetings and mandate a minimum of public hearings for public input.<sup>138</sup> These reform efforts still provide significant checks on incumbency and gerrymandering by opening the redistricting process to the public eye, thus making it harder for the ruling party to justify unfair maps. Such reform is more incremental and likely more appealing for a partisan legislature to adopt. In addition, opening the door into the map drawing process can gather steam and further support for reform down the road.

#### **IV. Conclusion: Final Thoughts**

Redistricting reform efforts for Maryland will likely be an uphill battle. However, looking to how other states have achieved reform can be a useful tool to move Maryland toward having a redistricting process that is fairer. Independent redistricting commissions have been shown to be effective by providing more visibility and bipartisan participation in the redistricting process, yielding more neutral outcomes. They also generally result in less litigation. To see the same effects in Maryland, the Maryland Constitution must be amended to take the power to draw districts away from politicians/legislators and give it to ordinary state citizens through a bipartisan independent redistricting commission. California, Colorado, and Michigan share this

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<sup>136</sup> See Ancheta, *supra* note 1, at 138.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

mechanism in that they have put legal guardrails into their respective state Constitutions that either give their redistricting commissions sole power in approving their state maps or facilitate that rejected maps are returned to the independent commission after comments are provided by the state's Supreme Court, so that the maps can be revised and resubmitted by the commission. In California, Colorado, and Michigan, after state Constitutions were amended to give redistricting commissions discrete authority to make them essential players and stakeholders in the redistricting process, we have seen the partisan influence of politicians and state legislatures diminish and more neutral redistricting outcomes take hold.