SHADOW DISTRICTS

Quinn Yeargain†

Redistricting disputes—for congressional, state legislative, and local districts—have proven all-consuming in politics. Litigation over the legality of districts, under both federal and state law, is near constant when decennial redistricting occurs. But largely omitted from redistricting litigation and scholarship, however, are the districts drawn to elect members of statewide boards. These boards have outsized authority over some of the most salient disputes in politics today, with state boards of education setting policies for what can be taught in classrooms and how LGBT students are treated by the public education system, public utility commissions adopting policies for renewable energy production and decarbonization, and executive councils playing a key role in checking the powers of state governors.

Despite the significant policymaking authority of these boards, the districts used to elect them are all too frequently ignored during decennial redistricting. Partisan gerrymandering claims are increasingly brought against congressional and state legislative districts, but hardly ever against state board districts. Racial justice groups frequently push for the creation of new minority-opportunity districts for Congress, state legislatures, and even municipal bodies, but hardly ever for state boards. And in some cases—most notably, Mississippi and Montana—these districts haven't been redrawn at all.

In this Article, I argue that the omission of state boards from redistricting litigation and conversations is a grave failure of democracy. I explore how representational progress in state democracy has largely left state boards elected by district behind. To do this, I build out a full legal history of these boards, drawing on my own comprehensive database of state elected offices, which tracks every creation, abolition, and redistricting of state boards from 1776 to the present. I map the inauguration of the one-person, one-vote standard by the U.S. Supreme Court and

† Assistant Professor of Law, Widener University Commonwealth Law School. I extend my sincere appreciation and gratitude to Miriam Seifter, Jonathan Marshfield, and Michael Dimino for their comments and suggestions and to the editorial staff at *Cardozo Law Review* for their dedication and hard work, including Kieran Graulich, Tim Gentles, John Hughes, Leandra Ipiña, Audrey Kim, Mabel Oghojafor, Nayantara Roy, Alexandra Newman, David Fleschner, Brogan Mahon, Aliza Balis, Bradley Koberg, and Abriyanna Finley.

explore its lackluster application in the context of state boards, revealing federal and state litigation that has never been discussed in legal scholarship.

Ultimately, I argue that the omission of state boards from redistricting litigation and conversations represents not just a serious neglect of the one-person, one-vote standard, but a missed opportunity for racial justice and equity. The mismatch between districts and representation has resulted in gerrymandered boards setting policies in important areas—with little claim to democratic legitimacy. At a time when public schools are in the crosshairs of culture wars, and when communities of color are demanding environmental justice, the unaccountability of the state institutions responsible for setting educational and environmental policies is problematic.

TABLE OF CONTENTS

INTRODUCTION

Every decade, the same cycle repeats itself: population changes are recorded in the decennial census, states gain and lose congressional districts, the districts used to elect officials up and down the ballot are redrawn, and subsequent litigation determines the legality of these new maps. Following the 2020 Census, the redistricting process was (perhaps unusually) bitter, protracted, and hard-fought. Even the proper administration of the census, usually one of the less controversial parts of the apportionment and redistricting process, had to be settled by the U.S. Supreme Court.[1]

As redistricting got underway in 2021, the limits of how aggressively states could use partisan considerations in constructing congressional and state legislative maps were tested. Though the U.S. Supreme Court declined to intervene in partisan gerrymandering disputes, which in *Rucho v. Common Cause* it held to be nonjusticiable political questions,[2] state courts have (mostly) proved friendlier to these claims.[3] Other controversies abounded—an apparent failure by the Washington State Redistricting Commission to comply with a midnight deadline in drawing congressional districts;[4] the validity of maps drawn by the newly created independent redistricting commissions in Colorado and Michigan;[5] the inability of the state legislatures and governors in

---

1 Dep't of Com. v. New York, 139 S. Ct. 2551, 2576 (2019) (holding that the Trump Administration's effort to put a citizenship question on the 2020 Census was invalid under the Administrative Procedure Act, and remanding to the Department of Commerce for reconsideration).

2 139 S. Ct. 2484, 2499–502 (2019).

3 Neiman v. LaRose, 207 N.E.3d 607, 623 (Ohio 2022) (striking down Ohio's congressional map); Harkenrider v. Hochul, 197 N.E.3d 437, 454–56 (N.Y. 2022) (striking down New York's congressional and state senate maps); Szeliga v. Lamone, Nos. C-02-CV-21-001816, C-02-CV-21-001773, 2022 WL 2132194, at *44–46 (Md. Cir. Ct. 2022) (striking down Maryland's congressional map); Harper v. Hall, 868 S.E.2d 499, 509–10 (N.C. 2022) (striking down North Carolina's congressional, state senate, and state house maps); League of Women Voters of Ohio v. Ohio Redistricting Comm'n (*League I*), 192 N.E.3d 379, 414 (Ohio 2022) (striking down Ohio's state senate and state house maps); League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 814–21 (Pa. 2018) (striking down Pennsylvania's congressional map); League of Women Voters of Fla. v. Detzner, 179 So. 3d 258, 296–98 (Fla. 2015) (striking down Florida's state senate map); League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 416–17 (Fla. 2015) (striking down Florida's congressional map).

4 *See generally* Order Regarding Wash. State Redistricting Comm'n's Letter to Sup. Ct., 504 P.3d 795 (Wash. 2021) (describing ostensible failure of the Washington State Redistricting Commission to adopt a map of congressional districts by the midnight deadline and upholding the Commission's actions as having "substantially complied" with the law).

5 *In re* Colo. Indep. Cong. Redistricting Comm'n, 497 P.3d 493, 515–16 (Colo. 2021) (approving Independent Congressional Redistricting Commission's plan); League of Women

Connecticut, Minnesota, New Hampshire, Pennsylvania, and Wisconsin to produce any maps at all;[6] the repeated failure of the Ohio Reapportionment Commission to draw constitutionally compliant state legislative maps;[7] and even the manner in which Tennessee State Senate districts were *numbered*.[8]

The most well-known of these disputes centered around the usual suspects—namely, congressional and state legislative districts. Disputes over the construction of county and municipal districts have occurred too,[9] but litigation in this arena is virtually always ongoing, as is litigation over whether multimember county boards should be elected countywide or by district.[10] Almost entirely ignored in conversations about

---

Voters of Mich. v. Indep. Citizens Redistricting Comm'n, 971 N.W.2d 595, 596 (Mich. 2022) (Cavanagh, J., concurring) (concurring with the conclusion that the Redistricting Commission complied with the state constitutional requirements).

6 Order, Norelli v. Sec'y of State, 292 A.3d 458 (N.H. 2022) (No. 2022-0184), 2022 WL 1747769 (adopting congressional districts); Johnson v. Wis. Elections Comm'n, 971 N.W.2d 402, 408–11 (Wis. 2022) (adopting congressional districts), *rev'd on other grounds*, 142 S. Ct. 1245 (2022); Johnson v. Wis. Elections Comm'n, 972 N.W.2d 559, 586 (Wis. 2022) (adopting state legislative districts on remand from U.S. Supreme Court); Carter v. Chapman, 270 A.3d 444, 476 (Pa. 2022) (adopting congressional districts); Wattson v. Simon, 970 N.W.2d 56, 66 (Minn. 2022) (adopting congressional districts); *In re* Petition of Reapportionment Comm'n, 268 A.3d 1185 (Conn. 2022) (per curiam) (adopting congressional districts).

7 Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337, 1347–48 (describing the Ohio Redistricting Commission's refusal to draw constitutionally compliant state legislative maps).

8 Moore v. Lee, 644 S.W.3d 59, 60 (Tenn. 2022) (reversing the trial court's order striking down state senate districts for failure to "consecutively number the four Senatorial districts included in Davidson County").

9 The classic example of litigation over county and municipal districts involves claims that the districts violate the Voting Rights Act. *See, e.g.*, Wright v. Sumter Cnty. Bd. of Elections & Registration, 979 F.3d 1282, 1311 (11th Cir. 2020) (requiring the adoption of new districts for the Sumter County, Georgia, School Board); Navajo Nation v. San Juan Cnty., 929 F.3d 1270, 1293 (10th Cir. 2019) (upholding district court's adoption of remedial redistricting plan for San Juan County, Utah, to create a second Native American opportunity district). However, in 2021, the New York State legislature amended its local government statutes to prohibit counties from engaging in partisan gerrymandering as they drew maps for their county legislatures, Act of Oct. 27, 2021, ch. 516, sec. 1, § 34(4)(e), 2021 N.Y. Laws 1407, 1408 (codified as amended at N.Y. MUN. HOME RULE LAW § 34(4)(e) (McKinney 2023)), which has already resulted in successful litigation to force redistricting, *Judge Tosses Out Redistricting Maps for Broome County Legislature*, SPECTRUM NEWS 1 (Dec. 6, 2022, 5:24 PM), https://spectrumlocalnews.com/nys/binghamton/politics/2022/12/06/judge-tosses-out-redistricting-maps-for-broome-county-legislature [https://perma.cc/3FJ9-CHHY].

10 For recent examples, see Press Release, ACLU of Kansas, Voting Rights Advocates Challenge At-Large Election Method in Dodge City, Kansas (Dec. 16, 2022), https://www.aclukansas.org/en/press-releases/voting-rights-advocates-challenge-large-election-method-dodge-city-kansas [https://perma.cc/TC85-S4EA]; and *Lower Brule Sioux Tribe v. Lyman County*, 625 F. Supp. 3d 891, 931–35 (D.S.D. 2022), which granted a preliminary injunction ordering Lyman County, South Dakota, to adopt a "new redistricting plan" for its county commission elections.

redistricting—by courts, litigants, and scholars alike—are elected, multimember state boards.

This omission is unsettling. A sizable number of states have multimember state boards whose members are elected by district—in the form of state boards of education, public utility commissions, executive councils, or other idiosyncratic, state-specific entities.[11] These boards possess tremendous power in their state governments, where they are *the* state actors responsible for setting public education, university, environmental, energy, and transportation policy.[12] In recent years, these boards have set rules relating to how history is taught in schools, how school systems treat transgender students, renewable-energy standards, and beyond.[13]

By every indication, these boards are subject to the same one-person, one-vote and Voting Rights Act requirements as state legislatures (along with elected county and city commissions and councils),[14] presenting manifold opportunities for lawsuits to protect minority groups' right to representation, to advance state constitutional claims relating to partisan gerrymandering, and to ensure strict compliance with other state and federal rules. But despite some notable exceptions,[15] the process by which these boards' districts are drawn and redrawn manages to escape scrutiny in all but the most egregious cases, meaning that all too often, these districts are redrawn in the shadows and produce democratically unresponsive policymakers.

Consider, for example, the Ohio State Board of Education (SBOE). From 1955 to 1992, the SBOE's districts were (usually) coterminous with the state's congressional districts.[16] But in 1992, the unwieldy board, then twenty-one in number, was cut nearly in half to just eleven elected members, with additional appointed members.[17] The General Assembly established a new procedure for allocating the districts—three contiguous

---

11 *See infra* Part I.

12 *See infra* Part I.

13 *See infra* Part I.

14 *See infra* Part II.

15 *See infra* Section III.B.

16 Act of July 12, 1955, sec. 1, § 3301.011, 1955–1956 Ohio Laws 655, 660 (creating the SBOE with twenty-three districts coterminous with the state's "twenty-three congressional districts, as such latter districts were in lawful existence on January 1, 1955"); Act of July 13, 1967, sec. 1, § 3301.011, 1967–1968 Ohio Laws 2212, 2212 (reorganizing the Board into twenty-four districts coterminous with the state's "twenty-four congressional districts, as such latter districts were in lawful existence on March 1, 1967" (emphasis omitted)); Act of July 29, 1971, sec. 1, § 3301.011, 1971–1972 Ohio Laws 2085, 2086 (reorganizing the Board based on "the number of [congressional] districts from time to time created").

17 Act of May 19, 1992, No. 162, sec. 1, § 3301.01, 1991–1992 Ohio Laws A1, A1–B1 (codified as amended at OHIO REV. CODE ANN. § 3301.01 (West 2023)).

State Senate districts, ideally a compact blend of rural and urban districts, would be joined together by the legislature to form an SBOE district.[18] In the event that the General Assembly failed to redistrict the Board of Education, the Governor was granted the power to do so himself.[19] In 1992,[20] 2002,[21] 2012,[22] and 2022,[23] the General Assembly's failure to draw SBOE districts has meant that the Governor had to do so each time. In 2022, this presented a particularly messy situation.

In 2018, the Ohio Constitution was amended to ostensibly end partisan gerrymandering by adopting new standards for redistricting and reconstituting the Ohio Apportionment Commission.[24] The legislative districts drawn by the Commission were rejected by the Ohio Supreme Court three separate times for failure to comply with the state constitution's new rules,[25] and districts were eventually imposed for the 2022 elections by a panel of three federal judges.[26] The General Assembly never drew new SBOE districts, and so Governor Mike DeWine drew districts himself.[27] But the State Senate districts used by Governor DeWine in drawing the SBOE maps were among the districts that the Ohio Supreme Court had declared unconstitutional.[28] Legislative Democrats called on DeWine to draw new maps based on the ones that

---

18 OHIO REV. CODE ANN. § 3301.01(B)(1) (West 2023).

19 *Id.* § 3301.01(B)(2).

20 The legislation passed by the General Assembly in 1992 did not itself establish any districts, *see* 1991–1992 Ohio Laws A1, and the legislature voted down an act that would have created actual districts, *Revised Redistricting of School Boards Dies*, AKRON BEACON J., July 1, 1992, at D3. Accordingly, the failure to do so left the responsibility to Governor George Voinovich. *Voinovich Announces State Board of Education Districts*, GALION INQUIRER, July 14, 1992, at 3.

21 Ohio Exec. Order No. 2002-01T (Jan. 31, 2002) (creating SBOE districts).

22 Catherine Candisky, *State School Board Districts New*, COLUMBUS DISPATCH (Feb. 11, 2012, 12:24 PM), https://www.dispatch.com/story/news/education/2012/02/11/state-school-board-districts-new/23462607007 [https://perma.cc/C9TA-X6CV].

23 Mike DeWine, Gov., State of Ohio, Letter of Designation (Jan. 31, 2022), https://content.govdelivery.com/attachments/OHIOGOVERNOR/2022/02/01/file_attachments/2063445/Letter%20of%20Designation%201.31.22.pdf [https://perma.cc/2NUC-QJEX] [hereinafter 2022 SBOE District Designation].

24 S.J. Res. 5, 132 Gen. Assemb., Reg. Sess. (Ohio 2018) (amending OHIO CONST. art. XI, § 1).

25 *League I*, 192 N.E.3d 379, 414–15 (Ohio 2022); League of Women Voters of Ohio v. Ohio Redistricting Comm'n (*League II*), 195 N.E.3d 974, 993 (Ohio 2022); League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 198 N.E.3d 812, 825–26 (Ohio 2022).

26 Gonidakis v. LaRose, 599 F. Supp. 3d 642, 678–79 (S.D. Ohio 2022).

27 2022 SBOE District Designation, *supra* note 23.

28 *Compare id.* ("The . . . State Board of Education districts have been designated based on the Senate districts map adopted by the Ohio Redistricting Commission on January 22, 2022 from the 2021 apportionment."), *with League II*, 195 N.E.3d at 978 ("We hold that petitioners have shown beyond a reasonable doubt that the plan adopted by the commission on January 22 violates Article XI, Sections 6(A) and 6(B) of the Ohio Constitution.").

were imposed for the 2022 elections,[29] but he declined to do so—meaning that the members of the SBOE elected at the 2022 elections were elected in districts composed of three unconstitutionally drawn State Senate districts. And yet no lawsuit was filed to enjoin this practice.

And while the SBOE is frequently overlooked in coverage of Ohio state politics—its members are elected in lower-profile, nonpartisan elections, and have a narrower task than most other state officers—its composition affects the resolution of important state issues. In the last several years, for example, the SBOE has waded into two hot-button issues in education. It repealed the anti-racism resolution it had adopted following George Floyd's murder in the summer of 2020,[30] which required the Department of Education to reexamine its model curriculums "to eliminate bias and ensure that racism and the struggle for equality are accurately addressed."[31] It also narrowly passed a resolution disapproving of the Biden Administration's use of Title IX to protect students on the basis of gender identity and sexual orientation,[32] and approving of the state legislature's ban on transgender girls from participating in girls' sports or using girls' bathrooms.[33] Though the 2022 midterm elections produced a Democratic majority on the SBOE, the legislature has subsequently stripped the Board of much of its powers—

29 Letter from Kenny Yuko, Ohio Sen. Minority Leader, and C. Allison Russo, Ohio House Minority Leader, to Mike DeWine, Gov., State of Ohio (July 12, 2022), https://ohiohouse.gov/assets/press-releases/111044/files/10825.pdf [https://web.archive.org/web/20220925214438/https://ohiohouse.gov/assets/press-releases/111044/files/10825.pdf].

30 Anna Staver, *Ohio State Board of Education Repeals Its Anti-Racism Resolution*, COLUMBUS DISPATCH (Oct. 18, 2021, 3:14 PM), https://www.dispatch.com/story/news/2021/10/14/ohio-state-board-education-repeals-anti-racism-resolution/6094952001 [https://perma.cc/EA6H-VHH9].

31 Ohio St. Bd. of Educ., Resolution No. 20: Resolution to Condemn Racism and to Advance Equality and Opportunity for Black Students, Indigenous Students and Students of Color (July 14, 2020), https://www.scribd.com/document/532425489/Ohio-State-School-Board-Equity-Resolution [https://perma.cc/B9GR-DSJG].

32 Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637 (June 22, 2021) (to be codified at 34 C.F.R. ch. I).

33 Jo Ingles, *Ohio Education Board Passes Controversial Resolution Against Federal Anti-Discrimination Policy*, STATEHOUSE NEWS BUREAU (Dec. 13, 2022, 5:09 PM), https://www.statenews.org/government-politics/2022-12-13/ohio-education-board-passes-controversial-resolution-against-federal-anti-discrimination-policy [https://perma.cc/S9H4-F33W].

including the power to select the chief administrator of state schools[34]—representing, perhaps, an unconstitutional power grab.[35]

Ohio's redistricting failures, while egregious in the abstract, are not egregious compared to the process by which other elected state boards have been redistricted. Like state legislatures, state boards were hardly ever redistricted prior to the adoption of the one-person, one-vote standard by the U.S. Supreme Court in the 1960s[36]—but even after that point, a surprising number of state boards were not redistricted.[37] Even today, there are state boards elected by district where the districts have not been redrawn by state legislatures in decades.[38] These inequities would (likely) not happen in higher-profile contexts, but that a *statewide* elected body has such a comparatively low profile is, itself, strange.

In this Article, I argue that the omission of the districts used to elect state boards from redistricting litigation and conversations represents a grave failure of democracy. In a time when more attention than ever is focused on how electoral districts are drawn, and as litigants are developing novel arguments across the country, the sidelining of these boards is an unwise strategy—and one that entrenches antimajoritarian policymaking at the state level. To support this argument, I map out the world of how elected, multimember state boards are redistricted. Drawing on my own comprehensive database of state elected offices from 1776 to the present, I build out a full legal history of these state boards. I track the creation and abolition of these boards, which I explore in the narrative of the Article and in a table in the Appendix.

---

34 Quinn Yeargain, *The Constitutionality of Stripping Elected Officials of Their Power*, ST. CT. REP. (Sept. 21, 2023), https://statecourtreport.org/our-work/analysis-opinion/constitutionality-stripping-elected-officials-their-power [https://perma.cc/TB8E-Y9TL]; Susan Tebben, *Blaming Legislative 'Turmoil,' State Board of Ed Puts Off Superintendent Search*, OHIO CAP. J. (Dec. 14, 2022, 4:45 AM), https://ohiocapitaljournal.com/2022/12/14/blaming-legislative-turmoil-state-board-of-ed-puts-off-superintendent-search [https://perma.cc/YYB2-TAW7]; Morgan Trau, *Ohio GOP Moves Forward Bill to Strip Powers from Board of Ed. After Losing Control to Democrats*, WEWS-TV NEWS (Nov. 18, 2022, 6:56 PM), https://www.news5cleveland.com/news/politics/ohio-politics/ohio-gop-moves-forward-bill-to-strip-powers-from-board-of-ed-after-losing-control-to-democrats [https://perma.cc/DV3B-AWTR].

35 Yeargain, *supra* note 34.

36 *See infra* Part II.

37 *See infra* Part II.

38 In Mississippi, the state's three Supreme Court districts, MISS. CODE ANN. § 9-3-1 (2023), which were last redrawn in 1987, Act of Apr. 20, 1987, ch. 491, 1987 Miss. Laws 660, are used to elect members of the Public Service Commission, MISS. CODE ANN. § 77-1-1, and the Transportation Commission, *id.* § 65-1-3. And in Montana, the Public Service Commission districts were last redrawn by the legislature in 2003, Act of Apr. 11, 2003, ch. 294, 2003 Mont. Laws 1014, but were redrawn by a three-judge panel in 2022, *see* Brown v. Jacobsen, 590 F. Supp. 3d 1273, 1277 (D. Mont. 2022) ("[T]he court-ordered adoption of the state's proposed redistricting will control the establishment of the district map until the Montana legislature acts differently.").

Despite the voluminous—and growing—literature in law and political science discussing congressional, state legislative, and even local redistricting, there is little comparable treatment of state boards. Accordingly, this Article makes two distinct contributions to the worlds of state constitutional law, election law, and legal history. First, I develop a comprehensive historical survey of how policymaking responsibility has been vested, at different times and in different areas, in state boards elected by district. I discuss the political and societal changes that motivated the creation of these boards, as well as the shift of policymaking authority to—and in some cases, away from—these boards.

Second, I tell the complicated and messy stories of how elected state boards have been redistricted, both before and after the U.S. Supreme Court's one-person, one-vote holdings and the adoption of the Voting Rights Act of 1965 and its amendments. I catalog, for the first time, every state law that redrew districts for one of these state boards, which I have collected in the Appendix to this Article.[39] I also discuss many federal court decisions relating to redistricting that have not been published in the *Federal Supplement* or meaningfully discussed by scholars. I show how, even as states have undergone constitutional changes that have revolutionized how congressional and state legislative redistricting processes occur, state boards are frequently ignored.

These contributions have significance outside the ambit of state constitutional scholarship. More fully fleshing out the history of district-based electoral systems adds to the public understanding of state institutional development, which will elevate contemporary debates about proposed reforms to state government institutions. Additionally, as challenges to the legality or constitutionality of different electoral systems or redistricting plans come to courts, both litigants and judges will benefit from having more information about different historical practices.

I begin in Part I with the significance of state boards elected by district. I start with a history of these boards in the United States, beginning with the state executive councils that grew out of colonial privy councils. I then consider the creation of elected state boards in several subject-specific areas, including tax assessment, public utility regulation, and education, and explore different trends in how state lawmakers and constitutional conventions have allocated policymaking responsibility. I note the salience of these boards in present-day political disputes and how they are positioned as key policymakers, which raises the stakes for how they are redistricted.

---

39 *See infra* Appendix.

Then, in Part II, I discuss the persistent failure by state legislatures to properly construct new boundaries for state board districts that account for changes in population. My discussion here differentiates how redistricting took place *before* the rights revolution and the Civil Rights Movement—and thus before the U.S. Supreme Court's one-person, one-vote rulings and the adoption of the Voting Rights Act of 1965—and *after* these developments. I then explore these rulings, both in the abstract and as applied to state boards. I argue that, though the one-person, one-vote principle has been unevenly developed, it clearly applies to state boards.

Finally, in Part III, I flip the discussion, and consider the failures to properly redistrict from the standpoint of voters and litigants. Here, I discuss the failure by citizens and the federal government to challenge the constitutionality and legality of these board districts and suggest several reasons why lawsuits may not be taking place. I conclude the Article with a series of recommendations for how these redistricting failures can be ameliorated—if it is desirable to maintain state boards as elected bodies at all.

I. ELECTED STATE BOARDS, THE DEVELOPMENT OF DISTRICTS, AND MODERN POLICYMAKING

When state constitutions were first adopted in the late eighteenth century, American democracy did not exist as we would recognize it today. Few states had governors who were directly elected, fewer states had any other statewide elected offices, and, in many states, legislative elections represented the only opportunities that voters had to alter the composition of their governments.[40] Over the course of the nineteenth century, reformers slowly integrated democracy into state governments by creating more statewide (and local) elected offices.[41]

But though even the earliest state constitutions worked to ensure regional representation in the governments they created,[42] district-based

---

40 *See, e.g.*, Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS, no. 1, Winter 1982, at 57, 60–63; T. Quinn Yeargain, *Democratizing Gubernatorial Selection*, 14 NE. U. L. REV. 1, 9–14 (2022); *cf.* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 872, 880 (2021).

41 Sturm, *supra* note 40, at 63–66 ("The Jacksonian emphasis on frequent rotation in office resulted in election of numerous executive officers in addition to the governor. Besides members of the legislature and the governor, typically, a lieutenant governor, a secretary of state, an attorney general, a treasurer, and often other officers were popularly elected.").

42 Many states froze their state legislative districts into their constitutions—preventing their configurations from being easily changed. Over time, this resulted in significant imbalances between districts. In the early 1960s in California, "it require[d] the votes of 422 citizens of Los

electoral systems were uncommon at the start of the republic outside of the legislative context—and generally did *not* increase in popularity during the century that followed. Though many states provided for multimember, elected state boards, most of these boards were elected in statewide elections.[43] It was only during the twentieth century that, buoyed primarily by the drive for modernization of state governments, electoral districts were created for statewide boards in significant numbers.[44]

In this Part, I tell the story of how elected, multimember state boards came to be elected by district, with each Section focusing on a different board. In Section I.A, I outline the different types of boards that have been elected by district from the earliest days of our country, discussing state executive councils, state boards of equalization, railroad (and later public service) commissions, state boards of education, and a handful of boards that elude easy categorization. For the most part, this categorical breakdown also works as a linear breakdown, because each of these boards was created or relevantly reconstituted in a chronological order that roughly lines up with the order of the Sections that follow.

Then, in Section I.B, I explore the modern role that these boards play—and how redistricting disputes can alter both the policies that the boards adopt and their positions in state government. To develop this idea, I discuss several case studies, and explore how malapportionment and both racial and partisan gerrymandering affect policy development.

A. *Types of Boards*

1. State Executive Councils

The first state constitutions created governments that, despite explicit requirements that powers be separated, nonetheless blended executive, judicial, and legislative powers.[45] While the state governments that were created bore a slight resemblance to the governments we have

---

Angeles County (population 6,038,771), who have one state senator, to equal the vote of a citizen of the 28th senatorial district (population 14,294), which also has one senator." Arthur L. Goldberg, *The Statistics of Malapportionment*, 72 YALE L.J. 90, 90 (1962).

43 *E.g.*, COLO. CONST. of 1876, art. IX, § 12 (State Board of Regents); MICH. CONST. of 1850, art. XIII, § 6 (State Board of Regents); MICH. CONST. of 1850, art. XIII, § 9 (SBOE); NEB. CONST. art. VIII, § 10 (1875) (State Board of Regents).

44 As I mention later, *infra* Section I.A, several states created districts in the eighteenth and nineteenth centuries for electing their executive councils and boards of education, but this was a minority approach.

45 G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 334 (2003).

today—insofar as they had governors, legislatures, and courts—their structures were quite different.

For example, virtually all states distributed executive power between a governor and an executive council.[46] While executive councils have received strikingly little treatment by academics, and thus are still not very well understood, it suffices to note, in this context, that they were political bodies, existing separately from state legislatures, that exercised prototypically "executive" functions.[47] Executive councils served a multipurpose role in their state governments, providing "advice and consent" to governors in the exercise of their powers,[48] reviewing acts passed by the legislature,[49] and filling vacancies in state government.[50]

Most executive councils were originally elected by state legislatures, but those in New Hampshire, Pennsylvania, and Vermont were directly elected at the outset. (And the Massachusetts Governor's Council was converted to district-based elections in 1855.)[51] Only Vermont's was elected statewide—every council candidate ran statewide, and the top twelve vote-getters won.[52] The other three were elected by district. At the beginning, these districts were coterminous with counties themselves. In Pennsylvania, the Supreme Executive Council consisted of twelve members, each of whom represented the then-existing counties.[53] The New Hampshire Executive Council was likewise elected by county—but the constitution merely set this as a default mechanism and allowed the legislature to draw districts at its discretion.[54]

---

46 T. Quinn Yeargain, *Democratizing Gubernatorial Succession*, 73 RUTGERS U. L. REV. 1145, 1149–52 (2021) (describing state executive councils).

47 *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 137–40, (1998 ed.) (describing creation and powers of executive councils); 1 FRANCIS NEWTON THORPE, A CONSTITUTIONAL HISTORY OF THE AMERICAN PEOPLE 1776–1850, at 88 (New York, Harper & Bros. 1898).

48 DEL. CONST. of 1776, arts. IX, X; GA. CONST. of 1777, art. XIX; ME. CONST. art. V, pt. 1, § 11 (1820); *id.* art. V, pt. 2; MD. CONST. of 1776, arts. XXVI, XXXIII; MASS. CONST. pt. 2, ch. 2, § 1, arts. IV–VI (1780); N.H. CONST. of 1792, pt. 2, § 62; N.C. CONST. of 1776, arts. XVIII, XIX; PA. CONST. of 1776, § 19; S.C. CONST. of 1778, art. IX; VT. CONST. of 1793, ch. 2, § 11; VA. CONST. of 1776, para. 7.

49 GA. CONST. of 1777, art. VIII; N.Y. CONST. of 1777, art. III; VT. CONST. of 1793, ch. 2, § 16

50 DEL. CONST. of 1776, art. XXI; ME. CONST. art. V, pt. 1 § 8 (1820); MD. CONST. of 1776, art. XIII; MASS. CONST. pt. 2, ch. 2, § 1, art. 9 (1780); N.H. CONST. of 1792, pt. 2, § 47; N.Y. CONST. of 1777, art. XXIII; N.C. CONST. of 1776, art. XX; PA. CONST. of 1776, § 20; VT. CONST. of 1793, ch. 2, § 11; VA. CONST. of 1776, pt. 2, para. 13.

51 MASS. CONST. amend. art. XVI (1855).

52 VT. CONST. of 1793, ch. 2, § 10.

53 PA. CONST. of 1776, § 19.

54 N.H. CONST. of 1792, pt. 2, art. 65.

None of these realities lasted long. Executive councils were disfavored by many of the framers of the U.S. Constitution,[55] and the decision not to create a national executive council likely doomed their existence.[56] In Pennsylvania, the system of government created by the 1776 Constitution, seen as radical at the time and disfavored by more conservative voices,[57] was significantly overhauled in its 1790 rewrite—and the Council was abolished and replaced by the State Senate.[58] After years of unsuccessful attempts,[59] Vermont's Council was abolished in 1836 and also replaced by the State Senate.[60]

But executive councils stuck around in Massachusetts and New Hampshire,[61] as well as in Maine, where the Council remained legislatively elected until its abolition in 1975.[62] The 1855 constitutional amendment that converted the Governor's Council in Massachusetts to district-based election also mandated that it be elected by districts that were redrawn every decade.[63] The New Hampshire Executive Council was elected by county[64] until the first redistricting took place in 1829,[65] and then continued sporadically thereafter.

2. State Boards of Equalization

Despite the centrality of tax disputes to the United States' formation—both preceding its independence and the adoption of the

---

55 FOUNDING THE AMERICAN PRESIDENCY 31–34, 44–47 (Richard J. Ellis ed., 1999) (describing debates over the distribution of executive power at the constitutional convention).

56 *See* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 274–75 (Rita Kimber & Robert Kimber trans., Univ. of N.C. Press 1980) (1973).

57 Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541, 546–48 (1989).

58 WOOD, *supra* note 47, at 245–49.

59 WILLIAM C. HILL, THE VERMONT STATE CONSTITUTION 15–18 (Oxford Univ. Press 2011) (1992).

60 VT. CONST. amend. art. III (1836).

61 MASS. CONST. amend. art. XVI (1855); N.H. CONST. of 1792, pt. 2, art. 65.

62 Const. Res., ch. 4, 107th Leg., Reg. Sess., 1975 Me. Laws 2224.

63 MASS. CONST. amend. art. XVI (1855) ("The legislature, at its first session after this amendment shall have been adopted, and at its first session after the next state census shall have been taken, and at its first session after each decennial state census thereafterwards, shall divide the commonwealth into eight districts of contiguous territory . . . .").

64 Mostly, anyway. The 1803 creation of Coos County out of Grafton County, Act of Dec. 24, 1803, 1803 N.H. Laws Nov. Sess. 15, resulted in the creation of a Coos-Grafton council district, Act of June 18, 1805, 1805 N.H. Laws June Sess. 24, but claiming that this constituted a "redistricting" would be resting too strongly on a technicality.

65 Act of Jan. 3, 1829, ch. 104, 1828 N.H. Laws 415.

U.S. Constitution—early constitutions were relatively silent on the topic of taxation.[66] Over the course of the nineteenth century, state constitutions were amended to include uniformity requirements, reflecting the basic idea that all property should be assessed and taxed in a uniform manner consistent with its value.[67] But tax administration was largely left to local elected officials,[68] each of whom had electoral incentives to artificially deflate their constituency's taxable property values so that their voters paid disproportionately less than did other property owners elsewhere in the state.[69]

In the absence of robust state oversight, these local machinations greatly reduced the value of the state tax base. This reduction in revenue did not go unnoticed by state officials, one of whom characterized it as "a rivalry between county assessors to see which county could make the greatest reduction" in assessment, resulting in "a contest in which each county was against every other county and all the counties against the state."[70] Similar concerns from around the country persuaded state legislatures in Illinois, Kansas, Kentucky, Louisiana, Ohio, Oregon, and South Carolina, as well as state constitutional convention delegates in California,[71] to create state boards of equalization elected by district.[72]

The newly formed state boards of equalization had the responsibility of both developing statewide standards for assessing property tax values and serving as a tribunal for hearing appeals of local assessment

---

66 G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 119 (1998) (noting that, prior to the mid-nineteenth century, legislatures had "unfettered . . . discretion" in setting tax policy).

67 David A. Myers, *Open Space Taxation and State Constitutions*, 33 VAND. L. REV. 837, 841–42 (1980); Glenn W. Fisher, *History of Property Taxes in the United States*, ECON. HIST. ASS'N (Sept. 30, 2002), https://eh.net/encyclopedia/history-of-property-taxes-in-the-united-states [https://perma.cc/BBW2-HHWH].

68 JENS PETER JENSEN, PROPERTY TAXATION IN THE UNITED STATES 340–43, 350–53 (1931).

69 *See* John Shannon, *Conflict Between State Assessment Law and Local Assessment Practice*, *in* PROPERTY TAXATION, USA 39, 49 (Richard W. Lindholm ed., 1967).

70 *E.g.*, Alva Adams, Governor of Colo., Biennial Message (Jan. 4, 1899), *reprinted in* COLO. S. JOURNAL, 12th Gen. Assemb., Reg. Sess. 22 (1899).

71 *E.g.*, Richard J. Oglesby, Governor of Ill., Biennial Message (Jan. 7, 1867), *reprinted in* ILL. H. JOURNAL, 25th Gen. Assemb., Reg. Sess. 16–17 (1867); 1879–81 KY. AUDITOR BIENNIAL REP., at v–vii; Newton C. Blanchard, Governor of La., Biennial Message (May 15, 1906), *reprinted in* LA. H. JOURNAL, 2nd Gen. Assemb., Reg. Sess. 14–17 (1906); Sylvester Pennoyer, Governor of Or., Biennial Message (1891), *reprinted in* OR. H. JOURNAL, 16th Legislative Assemb., Reg. Sess. app. at 10–11 (1891); *see also* William A. Poynter, Governor of Neb., Inaugural Address (Jan. 5, 1899), *reprinted in* NEB. S. JOURNAL, 26th Reg. Sess. 197 (1899) ("Under our present plan the same kind of property varies in valuation in different counties from 10 to 30 per cent.").

72 CAL. CONST. art. XIII, § 9 (1879); Act of Mar. 8, 1867, 1867 III. Pub. Laws 105; Act of Mar. 2, 1871, ch. 150, 1871 Kan. Laws 329; Act of May 10, 1884, ch. 1336, [1883] 1 Ky. Acts 151; Act of July 11, 1906, No. 182, 1906 La. Acts 331; Act of Apr. 13, 1852, §§ 56–57, 50 Ohio Laws 135, 159–60 (1852); Act of Feb. 21, 1891, 1891 Or. Laws 182; Act of Sept. 15, 1868, No. 22, § 17, 1868 S.C. Acts 28, 35.

determinations. Despite some initial promise and praise,[73] the tide turned against the boards.[74] In some states, they lasted for just a few election cycles before they were abolished[75]—though the Illinois and Ohio boards survived for several decades.[76] And though the California Board of Equalization was largely defanged and stripped of most of its powers in 2017,[77] it has survived several attempts to alter its constitutional status[78] or abolish it outright[79] and remains the only elected state tax board in the country today.[80]

3. Railroad-Turned–Public Service Commissions

The interconnectedness of the United States through railroad construction presented a daunting regulatory challenge for state governments. After trying out a variety of approaches to regulate railroads—having the legislature set rules, tasking courts with enforcing limits on railroad activities, and creating appointed railroad commissions

---

73 *E.g.*, J. Proctor Knott, Governor of Ky., Biennial Message (Dec. 31, 1885), *reprinted in* KY. S. JOURNAL, 1885–1886 Reg. Sess. 17–19 (1886) ("It is true that much good has been accomplished by the act of the last General Assembly establishing the State Board of Equalization. It met my very hearty approval at the time of its enactment . . . as the inauguration of a necessary and important movement in the right direction; and a careful observation of its operation during the past two years has confirmed the opinion I then entertained.").

74 *E.g.*, Sylvester Pennoyer, Governor of Or., Biennial Message (1893), *reprinted in* OR. H. JOURNAL, 17th Legislative Assemb., Reg. Sess. app. at 20 (1893) ("The State Board of Equalization, which has really proven to be a Board of Inequitable Assessment, has been of more harm than benefit . . . .").

75 The Kentucky Board of Equalization existed as an elected body from 1885 to 1888. [1883] 1 Ky. Acts 151; Act of May 4, 1888, ch. 1562, [1887] 1 Ky. Acts 209. The Louisiana Board existed from 1907 to 1916. 1906 La. Acts 331; Act of July 5, 1916, No. 140, 1916 La. Acts 330. And the Oregon Board existed from 1893 to 1898. 1891 Or. Laws 182; Act of Oct. 13, 1898, 1898 Or. Laws Spec. Sess. 15.

76 In Illinois, the Board was abolished in 1919, Act of June 19, 1919, 1919 Ill. Laws 718, and the Ohio Board in 1910, Act of May 10, 1910, 1910 Ohio Laws 399.

77 Taxpayer Transparency and Fairness Act, ch. 16, 2017 Cal. Stat. 932 (codified at CAL. GOV'T CODE § 15570.22 (West 2023)).

78 A.C.A. 4, ch. 99, 52d Leg., Reg. Sess.,1937 Cal. Stat. 2998; S.C.A. 18, ch. 129, 54th Leg., Reg. Sess., 1941 Cal. Stat. 3533 (proposing amendment to state constitution allowing legislature to abolish State Board of Equalization); *see also* DAVID R. DOERR, CALIFORNIA'S TAX MACHINE: A HISTORY OF TAXING AND SPENDING IN THE GOLDEN STATE 42 (Ronald Roach ed., 2000).

79 Adam Ashton, *For 90 Years, Californians Have Tried to Kill This Tax Board. This Is Why They Failed*, SACRAMENTO BEE (Apr. 24, 2017, 7:56 AM), https://www.sacbee.com/news/politics-government/the-state-worker/article146100459.html [https://web.archive.org/web/20210708012805/https://www.sacbee.com/news/politics-government/the-state-worker/article146100459.html].

80 However, though California is the only state with an elected tax *board*, North Dakota elects a single statewide Tax Commissioner. N.D. CONST. art. V, § 2.

with a set of weak powers—reformers turned to the idea of electing railroad commissioners.[81] Whether the rationale for its creation was rooted in a public interest or a capture theory of regulation,[82] the railroad commission envisioned by its advocates was a politically independent body with the power to rein in the worst abuses of railroad companies.[83] It was relatively slow to develop, with New Hampshire creating the first elected railroad commission—albeit one with extremely weak powers—in 1851.[84] But by the beginning of the twentieth century, railroad commissions (and their closely related variants) had been established as elected offices by more than half of the states in the country.[85]

The path of the elected railroad commission was inconsistent and haphazard. In some states, the shelf life of the commission was short. Depending on which party or ideological faction governed a state, an elected commission might be created, abolished, resurrected, and abolished again.[86] Tennessee, for example, created its elected Railroad Commission in 1883,[87] held its first elections for the office in 1884, and abolished it just months after the first commissioners took office in 1885.[88] This vacillation was especially true with respect to *statutorily*

81 *See, e.g.*, MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 176–81 (1977); JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 147 (2017); THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN 57–59 (1984).

82 *See* Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017, 1020–23 (1988); William J. Novak, *A Revisionist History of Regulatory Capture*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE & HOW TO LIMIT IT 25, 26–29 (Daniel Carpenter & David A. Moss eds., 2014).

83 ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 25–27 (1941).

84 Act of June 25, 1851, ch. 1104, 1851 N.H. Laws 1067.

85 *See* CUSHMAN, *supra* note 83, at 30.

86 *See, e.g.*, James F. Doster, *Were Populists Against Railroad Corporations? The Case of Alabama*, 20 J.S. HIST. 395, 397–98 (1954) (describing debates over powers of Alabama Railroad Commission); Tracy E. Danese, *Railroads, Farmers and Senatorial Politics: The Florida Railroad Commission in the 1890s*, 75 FLA. HIST. Q. 146, 157–58 (1996) (describing creation of elected Florida Railroad Commission); Annie Sabra Ramsey, *Utility Regulation in North Carolina, 1891–1941: Fifty Years of History and Progress*, 22 N.C. HIST. REV. 125 (1945) (describing creation of elected utility regulators in North Carolina).

87 Act of Mar. 30, 1883, ch. 199, 1883 Tenn. Acts 271.

88 Act of Apr. 3, 1885, ch. 77, 1885 Tenn. Acts 155.

created commissions.[89] Commissions written into constitutions generally lasted longer.[90]

In the beginning, most of these railroad commissions were elected statewide. A sizable minority of states, beginning with California in 1879, Kentucky in 1891, Louisiana in 1898, and Oregon in 1909, opted for district-based elections.[91] The rationale in favor of electing railroad commissions by district, as drawn from constitutional convention records[92] and other contemporaneous statements of legislative intent, is thin. What is available suggests that delegates believed that district-level elections were appropriate to reflect regional differences,[93] and that making the elections local in nature could help minimize the likelihood of corporate influence.[94] Of course, on both points, some delegates also argued the opposite.[95]

---

89 Beyond Tennessee, Minnesota's elected Railroad-turned–Public Service Commission first existed from 1876 to 1887, then from 1901 to 1973. Act of Mar. 8, 1875, ch. 103, 1875 Minn. Gen. Laws 135 (creating the Railroad Commission); Act of Mar. 5, 1885, ch. 188, 1885 Minn. Gen. Laws 243 (abolishing same); Act of Mar. 6, 1899, ch. 39, 1899 Minn. Gen. Laws 36 (re-establishing same); Act of May 25, 1967, ch. 864, 1967 Minn. Laws 1779 (abolishing same). North Carolina had an elected, multimember Corporation Commission from 1901 to 1934, which it abolished and briefly reorganized as an elected Utilities Commissioner from 1935 to 1941. Act of Mar. 6, 1899, ch. 164, 1899 N.C. Pub. Laws 291 (establishing Corporation Commission); Act of Mar. 9, 1933, ch. 134, 1933 N.C. Pub. Laws 100 (abolishing Corporation Commission and establishing Utilities Commissioner); Act of Mar. 8, 1941, ch. 97, 1941 N.C. Pub. Laws 151 (abolishing Utilities Commissioner).

90 Of the commissions created constitutionally in Arizona, Georgia, Kentucky, Louisiana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Virginia, and Texas, only three (the Kentucky Railroad Commission, the New Mexico Corporation-turned–Public Regulation Commission, and the Virginia Corporation Commission) were ever abolished. *See* S.B. 70, ch. 399, 2000 Ky. Acts 1232 (repealing KY. CONST. § 209 and amending *id.* §§ 201, 218); S.J. Res. 1 & 4, 54th Leg., 1st Sess., 2019 N.M. Laws 4017 (amending N.M. CONST. art. XI, § 1); Act of Feb. 18, 1926, ch. 37, 1926 Va. Acts 48. Note, however, that the 1902 Virginia Constitution merely allowed the legislature to create a popularly elected commission after January 1, 1908, VA. CONST. of 1902, art. XII, § 155, which it did in 1918, Act of Feb. 16, 1918, ch. 55, 1918 Va. Acts 108.

91 CAL. CONST. art. XII, §§ 22–23 (1879); KY. CONST. § 209 (repealed 2000); LA. CONST. of 1898, art. 283; Act of Feb. 18, 1907, ch. 53, 1907 Or. Laws 67.

92 *But see* Maureen E. Brady, *Uses of Convention History in State Constitutional Law*, 2022 WIS. L. REV. 1169, 1172–80 (cautioning against the use of state constitutional convention records).

93 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 605–06 (Sacramento, J. D. Young, Supt. State Printing 1880) [hereinafter CALIFORNIA CONSTITUTIONAL CONVENTION PROCEEDINGS].

94 *Id.* at 606; IV OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION ASSEMBLED AT FRANKFORT, ON THE EIGHTH DAY OF SEPTEMBER, 1890, TO ADOPT, AMEND OR CHANGE THE CONSTITUTION OF THE STATE OF KENTUCKY 4992 (Frankfort, E. Polk Johnson 1890) [hereinafter KENTUCKY CONSTITUTIONAL CONVENTION PROCEEDINGS].

95 CALIFORNIA CONSTITUTIONAL CONVENTION PROCEEDINGS, *supra* note 93, at 604 ("Districts to be formed for what purpose? Simply for the purpose of selecting the locality in which these three gentlemen may reside. There is no such thing as a railroad district in the State."); *id.* at 570 (arguing

By the early twentieth century, many prominent Progressives had soured on the idea of electing railroad commissions. In 1905, Wisconsin Governor Robert La Follette urged the state legislature to abolish his state's elected Railroad Commissioner, arguing that democracy did not guarantee the election of a competent, qualified regulator, and that it instead provided well-heeled corporations with an opportunity to influence the election.[96] La Follette noted that public utility regulation was specialized and highly technical in nature, and that the best way to select qualified regulators was through gubernatorial appointment, not election.[97] Under the reforms pioneered by La Follette, as well as New York Governor Charles Evans Hughes, new commissions were created not only to regulate railroads, but public utilities more generally.[98]

This approach spread throughout the United States,[99] with many governors eagerly recommending it to their legislatures for adoption—and with many of the same arguments and critiques advanced by La Follette and Hughes.[100] The movement to abolish elected railroad

---

that electing the Railroad Commission by district prevented close scrutiny of the Commission's actions); KENTUCKY CONSTITUTIONAL CONVENTION PROCEEDINGS, *supra* note 94, at 5821 ("Now, if these Railroad Commissioners are to be elected from Superior Court Districts, there will be a Convention called by the Democratic party to nominate a candidate for that office in the districts in which he is to be elected that year. . . . [B]ut few of the great body of the people will take any interest whatever in its action . . . [so] it will take but a small effort on the part of those railroads . . . to secure the appointment of such Delegates as will favor the railroads . . . .").

96 Robert La Follette, Governor of Wis., Biennial Message (Jan. 12, 1905), *reprinted in* WIS. S. JOURNAL, 47th Sess. 73–77 (1905) ("The encroachment of the great railway systems, allied with industrial trusts and combinations, upon democracy, is a constant menace to whatever degree we may perfect the laws providing for the machinery of popular government. Every additional temptation for these great organizations as a system to take part in the elections, should be removed. Surely it is the part of wisdom to add none unnecessarily."); *see also* WILLIAM T. GORMLEY, JR., THE POLITICS OF PUBLIC UTILITY REGULATION 184 (1983).

97 La Follette, *supra* note 96, at 71 ("A plausible objection which is always urged by the railroads against any 'interference' with their making rates is, that rate-making involves a technical knowledge only possessed by those engaged in the transportation business. I am free to admit that rate-making requires technical and expert knowledge. . . . The railroads secure the services of men competent to discharge these duties. The state may likewise secure the services of men equally competent.").

98 RICHARD F. HIRSH, POWER LOSS: THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN ELECTRIC UTILITY SYSTEM 19–23 (1999).

99 DAVID R. BERMAN, GOVERNORS AND THE PROGRESSIVE MOVEMENT 160 (2019); 1 HENRY C. SPURR, GUIDING PRINCIPLES OF PUBLIC SERVICE REGULATION 12 (1924).

100 Walter R. Stubbs, Governor of Kan., Inaugural Message (Jan. 12, 1909), *reprinted in* KAN. S. JOURNAL, 16th Sess. 6–7 (1909) ("Under the leadership of Governor Hughes in New York, and Governor LaFollette [sic] in Wisconsin, public-utilities laws have been enacted . . . . I most earnestly recommend the enactment of a public utilities law in Kansas . . . adding the best features of the New York and Wisconsin public-utilities laws . . . ."); Herbert S. Hadley, Governor of Mo., Special Message Concerning Public Service Corporations (May 12, 1909), *reprinted in* MO. H. JOURNAL, 45th Gen. Assemb. app. 13x, at 9–11 (1909) ("The experience of other states, particularly of

commissions ran in tandem with the Short Ballot Movement, a broader effort to cut down on the number of elected offices,[101] and the debates in many states were not about *whether* to create an appointed board, but *how* to.[102]

However, the appetite for appointed public utility commissions extended only so far. Many southern states, hostile to the structural reforms proposed by Progressives, including the short ballot, opted to retain sprawling executive branches—including elected railroad commissions. In some of the states in the Great Plains, agrarian delegates to constitutional conventions successfully won the creation of elected commissions in state constitutions,[103] where they usually remained.[104]

But the preservation of the elected railroad commission did not prevent changes to the commissioners' power or method of election. Most of the states that continued to elect railroad commissioners expanded their regulatory power to include other public utilities, like electricity generation and distribution, other common carriers, and water companies—which frequently resulted in a name change from Railroad Commission to Public Utility Commission (PUC).[105] Additionally, an initial decision to keep an elected PUC did not permanently resolve the debate. Over the course of the twentieth century, the number of elected PUCs steadily declined, as did the number of PUCs that were elected statewide. Mississippi switched from at-large to district-level elections in

---

Wisconsin and New York, demonstrates the advisability and the effectiveness of [an appointed railroad commission]."); George C. Pardee, Governor of Cal., Second Biennial Message (Jan. 7, 1907), *reprinted in* CAL. S. JOURNAL, 37th Sess. 38 (1907) (calling for abolition of elected Railroad Commission).

101 NAT'L SHORT BALLOT ORG., THE SHORT BALLOT: A MOVEMENT TO SIMPLIFY POLITICS 16–19 (1916) (laying out the principles of the Short Ballot Movement). *See generally* BERNARD HIRSCHHORN, DEMOCRACY REFORMED: RICHARD SPENCER CHILDS AND HIS FIGHT FOR BETTER GOVERNMENT (1997) (describing the progress of the Short Ballot Movement).

102 In Missouri, for example, the legislature and the Governor debated how to create the new Public Service Commission, who would have authority to appoint the members, how large it would be, et cetera. *Utilities Bill Core for Fight on Major*, ST. LOUIS GLOBE-DEMOCRAT, Jan. 26, 1913, at 7; *Joker in Utility Bill? Politicians May Win Fight for Board of Five Members*, KAN. CITY TIMES, Jan. 29, 1913, at 4.

103 *See, e.g.*, JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION 324 (Oxford Univ. Press 2011) (1993); TONI MCCLORY, UNDERSTANDING THE ARIZONA CONSTITUTION 28 (2d ed. 2016); DANNY M. ADKISON & LISA MCNAIR PALMER, THE OKLAHOMA STATE CONSTITUTION: A REFERENCE GUIDE 140–41 (2001).

104 *See supra* note 90 and accompanying text.

105 *E.g.*, Act of Sept. 25, 1915, No. 746, 1915 Ala. Gen. Laws 865 (changing the name of the Alabama Railroad Commission to the Alabama Public Service Commission); Act of Aug. 21, 1922, No. 539, 1922 Ga. Laws 143 (changing name of the Georgia Railroad Commission to the Georgia Public Service Commission).

1938,[106] as did Nebraska in 1962,[107] Montana in 1975,[108] and New Mexico in 1997.[109]

On the other hand, some state legislatures declined to expand the duties of their railroad commissions, instead creating separate bodies to regulate public utilities. Kentucky is the classic case—its Railroad Commission was written into its 1891 Constitution, but the constitutional text said little about the Commission's actual duties.[110] Accordingly, the legislature created a separate body to supervise utilities,[111] and slowly whittled away the Railroad Commission's duties until it was left with the power to "settle[] disputes about weeds and brush along railroad rights of way" and to hear "complaints about bumpy, deteriorating railroad crossings."[112] After two failed attempts to abolish the Commission in 1973 and 1992,[113] voters narrowly approved a constitutional amendment that did so in 2000.[114]

4. State Boards of Education

The first elected state education offices—sometimes boards of education, but usually superintendents—were created in the mid-nineteenth century, and they caught on quickly. Iowa's 1846 Constitution established the first elected superintendent,[115] and, by 1873, more than half of all states had similar positions.[116] Most states opted to vest policymaking responsibility and school supervision in a single official, but Alabama and Iowa briefly opted for education boards that were

---

106 Act of Apr. 4, 1938, ch. 139, 1938 Miss. Laws 180.

107 Act of Mar. 24, 1961, ch. 251, 1961 Neb. Laws 739 (amending NEB. CONST. art. IV, § 20).

108 Act of Mar. 28, 1974, ch. 339, 1974 Mont. Laws 1059.

109 N.M. CONST. art. XI, § 1 (1996).

110 KY. CONST. § 209 (repealed 2000).

111 KY. CONST. REV. COMM'N, REPORT OF THE CONSTITUTION REVIEW COMMISSION 73 (1950); Orba F. Traylor & Roy H. Owsley, *The Public Service Commission of Kentucky*, 24 KY. L.J. 449, 451–52 (1936) (describing creation of Public Service Commission to regulate utilities instead of railroad commission).

112 Editorial, *Pull Up the Tracks: State Railroad Commission Has Outlived Its Purpose*, LEXINGTON HERALD-LEADER, Oct. 30, 1999, at A14; *see also* ROBERT M. IRELAND, THE KENTUCKY STATE CONSTITUTION 197–99 (Oxford Univ. Press 2011) (1999) (describing limited powers of the Commission).

113 IRELAND, *supra* note 112, at 198.

114 S.B. No. 70, ch. 399, 2000 Ky. Acts 1232 (repealing KY. CONST. § 209 and amending *id.* §§ 201, 218).

115 IOWA CONST. of 1846, art. IX, § 1.

116 *See, e.g.*, John C. Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education 1776–1900*, 42 AM. J. LEGAL HIST. 1, 28–29 (1998). I cite Eastman here for this work only, not for his more recent work. *See, e.g.*, 18 U.S.C. § 2383.

elected by district.[117] Michigan created *both* an elected Superintendent of Public Instruction and an elected SBOE in its 1850 Constitution[118]—and the Board still exists today.[119]

State school superintendents were, for a while, one of the most common statewide elected officials. But during the twentieth century, as policymakers worked to professionalize their state school systems, having a potentially inexperienced elected official running a complex agency was undesirable.[120] Accordingly, legislators and constitutional convention delegates proposed making the office appointive rather than elective.[121] Some states opted to preserve a modicum of democratic input by simultaneously creating a SBOE, elected by district, with the responsibility of appointing the superintendent,[122] but many others established both appointed boards and superintendents.[123]

Several western states also created boards of university trustees that were also elected by district. In Colorado, Nebraska, and Nevada, these were originally statewide elected offices,[124] but districts were adopted in

---

117 IOWA CONST. art. IX, pt. 1, § 1 (1857) (creating SBOE); *id.* art. IX, pt. 1, § 15 (allowing the legislature to abolish the Board after 1863); MICH. CONST. of 1850, art. XIII, § 6 (creating Michigan University Board of Regents and providing for election by district); Act of Mar. 10, 1851, No. 25, 1851 Mich. Acts 20.

118 MICH. CONST. of 1850, art. VIII, § 1 (providing for elected Superintendent of Public Instruction); *id.* art. XIII, § 9 (providing for elected SBOE).

119 *Id.* art. VIII, § 3.

120 *See* MORTON KELLER, REGULATING A NEW SOCIETY: PUBLIC POLICY AND SOCIAL CHANGE IN AMERICA, 1900–1933, at 45–51 (1994) (describing progressive efforts to modernize and professionalize school administration).

121 *See* Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537, 1556–57 (2019); *see also* HARL R. DOUGLASS & CALVIN GRIEDER, AMERICAN PUBLIC EDUCATION: AN INTRODUCTION 149–50 (1948) ("Appointment by the state board is favored by experts in educational administration, because the emphasis in selection can be more easily placed on professional qualifications."); Charles H. Judd, *State Departments of Education*, 41 SCH. REV. 101, 101–02 (1933) (arguing that state constitutional drafters "made the mistake of putting into the fundamental laws of most of the states the provision that the chief educational officer shall be selected by popular vote").

122 *See infra* Appendix (Alabama Board of Education, Colorado Board of Education, Kansas Board of Education, Louisiana Board of Elementary and Secondary Education, Nebraska Board of Education, Nevada Board of Education, New Mexico Public Education Commission, Texas Board of Education, Utah Board of Education).

123 *E.g.*, FLA. CONST. art. IX, § 2 (1998); ILL. CONST. art. X, § 2; Act of Apr. 3, 2019, No. 8, 2019 Ind. Acts 28; MISS. CONST. art. VIII, § 203 (1982); MO. CONST. art. IX, § 2; H.J. Res. 513, ch. 1, 47th Leg. Sess., 1972 S.D. Laws 15 (proposing reorganization of executive branch, including abolition of elected superintendent); S.D. CONST. art. IV, § 1–9 (1972); VA. CONST. of 1902, art. IX, § 131 (1928); W. VA. CONST. art. XII, § 2 (1958).

124 COLO. CONST. art. IX, § 12 (1876); NEB. CONST. art. VII, § 10 (1875); NEV. CONST. art. XI, § 7 (1864).

the twentieth century.[125] Michigan went in the opposite direction, creating a university board of trustees elected from districts that were coterminous with its judicial circuits in its 1850 Constitution,[126] and then adopting statewide election in 1863.[127]

5. Other Boards

Beyond the multimember boards and commissions elected by district mentioned in this Section, other entities that elude easy classification were created by a handful of states. Three states elected public works boards from districts: Louisiana (1860–61),[128] Maryland (1852–64),[129] and Virginia (1854–70).[130] Louisiana briefly created, from 1937 to 1940, an *elected* Board of Governors of the State Bar, with members chosen from the state's congressional districts.[131] For twenty years, from 1949 to 1969, Nevada had a statewide Board of Fish and Game Commissioners, with one commissioner elected from each county.[132]

Mississippi, however, merits separate mention. Its Board of Penitentiary Trustees and Board of Bank Examiners were elected from the state's supreme court districts from 1908 to 1930 and 1916 to 1924, respectively.[133] It created an elected Highway Commission in 1921, which was originally elected from the state's eight congressional districts,[134] consolidated the board to three members elected from supreme court

---

125 Act of Mar. 16, 1973, ch. 376, 1973 Colo. Laws 1323; NEB. CONST. art. VII, § 10 (1920); Act of Mar. 4, 1959, ch. 78, 1959 Nev. Stat. 81.

126 MICH. CONST. of 1850, art. XIII, § 6.

127 *Id.* art. XIII, § 6 (1862); J. Res. 17, 1861 Leg., Reg. Sess., 1861 Mich. Acts 589.

128 Act of Mar. 17, 1859, No. 279, 1859 La. Acts 229; Act of Mar. 4, 1861, No. 71, 1861 La. Acts 52.

129 MD. CONST. of 1851, art. VII, §§ 1–2 (creating Board of Public Works and four districts); MD. CONST. of 1864, art. VII, § 1 (constituting the Governor, Comptroller, and Treasurer as the Board of Public Works).

130 VA. CONST. of 1851, art. V, § 14 (creating Board of Public Works); Act of Mar. 9, 1853, ch. 56, 1852–1853 Va. Acts 59 (creating three Public Works districts); VA. CONST. of 1870, art. IV, § 17 (constituting the Governor, Auditor, and Treasurer as the Board of Public Works).

131 Act of Nov. 21, 1934, No. 10, 1934 La. Acts 2d Extraordinary Sess. 70 (creating elected Board of Governors of the State Bar); Act of July 9, 1940, No. 54, 1940 La. Acts 364 (establishing the State Bar as a self-governing organization).

132 Act of Mar. 22, 1947, ch. 101, 1947 Nev. Stat. 349; Act of May 4, 1969, ch. 679, 1969 Nev. Stat. 1546.

133 MISS. CODE § 3590 (1906) (establishing Board of Penitentiary Commissioners); Act of Mar. 9, 1914, ch. 124, 1914 Miss. Laws 107 (creating Board of Bank Examiners); Act of Mar. 28, 1922, ch. 172, 1922 Miss. Laws 178 (abolishing Board of Bank Examiners); Act of Apr. 2, 1934, ch. 147, 1934 Miss. Laws 347 (abolishing Board of Penitentiary Commissioners).

134 Act of Mar. 29, 1920, ch. 203, 1920 Miss. Laws 269.

districts in 1930,[135] and reestablished it as the Transportation Commission in 1992.[136] The Mississippi Transportation Commission still exists as an elected board, making it the only currently elected state transportation authority.[137]

B. *The Modern Relevance of Elected State Boards*

With a few notable exceptions,[138] the designation of an office as elected generally confers policymaking authority on the officeholder. In the context of elected state boards, it is unsurprising that they wield a significant amount of power—but, given the subject matter focus of most boards, their authority is usually narrower and more discrete. These boards frequently function as the executive head of a state cabinet department or administrative agency,[139] marking a significant difference

---

135 Act of Apr. 14, 1930, ch. 47, 1930 Miss. Laws 61; Act of Mar. 20, 1936, ch. 200, 1936 Miss. Laws 436.

136 Act of May 13, 1992, ch. 496, 1992 Miss. Laws 719.

137 Geoff Pender, *Who's Applying to Run the Mississippi Department of Transportation?*, MISS. TODAY (May 17, 2021), https://mississippitoday.org/2021/05/17/whos-applying-to-run-the-mississippi-department-of-transportation [https://perma.cc/ULX6-YMUS] ("Mississippi is the last transportation department in the nation to elect its transportation commission."). Previously, Michigan elected a State Highway Commissioner from 1913 to 1965. Act of June 2, 1909, No. 283, ch. 5, 1909 Mich. Pub. Acts 544, 576–82 (creating Commissioner); MICH. CONST. art. V, § 28 (1964) (creating appointed highway commission and appointed state highway director).

138 For example, the elected Secretary of State and Treasurer of Wisconsin are extremely weak offices—indeed, the *weakest* elected secretary of state and treasurer, respectively, in the country, 53 COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 154–57, 172–73 (2021), https://www.nga.org/wp-content/uploads/2022/10/CSG-book-of-the-states-2021.pdf [https://perma.cc/X25G-Q7JT]—and the California Board of Equalization had most of its power stripped away through a 2017 statutory change, Taxpayer Transparency and Fairness Act, ch. 16, 2017 Cal. Stat. 932 (codified at CAL. GOV'T CODE § 15570.22 (West 2023)).

139 COLO. REV. STAT. §§ 22-2-103, 24-1-115 (2023) (creating the Colorado Department of Education, headed by the Commissioner appointed by the elected Board of Education); KAN. STAT. ANN. § 72-371 (2023) (creating the Kansas Department of Education, headed by the Commissioner of Education appointed by the elected Board of Education); LA. STAT. ANN. § 17:21(C) (2023) (creating the Louisiana Department of Education, headed by the Superintendent of Education appointed by the elected Board of Elementary and Secondary Education); *id.* §§ 36:4(A)(18), 45:1161.1 (creating the Louisiana Department of Public Service, headed by the elected Public Service Commission); MISS. CODE ANN. § 65-1-3 (2023) (creating the Mississippi Department of Transportation, headed by the elected Transportation Commission); MONT. CODE ANN. § 2-15-2601 (2023) (creating the Montana Department of Public Service Regulation, headed by the elected Public Service Commission); NEB. REV. STAT. § 79-301(1) (2023) (creating the Nebraska Department of Education, headed by the Commissioner of Education appointed by the elected Board of Education); OHIO REV. CODE ANN. § 3301.13 (West 2023) (creating the Ohio Department of Education, headed by the elected Board of Education headed by the Superintendent of Public Instruction).

in the distribution of power between federal and state administrative law regimes.[140]

Elected state boards of education, for example, have been at the front of several years of disputes over public education. Over the last several years, Republican-led state legislatures have sought to ban schools from teaching students about race and comprehensive, age-appropriate sex education, and to prohibit transgender students from participating in school sports or using the bathrooms that align with their genders.[141] Debates over the efficacy of these policies have spilled over into elected SBOE agendas, too. Several boards with Republican majorities have cemented legislative action through new rules and guidance of their own,[142] but a handful have opted against setting statewide rules themselves.[143] Many of the 2022 races for state boards of education revolved around these issues, with conservatives hoping to win majorities to implement their policies.[144] Though a nationwide push by conservatives to take over local school boards largely faltered,[145] these

---

140 *See generally* Todd Phillips, *Commission Chairs*, 40 YALE J. ON REGUL. 277 (2023) (exploring the functioning of federal commission chairs).

141 Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS INST. (Nov. 2021), https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory [https://perma.cc/362B-7VRL]; *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJ., https://www.lgbtmap.org/equality-maps/sports_participation_bans [https://perma.cc/7D3C-RCJJ] (Nov. 1, 2023). *But see New Mexico Is Pushing to Be a 'Model' for How Race Is Taught in U.S. Schools*, NPR (Jan. 20, 2022, 1:52 AM), https://www.npr.org/2022/01/20/1074311649/new-mexico-model-inclusive-race-education [https://perma.cc/B4Y6-NM6B].

142 *E.g.*, Courtney Tanner, *Here Are the New Rules Approved by the Utah School Board on Teaching About Racism in Response to Critical Race Theory Debate*, SALT LAKE TRIB. (June 4, 2021, 9:24 PM), https://www.sltrib.com/news/education/2021/06/04/response-heated-critical [https://perma.cc/S58R-X7WQ].

143 Marjorie Cortez, *State School Board Shelves Gender Identity Guidance, Leaving Schools to Fend for Themselves*, DESERET NEWS (Apr. 7, 2022, 10:49 PM), https://www.deseret.com/utah/2022/4/7/23015797/utah-board-of-education-wont-give-gender-identity-guidance-restrooms-locker-rooms-overnight-trips [https://perma.cc/33QL-EM9M]; Craig Monger, *State Board of Education Drops Transgender Bathroom Law from Meeting Agenda*, 1819 NEWS (Sept. 9, 2022), https://1819news.com/news/item/state-board-of-education-excludes-transgender-bathroom-law-from-voting-agenda [https://perma.cc/9XBQ-Q7NU].

144 *E.g.*, Aaron Sanderford, *State Board of Ed Races Could Decide Future Role of Board, Next Ed Commissioner*, NEB. EXAMINER (Nov. 5, 2022, 12:17 AM), https://nebraskaexaminer.com/2022/11/05/state-board-of-ed-races-could-decide-future-role-of-board-next-ed-commissioner [https://perma.cc/HG32-8BZT]; Sharon Hartin Iorio, Opinion, *Why Two Down-Ballot Races Will Shift the Kansas Education Agenda*, KIOWA CNTY. SIGNAL (Nov. 2, 2022), https://www.kiowacountysignal.com/2022/11/02/why-two-down-ballot-races-will-shift-the-kansas-education-agenda [https://perma.cc/T9HE-FUWV].

145 *See* Collin Binkley, *'Too Hyperbolic'? School Board Parental Rights Push Falters*, ASSOCIATED PRESS (Nov. 14, 2022, 10:15 AM), https://apnews.com/article/school-boards-politics-

efforts were more successful in Kansas and Texas,[146] where Republican gerrymanders of the SBOE districts aided conservative candidates in close races.[147]

But the influence of state boards of education isn't just limited to enacting policy. In many states with elected state boards, the boards, rather than the governor, have the responsibility of selecting the superintendent of public instruction[148] and organizing the state department of education.[149] The distance between the governor and control of state schools has motivated some state legislatures to propose

---

parents-rights-2bed4680bdedd4c866e046136630a9e8 [https://perma.cc/8YCN-6S2X]; *see also* Laura Meckler & Anne Branigin, *School Culture War Campaigns Fall Flat in Some Tight Races*, WASH. POST (Nov. 10, 2022, 5:41 PM), https://www.washingtonpost.com/education/2022/11/10/education-candidates-election-crt-indoctrination [https://perma.cc/TUN4-L5LT].

146 Rachel Mipro, *Republicans Sweep Kansas Board of Education Seats, Say They Will Give Parents More Oversight*, KAN. REFLECTOR (Nov. 9, 2022, 2:02 PM), https://kansasreflector.com/2022/11/09/republicans-sweep-kansas-board-of-education-seats-say-they-will-give-parents-more-oversight [https://perma.cc/R926-PEJ9]; Talia Richman, *Texas State Board of Education Moves Further Right with New Republican Members*, DALL. MORNING NEWS (Nov. 9, 2022, 9:59 AM), https://www.dallasnews.com/news/education/2022/11/08/state-board-of-education-races-will-determine-what-texas-kids-learn/ [https://perma.cc/D8EL-QHQ5]. *But see* Aaron Sanderford, *In Nebraska's Sea of Red, Few Felt Splash from 'Republican Wave,'* NEB. EXAMINER (Nov. 15, 2022, 5:45 AM), https://nebraskaexaminer.com/2022/11/15/in-nebraskas-sea-of-red-few-felt-splash-from-republican-wave [https://perma.cc/7WSA-Q3MD].

147 Jodi Fortino, *Conservatives Sweep Races for Seats on Kansas State Board of Education*, KCUR (Nov. 9, 2022, 8:10 AM), https://www.kcur.org/politics-elections-and-government/2022-11-09/conservatives-sweep-races-for-seats-on-kansas-state-board-of-education [https://perma.cc/GG8W-APBC] ("The State Board of Education's map was redrawn earlier this year, splitting Wyandotte County into three districts and Johnson County from two districts into three. Republican legislators hoped the redistricting would allow more conservatives to win seats on what is typically a moderate board."); *see also* Dominic Anthony Walsh, *Texas GOP Increases Majority on State Board of Education with Aid of 'Anti-CRT' PAC, Pro-Charter Donors*, HOUS. PUB. MEDIA (Jan. 4, 2023, 3:26 PM), https://www.houstonpublicmedia.org/articles/news/politics/elections/2022/11/10/437203/texas-gop-increases-majority-on-state-board-of-education-with-aid-of-anti-crt-pac-pro-charter-donors [https://perma.cc/3AEK-MQY7].

148 ALA. CONST. art. XIV, § 262; COLO. CONST. art. IX, § 1(2); KAN. CONST. art. VI, § 4; KAN. STAT. ANN. § 72-371 (2023); LA. CONST. art. VIII, § 2; LA. STAT. ANN. § 17:21(C) (2023); NEB. CONST. art. VII, § 4; OHIO CONST. art. VI, § 4; *see also* 17 GUAM CODE ANN. §§ 3102.1(a), 3103 (2022) (authorizing SBOE, elected at-large, to appoint superintendent); MICH. CONST. art. VIII, § 3 (same). *But see* NEV. REV. STAT. § 385.150 (2023) (authorizing the Governor to appoint the Superintendent of Public Instruction from candidates nominated by SBOE); *id.* § 385.010(3) (designating the Superintendent as the "executive head of the Department [of Education]"); N.M. CONST. art. XII, § 6 (authorizing the Governor to appoint the Secretary of Public Education with Senate confirmation); TEX. EDUC. CODE ANN. § 7.051 (West 2023) (authorizing the Governor to appoint the Commissioner of Education with Senate confirmation).

149 ALA. CODE §§ 16-2-2 to -3 (2023); COLO. REV. STAT. § 22-2-107 (2023); NEB. CONST. art. VII, § 4 ("The board shall appoint all employees of the State Department of Education on the recommendation of the Commissioner of Education."); OHIO REV. CODE ANN. § 3301.13 (West 2023).

removing their elected state boards' power over schools[150] or to change the method of electing the board,[151] especially when the board and legislature are ideologically apart.

Though fewer public utility commissions are elected by district than state boards of education, they have similarly provided opportunities for transformative policy changes. In recent years, environmental activists have sought to remake the composition of PUCs and have supported candidates with environmentalist leanings in PUC elections.[152] Though most PUCs are limited to ensuring "just and reasonable" rates for utility consumers, limiting their ability to focus on decarbonization efforts,[153] PUCs still have a role to play in reimagining energy generation and distribution.[154]

Whether the election of PUCs is, in general, an effective way to achieve environmental goals remains to be seen—and is the subject of some debate.[155] Where PUCs are elected by district, however, and especially where minority-opportunity districts have been created, communities of color have the opportunity to alter the debate over energy policy. The environmental justice movement has raised concerns over the environmental harms that have been disproportionately visited on

150 Aaron Sanderford, *Constitutional Amendment Would Eliminate State Board of Education*, NEB. EXAMINER (Jan. 13, 2023, 3:30 PM), https://nebraskaexaminer.com/2023/01/13/constitutional-amendment-would-eliminate-state-board-of-education [https://perma.cc/A2YM-2URZ]; Tebben, *supra* note 34; Trau, *supra* note 34.

151 *E.g.*, UTAH CODE ANN. § 20A-14-104.1(2) (West 2023) (providing for partisan elections for the Utah SBOE); Richards v. Cox, 450 P.3d 1074, 1085 (Utah 2019) (holding switch from nonpartisan to partisan elections constitutional).

152 *E.g.*, Rebecca Leber, *These Obscure Races May Decide the Future of Climate Change*, MOTHER JONES (Nov. 2, 2020), https://www.motherjones.com/environment/2020/11/climate-utility-races-2020 [https://perma.cc/LKH6-U6RN]. *See generally* CLEAN ENERGY FOR ALL & LEAGUE OF CONSERVATION VOTERS, ADVANCING CLEAN ENERGY IN THE STATES (2020), https://www.lcv.org/wp-content/uploads/archive/2020/12/cefa-report-2020.pdf [https://perma.cc/AR36-XQHL] (describing efforts to reform PUCs).

153 Inara Scott, *Teaching an Old Dog New Tricks: Adapting Public Utility Commissions to Meet Twenty-First Century Climate Challenges*, 38 HARV. ENV'T L. REV. 371, 394–400 (2014).

154 *See* Shelley Welton, *Grasping for Energy Democracy*, 116 MICH. L. REV. 581, 601–02 (2018); Joshua C. Macey, *Zombie Energy Laws*, 73 VAND. L. REV. 1077, 1105–21 (2020); *see also* John V. Barraco, Comment, *Distributed Energy and Net Metering: Adopting Rules to Promote a Bright Future*, 29 J. LAND USE & ENV'T L. 365, 376–78 (2014).

155 *E.g.*, KEN COSTELLO & RAJNISH BARUA, NAT'L REG. RES. INST., EVALUATION OF PUBLIC REGULATION COMMISSION STAFFING AND BUDGET ALLOCATION 15 (2017), https://www.nmlegis.gov/publications/Studies_Research_Reports/Evaluation%20of%20Public%20Regulation%20Commission%20Staffing%20and%20Budget%20Allocation%20-%20May%202017.pdf [https://perma.cc/BJ4G-RS8E] ("The general perception among regulatory experts is that when regulators are elected rather than appointed by the governor with legislative confirmation, politics become a bigger factor in their decisions and other practices.").

communities of color for decades,[156] but it has won mainstream success in recent years. The White House, and many governors' offices, have created environmental justice offices in agencies and departments.[157]

This is true in public service commission (PSC) elections, too. One of the best examples in recent years is the 2022 race for the Louisiana Public Service Commission in the 3rd District, a Black-majority district that stretches from New Orleans to Baton Rouge. In a low-profile runoff election between incumbent Commissioner Lambert Boissiere III and challenger Davante Lewis, both Democrats, Lewis defeated Boissiere by a wide margin.[158] Lewis charged that Boissiere had been insufficiently attentive to environmental justice concerns[159]—arguments that likely would not have resonated as effectively in a statewide race.

In several western states, changes to PSCs have sometimes minimized the opportunity for communities of color to secure representation on the boards. A panel of three federal judges ordered new maps for the Montana Public Service Commission in 2022, following the failure of the state legislature to draw new maps since 2003. The districts adopted by the panel were a mixed bag for Native communities in Montana—though the Blackfeet Reservation was kept whole, the Flathead Reservation was split.[160] The PSC has long been criticized by environmental activists for inaction on climate change,[161] and limiting the

156 Alejandra Borunda, *The Origins of Environmental Justice—and Why It's Finally Getting the Attention It Deserves*, NAT'L GEOGRAPHIC (Feb. 24, 2021), https://www.nationalgeographic.com/environment/article/environmental-justice-origins-why-finally-getting-the-attention-it-deserves [https://web.archive.org/web/20231006113002/https://www.nationalgeographic.com/environment/article/environmental-justice-origins-why-finally-getting-the-attention-it-deserves].

157 *Environmental Justice at the White House*, HARV. ENV'T & ENERGY L. PROGRAM, https://eelp.law.harvard.edu/ej-tracker-whitehouse [https://perma.cc/8ASC-UXZQ]. *See generally* Steven Bonorris & Nicholas Targ, *Environmental Justice in the Laboratories of Democracy*, 25 NAT. RES. & ENV'T, no. 2, Fall 2010, at 44 (describing adoption of environmental justice initiatives in the states).

158 Paul Braun, *After PSC Race Ends in Incumbent Loss, Here's What to Expect from Newcomer Davante Lewis*, WWNO (Dec. 12, 2022, 2:25 PM), https://www.wwno.org/2022-12-12/after-psc-race-ends-in-incumbent-loss-heres-what-to-expect-from-newcomer-davante-lewis [https://perma.cc/VXR3-ULHB].

159 Emily Pontecorvo & Lylla Younes, *In Louisiana, an Electoral Upset Could Mean a Breakthrough for Renewables*, GRIST (Dec. 13, 2022), https://grist.org/article/in-louisiana-an-electoral-upset-could-mean-a-breakthrough-for-renewables [https://perma.cc/E96K-NFJD]; Adam Mahoney, *Meet the Trailblazing Black LGBTQ Official at 'Ground Zero' for Climate Justice*, CAP. B (Dec. 26, 2022), https://capitalbnews.org/davante-lewis-qa [https://web.archive.org/web/20230602043809/https://capitalbnews.org/davante-lewis-qa].

160 Brown v. Jacobsen, 590 F. Supp. 3d 1273, 1291 (D. Mont. 2022).

161 *E.g.*, Eric Dietrich, *NorthWestern Says It's Running Short on Power. Climate Activists Say We're Running Out of Time*, MONT. FREE PRESS (Dec. 19, 2019), https://montanafreepress.org/2019/12/19/northwestern-says-its-running-short-on-power-climate-activists-say-were-running-out-of-time [https://perma.cc/CFT4-6XV8].

opportunity for Native voters to select a candidate of their choice in a state where they are already underrepresented has impacts to both policy and representation.

Similarly, in New Mexico, where the Public Regulation Commission (PRC) was elected by district from 1999 until 2023, the state legislature drew a Native-majority district in the northern part of the state during every redistricting cycle.[162] Given the long history of environmental racism that Native communities in northern New Mexico have experienced,[163] the ability of Native communities to guarantee representation on the PRC was important. Accordingly, when New Mexico voters ratified a constitutional amendment in 2020 converting the PRC into an appointed body, several Native groups unsuccessfully challenged the legality of the amendment, arguing that the switch would deprive them of representation in deciding matters that uniquely affected their communities.[164] Though their legal challenge failed,[165] Governor Michelle Lujan Grisham issued an executive order to create the Tribal Advisory Council, which would "advise the PRC on issues relevant to New Mexico's Native American communities and provide recommendations on how the PRC may best address those issues."[166]

Finally, the composition of the New Hampshire Executive Council demonstrates how partisan gerrymandering can decimate the purpose of an elected board. The Council exercises the "advice and consent" role that state senates in most other states do, including with respect to the Governor's nominees for the state supreme court.[167] Executive councils in New Hampshire, as well as in other states, have served as checks on

---

162 *See infra* notes 332–37 and accompanying text.

163 *E.g.*, UCLA INST. OF THE ENV'T & SUSTAINABILITY, IMPACTS OF OIL AND GAS DRILLING ON INDIGENOUS COMMUNITIES IN NEW MEXICO'S GREATER CHACO LANDSCAPE 17 (2020), https://www.ioes.ucla.edu/wp-content/uploads/2020/09/ucla-ioes-practicum-impacts-of-oil-and-gas-on-indigenous-communities-in-new-mexico-final-report-9-2020.pdf [https://perma.cc/2QPP-78MX]; Jonathan Juarez-Alonzo, Commentary, *It's Time to Listen to Indigenous People Who Are Risking Their Lives to Save Us All*, SOURCE NM (Sept. 23, 2021, 5:53 AM), https://sourcenm.com/2021/09/23/its-time-to-listen-to-indigenous-people-who-are-risking-their-lives-to-save-us-all [https://perma.cc/ZW6B-SXXS].

164 Ryan Lowery, *Indigenous Groups Say Changes to Utility Regulation in NM Would Favor Energy Companies*, SOURCE NM (Sept. 19, 2022, 4:01 AM), https://sourcenm.com/2022/09/19/indigenous-groups-say-changes-to-utility-regulation-in-nm-would-favor-energy-companies [https://perma.cc/VVT9-BWX3].

165 Indigenous Lifeways v. N.M. Compilation Comm'n Advisory Comm., 528 P.3d 678, 690 (N.M. 2023).

166 Establishing the Public Regulation Commission Tribal Advisory Council, N.M. Exec. Order No. 2022-167 (Dec. 30, 2022), https://www.governor.state.nm.us/wp-content/uploads/2022/12/Executive-Order-2022-167.pdf [https://perma.cc/JKK8-PSYZ].

167 N.H. CONST. pt. 2, arts. 46–47.

gubernatorial power.[168] In 2019, when Democrats had a 3-2 majority on the Executive Council, and Republican Chris Sununu was Governor, the Council rejected Sununu's nomination of Gordon MacDonald to the state supreme court, citing MacDonald's conservative views.[169] When Republicans gained a majority on the Council in the 2020 election, they confirmed MacDonald's nomination the next year[170]—and passed gerrymandered maps for the Council and the state legislature to maintain their majorities. Accordingly, in the 2022 elections, despite Democratic candidates winning a majority of the vote statewide in Executive Council races, the Republican gerrymander held up—and only one Democratic candidate won.[171] Fairly drawn districts would have produced a more balanced outcome, and perhaps a Democratic majority, which would have been able to provide the check on Governor Sununu's power that the drafters of the state constitution intended.

II. THE FAILURE TO CONSISTENTLY REDISTRICT

In the 1960s, the U.S. Supreme Court kicked off the modern practice of decennial redistricting—first, by holding in *Baker v. Carr* that Fourteenth Amendment violations alleged by a failure to redistrict constituted a justiciable question,[172] and then by holding in *Wesberry v. Sanders* and *Reynolds v. Sims* that congressional districts and state legislative districts must be drawn according to the one-person, one-vote principle.[173]

The next year, Congress passed the Voting Rights Act of 1965 (VRA).[174] Section 2 of the VRA prohibited the adoption of voting laws that were designed to discriminate against racial minority groups.[175] In

168 *E.g.*, A.N. Holcombe, *The Executive Council, with Special Reference to Massachusetts*, 9 AM. POL. SCI. REV. 304, 307 (1915).

169 Holly Ramer, *Council Rejects AG as Chief Justice*, CONCORD MONITOR, July 11, 2019, at A1.

170 Josh Rogers, *Second Time's the Charm for MacDonald, as Council Okays His Bid for N.H. Chief Justice*, N.H. PUB. RADIO (Jan. 22, 2021, 3:58 PM), https://www.nhpr.org/nh-news/2021-01-22/second-times-the-charm-for-macdonald-as-council-okays-his-bid-for-n-h-chief-justice [https://perma.cc/C2P6-9XJS].

171 *See* Annmarie Timmins, *Republicans Hold on to 4–1 Executive Council Majority Despite Strong Challenge by Democrats*, N.H. BULL. (Nov. 10, 2022, 9:16 AM), https://newhampshirebulletin.com/2022/11/10/republicans-hold-on-to-4-1-executive-council-majority-despite-strong-challenge-by-democrats [https://perma.cc/H8W9-PA2H].

172 369 U.S. 186, 209–10 (1962).

173 376 U.S. 1, 7–8 (1964); 377 U.S. 533, 565–66 (1964). *See generally* MICHAEL R. DIMINO, BRADLEY A. SMITH & MICHAEL E. SOLIMINE, VOTING RIGHTS AND ELECTION LAW: CASES, EXPLANATORY NOTES, AND PROBLEMS 111–44 (3d ed. 2021).

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

175 52 U.S.C. § 10101(a)(1).

1982, as a response to the Supreme Court's 1980 decision in *City of Mobile v. Bolden*, which limited the scope of section 2 claims, Congress passed amendments to the VRA that specifically prohibited unintentional vote dilution.[176] For the past forty years, voting rights activists have successfully raised vote-dilution claims to carve out districts to provide racial minority groups with the opportunity to elect candidates of their choice,[177] and to convert local elected bodies from at-large to district-based elections.[178]

Both the one-person, one-vote principle and the VRA's requirements have proven controversial[179]—and through several decades of (still ongoing) litigation, the Supreme Court has expounded on what these requirements mean in practice,[180] though its opinions have frequently served to muddy the waters. Technical violations of one-person, one-vote still abound,[181] and the Supreme Court significantly narrowed the scope of the VRA in *Shelby County v. Holder*, which functionally ended the requirements that certain "covered jurisdictions" preclear changes to their voting rules with the U.S. Department of Justice.[182]

---

176 Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301(b)); Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1352–56 (1983) (describing the Court's opinion in *City of Mobile v. Bolden*, 446 U.S. 55 (1980)).

177 *E.g.*, Nicholas Warren, Gingles *Unraveled: Hispanic Voting Cohesion in South Florida*, 2 N.C. C.R.L. REV. 1, 8–10 (2022) (describing the use of vote-dilution litigation under the VRA to create Black and Hispanic opportunity districts in South Florida).

178 *See, e.g.*, Bernard Grofman & Chandler Davidson, *The Effect of Municipal Election Structure on Black Representation in Eight Southern States*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990, at 301, 308–14 (Chandler Davidson & Bernard Grofman eds., 1994).

179 After the Court's decisions in *Baker v. Carr*, *Wesberry v. Sanders*, and *Reynolds v. Sims*, for example, members of Congress and state legislators agitated for a federal constitutional amendment (the Dirksen Amendment) that would have allowed state legislatures to "apportion one house of their bicameral legislatures on some basis other than population." Arthur Earl Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949, 949 (1968).

180 *See, e.g.*, Allen v. Milligan, 599 U.S. 1, 30–42 (2023) (affirming preliminary injunction against Alabama's congressional districts).

181 I explore *some* of these violations in this Part. Other violations are due to bizarre timelines—like Montana's off-cycle redistricting for its state legislative districts. Quinn Yeargain, *Will Montana Legislators Fix Their State's Unconstitutional Redistricting Process?*, GUARANTEED REPUBLICS (Jan. 9, 2023), https://guaranteedrepublics.substack.com/p/will-montana-legislators-fix-their [https://perma.cc/GJ9R-VSWP]. Outside of these contexts, data on the failure to redistrict is sparse—but it is a reasonable expectation that out of the thousands of counties and municipalities using district-based elections for their legislative bodies, at least some fail to routinely redraw their districts.

182 570 U.S. 529, 554–57 (2013); Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 55–62.

Regardless of what the future holds for these requirements, however, their adoption fundamentally altered the world of redistricting. Prior to the 1960s, congressional and state legislative redistricting happened sporadically—if even that.[183] Even where state constitutions *ostensibly* required regular redistricting to take place, it frequently didn't.[184] And in states where apportionment schemes were written into the constitution, altering the allocation of districts was functionally impossible.[185]

This systematic failure to redistrict was equally—if not even *more*—applicable in the context of multimember state boards that were elected by district. In most states with such boards, even if the state constitutions technically required legislative redistricting, they imposed no such requirements for redistricting *boards*. Accordingly, redistricting these boards happened only at the whim of state legislatures.

---

183 *E.g.*, Nicholas G. Napolio & Jeffery A. Jenkins, *Conflict over Congressional Reapportionment: The Deadlock of the 1920s*, 35 J. POL'Y HIST. 91, 96–98, 113 (2023) (describing failure to reapportion congressional districts after the 1920 Census and the devolution of redistricting authority to states with the passage of the Apportionment and Census Act of 1929); Micah Altman, *Traditional Districting Principles: Judicial Myths vs. Reality*, 22 SOC. SCI. HIST. 159, 166–79 (1998) (exploring history of malapportioned congressional districts); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, Reynolds *Reconsidered*, 67 ALA. L. REV. 485, 488–96 (2015) (describing persistent failures to redraw state legislative districts).

184 GORDON E. BAKER, STATE CONSTITUTIONS: REAPPORTIONMENT 15–16 (State Const. Stud. Project, Ser. 2, No. 2, 1960) ("As is widely recognized, these various provisions for frequent reapportionment and redistricting often go unobserved and unenforced. The dates certain state legislatures were last reapportioned read back several decades. . . . Moreover, when redistricting does take place, it is frequently only a partial one, shifting a seat here and there but avoiding an over-all reallocation of legislative strength.").

185 *Id.* at 10–12.

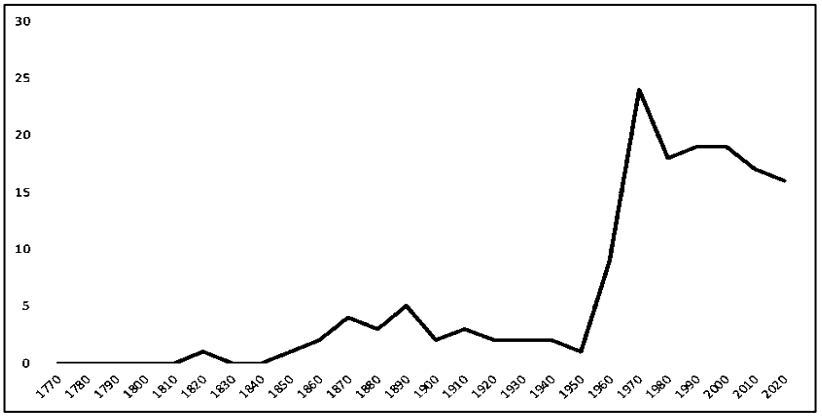

Figure 1: Number of redistricting acts or court orders for state boards by decade

So far, this isn't anything revelatory. Perhaps the woes of malapportionment were more egregious in the context of elected boards and commissions pre-*Baker v. Carr* than in the legislative context, but it is clear that both boards and legislatures were not redistricted as much as they should have been.

What *is* revelatory, though, is the unique lethargy that has characterized board districting after *Baker v. Carr*. States reluctantly conformed their legislative redistricting practices to the requirements of the Fourteenth Amendment during and after the 1960s[186]—and these practices are very much works in progress, as tweaks and changes are made to resolve litigation.[187] Separately, in many states, voting rights and good-government activists have successfully pushed for reforms to the

186 TARR, *supra* note 66, at 146–47.

187 For example, when the Maine Constitution was amended following the adoption of the one-person, one-vote principle, it originally required that redistricting take place in years ending in -4. *See* Const. Res., ch. 1, 107th Leg., Reg. Sess., 1975 Me. Laws 2215. Though the state constitution only regulated state legislative redistricting, the legislature aligned the congressional redistricting process with this timeline by statute. In 2011, following the failure to redraw districts after the 2010 Census, several voters challenged the use of the congressional districts drawn in 2003 for elections in 2012. A three-judge panel struck down the districts as unconstitutional and required that redistricting take place. Desena v. Maine, 793 F. Supp. 2d 456, 458, 462–63 (D. Me. 2011). In response, the Maine legislature quickly proposed a state constitutional amendment altering its redistricting timeline, which was ratified later that year. Const. Res., ch. 1, 125th Leg., 1st Reg. Sess., 2011 Me. Laws 1209.

redistricting process in an effort to end partisan gerrymandering[188] and safeguard minority communities' right to representation in state government.[189] But state board redistricting remains a glaring exception to these developments.

Today, it is clear that the Fourteenth Amendment requires legislative bodies to be redistricted every decade. Most states have embraced this requirement by amending their state constitutions and statutes to adopt specific timelines for redistricting state legislative districts.[190] But very few of these requirements have been extended to state boards. And of the constitutional amendments or initiated statutes that have attempted to reform the redistricting process, only a handful have encompassed state boards.[191] Further, when state legislatures decline or refuse to adopt new districts for state boards, litigants are frequently slow to sue[192]—and courts are sometimes reluctant to take these claims seriously.[193]

In this Part, I explore this phenomenon. I begin in Section II.A with the predictable failure to redraw state board districts prior to the 1960s. I detail the rare redistricting that took place prior to this time, which is attributable to the lack of any legal requirement to do so and the fact that many boards were elected from already-existing districts that generally remained the same. Then, in Section II.B, I discuss the changes to redistricting after the adoption of the one-person, one-vote requirement in the 1960s and the 1982 amendments to the VRA. Finally, in Section II.C, I outline the omission of board redistricting from many of the successful (and unsuccessful) changes to the redistricting process.

A. *Premodern Redistricting*

Before *Baker v. Carr* and its progeny, little redistricting took place—at any level. Though many early state legislatures were originally apportioned on the basis of population, by the early twentieth century, most states had failed to meaningfully adjust their districts to keep pace with changes in population, and many had "abandoned long-established

188 Samuel S.-H. Wang, Richard F. Ober Jr. & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203, 225–40 (2019) (describing state constitutional provisions that guard against partisan gerrymandering).

189 *See infra* Part III.C (discussing state-level voting rights acts).

190 *See* TARR, *supra* note 66, at 146–47.

191 *See infra* Part II.C.3.

192 *See infra* Part III.A.

193 *See infra* notes 265–66, 409–20, and accompanying text.

formulas based on population."[194] As a result, state legislators were elected by the same districts for decades,[195] and members of Congress were too,[196] unless population shifts created or destroyed a district.

Most early state governments did not have multimember boards elected by district, but, as these boards were created in the late nineteenth and early twentieth centuries, most of them relied on already-existing districts. Congressional,[197] state senate,[198] or judicial districts[199]—sometimes, even counties themselves[200]—were used to elect members of state boards. In some cases, these districts were merely intended as a starting point, and the legislature was given the power to draw new district boundaries in the future.[201] But more often, the districts were intended to be multipurpose. As a result, boards were locked into using the underlying districts, and the board districts could not be independently changed.

As the underlying districts changed, the accompanying board districts were usually modified in tandem, sometimes resulting in the creation of new board seats. In Illinois, Louisiana, and Oregon, which used multipurpose districts to elect members of their state boards of equalization, new equalization districts were created when Illinois gained congressional seats in 1881 and 1891,[202] when Louisiana added an eighth

---

194 ROBERT B. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 16–29 (Clarion 1970) (1965); *see also* Leroy Hardy, Alan Heslop & Stuart Anderson, *Introduction*, *in* REAPPORTIONMENT POLITICS: THE HISTORY OF REDISTRICTING IN THE 50 STATES 17, 18 (Leroy Hardy, Alan Heslop & Stuart Anderson eds., 1981).

195 Malcolm E. Jewell, *Political Patterns in Apportionment*, *in* THE POLITICS OF REAPPORTIONMENT 1, 8–12 (Malcolm E. Jewell ed., Transaction Publishers 2011) (1962).

196 *Id.* at 12–14.

197 *See infra* Appendix (Alabama Board of Education, Arkansas Board of Education, California Board of Equalization (1881–1925), Colorado Board of Education, Colorado University Regents, Illinois Board of Equalization (1873–1919), Iowa Board of Education (1955–73), Kentucky Board of Equalization, Louisiana Board of Education (1922–93), Louisiana Board of Equalization, Louisiana Board of Governors of the State Bar, Mississippi Highway Commission (1921–33), Nebraska Board of Regents (1923–49), Ohio Board of Education (1955–93), Oregon Public Service Commission, South Carolina Board of Equalization, Texas Board of Education (1951–84)).

198 *See infra* Appendix (Illinois Board of Equalization (1869–73), Ohio Board of Equalization).

199 *See infra* Appendix (Kansas Board of Railroad Assessors, Mississippi Public Service Commission, Mississippi Board of Bank Examiners, Mississippi Board of Penitentiary Trustees, Nebraska Board of Education, Nebraska Board of Regents (1949–71), New Mexico Public Education Commission (1961–73), Oregon Board of Equalization, Utah Board of Education (1951–73)).

200 *See infra* Appendix (Nevada Board of Fish and Game Commissioners, New Hampshire Executive Council (1793–1805), Pennsylvania Supreme Executive Council).

201 *See infra* Appendix (California Board of Equalization, Nebraska Board of Regents, New Hampshire Executive Council).

202 Act of Apr. 29, 1882, 1882 Ill. Laws 5; Act of June 9, 1893, 1893 Ill. Laws 3.

congressional district in 1913,[203] and when Oregon created eighth and ninth judicial districts in 1895.[204] Though the changes to the underlying districts occurred as the result of legislative enactments, the accompanying changes to the *board* districts seemingly occurred automatically.[205] But given the general tendency to not redraw districts at all, the underlying districts weren't routinely modified. As a result, a single set of malapportioned districts, if used for more than one purpose, could render multiple entities unrepresentative of the electorate.

Sometimes, however, changes in the underlying districts were irrelevant to the board districts. Several states did this deliberately. When Ohio and Iowa created elected boards of education in the 1950s, they tied the educational districts to congressional districts, but froze them to the congressional districts *as they existed* at that time.[206] Subsequent redistricting, therefore, did not affect the board districts at all.

In rarer cases, board districts were locked in place as the result of legislative inaction—not necessarily as the result of a deliberate choice to permanently freeze the districts.[207] Accordingly, as new districts were created, legislatures did not bother to modify the board districts. When Oregon created its Railroad Commission in 1907, it consisted of three members—one elected statewide, and two by the then-existing congressional districts.[208] The creation of a third congressional district in 1911[209] did not add a new member to the Commission; instead, the commission districts' descriptions were altered to instead refer to "the district composed of the counties lying east" and "the district . . . lying west of the Cascade Mountains."[210]

In a handful of states, however, separate districts were created for statewide elected boards.[211] Or, at a minimum, board districts were

---

203 Act of July 11, 1912, No. 160, 1912 La. Acts 294.

204 Act of Feb. 20, 1895, 1895 Or. Laws 10; Act of Feb. 20, 1895, 1895 Or. Laws 11.

205 The redistricting acts did not explicitly mention the equalization districts; separately, my examination of the applicable session laws in these three states during these times shows that no *separate* legislative acts modified the equalization districts.

206 Act of Apr. 22, 1953, ch. 114, 1953 Iowa Acts 194 (tying State Board of Public Instruction districts to congressional districts "as they exist on January 1, 1953"); Act of June 24, 1955, 1955–1956 Ohio Laws 655 (tying SBOE districts to congressional districts "as such latter districts were in lawful existence on January 1, 1955").

207 There is, unsurprisingly, little in the legislative history about the reasoning for why the districts for multimember elected state boards were drawn as they were—and as such, evaluating legislative intent is challenging.

208 Act of Feb. 18, 1907, ch. 53, 1907 Or. Laws 67.

209 Act of Feb. 23, 1911, ch. 180, 1911 Or. Laws 290.

210 Feb. 15, 1915, ch. 71, 1915 Or. Laws 79.

211 *See infra* Appendix (California Board of Equalization, California Railroad Commission, Kentucky Railroad Commission, Louisiana Public Service Commission, Louisiana Public Works

initially tied to preexisting districts and legislatures were given the power to draw new districts. When the California Board of Equalization was created in the state's 1879 Constitution, it was tied to the then-existing congressional districts until changed;[212] similarly, the Kentucky Railroad Commission was originally tied to superior court districts in the 1891 Kentucky Constitution.[213] The Kentucky legislature did so prior to the Commission's first election in 1895,[214] but the California legislature left the 1879-era congressional districts in place for Equalization Board elections until 1923.[215]

The states with separately created districts generally fared no better in redistricting on a regular schedule. During the two iterations of the Arkansas Railroad Commission, the lines were only redrawn once, in 1921, when the commission was recreated. The 1923 redistricting of the California Board of Equalization remained in place for another fifty years, and the state Railroad Commission was never redistricted in its thirty-year existence. The Kentucky Railroad Commission districts were redrawn in 1932 and the districts—which were non-contiguous[216] and an obvious partisan gerrymander[217]—remained unaltered until the Commission's abolition in 2000. The Louisiana Railroad Commission (later the Public Service Commission) districts were drawn in the state's 1898 Constitution,[218] kept the same in the 1913 and 1921 Constitutions,[219]

Commission, Massachusetts Governor's Council, Maryland Public Works Commission, Nebraska Public Service Commission, Nevada Board of Education, Nevada Board of Regents, New Hampshire Executive Council, Oregon Board of Control, Virginia Board of Public Works).

212 CAL. CONST. art. XIII, § 9 (1879).

213 KY. CONST. § 209 (1891).

214 Act of Apr. 5, 1893, ch. 171, §§ 228–231, 1891 Ky. Acts 612, 715–16.

215 Act of May 18, 1923, ch. 175, 1923 Cal. Stat. 418; *see also Re-Districting of State Taxes Asked: County Assessors of Southern California Declare Action Badly Needed*, MODESTO HERALD, Feb. 17, 1923, at 1.

216 Under the map adopted in 1932, Clinton County was a part of District 3, but it was separated from the rest of the district by Wayne County, which was a part of District 2. Act of 1932, ch. 144, 1932 Ky. Acts 674. It is unclear whether the lack of geographic contiguity technically made the districts unlawful; though the Kentucky Constitution requires state legislative districts to be contiguous, KY. CONST. § 33 ("[T]he counties forming a district shall be contiguous."); *Fischer v. State Bd. of Elections*, 879 S.W.2d 475, 476 n.4 (Ky. 1994) ("[W]e regard this requirement as immutable."), no challenge was apparently raised to the Railroad Commission districts.

217 *Rail District Change Approved in Senate: Measure Would Make Second District, Including City, Democratic*, LOUISVILLE COURIER-J., Mar. 8, 1932, at 10 ("The purpose of the realignment was to remove the Second District, in which Louisville lies, from the doubtful column and make it safely Democratic. The First District, as always, remains Democratic, and the Third, which has always been Republican, becomes more so.")

218 LA. CONST. of 1898, art. 289.

219 LA. CONST. of 1913, art. 289; LA. CONST. of 1921, art. VI, § 8.

and were altered only in 1972.[220] After its creation in 1933, the Nevada Board of Education was redistricted twice, in 1947 and 1955,[221] and the Board of Regents was not redistricted at all. And perhaps most dramatically, the New Hampshire Executive Council was redistricted only *five times* from its creation in 1792 until 1963.[222]

The only state that routinely redistricted any of its boards was Massachusetts. The 1855 constitutional amendment providing for the popular election of the Governor's Council obligated the legislature to redraw the council districts every ten years according to the results of the state census.[223] The legislature actually complied with this requirement—and new lines were drawn in 1856, 1857, 1866, 1876, 1886, 1896, 1906, 1916, 1926, 1939, 1948, and 1960.[224]

B. *The One-Person, One-Vote Requirement*

Beginning in the 1960s, the U.S. Supreme Court handed down a series of opinions that established the general requirements of the one-person, one-vote principle—but in doing so, left some cracks and ambiguities in the doctrine. Prior to this point, the Court had held in *Colegrove v. Green* that malapportionment in congressional districts presented a nonjusticiable political question,[225] but the Court's ruling in *Baker v. Carr* overturned that holding and allowed malapportionment challenges to proceed.[226]

Shortly thereafter, in *Wesberry v. Sanders*, the Court held that congressional districts needed to be apportioned on the basis of equal population, which meant that "as nearly as is practicable one man's vote

---

220 The districts were written into the constitution with no explicit means of changing them, but in the early 1970s, apparently out of fear of litigation, the legislature statutorily changed them. Act of June 12, 1972, No. 14, 1972 La. Acts 106.

221 Act of Mar. 15, 1947, ch. 63, § 21, 1947 Nev. Stat. 91, 102; Act of Mar. 29, 1955, ch. 402, § 8, 1955 Nev. Stat. 794, 799.

222 Act of Jan. 3, 1829, ch. 104, 1828 N.H. Laws 415; Act of July 2, 1873, ch. 27, 1873 N.H. Laws 158; Act of July 11, 1876, ch. 9, 1876 N.H. Laws 563; Act of Mar. 12, 1891, ch. 16, 1891 N.H. Laws 312; Act of May 21, 1913, ch. 152, 1913 N.H. Laws 685.

223 MASS. CONST. amend. art. XVI (1855).

224 Act of June 6, 1856, ch. 307, 1856 Mass. Acts 243; Act of July 30, 1857, ch. 310, 1857 Mass. Acts 780; Act of May 9, 1866, ch. 221, 1866 Mass. Acts 221; Act of Apr. 28, 1876, ch. 222, 1876 Mass. Acts 218; Act of June 30, 1886, ch. 348, 1886 Mass. Acts 348; Act of June 6, 1896, ch. 509, 1896 Mass. Acts 505; Act of June 18, 1906, ch. 497, 1906 Mass. Acts 668; Act of May 26, 1916, ch. 270, 1916 Mass. Gen. Acts 275; Act of May 28, 1926, ch. 372, 1926 Mass. Acts 433; Act of Aug. 12, 1939, ch. 507, 1939 Mass. Acts 753; Act of Apr. 22, 1948, ch. 250, 1948 Mass. Acts 230; Act of May 27, 1960, ch. 432, 1960 Mass. Acts 324.

225 328 U.S. 549, 556 (1946).

226 369 U.S. 186, 237 (1962).

in a congressional election is to be worth as much as another's."[227] In *Kirkpatrick v. Preisler*, decided five years later, the Court explained that "the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality" when drawing congressional districts.[228]

In *Reynolds v. Sims*, the Court took up the issue of malapportionment in the context of state legislative districts. Here, too, it held that "the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[229] But it did not impose a requirement of "[m]athematical exactness or precision," which it noted was "hardly a workable constitutional requirement."[230] Instead, the Court required each state to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."[231] It elaborated on this idea in subsequent cases, explaining that "minor deviations from mathematical equality among state legislative districts" do not raise constitutional questions,[232] and that "an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations."[233]

However, both *Wesberry* and *Reynolds* were limited, by their own terms, to congressional and state legislative districts, respectively. In the immediate aftermath of those decisions, there was some confusion as to whether the principle applied to other bodies, too.[234] In *Avery v. Midland County*, the Court held that "when the State delegates lawmaking power to local government and provides for the election of local officials from districts . . . it must insure that those qualified to vote have the right to an equally effective voice in the election process."[235] The challenge in *Avery* was to the county commission in Midland County, Texas, and the Court rejected arguments that the commission's functions were "not sufficiently

---

227 376 U.S. 1, 7–8 (1964).

228 394 U.S. 526, 530–31 (1969).

229 377 U.S. 533, 568 (1964).

230 *Id.* at 577.

231 *Id.*

232 Gaffney v. Cummings, 412 U.S. 735, 745 (1973).

233 Brown v. Thomson, 462 U.S. 835, 842 (1983) (first citing Connor v. Finch, 431 U.S. 407, 418 (1977); and then citing White v. Regester, 412 U.S. 755, 764 (1973)).

234 *E.g.*, Lawrence T. Holden, Jr. & William W. Willard, Note, *State Apportionment—The Wake of* Reynolds v. Sims, 45 B.U. L. REV. 88, 107 (1965) ("[A]ny attempt to predict the fate of an apportionment plan prior to its subjection to judicial examination is speculative."); Philip L. Martin, *The Supreme Court and Local Government Reapportionment: The First Phase*, 35 TENN. L. REV. 313, 313–14 (1968) ("Assuming in the absence of any specific instructions by the Supreme Court that the same guideline applied in other cases, lower courts have ruled that there must be strict adherence to the concept of 'one-man, one-vote.'").

235 390 U.S. 474, 480 (1968).

'legislative.'"[236] It noted that the commission's responsibilities included "some tasks which would normally be thought of as 'legislative,' others typically assigned to 'executive' or 'administrative' departments, and still others which [were] 'judicial.'"[237] Accordingly, "the Constitution permits no substantial variation from equal population in drawing districts for units of local government having *general governmental powers* over the entire geographic area served by the body."[238] This idea was further expanded in *Hadley v. Junior College District*, which concerned a challenge to the Junior College District of Metropolitan Kansas City.[239] Though the district trustees' powers were "not fully as broad as those of the Midland County Commissioners," they were "general enough and [had] sufficient impact throughout the district to justify" expanding *Avery* to the trustees.[240]

The Court has been more willing to tolerate voting differences—including limiting voting rights to eligible voters who own property—in the context of special districts,[241] and the extension of one-person, one-vote to judicial elections has long been contested. Much has been made of the Supreme Court's summary affirmation of a district court opinion that held that "the concept of one-man, one-vote apportionment does not apply to the judicial branch of government,"[242] which was predicated on the idea that judges do not *represent* people as much as they *serve* them.[243] As Jed Shugerman has pointed out, "[t]hese distinctions are facile, and they no longer hold up in light of other Supreme Court decisions ruling that judges *do represent* the people they serve."[244]

How state boards fit into this framework is unclear from the Court's jurisprudence. Given the relative rarity of state boards elected by district—at least, as compared to state legislatures, county commissions, or city councils—few cases have been brought to allege that the districts are malapportioned. In the few cases that have been brought, courts have either concluded with little apparent difficulty that one-person, one-vote

236 *Id.* at 482.

237 *Id.*

238 *Id.* at 484–85 (emphasis added).

239 397 U.S. 50, 51 (1970).

240 *Id.* at 53–54.

241 *See* Melvyn R. Durchslag, Salyer, Ball, *and* Holt*: Reappraising the Right to Vote in Terms of Political "Interest" and Vote Dilution*, 33 CASE W. RSRV. L. REV. 1, 4–6 (1982).

242 Wells v. Edwards, 347 F. Supp. 453, 454 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973).

243 *See id.* at 455–56.

244 Jed Handelsman Shugerman, *Countering Gerrymandered Courts*, 122 COLUM. L. REV. F. 18, 29 (2022).

applies to these districts,[245] or the applicability of the doctrine has been assumed without comment.[246]

In any event, if a junior college district's board of trustees exercises "general governmental powers" such that one-person, one-vote applies,[247] it seems clear enough that the doctrine would also apply to an elected public service commission, an elected SBOE, or an elected board of equalization. Even bodies like the Massachusetts Governor's Council or the New Hampshire Executive Council, which are ostensibly identified as *executive* entities,[248] have powers that are understood in modern parlance as legislative in nature[249]—and thus, the *per se* classification of these entities as "executive" in their state constitutions is likely of no moment.[250]

C. *Modern Redistricting*

1. One-Person, One-Vote Requirement

Moreover, the lack of a clear ruling on the applicability of the one-person, one-vote principle to state boards elected by district has been largely immaterial in the state-level experiences with the doctrine. The uncertainty in the interregnum between *Reynolds* and *Avery* caused heartburn for state legislatures. Several of the states had only very recently ditched their elected state superintendents of public instruction for state

---

245 McCray v. Miss. State Bd. of Election Comm'rs, No. DC84-131-LS-O, slip op. at 5 (N.D. Miss. Feb. 12, 1985) ("The Mississippi Public Service Commissioners and Highway Commissioners exercise a broad range of governmental powers in their respective management of public conveyances, telephones, telegraph, utilities, and highways for the public safety and welfare. They are arms of the state legislature whose actions affect the general population and are not immune from the requirements of the Equal Protection Clause." (citing Strickland v. Burns, 256 F. Supp. 824 (M.D. Tenn. 1966))); Watkins v. Ala. St. Bd. of Educ., No. 84-H-746-N, slip op. at 1–2 (M.D. Ala. Dec. 20, 1985) (noting that the "clear commands" of the U.S. Supreme Court established that "substantial disparity of population among districts violates the 'one-person, one-vote' principle," and holding that the Alabama SBOE districts were malapportioned).

246 *See* Brown v. Jacobsen, 590 F. Supp. 3d 1273, 1280–83 (D. Mont. 2022) (concluding that the Montana Public Service Commission is a "statewide legislative body" within the meaning of 28 U.S.C. § 2284(b), based on the Supreme Court's rulings in "*Reynolds*, *Avery*, and *Hadley*," which "heavily informed" the drafting of the statute).

247 *See* Hadley v. Junior Coll. Dist., 397 U.S. 50, 53 (1970).

248 MASS. CONST. pt. II, ch. II, § 1, art. IV; N.H. CONST. pt. 2, art. 60.

249 Both councils, for example, have the power of advice and consent, *see* MASS. CONST. pt. II, ch. II, § 1, art. V; N.H. CONST. pt. 2, arts. 46, 50, 52, 56, 60, which we understand today as a legislative power, *see* Russell L. Weaver, *"Advice and Consent" in Historical Perspective*, 64 DUKE L.J. 1717, 1727–30 (2015); Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J.L. & PUB. POL'Y 103, 139–41 (2005).

250 *See* Avery v. Midland County, 390 U.S. 474, 482 (1968) (rejecting an analogous argument).

boards of education elected by district.[251] Nebraska had not only just switched to an elected SBOE, but *also* to district-based elections for its Public Service Commission.[252] In doing so, states usually hitched the boards to preexisting districts—like, for example, state supreme court districts—which had not been reapportioned in decades.[253] As a result, states now believed that they needed to redraw the districts used to elect these boards—or face a risk of having the redistricting done for them by federal courts.[254]

Despite the *assumption* that the one-person, one-vote principle applied in the context of state board elections, only a few reported decisions actually spoke to that issue during the transitory period of the 1960s and 1970s. In *Heiser v. Rhodes*, a challenge to Ohio's SBOE districts, the three-judge panel declined to extend the one-person, one-vote principle to those elections,[255] relying instead on the strange circumstances and the unusual posture of the case to deny relief.[256] And in *Freeman v. Dies*, a similar challenge to the districts used for the Texas Board of Education, the panel concluded that the existing districts were unconstitutional but declined to adopt new lines until the legislature could consider the results of the 1970 Census.[257]

---

251 Colorado, Iowa, Nebraska, Ohio, Texas, and Utah all did so in the 1950s. *See infra* Appendix.

252 Act of May 21, 1951, ch. 164, 1951 Neb. Laws 643 (constitutional amendment creating elected SBOE); NEB. CONST. art. VII, §§ 14–16 (1952); Act of July 1, 1963, ch. 174, 1963 Neb. Laws 596.

253 *E.g.*, *Supreme Court—'Most Malapportioned Body in State Government,'* LINCOLN STAR, Aug. 20, 1967, at B1.

254 *E.g.*, *id.*; Eric McCrossen, *Reapportion Suit Is Due in Education*, ALBUQUERQUE J., May 3, 1971, at A-4; Lynne Olson, *Legislative Reapportionment Approved by Utah Senate 15-11*, OGDEN STANDARD-EXAMINER, Jan. 27, 1972, at 1.

255 305 F. Supp. 269, 271 (S.D. Ohio 1969) ("[I]f the one-man one-vote principles (taught in *Wesberry* and *Baker v. Carr*) apply to the Ohio State Board of Education . . . the statute under which the 1969 election for School Board members is being held[ ]is clearly unconstitutional.").

256 "In 1967 the Ohio Legislature divided the State into 24 different districts for Congressional purposes. In each was to be elected one member of Congress in the 1968 general election. At the same time the State was divided into 24 districts for several other purposes," including "for the election in 1967 of 24 members of the Ohio State Board of Education, one from each of the 24 districts." *Id.* at 270. The statute at issue specifically provided that the SBOE districts "shall coincide with the boundaries and counties comprising each of the 24 Congressional districts as such latter districts *were in lawful existence on March 1, 1967*." *Id.* (emphasis added) (quoting Act of July 13, 1967, sec. 1, § 3301.011, 1967–1968 Ohio Laws 2212, 976, 2212). However, the 1967 congressional redistricting plan was struck down by the U.S. Supreme Court, *Lucas v. Rhodes*, 389 U.S. 212 (1967), leaving open the question of whether the SBOE redistricting was lawful. The panel ultimately concluded that the relief sought by the plaintiff (a candidate for the Board whose candidacy was rejected on the basis that he did not live in the district he sought to represent), including placing his name on the November 1969 ballot and enjoining the 1969 election, was improper under the circumstances. *Heiser*, 305 F. Supp. at 272–73.

257 307 F. Supp. 1028, 1034 (N.D. Tex. 1969).

Regardless, in the span of just a few years after the Court's decisions, five states redistricted their boards based on the 1960 Census and queued up decennial redistricting processes beginning in 1971. In the early 1970s, three more states did so. The Louisiana legislature drew new districts for its Public Service Commission in 1972.[258] Shortly thereafter, state voters ratified a new constitution that expanded the size of the PSC from three to five members,[259] thus necessitating a new set of districts, and reorganized the State Board of Elementary and Secondary Education,[260] which the legislature then tied to congressional districts.[261] In the years after the adoption of the one-person, one-vote standard, several additional states created boards that were elected by district—to which the standard would presumably apply. Hawai'i created elected state boards of education in 1964,[262] and Alabama and Kansas replaced their elected superintendents of public instruction with elected school boards in 1966 and 1969, respectively.[263]

After this point, the decennial redistricting schedule typically used in congressional and state legislative redistricting was used for state boards. Mostly, anyway. The California legislature did not draw new districts for the Board of Equalization prior to the 1982 election, despite a plea from Secretary of State March Fong Eu to do so.[264] Eu then went to the California Supreme Court to ask it to take over the redistricting process, as it did for congressional and state legislative districts earlier in the year. However, in a brief opinion, the court declined to act.[265] New districts were drawn in 1983 and used in 1984.[266]

The Alabama legislature declined to redistrict its SBOE following the 1970 and 1980 census, resulting in federal-court ordered redistricting in 1985.[267] The legislature's failure to draw state legislative or SBOE districts after the 1990 Census resulted in more litigation, and, in 1993, a state court ordered the adoption of new districts.[268] Litigation over the SBOE

258 Act of June 12, 1972, No. 14, 1972 La. Acts 106.

259 LA. CONST. art. IV, § 21 (1974).

260 *Id.* art. VIII, § 3(B).

261 Act of July 16, 1975, No. 274, 1975 La. Acts 596.

262 HAW. CONST. art. IX, § 2 (1964).

263 KAN. CONST. art. VI, §§ 2(a), 3(a) (1966); Act of May 1, 1969, No. 2, 1969 Ala. Laws 16.

264 Claudia Luther, *Eu Warns Legislature Redistricting Can't Wait Forever*, L.A. TIMES, Feb. 20, 1982, at J4.

265 Claire Cooper, *Court Lets Tax Board Boundaries Stand*, MODESTO BEE, Mar. 4, 1982, at B6.

266 Act of Jan. 2, 1983, ch. 6, 1983 Cal. Stat. 5556.

267 Watkins v. Ala. State Bd. of Educ., No. 84-H-746-N (M.D. Ala. Dec. 20, 1985).

268 Mary Orndorff, *Court Accepts ADC's Remapping Plan for State BOE*, MONTGOMERY ADVERTISER, Aug. 6, 1993, at 3B.

districts continued after the 1993 judgment,[269] and several changes in how the Supreme Court interpreted the VRA prompted a federal lawsuit over the 1993 boundaries. As a result, new districts were adopted by another federal court order in 1996.[270]

In Hawai'i, the creation of an elected SBOE in 1966 was quickly followed by a flurry of judicial, constitutional, and statutory changes to its composition. A set of districts was created in 1966 in tandem with the Board's creation, but, in 1970, the state attorney general issued an opinion suggesting that, following the U.S. Supreme Court's decision in *Hadley v. Junior College District*, the districts were unconstitutionally malapportioned.[271] The failure to redistrict the Board resulted in litigation shortly thereafter. In 1973, a federal judge determined that the districts were, indeed, malapportioned, and ordered the legislature to adopt new maps.[272] Its failure to do so prompted the judge to draw districts of his own creation—and to reduce the size of the Board from eleven members to nine.[273]

In 1978, the state constitutional convention proposed a new structure for the Board that divided the state into two districts, which would then be subdivided into departmental school districts by the legislature.[274] Members would be elected at-large by all residents of each district, but one board member was required to reside in each departmental school district.[275] The next year, the legislature drew lines for each departmental school district,[276] and, in 1984, gave the state's lieutenant governor the power to assign State House districts into these residential subdistricts.[277] Accordingly, following the 1990 and 2000

---

269 *See* Collins v. Bennett, 684 So. 2d 681, 683 (Ala. 1995) (noting that a separate set of plaintiffs challenging the SBOE districts appealed from the consent judgment approved by the Montgomery County Circuit Court, specifically challenging the inequality in population among the districts and the "irregular shape" of District 4).

270 Bill Poovey, *Judge Orders State to Redraw Board of Education Districts*, MONTGOMERY ADVERTISER, July 4, 1996, at 3B; *Judge Approves Changes in School Board Districts*, ANNISTON STAR, Dec. 5, 1996, at 11A.

271 Haw. Att'y Gen. Op. No. 70-5 (Mar. 9, 1970).

272 *School Board Remap Ruling*, HONOLULU ADVERTISER, July 7, 1973, at A-13.

273 June Watanabe, *Judge Trims School Board*, HONOLULU ADVERTISER, June 8, 1974, at A-1.

274 HAW. CONST. art. X, § 2 (1978).

275 *Id.*

276 Act of May 26, 1979, No. 125, 1979 Haw. Sess. Laws 287.

277 Act of Apr. 18, 1984, No. 63, 1984 Haw. Sess. Laws 115. In its report accompanying this bill, the Senate Judiciary Committee explained that "department school districts are defined according to the representative districts of the districting scheme under which the 1980 elections were held," as per its 1979 enactment. After each decennial redistricting, "the law would have to be updated to reflect the current scheme. This bill would obviate this necessity by allowing the Lieutenant Governor to designate the representative districts that comprise the departmental school districts." S. REP. NO. 376-84, 12th Leg. (Haw. 1984), *reprinted in* HAW. S. JOURNAL, 12th Leg. 1167 (1984).

censuses, the lieutenant governor did so by proclamation, and, in 2010, voters approved a constitutional amendment changing the method of the Board's selection from election to gubernatorial appointment.[278]

In Montana, the statewide elected Railroad Commission was converted into the Public Service Commission, which was elected by district. But other than an initial districting in 1974,[279] the body was only redistricted by the legislature once, in 2003,[280] ultimately resulting in new, court-ordered maps in 2022.[281] The Mississippi Supreme Court districts—which are not just used for the court itself, but also for the Public Service Commission and Transportation Commission—were redistricted only once, in 1987, as part of an effort to settle litigation over the legality of the lines.[282] No redistricting has taken place since, triggering a series of lawsuits.[283]

But one of the most egregious examples of a systematic refusal to redistrict was in Kentucky, where the Railroad Commission districts were modified exactly once, in 1932,[284] and then never again until the Commission's abolition in 2000.[285] Here, it's possible that after years of stripping the Railroad Commission of almost all of its responsibilities,[286] the state legislature simply did not see the need to draw districts for an increasingly powerless board.

Far more frequent than the *refusal* to draw new districts has been the apparent *inability* to do so. One of the potential challenges here is the dependence of some state board districts on the passage of *other* districts. The Kansas and Ohio SBOE districts, along with the Governor's Council districts in Massachusetts, are built by combining state senate districts[287]—which obviously necessitates the *existence* of state senate

278 HAW. CONST. art. X, § 2 (2010).

279 Act of Mar. 28, 1974, ch. 339, 1974 Mont. Laws 1059.

280 Act of Apr. 11, 2003, ch. 294, 2003 Mont. Laws 1014.

281 Brown v. Jacobsen, 590 F. Supp. 3d 1273, 1276–77 (D. Mont. 2022).

282 Act of Apr. 20, 1987, ch. 491, 1987 Miss. Laws 660; *After Arguments, Senate Votes to Redraw Supreme Court Districts*, BILOXI SUN HERALD, Apr. 3, 1987, at C2 [hereinafter *1987 Public Service Commission Redraw*].

283 Magnolia Bar Ass'n v. Lee, 994 F.2d 1143, 1144 (5th Cir. 1993); NAACP v. Fordice, 252 F.3d 361, 364 (5th Cir. 2001); Complaint for Declaratory Judgment & Injunctive Relief, White v. State Bd. of Election Comm'rs, No. 22-cv-62 (N.D. Miss. Apr. 25, 2022), 2022 WL 1214247.

284 Act of 1932, ch. 144, 1932 Ky. Acts 674.

285 S.B. 70, ch. 399, 2000 Ky. Acts 1232 (repealing KY. CONST. § 209 and amending *id.* §§ 201, 218).

286 *See supra* note 112 and accompanying text.

287 KAN. CONST. art. VI, § 3 ("four contiguous senatorial districts"); OHIO REV. CODE ANN. § 3301.01(B)(1) (West 2023) ("three contiguous senate districts"); MASS. CONST. amend. art. XVI (1855) ("five contiguous senatorial districts"). In California, the four Board of Equalization districts are comprised of "10 whole, complete, and adjacent Senate districts" "[t]o the extent practicable," but not to the detriment of other criteria. CAL. CONST. art. XXI, § 2(d).

districts—and in Colorado, Board of Education and University Regents districts are the same as congressional districts.[288]

Standoffs between governors and legislatures over redistricting have also resulted in court-ordered redistricting. In many cases, however, it seems that disagreements over state board redistricting have been *far* less contentious than similar disagreements over congressional and state legislative redistricting. Broader redistricting disputes in California (1991), Kansas (2011), New Mexico (2001), and Texas (2001) were ultimately resolved by courts—but redistricting for state boards resolved far more easily than for congressional and state legislative districts.

In California, the state supreme court appointed a panel of special masters to draw a total of four sets of districts, reviewed the proposals, and ultimately adopted them.[289] While the congressional and state legislative districts were contested, and a federal lawsuit was filed to enjoin their use,[290] the Board of Equalization districts were hardly mentioned in any opinion.[291] Two different redistricting disputes in New Mexico were resolved more amicably for the state boards than for the congressional and state legislative districts. In 2001, Governor Gary Johnson signed proposed districts for the Public Regulation Commission,[292] but vetoed the congressional and state legislative maps.[293] In the state court litigation that followed, the trial court conducted a brief trial for the SBOE districts and ended up adopting the legislative proposal for the districts—with little objection from any litigant.[294] In Texas, the failure to draw any maps in 2001 prompted federal litigation. Prior to a trial before the three-judge panel, the plaintiff and state defendants

---

288 COLO. REV. STAT. § 22-2-105(1) (2023) ("The State Board of Education consists of one member elected from each congressional district in the state and, if the total number of congressional districts of the state is an even number, one member elected from the state at large."); *id.* § 23-20-102 (Board of Regents).

289 Wilson v. Eu, 816 P.2d 1306, 1306–07 (Cal. 1991) (in bank) (appointing special masters to draw congressional, state senate, state assembly, and Board of Equalization districts); Wilson v. Eu, 817 P.2d 890, 891–92 (Cal. 1991) (in bank) (submitting special masters' maps to the U.S. Department of Justice for preclearance); Wilson v. Eu, 823 P.2d 545, 555–56, 559 (Cal. 1992) (in bank) (modifying the districts and ordering their adoption).

290 DeWitt v. Wilson, 856 F. Supp. 1409, 1410 (E.D. Cal 1994).

291 *Wilson*, 823 P.2d at 727–28 (briefly noting an objection to the special masters' districts); *id.* at 793–94 (portion of special masters' recommendations briefly discussing the equalization districts); *DeWitt*, 856 F. Supp. 1409 (not even discussing equalization districts).

292 Act of Oct. 3, 2001, ch. 3, 2001 N.M. Laws 1st. Spec. Sess. 15 (Public Regulation Commission districts).

293 David Miles, *Governor Vetoes Plans for Districts*, ALBUQUERQUE J., Oct. 4, 2001, at D3.

294 Sanchez v. Vigil-Giron, No. D0101 CV 2001 02250, slip op. at 2 (N.M. Dist. Ct. Feb. 6, 2002) (noting that the state legislature's proposed redistricting plan, which was proposed by the plaintiff and the SBOE, was "not objected to" by the Secretary of State and "should be adopted as the redistricting plan for the New Mexico Board of Education beginning for the 2002 primary and general elections").

submitted a joint pretrial order stipulating that the plaintiff's proposal "meets all legal and constitutional requirements," though the Texas Attorney General submitted two additional plans.[295] After the trial, the panel issued a brief order adopting the plaintiff's plan with little elaboration.[296]

2. The Voting Rights Act of 1965 and Its Amendments

Separate from the Fourteenth Amendment's requirement of equipopulous districts, the Voting Rights Act of 1965—and its amendments—has similarly affected the composition of state board districts. Section 2 of the VRA bars any "standard, practice, or procedure" that "results in a denial or abridgment" of the right to vote on the basis of race.[297] Under the 1982 amendments to the VRA, this includes vote-dilution claims, which has effectively required the creation of congressional and state legislative districts that provide opportunities for communities of color to elect candidates of their choice.[298] However, comparatively little litigation has challenged the legality of state board districts under the VRA.

Alabama has been one of the only states to see the VRA wielded to alter the composition of its state board districts. After the SBOE was recreated as an elected body in 1969, and initial districts were created that same year,[299] the legislature did not draw any new districts after the 1970 or 1980 censuses.[300] Accordingly, in 1984, a lawsuit was filed challenging the constitutionality of the districts under one-person, one-vote and their legality under the VRA.[301] The Middle District of Alabama initially gave the legislature the opportunity to redraw the districts, but when it failed to do so, the court adopted a new map itself, which created two minority-opportunity districts, including one majority-Black district.[302]

The saga repeated itself in the 1990s: after the census, the legislature did not redraw the state legislative or SBOE districts, and litigation soon commenced.[303] In 1993, a state court judge ordered the districts to be

295 Joint Pretrial Order at 5, Miller v. Cuellar, No. 3-01CV1072-G (N.D. Tex. Nov. 2, 2001).

296 *Miller*, No. 3-01CV1072-G.

297 Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301(a)).

298 Warren, *supra* note 177, at 8–10.

299 Act of May 14, 1969, No. 16, 1969 Ala. Laws 39.

300 Watkins v. Ala. State Bd. of Educ., No. 84-H-746-N, slip op. at 1 (M.D. Ala. Dec. 20, 1985).

301 *Id.*

302 Betty Cork, *18 Democrats Seek Spots on State BOE*, MONTGOMERY ADVERTISER, May 27, 1986, at 7A; *Judge Approves District Plan*, ALA. J., Mar. 6, 1986, at 2.

303 Orndorff, *supra* note 268.

slightly redrawn,[304] including by adding what was dubbed a "scorpion's tail" that connected parts of Tuscaloosa with a Birmingham-based district.[305] But several U.S. Supreme Court decisions from the 1990s—including *Shaw v. Reno* and *Miller v. Johnson*—disclaimed the use of geographically irregular districts to achieve racial equity.[306] These decisions triggered subsequent litigation over the constitutionality of minority-opportunity districts in other states,[307] including Alabama, where the "scorpion's tail" was challenged.[308] The litigation resulted in slightly redrawn, cleaner-looking districts,[309] but still preserved two minority-opportunity districts.[310] Redistricting after the 2000 Census and beyond occurred on a regular timetable,[311] and resulted in two minority-opportunity districts in Birmingham–Tuscaloosa and the Black Belt.

In Louisiana, the eight districts for electing the Board of Elementary and Secondary Education (BESE) were initially based on congressional districts.[312] But following the 1990 Census, when Louisiana was reduced to seven seats in the House, a separate set of districts was drawn.[313] Here, the U.S. Department of Justice interposed an objection to the districts and refused to preclear them, concluding that the failure to draw a *second* majority Black district was illegal under section 5 of the VRA.[314] Accordingly, the legislature drew a replacement map[315] (which the DOJ precleared), and simultaneously proposed a constitutional amendment, which was rejected in the 1992 general election, that would have made

304 Liam T.A. Ford, *Justice Approves New BOE Districts*, MONTGOMERY ADVERTISER, Oct. 20, 1993, at 3B,

305 *E.g.*, Michaelle Chapman, *Plan May Change Board Races*, BIRMINGHAM POST-HERALD, Sept. 19, 1996, at A1; *Court Limits U.S. in Voting Cases*, BIRMINGHAM POST-HERALD, May 12, 1997, at A1.

306 Shaw v. Reno, 509 U.S. 630, 646–49 (1993); Miller v. Johnson, 515 U.S. 900, 920–27 (1995).

307 Timothy G. O'Rourk, Shaw v. Reno*: The Shape of Things to Come*, 26 RUTGERS L.J. 723, 724–25 (1995) (summarizing litigation after *Shaw*).

308 Chapman, *supra* note 305.

309 *Id.*

310 *Id.*

311 Act of Feb. 7, 2002, No. 73, 2002 Ala. Laws 175; Act of June 15, 2011, No. 677, 2011 Ala. Laws 1822; Act of Nov. 4, No. 559, 2021 Ala. Laws 2nd Spec. Sess.

312 Act of July 16, 1975, No. 274, 1975 La. Acts 596.

313 Act of July 17, 1991, No. 651, 1991 La. Acts 2062.

314 Letter from John R. Dunne, Ass't Att'y Gen., U.S. Dep't of Justice, Civil Rts. Div., to Angie Rogers LaPlace, La. Ass't Att'y Gen. (Oct. 1, 1991), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/LA-1770.pdf [https://perma.cc/85ZB-HT8G]; *see also* United States v. Hays, 515 U.S. 737, 739–40 (1995) (describing DOJ's refusal to preclear BESE districts). Some in the legislature requested that state Attorney General William Guste challenge the DOJ's refusal to preclear the BESE districts. Robert Morgan, *Guste May Be Asked to Challenge Remap Rejection*, ALEXANDRIA DAILY TOWN TALK, Oct. 23, 1991, at C-11.

315 Act of May 13, 1992, No. 6, 1992 La. Acts 7.

BESE districts permanently coterminous with congressional districts.[316] No such challenge was raised with respect to the state's Public Service Commission districts, and both the BESE and PSC districts were precleared by the DOJ as drawn in 2001 and 2011.[317]

Texas has seen a fair amount of litigation over its districts—congressional, State Senate, State House, and SBOE districts alike[318]—but few claims under the VRA have specifically challenged the SBOE districts. For example, in 1991, several Hispanic groups argued that the 1990 Census "disproportionately undercounted racial and ethnic minority populations in Texas," and sought to forbid the use of 1990 Census data in drawing congressional, state legislative, and SBOE districts.[319] Though a state trial court initially enjoined the usage of 1990 and 1980 census data,[320] the plaintiffs in the case did not specifically challenge the SBOE districts,and the Supreme Court of Texas reversed anyway.[321] The failure of the Texas legislature to draw any districts in 2001 resulted in a federal court adopting a set of districts itself,[322] and the 2011 SBOE districts, drawn by the legislature, were precleared by the DOJ.[323]

Following the 2021–22 redistricting cycle, the League of United Latin American Citizens (LULAC) challenged the legality of the congressional, state legislative, and SBOE districts. LULAC argued that though the legislature had drawn only three Hispanic-majority SBOE districts, "[t]he Latino population of Texas is sufficiently numerous and geographically compact to comprise the majority of the [citizen voting age population] in at least 4 SBOE districts," and that the Latino voting strength in the Third District was weakened.[324] However, though the district court continued LULAC's claims with respect to one of the state

316 H.B. 67, No. 1143, § 4, 1992 La. Acts 3480, 3481–82.

317 *Justice Clears Redrawn Education Districts*, MONROE NEWS-STAR, Aug. 9, 2011, at 6A; Robert Morgan, *Senate Passes House Redistricting Plan*, SHREVEPORT TIMES, May 8, 2003, at 2B.

318 Lisa Marshall Manheim, *Redistricting Litigation and the Delegation of Democratic Design*, 93 B.U. L. REV. 563, 589–90 (2013) (describing constant redistricting litigation in Texas); David R. Richards, *Litigating Texas Redistricting: A Democratic Lawyer's Experience*, *in* ROTTEN BOROUGHS, POLITICAL THICKETS, AND LEGISLATIVE DONNYBROOKS: REDISTRICTING IN TEXAS 41, 51–59 (Gary A. Keith ed., 2013) [hereinafter ROTTEN BOROUGHS]; J.D. Pauerstein, *Texas Redistricting: A Republican Lawyer's Perspective*, *in* ROTTEN BOROUGHS, *supra*, at 61, 62–76.

319 Terrazas v. Ramirez, 829 S.W.2d 712, 714 (Tex. 1991).

320 *Id.* at 714–15 (describing actions of the trial court).

321 *Id.* at 725–26.

322 Miller v. Cuellar, No. 3-01CV1072-G (N.D. Tex. Nov. 2, 2001).

323 Tim Eaton, *State, Feds Bicker over Map Delays*, AUSTIN AM.-STATESMAN, Dec. 2, 2011, at B1.

324 Complaint for Declaratory Judgment & Injunctive Relief ¶¶ 96–99, League of United Latin Am. Citizens v. Abbott, No. 21-CV-259 (W.D. Tex. Oct. 18, 2021).

House districts it contested, it dismissed the claim about the SBOE districts.[325]

And Mississippi has seen repeated lawsuits over the composition of its three Supreme Court districts, which it also uses to elect its Public Service Commission and Transportation Commission. The districts had remained materially unaltered from their initial creation in 1892 until 1987.[326] In 1984, a group of Black plaintiffs challenged the legality of the state's supreme court districts under both the VRA and one-person, one-vote.[327] As part of a 1987 settlement to end the multiyear litigation, the state legislature made a slight modification to the districts to equalize the populations.[328]

Since that point, other sets of plaintiffs have challenged the districts. All of the challenges have been centered around the use of the districts for state supreme court elections,[329] and have raised primarily racial discrimination challenges under the VRA, not one-person, one-vote challenges.[330] To date, these challenges have been rejected. Despite the clearer application of one-person, one-vote to the PSC and Transportation Commission,[331] as well as the fact that the districts were not redrawn at all after the 1990, 2000, 2010, or 2020 censuses, no challenge has centered around *those* districts or has raised malapportionment as one of its primary claims.

New Mexico has not seen a significant amount of litigation over the racial makeup of its districts—with the exception of its Public Regulation Commission districts. In 2011, Governor Susana Martinez vetoed the

---

325 League of United Latin Am. Citizens v. Abbott, Nos. 21-CV-259, 21-CV-988, 2022 WL 17477565, at *7 (W.D. Tex. Dec. 6, 2022).

326 The only modifications to the districts of *any* sort reflected the creation of new counties—but even here, the creation of new counties did not alter the landmass encompassed in each of the three districts.

327 Complaint, McCray v. Miss. State Board of Election Comm'rs, No. DC84-131-LS-O (N.D. Miss. Feb. 12, 1985).

328 Act of Apr. 20, 1987, ch. 491, 1987 Miss. Laws 660; *1987 Public Service Commission Redraw*, *supra* note 282.

329 *E.g.*, Magnolia Bar Ass'n v. Lee, 994 F.2d 1143, 1144 (5th Cir. 1993); NAACP v. Fordice, 252 F.3d 361, 364 (5th Cir. 2001); Complaint for Declaratory Judgment & Injunctive Relief ¶ 1, White v. State Bd. of Election Comm'rs, No. 22cv62 (N.D. Miss. Apr. 25, 2022), 2022 WL 1214247.

330 *Magnolia Bar Ass'n*, 994 F.2d at 1144 ("The plaintiffs in this case filed suit against various officials of the State of Mississippi, alleging that Mississippi's current method of electing supreme court judges violates section 2 of the Voting Rights Act of 1965."); *NAACP*, 252 F.2d at 364 ("Plaintiffs-Appellants, Elijah Wilson and Robert Leflore ('Wilson'), claim that maintaining the districts with these white voting age population majorities violates Section 2 of the 1965 Voting Rights Act."); Complaint at 55, *White*, No. 22cv62 (requesting that the district court "[d]eclare the district boundaries and/or districting scheme used by the State of Mississippi in electing the justices of the Mississippi Supreme Court to be in violation of Section 2 of the Voting Rights Act and the United States Constitution").

331 *See infra* Section III.B.

congressional, state legislative, and PRC maps passed by the legislature, resulting in state court litigation to draw four sets of maps.[332] A coalition of tribal nations joined the litigation, seeking greater Native representation.[333] In the trial over the PRC districts, the Navajo Nation submitted a proposed map, which created a Native-opportunity district in northern New Mexico,[334] building on decades of Native representation on the SBOE.[335] And though the trial court opted for a different map, it concluded that creating such a district was required under both the VRA and *Gingles* and that "protection of Native American voting rights is a significant state policy and that some population deviations are necessary to protect such rights."[336] Accordingly, it selected the map that "place[d] the highest priority on population equality and compliance with the Voting Rights Act."[337]

In the 2021–22 redistricting cycle, Native groups played a significant role in the construction of new maps at all levels.[338] The All Pueblo Council of Governors, a coalition of the state's tribal nations, submitted several proposed maps to the Citizen Redistricting Committee,[339] and the

---

332 Trip Jennings, *Lawsuits Fly in Fight to Redraw Districts*, SANTA FE NEW MEXICAN (Sept. 26, 2011), https://www.santafenewmexican.com/news/local_news/lawsuits-fly-in-fight-to-redraw-districts/article_7720995e-63d2-5907-8d6f-09c8cce5462f.html [https://perma.cc/SUM6-W4YX].

333 Second Amended Complaint of Plaintiffs the Pueblo of Laguna, the Pueblo of Acoma, the Jicarilla Apache Nation, the Pueblo of Zuni, the Pueblo of Santa Ana, the Pueblo of Isleta, Richard Luarkie, Harry A. Antonio, Jr., David F. Garcia, Levi Pesata and Leon Reval for Injunctive and Declaratory Relief for Redistricting of the New Mexico State Senate and the New Mexico State House Districts, Egolf v. Duran, No. D-101-CV-2011-02942 (N.M. Dist. Ct. Jan. 25, 2012), 2011 WL 12523990.

334 Amended Findings of Fact and Conclusions of Law at 11–14, *Egolf*, No. D-101-CV-2011-02942 [hereinafter *Egolf* Amended Findings of Fact], https://www.nmlegis.gov/Redistricting/Documents/Court%20Decision%20-%20Public%20Regulation%20Commission.pdf [https://perma.cc/B26R-CKG9].

335 Peter Eichstaedt, *Session Adjourns; Plans Await Signature*, SANTA FE NEW MEXICAN, Sept. 20, 1991, at A3 ("The State Board of Education plan, which passed with little debate, contains 10 districts, including one in the northwestern part of the state in which Indians constitute a majority."); Barry Massey, *Jicarilla Apaches Push Majority Indian District*, ALBUQUERQUE TRIB., Aug. 24, 2001, at A4 (noting that Charles Dorame, the then-Governor of the Tesuque Pueblo, "urged placing the northern pueblos together in regional districts for Congress, State Board of Education and the Public Regulation Commission").

336 *Egolf* Amended Findings of Fact, *supra* note 334, at 21–24.

337 *Id.* at 24–25.

338 REDISTRICTING PARTNERS, NEW MEXICO REDISTRICTING EVALUATION REPORT 32–39 (2022), https://nmfirst.org/wp-content/uploads/sites/230/2022/09/New-Mexico-Redistricting-Evaluation-Report-9-26-22-1.pdf [https://perma.cc/3TEV-AJ77] (describing role of Native groups in redistricting).

339 Nash Jones, *Tribal Leaders Call for Self-Determination in Redistricting*, KUNM (Aug. 19, 2021, 6:39 PM), https://www.kunm.org/local-news/2021-08-19/tribal-leaders-call-for-self-determination-in-redistricting [https://perma.cc/2N5F-5LQA]; Robert Nott, *Native American*

Navajo Nation Human Rights Commission submitted a plan for the Public Education Commission districts.[340] In the end, maps were adopted that increased the Native population in District 5, a change sought by the Navajo Nation because "District 5 charter schools that are overseen by the PEC are all predominantly Native American students."[341]

3. Electoral Reform and Boards

Over the last several decades, in efforts to combat partisan gerrymandering, legislatures and coalitions of voters have proposed alternative processes for undertaking redistricting. In the context of congressional and state legislative redistricting, these proposals have been largely successful. The 2021–22 redistricting cycle saw a record number of congressional districts drawn by independent redistricting commissions—or otherwise saw state courts strike down partisan gerrymanders enacted by legislatures.[342]

The efforts to reform the redistricting process have occasionally been far-reaching enough to include state boards, too. California, for example, amended its constitution in 1980 to mandate that the state legislature draw new state legislative and State Board of Equalization districts every decade.[343] Then, following two failed attempts,[344] an

---

Communities Submit New Mexico Redistricting Maps, TAOS NEWS (Dec. 15, 2021), https://www.taosnews.com/news/politics/native-american-communities-submit-new-mexico-redistricting-maps/article_7da9471e-72e7-5f8d-81df-34534e712c5b.html [https://perma.cc/5BEZ-HK8X].

340 N.M. CITIZEN REDISTRICTING COMM., CRC DISTRICT PLANS & EVALUATIONS FOR NEW MEXICO CONGRESS, STATE SENATE, STATE HOUSE OF REPRESENTATIVES, & PUBLIC EDUCATION COMMISSION: 2020 REDISTRICTING CYCLE 98–101 (2021), https://www.nmredistricting.org/wp-content/uploads/2021/11/2021-11-2-CRC-Map-Evaluations-Report-Reissued-1.pdf [https://perma.cc/PV7R-P86M].

341 Robert Nott, *Public Education Commission Map Adjusted to Give Natives More Say*, SANTA FE NEW MEXICAN (Jan. 14, 2023), https://www.santafenewmexican.com/news/legislature/public-education-commission-map-adjusted-to-give-natives-more-say/article_61c26ee8-5924-11ec-b384-e3520d1ec50e.html [https://perma.cc/YU88-UHAB] (quoting Leonard Gorman, executive director of the Navajo Human Rights Commission).

342 *See supra* notes 16–29 and accompanying text.

343 A.C.A. 53, ch. 78, 1977–78 Leg., Reg. Sess., 1978 Cal. Stat. 4821 (adding CAL. CONST. art. XXI, § 1).

344 In 1984, a voter-initiated constitutional amendment proposed the creation of the Fair Reapportionment Commission, which would have been responsible for drawing congressional, state legislative, and State Board of Equalization districts. MARCH FONG EU & WILLIAM G. HAMM, 1984 GENERAL ELECTION: CALIFORNIA BALLOT PAMPHLET 54–57 (1984), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1931&context=ca_ballot_props [https://perma.cc/72L4-N3ND]. Equalization districts would have been required to consist of "10

initiated constitutional amendment created the Citizens Redistricting Commission in 2008, which is empowered to redraw congressional, state legislative, and SBOE districts every decade.[345] In Colorado, the fact that the SBOE and the University Regents districts are tied to congressional districts[346] meant that the creation of the Independent Congressional Redistricting Commission in 2018 to draw congressional districts necessarily affected both boards' districts, too.[347]

And in Utah, voters ratified an initiated statute in 2018 that created an Independent Redistricting Commission. Owing to the limited power of Utah's initiative process, which extends only to proposing statutes, not constitutional amendments,[348] the Commission's powers were a bit awkward. It was given the responsibility to draft a set of maps and then to submit them to the state legislature, which could only approve or disapprove them.[349] Most of the attention focused on the Commission's ability to undo the Republican gerrymander of the state's congressional districts.[350] However, the Commission's powers were a bit broader—they extended to "creating the boundaries of Utah's congressional, state legislative, and *other* districts,"[351] with "other" probably meaning the SBOE districts. However, in 2020, the state legislature repealed the

adjacent Senate districts" and—like congressional and state legislative districts—would have been "geographically compact," limited in the number of times they could cross county boundaries, "contiguous" with "reasonable access between population centers," and would have "preserve[d] identifiable communities of interest," "promote[d] competition," and not favored or disfavored any party or incumbent. *Id.* at 81. A similar commission was proposed by voter initiative in 1990. MARCH FONG EU, JUNE 5, 1990 PRIMARY ELECTION: BALLOT PAMPHLET 48–51, 80–109 (1990), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2058&context=ca_ballot_props [https://perma.cc/R8AH-953S].

345 CAL. CONST. art. XXI, §§ 1–2 (2008).

346 S. Con. Res. 6, 36th Gen. Assemb., Reg. Sess., 1947 Colo. Sess. Laws 976; Act of Mar. 16, 1973, ch. 376, 1973 Colo. Sess. Laws 1323.

347 *Cf.* S. Con. Res. 18-004, 70th Gen. Assemb. 2nd Reg. Sess., 2018 Colo. Sess. Laws 3082.

348 UTAH CONST. art. VI, § 1(2)(a)(i)(A)–(B).

349 Utah Independent Redistricting Commission and Standards Act, UTAH CODE ANN. § 20A-19-204(2)(a) (West 2018) (repealed 2020).

350 *E.g.*, *Proposition 4—Arguments*, UTAH LIEUTENANT GOV., https://elections.utah.gov/Media/Default/2018%20Election/Issues%20on%20the%20Ballot/Proposition%204%20-%20Arguments.pdf [https://perma.cc/2B9L-H4E2]; David DeMille, *Election Results Update: Vote Margin Just 0.05 Percent for Utah Redistricting Measure*, SPECTRUM & DAILY NEWS (Nov. 15, 2018, 4:40 PM), https://www.thespectrum.com/story/news/2018/11/13/election-results-redistricting-proposition-4-deadlocked/1995183002 [https://perma.cc/BRT4-Y7CP] ("The measure would create a seven-person commission to draw new political maps for congressional and state legislative districts after the 2020 census.").

351 Utah Independent Redistricting Commission and Standards Act, Prop. 4 (2018); UTAH CODE ANN. § 20A-19-102 (West 2018) (repealed 2020) ("other districts") (emphasis added); *id.* § 20A-19-201(4)(b) (same); *id.* § 20A-19-203(1), (2)(b) (same).

Commission's authority, reducing it to an advisory body that the legislature could ignore in future redistricting cycles.[352]

Outside of these three states, however, most redistricting reform efforts have ignored state boards, leaving redistricting responsibility with the state legislature. In Montana, the 1972 Constitution created the Districting and Apportionment Commission, which was given responsibility for drawing the state's congressional and state legislative districts.[353] Several years later, when the state legislature converted the statewide elected Railroad Commission into a Public Service Commission, elected from five districts, the legislature retained the authority to draw districts itself.[354] In Montana, this left drawing PSC districts as the legislature's *only* redistricting authority, the low salience of which potentially explains why the legislature has only drawn PSC districts twice: first in 1974, when the PSC was created,[355] and second in 2003.[356]

In Texas, voters ratified an amendment to the state constitution in 1948 that created the Legislative Redistricting Board, which draws state legislative districts if the legislature fails to do so.[357] The Board was established as a "cudgel that would force recalcitrant legislators to engage in redistricting" following decades of unredistricted and malapportioned districts.[358] The Board has redrawn districts a handful of times—in 1971, 1981, and 2001.[359] However, the Board's authority does not extend to SBOE districts. Accordingly, when the legislature failed to draw SBOE districts in 2001, it fell to federal courts to do so.[360]

Ohio, however, presents the most obvious—and troubling—case of how state board districts are excluded from redistricting reform. Its 1851 Constitution created an apportionment board consisting of the Governor, Secretary of State, and Auditor with responsibility for drawing legislative districts,[361] though the legislature continued to draw congressional districts. The requirements for redistricting shifted over

---

352 Redistricting Amendments, ch. 288, 2020 Utah Laws 2018.

353 MONT. CONST. art. V, § 14 (1972).

354 Act of Mar. 28, 1974, ch. 339, 1974 Mont. Laws 1059.

355 *Id.*

356 Act of Apr. 11, 2003, ch. 294, 2003 Mont. Laws 1014.

357 S.J. Res. 2, 1947 Tex. Laws 1183 (amending TEX. CONST. art. III, § 28).

358 Reid Pillifant, Note, *Below Board: How Texas's Legislative Redistricting Board Violates Section 2 of the Voting Rights Act*, 99 TEX. L. REV. 1219, 1220–21 (2021).

359 *Id.* at 1224–26; *see also* Jonathan Snare, *The Scope of the Powers and Responsibilities of the Texas Legislature in Redistricting and the Exploration of Alternatives to the Legislative Role: A Basic Primer*, 6 TEX. HISP. J.L. & POL'Y 83, 91–92 (2001) (describing the redistricting process in 2001).

360 Miller v. Cuellar, No. 3-01CV1072-G (N.D. Tex. Nov. 2, 2001).

361 OHIO CONST. of 1851, art. XI, § 11.

time, most notably in 2015, when the board was abolished, and the Ohio Redistricting Commission was created.[362] In 2018, a new process was adopted for congressional districts. Though the legislature retained its authority to draw the districts, it could only do so by a three-fifths vote.[363] If it failed to do so, responsibility shifted to the Redistricting Commission to draw maps.[364] Throughout these changes, the legislature has retained exclusive responsibility for drawing SBOE districts, and the Governor is vested with backup redistricting authority if the legislature does not timely act. As mentioned in the introduction, the legislature has *always* failed to draw SBOE districts, and governors George Voinovich, Bob Taft, John Kasich, and Mike DeWine have each used their backup authority to do so.[365]

III. REMEDYING REDISTRICTING DEFECTS

State board districts are frequently afterthoughts. From the very beginning of their creation, other, already-created districts were repurposed to elect state boards with various policymaking responsibilities. Changes to those underlying districts only sometimes resulted in changes to how state boards were themselves elected. And even when separate districts were created, systematic failures to redraw *any* districts prior to the U.S. Supreme Court's one-person, one-vote mandate extended to state boards, too. The Court's decision in *Reynolds v. Sims*, which held that the Fourteenth Amendment required that state legislative districts be roughly equipopulous, spurred many states to redraw the districts used to elect members of state boards for the first time in decades—or ever.[366]

Today, the defects in the redistricting process are multidimensional. Though some boards are *still* elected from districts that were last redrawn decades ago,[367] most undergo routine decennial redistricting.[368]

---

362 Am. Sub. H.J. Res. 12, 130th Gen. Assemb., Reg. Sess., 2013–2014 Ohio Laws (enacting OHIO CONST. art. XI, §§ 1–10).

363 Sub. S.J. Res. 5, 132d Gen Assemb., Reg. Sess., 2017–2018 Ohio Laws (amending OHIO CONST. art. XI, § 1 and enacting *id.* art. XIX, §§ 1–3).

364 OHIO CONST. art. XIX, § 1(A).

365 *See supra* notes 20–23 and accompanying text.

366 *See supra* Section II.B.

367 *See infra* Appendix (Mississippi Public Service Commission, Mississippi Transportation Commission, Montana Public Service Commission).

368 *See infra* Appendix (Alabama Board of Education, California Board of Equalization, Colorado Board of Education, Colorado University Regents, Kansas Board of Education, Louisiana Public Service Commission, Louisiana Board of Elementary and Secondary Education,

Accordingly, the recurring problem is the apathy and confusion with which state legislators, litigants, and courts approach the process of redrawing state board districts. As mentioned in the previous Part, challenges under the VRA are rare[369]—and despite the remarkable results of state constitutional litigation over partisan gerrymandering, few cases have been brought against a board's districts.[370] Even when impasses between governors and legislatures over redistricting have forced courts to step in to supervise the process, how *board* districts are created is rarely meaningfully contested.[371]

Part of the confusion (or apathy) may be a result of ambiguities in the law about how federal redistricting rules apply to statewide bodies other than legislatures. Some jurists have expressed uncertainty about whether these normal rules apply and have attempted to analogize boards to "quasi-judicial" bodies to which normal redistricting rules might not apply. For example, a recent Eleventh Circuit decision characterized the Georgia Public Service Commission as a "quasi-judicial" administrative body and then incorporated the Circuit's caselaw on *judicial* elections to reject a lawsuit filed under Section 2 of the VRA.[372] Other state-specific contexts prompt knotty questions that are not always easy to resolve. For the typical litigant in a redistricting case—or, indeed, for the typical court hearing such a claim—it may be easier to assume that these rules and complexities are insurmountable barriers.

In this final Part, I explore in greater detail how and why board districts are paid little attention in redistricting processes, both by legislators and litigants. I begin in Section III.A by diagnosing the current problems with redistricting boards, building on the discussion in Part II. Then, in Section III.B, I discuss the contexts of these problems, developing some of the initial explanations offered throughout this Article with examples from the few cases that have been used to challenge

---

Massachusetts Governor's Council, Nebraska Board of Education, Nebraska Board of Regents, Nebraska Public Service Commission, Nevada Board of Education, Nevada Board of Regents, New Hampshire Executive Council, New Mexico Public Education Commission, Ohio Board of Education, Texas Board of Education, Utah Board of Education).

369 *See supra* Section II.C.2.

370 One of the few was brought in New Hampshire, where voters challenged the State Senate and Executive Council districts as "partisan gerrymanders" that were unconstitutional under the New Hampshire Constitution's free-elections provision and the voters' rights to "equal protection, free speech, and free assembly." Brown v. Scanlan, No. 2022-CV-00181, slip op. at 2, 6 (N.H. Super. Ct. Oct. 5, 2022), https://npr.brightspotcdn.com/7d/98/f7113818475aa07e9814c22d77e2/order.pdf [https://perma.cc/BRC2-K3AA]. The New Hampshire Supreme Court, in a 3-2 decision, held that partisan gerrymandering was not a justiciable issue under the state constitution and rejected the challenge. Brown v. Sec'y of State, 2023 WL 8245078, at *16 (N.H. Nov. 29, 2023).

371 *See supra* Section II.C.2.

372 *E.g.*, Rose v. Sec'y, State of Ga., 2023 WL 8166878, at *10–11 (11th Cir. Nov. 24, 2023).

the construction of board districts. Finally, in Section III.C, I tentatively outline several solutions.

A. *Identifying the Problems*

The adoption of the one-person, one-vote rule, and the passage of the VRA and its amendments, were not just-add-water recipes to end malapportionment and racial discrimination in redistricting.[373] True, for the most part regular redistricting has taken place following the federal census every decade since 1970.[374] And majority-minority districts have been created in many states—namely, those where people of color make up a sufficient share of the electorate and where there are enough districts in existence[375] to support the creation of such districts.[376]

But challenges still remain. In this Section, I build on three that I have laid out previously: (1) that regular redistricting does not always take place; (2) that state board districts are likely still drawn in a manner that minimizes the power of communities of color; and (3) that claims regarding partisan gerrymandering of state boards have not been adequately developed by litigants or courts.

First, decennial redistricting has not taken place everywhere. As mentioned previously, Kentucky failed to redistrict its Railroad Commission at any point from 1932 until the commission's abolition in 2000;[377] Montana failed to redistrict its Public Service Commission in 1980, 1990, 2010, and 2020;[378] and Mississippi failed to redistrict both its Public Service Commission and its Transportation Commission in 1990,

---

373 *See* Shelby County v. Holder, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

374 *But see infra* Appendix (Kentucky Railroad Commission, Mississippi Public Service Commission, Mississippi Transportation Commission).

375 Holder v. Hall, 512 U.S. 874, 881–85 (1994) ("[A] plaintiff cannot maintain a § 2 challenge [under the Voting Rights Act] to the size of a government body . . . ."). In dissent, Justice Blackmun would have allowed challenges to the size of government bodies under the VRA, concluding that it would be possible in many cases to "identify[] an appropriate baseline against which to measure dilution." *Id.* at 952–53 (Blackmun, J., dissenting). He noted that there would be "significant constraints" on any size challenge, and that such challenges to "traditional single-member executive offices, such as governors and mayors, or even sheriffs or clerks of court" could not succeed. *Id.*

376 52 U.S.C. § 10301(b) (establishing that a violation occurs if "it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice"); *cf.* Johnson v. De Grandy, 512 U.S. 997, 1000 (1994) ("[N]o violation of § 2 can be found . . . where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective share in the voting-age population.").

377 *See supra* notes 284–86 and accompanying text.

378 *See supra* notes 279–81 and accompanying text.

2000, 2010, and 2020,[379] and is currently defending itself in a lawsuit over the malapportionment of these districts.[380]

Second, it is likely that racially discriminatory redistricting is still taking place. Though "things have changed dramatically" in the South in the half-century after the passage of the VRA,[381] Southern state legislatures continue to minimize opportunities for voters of color to elect candidates of their choice and to participate in the political process.[382] The states to which preclearance previously applied, and which still elect multimember state boards, have long histories of running afoul of the VRA.[383] And despite the lack of frequent VRA litigation over the districts used to elect state boards,[384] federal courts have found that these same states have continued to racially discriminate in the construction of congressional, state legislative, and local districts.[385]

Third, all too frequently, state boards have been left behind by the broader movement to end partisan gerrymandering. As previously mentioned, the creation of independent redistricting commissions has

---

379 *See supra* notes 282–83 and accompanying text.

380 Complaint for Declaratory Judgment & Injunctive Relief, White v. State Bd. of Election Comm'rs, No. 22cv62 (N.D. Miss. Apr. 25, 2022), 2022 WL 1214247.

381 Shelby County v. Holder, 570 U.S. 529, 547 (2013). *But see id.* at 590 (Ginsburg, J., dissenting) ("Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."); James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote:* Shelby County v. Holder, 8 HARV. L. & POL'Y REV. 39, 43–45 (2014); Richard L. Hasen, Shelby County *and the Illusion of Minimalism*, 22 WM. & MARY BILL OF RTS. J. 713, 726–38 (2014); Stephanopoulos, *supra* note 182, at 73–118 (considering possible responses by southern state legislatures to the Court's decision in *Shelby County*); *see also* Madera v. Detzner, 325 F. Supp. 3d 1269, 1281–82 (N.D. Fla. 2018) (observing that "[i]n 2013, African Americans were relieved to learn that 'things have changed' in the South in terms of voting rights," and collecting cases of subsequent vote discrimination).

382 *See, e.g.*, N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016) (noting that voting restrictions adopted by North Carolina "target African Americans with almost surgical precision"); Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 120–22 (2022); James A. Gardner, *Illiberalism and Authoritarianism in the American States*, 70 AM. U. L. REV. 829, 901–04 (2021); Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183, 219–20 (2020).

383 *E.g.*, DEBO P. ADEGBILE, RENEWTHEVRA.ORG, VOTING RIGHTS IN LOUISIANA 1982–2006, at 22–23 (2006), http://www.protectcivilrights.org/pdf/voting/LouisianaVRA.pdf [https://perma.cc/BQ9Q-DCMN].

384 *See supra* Section II.C.2.

385 *E.g.*, Singleton v. Merrill, 582 F. Supp. 3d 924, 971–74 (N.D. Ala. 2022) (detailing list of acts undertaken by the State of Alabama that discriminated against Black voters); *id.* at 1020–22 (identifying continued discrimination); Robinson v. Ardoin, 605 F. Supp. 3d 759, 846 (M.D. La. 2022) ("Nor did the Voting Rights Act foretell an era free from racially motivated voting discrimination in Louisiana. Instead, the Act's provision for supervision of state practices meant that Louisianans were more aware of attempts to disenfranchise Black voters."); *id.* at 848–51 ("The evidence of Louisiana's long and ongoing history of voting-related discrimination weighs heavily in favor of Plaintiffs.").

frequently ignored the existence of state elected boards. But these boards have also been neglected in state-level litigation that has challenged the constitutionality of partisan gerrymanders.

In the past decade, state courts—led by those in Florida, North Carolina, and Pennsylvania—have increasingly embraced claims that state constitutions contain protections against partisan gerrymandering that the Federal Constitution does not. Accordingly, across the country, state courts have been more willing to strike down congressional and state legislative districts for running afoul of these protections. Most of these developments have taken place in states without elected boards, but in the states with boards, few of these challenges have focused on board districts at all.

For example, congressional redistricting following the 2020 Census was extremely contentious in Kansas. Governor Laura Kelly, a Democrat, vetoed the map put forth by the Republican legislature, which scraped together enough votes to override her veto.[386] Thereafter, a group of voters challenged the legality of the map, arguing that the Kansas Constitution prohibits partisan gerrymandering—a claim that the Kansas Supreme Court rejected.[387] However, Kelly signed the maps creating state legislative and SBOE districts,[388] and in a proceeding before the state supreme court to determine the validity of the maps, the court declined to reach the issue of partisan gerrymandering in *that* context,[389] noting that the SBOE maps were "not at issue" anyway.[390]

Ongoing litigation in New Mexico over the constitutionality of the state's congressional districts similarly failed to include any claims about the Public Education Commission districts. Following the 2020 Census, the New Mexico legislature drew three districts that were designed to elect Democrats, forcing Republican Congresswoman Yvette Herrell into a district that President Biden had narrowly won. In the 2022 midterm elections, the plan worked when Herrell narrowly lost reelection to

386 Tim Carpenter, *Kansas House Completes Override of Gov. Kelly's Veto of Congressional Redistricting Map*, KAN. REFLECTOR (Feb. 9, 2022, 1:02 PM), https://kansasreflector.com/2022/02/09/kansas-house-completes-override-of-gov-kellys-veto-of-congressional-redistricting-map [https://perma.cc/MR4P-QNEN].

387 Rivera v. Schwab, 512 P.3d 168, 181–87 (Kan. 2022).

388 Andrew Bahl & Rafael Garcia, *Kansas Governor Signs New Legislative, Board of Education Maps, with Legal Challenge Possible*, TOPEKA CAP. J. (Apr. 16, 2022, 10:34 AM), https://www.cjonline.com/story/news/education/2022/04/15/kansas-governor-laura-kelly-signs-legislature-board-education-redistricting-maps/7338939001 [https://perma.cc/LF3R-QEE3].

389 *In re* Validity of Senate Bill 563, 512 P.3d 220, 225 (Kan. 2022).

390 *Id.* at 224.

Democrat Gabe Vasquez.[391] Prior to the election, Republicans challenged the constitutionality of the districts under the New Mexico Constitution but did not challenge the state legislative or Public Education Commission districts.[392]

One of the few challenges brought to a state board map on the basis that it was an impermissible partisan gerrymander under a state constitution—indeed, perhaps the *only* such challenge—occurred in New Hampshire. There, a group of voters challenged the State Senate and Executive Council districts under the state constitution's free-elections provision and the voters' rights to "equal protection, free speech, and free assembly."[393] The state trial court dismissed the claim as a nonjusticiable political question,[394] though the case has been appealed to the state supreme court.

B. *Contextualizing the Problem*

Suppose that, in the world of state board redistricting, malapportionment is a problem. Though most states regularly redistrict their state boards, some don't. Suppose further that racial gerrymandering is a problem, too. Though Southern states seemingly provide more proportionate and equitable representation for communities of color on state boards than they do in Congress and state legislatures, underrepresentation remains. And suppose finally that partisan gerrymandering is also a problem. Redistricting reforms have skipped over state boards, and litigants have been slow to pick up the slack.

These problems are ultimately rooted in inaction—sometimes, *literally* doing nothing—and routine noncompliance. It is difficult to assign any sort of clear motivation to this nonbehavior. Unlike with the construction of congressional and state legislative districts,[395] legislators

391 Dan Boyd, *Redrawn CD2 Riles Republicans After Defeat*, ALBUQUERQUE J. (Nov. 11, 2022), https://www.abqjournal.com/2549023/ex-rep-herrell-said-dems-engineered-her-ouster.html [https://perma.cc/CYF7-KPSW].

392 Complaint for Violation of N.M. Const. Article II, Section 18, Republican Party of N.M. v. Oliver, No. D-506-CV-2022-00041 (N.M. Dist. Ct. Jan. 21, 2022), https://www.democracydocket.com/wp-content/uploads/2022/01/2022-01-21-complaint.pdf [https://perma.cc/ES34-RC9P].

393 Brown v. Scanlan, No. 2022-CV-00181, slip op. at 6–8 (N.H. Super. Ct. Oct. 5, 2022), https://npr.brightspotcdn.com/7d/98/f7113818475aa07e9814c22d77e2/order.pdf [https://perma.cc/BRC2-K3AA].

394 *Id.* at 7–8.

395 *E.g.*, David Daley, *The Secret Files of the Master of Modern Republican Gerrymandering*, NEW YORKER (Sept. 6, 2019), https://www.newyorker.com/news/news-desk/the-secret-files-of-the-master-of-modern-republican-gerrymandering [https://perma.cc/2AEG-73YJ].

and party strategists don't *appear* to be furtively meeting behind closed doors to develop the most effective way to gerrymander the other party into obsolescence. And given the sympathy of both federal and state courts to least-change solutions in redistricting disputes,[396] there is a pretty thick thumb on the scale in favor of the status quo, whatever it may be.

One of the most nuanced explanations is that the one-person, one-vote principle is difficult to apply, there's no Supreme Court holding that it unequivocally applies in the context of the state boards at issue, and that the easiest course of action is to *not* make waves. Though most courts, at both the state and federal levels, have presumed some requirement of equal populations in constructing districts for elected state boards,[397] it is possible that they're overreading the Supreme Court's limited caselaw on this subject.

The dichotomy suggested by the Court's jurisprudence provides some (albeit limited) support for this skepticism. The Court's strictest invocation of the one-person, one-vote standard has been in the context of congressional districts, where states are mandated to "draw congressional districts with populations as close to perfect equality as possible."[398] Ideally, this means that districts should be drawn with zero deviation in population,[399] but some deviations can be acceptable if in support of state policy.[400] In the context of state and local districts, "jurisdictions are permitted to deviate somewhat from perfect population equality to accommodate traditional districting objectives," but ideally, "the maximum population deviation between the largest and smallest district [should be] less than 10%."[401]

Though the Court has not explicitly held that the one-person, one-vote principle does not apply in the context of judicial elections or districts, in 1973 it summarily affirmed the decision of a three-judge panel in *Wells v. Edwards* with a holding to this effect.[402] Though summary

396 Amariah Becker & Dara Gold, *The Gameability of Redistricting Criteria*, 5 J. COMPUTATIONAL SOC. SCI. 1735, 1736 (2022) ("District core preservation—or following *least-change* principles—is not often in redistricting guidelines or state constitutions. But it frequently appears in court decisions when a state has reached a redistricting impasse (for example, if the Governor vetoes the legislature's proposed plan).").

397 *See supra* Section II.C.

398 Evenwel v. Abbott, 578 U.S. 54, 59 (2016).

399 Kirkpatrick v. Preisler, 394 U.S. 526, 530–31 (1969).

400 *E.g.*, Johnson v. Wis. Elections Comm'n, 971 N.W.2d 402, 410–11 (Wis. 2022) (collecting cases), *rev'd on other grounds sub nom.* Wis. Legislature v. Wis. Elections Comm'n, 595 U.S. 398 (2022).

401 *Evenwel*, 578 U.S. at 59–60.

402 409 U.S. 1095, 1095 (1973) (mem.).

affirmances are binding precedent,[403] the Court has made clear that "'a summary affirmance is an affirmance of the judgment only,' and 'the rationale of the affirmance may not be gleaned solely from the opinion below.'"[404] The Court's affirmance in *Wells* has been taken by many lower courts as an endorsement of the three-judge panel's holding and rationale.[405] According to the panel in *Wells*, the Equal Protection Clause's preservation of "a truly representative form of government[] is simply not relevant to the makeup of the judiciary" because "[j]udges do not represent people, they serve people."[406] It drew a distinction, therefore, between elected bodies that "perform governmental functions"[407] and judicial bodies, which it felt were the "certain functionaries whose duties are so far removed from normal governmental activities" that the *Hadley* court had contemplated as outside the scope of the one-person, one-vote principle.[408]

Perhaps if we thoroughly examined the actual duties of the state boards, we might see them as quasi-*judicial* bodies—or, at least, analogous enough to judicial bodies—such that they are "removed from normal governmental activities."[409] Public service commissions, though occasionally described as the "fourth branch of government,"[410] may

403 Hicks v. Miranda, 422 U.S. 332, 343–46 (1975).

404 Comptroller of the Treasury v. Wynne, 575 U.S. 542, 559–60 (2015) (quoting Mandel v. Bradley, 432 U.S. 173, 176 (1977)); *see also* Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 713 n.55 (2018).

405 Rodriguez v. Bexar County, 385 F.3d 853, 859 n.3 (5th Cir. 2004) ("[T]he one-person, one-vote requirement of *Baker v. Carr* does not apply to judicial districts . . . ." (citation omitted) (citing 369 U.S. 186 (1962))); Bradley v. Work, 154 F.3d 704, 709 (7th Cir. 1998) ("[T]he one-person, one-vote principle does not apply to judicial elections . . . ."); Kirk v. Carpeneti, 623 F.3d 889, 897 (9th Cir. 2010) ("[T]he Equal Protection Clause does not require states to distribute judicial election districts according to population."); Nipper v. Smith, 39 F.3d 1494, 1510 n.33 (11th Cir. 1994) ("The Supreme Court has held . . . that one person, one vote requirements do not apply to judicial elections."); *see also* Andrew S. Marovitz, Note, *Casting a Meaningful Ballot: Applying One-Person, One-Vote to Judicial Elections Involving Racial Discrimination*, 98 YALE L.J. 1193, 1194–95 (1989). *But see* Baten v. McMaster, 967 F.3d 345, 363–64 (4th Cir. 2020) (Wynn, J., dissenting) (noting that the Fourth Circuit "concluded that *Wells* . . . did not control in a case involving a claim of vote dilution" (citing Republican Party of N.C. v. Martin, 980 F.2d 943, 954 (4th Cir. 1992))).

406 Wells v. Edwards, 347 F. Supp. 453, 455 (M.D. La. 1972) (quoting Buchanan v. Rhodes, 249 F. Supp. 860, 865 (N.D. Ohio 1966)).

407 *Id.* (emphasis omitted) (quoting Hadley v. Junior Coll. Dist. Metro. Kan. City, 397 U.S. 50, 56 (1970)).

408 *Id.* at 454–55 (quoting *Hadley*, 397 U.S. at 56).

409 *See Hadley*, 397 U.S. at 56.

410 *See, e.g.*, Polaris Int'l Metals Corp. v. Ariz. Corp. Comm'n, 652 P.2d 1023, 1029 (Ariz. 1982) ("The Corporation Commission has been treated as a fourth branch of government in Arizona." (first citing Ariz. Corp. Comm'n v. Super. Ct., 459 P.2d 489 (Ariz. 1969) (in banc); and then citing Selective Life Ins. Co. v. Equitable Life Assurance Soc'y of the U.S., 422 P.2d 710 (Ariz. 1967) (in banc))). *But see* Sun City Home Owners Ass'n v. Ariz. Corp. Comm'n, 496 P.3d 421, 425 (Ariz.

present the paradigmatic case of this kind of quasi-judicial body. They operate like courts in that they have original jurisdiction over certain disputes and adjudicate rights, and the judiciary has appellate jurisdiction over their final determinations.

This concern appears to be most pronounced in *Rose v. Raffensperger*, a case recently decided by the Eleventh Circuit. The issue in *Rose* was not about the constitutionality or legality of board districts, but instead whether, under the VRA, the use of statewide elections to compose a multimember elected state board qualifies as vote dilution.[411] Though the district court had ordered the use of districts to elect members of the Georgia Public Service Commission, the Eleventh Circuit panel reversed—concluding that the PSC's status as a "'quasi-judicial' administrative body" meant that the court was obligated to "respect . . . a state's decision on matters involving its governmental structure," like it would a decision to elect judges in a particular way.[412]

Pulling this thread yields too much yarn. Almost every elected official or body in state government might be plausibly described as "quasi-judicial."[413] State executive agencies—under the oversight of the governor, an elected regulator, or an independent constitutional officer[414]—that make determinations through the use of administrative law judges might be described as exercising "judicial" power.[415] Legislatures, too, are frequently described as "courts" when conducting impeachment trials[416] and have the power to "judge" the elections of their own members and to hear election contests, powers that are treated as

2021) (noting that the "expansive view of the [Corporation] Commission's power has led some to erroneously characterize it as a fourth branch of government" (citing *Ariz. Corp. Comm'n*, 459 P.2d at 493)).

411 Rose v. Raffensperger, 619 F. Supp. 3d 1241, 1248 (N.D. Ga. 2022).

412 Rose v. Sec'y, State of Ga., 2023 WL 8166878, at *8–11 (11th Cir. Nov. 24, 2023).

413 Oral Argument at 21:33–:41, Rose v. Ga. Sec'y of State, No. 22-12593 (11th Cir. Dec. 15, 2022), https://www.ca11.uscourts.gov/system/files_force/oral_argument_recordings/22-12593.mp3?download=1 [https://web.archive.org/web/20230816195254/https://www.ca11.uscourts.gov/system/files_force/oral_argument_recordings/22-12593.mp3?download=1] [hereinafter Rose v. Raffensperger Oral Argument Recording].

414 Seifter, *supra* note 121, at 1551–59 (describing distribution of agencies and departments under governors, constitutional officers, and elected officials); *see also* Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1397–1401 (2008) (describing elected official power over agencies and departments); Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 499–515 (2017) (describing gubernatorial power over executive branches).

415 *E.g.*, Christopher J. Walker, *Constitutional Tensions in Agency Adjudication*, 104 IOWA L. REV. 2679, 2685 (2019).

416 *E.g.*, ALA. CONST. of 1901, art. VI, § 139; CAL. CONST. art. VI, § 1 (1879); KY. CONST. § 42; N.M. CONST. art. VI, § 1; OKLA. CONST. art. VII, § 1; TEX. CONST. art. XV, § 3; WIS. CONST. art. VII, § 1; WYO. CONST. art. V, § 1.

quasi-judicial by courts.[417] Other state boards operate similarly. Some state boards of education, for example, serve as tribunals for appeals of decisions made by the state superintendent of education and local school boards.[418] And though presented in a materially different context, a three-judge panel in *Brown v. Jacobsen* took a broad view of the Supreme Court's reference to "units of local government [exercising] general governmental powers"[419] and determined that the Montana Public Service Commission was a "legislative body" (and not an "executive" body) for purposes of convening the panel.[420]

Regardless of how we would answer the question of the one-person, one-vote principle's application to elected state boards, there is at least a plausible argument that it does not apply. In that light, the reticence by plaintiffs to litigate such a knotty question, and the reluctance of courts to attempt to answer it, perhaps makes a bit more sense.

The legal uncertainty feeds logically into a more obvious explanation for this inertia—namely, that it is born out of apathy or disinterest. When considering the apparent unwillingness of plaintiffs to litigate potential claims involving state boards, we might improve upon this rather pedestrian label and instead describe it as *strategic inaction*.

Election reformers and frequent litigants like the League of Women Voters, LULAC, and the NAACP have limited resources. In pushing for the creation of more minority-opportunity districts—especially in states under the jurisdiction of the Fifth Circuit—they are *already* facing a Sisyphean task. Not only that, but they may also view any lawsuit they file as giving a skeptical court the chance to unravel the progress that's already been made.[421] Doing so over districts used to elect a SBOE or public service commission—which, regardless of their objective power, have a single-subject portfolio—may well be unwise. Not to mention that opening a new front in the redistricting wars, while already battling over

---

417 *E.g.*, Ferguson v. Maddox, 263 S.W. 888, 890–91 (Tex. 1924) ("These powers are essentially judicial in their nature."); *In re* Exec. Commc'n Filed the 17th Day of Apr., A.D. 1872, 14 Fla. 289, 295 (1872) ("The Senate, when thus organized, is unquestionably a court—because it is a body invested with judicial functions . . . ."). *But see* Mecham v. Gordon, 751 P.2d 957, 961–62 (Ariz. 1988) ("Removals from office are not acts within the judicial power. . . . Trial in the Senate is a uniquely legislative *and* political function. It is not judicial." (citing Ahearn v. Bailey, 451 P.2d 30, 33 (Ariz. 1969) (in banc))).

418 *E.g.*, KAN. STAT. ANN. §§ 72-262 to -263 (2023); NEB. REV. STAT. § 79-318(11) (2023); *see also* UTAH CODE ANN. § 53E-3-401(8) (West 2023) (empowering SBOE to adjudicate violations of the public education code by education entities).

419 Avery v. Midland County, 390 U.S. 474, 485 (1968).

420 Brown v. Jacobsen, 590 F. Supp. 3d 1273, 1283 (D. Mont. 2022).

421 *See, e.g.*, Rick Hasen, *Oral Argument Analysis of* Merrill v. Milligan*: Alabama Won't Get All It Wants in Voting Rights Redistricting Case, but It May Well Get Enough*, ELECTION L. BLOG (Oct. 4, 2022, 9:12 AM), https://electionlawblog.org/?p=132252 [https://perma.cc/V2Q3-EEZG] (describing *Allen v. Milligan*, 599 U.S. 1 (2023)).

congressional and state legislative districts, may be spreading too thinly their limited resources and capital.

But there is a price to pay for this inaction: hostile legislatures might see it as an opportunity to entrench their side's power. Even where there is merit to creating a new minority-opportunity district,[422] when the minority party concedes that it is disinterested in waging a war to create one, it cannot be surprising when such a district is not created. For example, though Louisiana Governor John Bel Edwards indicated his support for creating a third Black-opportunity district on the State Board of Elementary and Secondary Education, he undermined his position rather fatally by saying that he "would not lose any sleep" if such a district was not created.[423]

Legislative apathy can't be discounted, either. In several of the states where congressional and legislative redistricting has been passed off to a commission, drawing the boundaries for an elected state board remains with the legislature. It seems possible that the creation of alternative redistricting structures *without* authority to redistrict state boards doesn't just exclude boards from that process, but actually encourages legislatures to ignore their extant redistricting responsibilities. When the responsibility for drawing congressional and state legislative districts is taken from legislatures and given to an independent commission, it may be that redistricting is no longer on the legislature's radar. As such, it may be less inclined to draw (compliant) districts for state elected boards.

C. *Solving the Problem*

To sum up, the districts used to elect state boards are either undesirable or outright illegal. Neither legislatures nor litigants seem terribly concerned about these realities. What is the solution? Saying that both parties should simply *care* more is, perhaps, true, but ultimately unhelpful—there are plenty of issues and problems that could be improved with greater attention.

Let's instead start with institutional and structural modifications. As has been repeated *ad nauseam*, in many states, legislators and voters have

---

422 *E.g.*, Will Sentell, *Bid to Add New Minority Seat to BESE Could Spark Controversy During Redistricting Session*, THE ADVOCATE (Jan. 16, 2022), https://www.theadvocate.com/baton_rouge/news/education/bid-to-add-new-minority-seat-to-bese-could-spark-controversy-during-redistricting-session/article_5119f9e2-7492-11ec-8c64-9fdbbcb09a38.html [https://perma.cc/C4BM-GNXL].

423 Greg Larose, *Gov. John Bel Edwards: Redistricting Bills Without New Minority Districts 'Very Problematic,'* LA. ILLUMINATOR (Feb. 14, 2022, 5:22 PM), https://lailluminator.com/2022/02/14/gov-john-bel-edwards-redistricting-bills-without-new-minority-districts-very-problematic [https://perma.cc/UD4V-B3LD].

created redistricting commissions that are (at least in theory) removed from the political process. Responsibility for drawing new board districts should be handed over to such a commission with a requirement that it undertake redistricting after every federal census.

And regardless of whether redistricting is handed off to a commission or stays with the state legislature, clear and equitable standards should govern the redistricting process. State constitutions and statutes set manifold requirements for congressional, legislative, and local redistricting.[424] These requirements set clear guidelines for redistricting authorities to follow, and frequently grant state supreme courts original jurisdiction to review compliance with these requirements.[425]

State-level actions to ban racial (and partisan) discrimination in redistricting provide a good example of how these requirements can be structured. In light of the failure by Congress to pass an updated version of the VRA—for example, the John Lewis Voting Rights Act[426]—several states have adopted their own VRA analogues. These analogues frequently mirror the language of the original VRA, but are frequently more explicit in delineating when a violation occurs[427] and sometimes more explicit about what remedies a court can order.[428] For example, though the federal VRA does not permit a court to order a change to the size of an elected body under the U.S. Supreme Court's caselaw,[429] the John R. Lewis Voting Rights Act of New York allows a court to "reasonably increas[e] the size of the governing body" upon finding a violation.[430] Tools like these, if adopted in recalcitrant states with respect

---

424 *See, e.g.*, David Schultz, *Redistricting and the New Judicial Federalism: Reapportionment Litigation Under State Constitutions*, 37 RUTGERS L.J. 1087, 1112–29 (2006); *see also* Justin Levitt & Michael P. McDonald, *Taking the "Re" Out of Redistricting State Constitutional Provisions on Redistricting Timing*, 95 GEO. L.J. 1247, 1254–1266 (2007).

425 *E.g.*, COLO. CONST. art. V, § 44.5(1)–(2) (providing that the Colorado Supreme Court "shall review the submitted [redistricting] plan and determine whether the plan complies with the criteria listed in section 44.3," and limiting the Court's power to set aside the plan unless the Commission "abused its discretion in applying or failing to apply the criteria"); IDAHO CONST. art. III, § 2(5) (granting the Idaho Supreme Court "original jurisdiction over actions involving challenges to legislative apportionment").

426 *See* Carl Hulse, *After a Day of Debate, the Voting Rights Bill Is Blocked in the Senate.*, N.Y. TIMES (Jan. 27, 2022), https://www.nytimes.com/2022/01/19/us/politics/senate-voting-rights-filibuster.html [https://perma.cc/MSM3-T9TL].

427 CAL. ELEC. CODE §§ 14026–14028 (West 2023); N.Y. ELEC. LAW §§ 17-204, -206 (McKinney 2023); OR. REV. STAT. § 255.411 (2023); VA. CODE ANN. §§ 24.2-126, -129 to -130 (2023); WASH. REV. CODE § 29A.92.030 (2023).

428 N.Y. ELEC. LAW § 17-206(5) (McKinney 2023); WASH. REV. CODE § 29A.92.110 (2023). *But see* CAL. ELEC. CODE § 14029 (West 2023); OR. REV. STAT. § 255.411(8)(a) (2023); VA. CODE ANN. § 24.2-130(D) (2023).

429 Holder v. Hall, 512 U.S. 874, 881–85 (1994).

430 N.Y. ELEC. LAW § 17-206(5)(v) (McKinney 2023).

to the districts used to elect state boards,[431] could lower the hurdles for litigants to allege that board districts are out of compliance.

Are these efforts worth it for boards with such narrow portfolios? If we still agree with the idea that these boards *should* be elected, and that democratic input adds value into the process by which these boards make and enforce policies, then yes, these efforts surely must be worth it. The contemporaneous arguments made in support of electing boards by district—and scrapping, for example, a statewide election for superintendent of public instruction in favor of district-level elections for a SBOE—emphasized the value of representation in all areas of policymaking. Ensuring diversity of thought and geography in a board that sets education policy or that regulates common carriers and public goods makes sense. After all, voters across the country have *repeatedly* rejected efforts to abolish elected boards, so perfecting the process by which these boards are elected may be the best way to effectuate the electorate's support for these boards.

On the other hand, maybe this rationale just doesn't cut it anymore. Perhaps we should eliminate elections for boards of education, public utility commissions, university regents, and even the California Board of Equalization. Though voters undoubtedly have strong feelings about education and energy policy, these boards may have too small a niche of responsibilities to inspire genuine passion in the electorate. In that case, perhaps the fact that voters don't appear to *actually* care about these elections should take precedence over the fact that they *say* they care. The disappearance of elected offices from public view by virtue of low-salience elections is not a good thing for accountability. Accordingly, our response to the repeated failures to redistrict elected state boards lawfully, regularly, and equitably could be to abolish these boards altogether—and put greater stock in gubernatorial appointment and state senate confirmation producing more representative boards.

---

431 Most of the state-level voting rights acts' provisions relating to at-large or district-based elections apply to counties and municipalities, not to the state itself—such that state legislative districts seemingly cannot run afoul of them. CAL. ELEC. CODE § 14026(c) (West 2023); N.Y. ELEC. LAW § 17-204(4) (McKinney 2023); OR. REV. STAT. § 255.411(1)(a) (2023); VA. CODE ANN. § 24.2-129 (2023); WASH. REV. CODE § 29A.92.030(1) (2023). In California, for example, when constructing State Board of Equalization districts, the Citizens Redistricting Commission did not explicitly set out to comply with the state voting rights act, instead explaining that it "balanc[ed] . . . multiple requirements and interests, including . . . county, city, neighborhood, and community of interest boundaries. In particular, because the main mission of the BOE focuses on county tax assessment, the Commission attempted to keep counties whole in these districts." 2020 CAL. CITIZENS REDISTRICTING COMM'N, REPORT ON FINAL MAPS 51 (2021), https://wedrawthelines.ca.gov/wp-content/uploads/sites/64/2023/01/Final-Maps-Report-with-Appendices-12.26.21-230-PM-1.pdf [https://perma.cc/99UG-55SG].

CONCLUSION

States have long been described—perhaps *ad nauseum*—as "laboratories of democracy," drawing from Justice Louis Brandeis's description of states' unique ability within the U.S. federal system to try different approaches to organization and policymaking.[432] The creation of statewide bodies that are elected by district represents such an approach. Rather than concentrating policymaking authority in a single state official elected by a majority of voters, these boards horizontally distribute the power, providing an opportunity for different regions of the state, political minorities, and communities of interest to elect their own representatives to the board. But at the same time, these boards are not a newfangled idea or quixotic experiment. Some of these boards have longer histories than elected governors or bicameral legislatures and have wielded considerable power.

In this Article, I explore the failure to consistently and adequately redistrict state boards throughout most of American history—even after the adoption of the one-person, one-vote standard. I argue that state legislators, redistricting reformers, and litigants have largely not engaged with the redistricting process for these boards. State legislators have been slow to redraw the districts used for state boards and reluctant to do so in a manner that respects racial and political diversity. These legislative failures are compounded by the apparent unwillingness of litigants to challenge the lawfulness of the districts.

The result, I conclude, is that we are left with powerful boards with little claim to democratic legitimacy. State boards of education, public utility commissions, and executive councils play a vital role in adjudicating many of today's controversial political issues—but their election from malapportioned and gerrymandered districts undermines their representative role.

This is not just a political failure that produces bad policy outcomes. It's also unconstitutional under the Fourteenth Amendment, illegal under the federal VRA, and perhaps even prohibited by state constitutional protections The call to action, therefore, is not just to legislators—but also to private litigants and courts. These failures can be remedied with the right reform efforts. State-level reformers can include state boards in their redistricting reform efforts, litigants can pursue VRA and partisan gerrymandering challenges to the districts, and state legislators can take their redistricting responsibilities more seriously.

This Article grounds these reform efforts. It provides a comprehensive legal history of these boards and their redistricting over

---

432 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

time, and it meticulously analyzes the noncompliance with constitutional and legal redistricting standards over the last half-century. My hope is that the attention I have drawn to this issue through this Article, as well as the compilation of redistricting information included in the Appendix, spurs conversations about reform. Because while the *existence* of these boards is no untested experiment, having them teeter along, with unrepresentative districts that appear to have been apathetically drawn, is surely an accident of democracy's laboratory.

APPENDIX

State	Board	Established	Abolished	District Source	Redistricted
Alabama	Board of Education	1868[433]	1876[434]	Congressional districts[1]	n/a
		1969[435]		Separate districts[3]	1985,[436] 1993,[437] 1996,[438] 2001,[439] 2011,[440] 2021[441]
Arkansas	Board of Education	1931[442]	1937[443]	Congressional districts[1]	n/a
California	Board of Equalization	1879[444]		Congressional districts[445] (1881–1925);	1923,[446] 1971,[447] 1983,[448]

433 ALA. CONST. of 1868, art. XI, § 1.

434 *See generally* ALA. CONST. of 1876.

435 Act of May 1, 1969, No. 2, 1969 Ala. Laws 16.

436 Following the failure to draw new districts after the 1970 and 1980 censuses, the Middle District of Alabama ordered the adoption of new districts in 1985. Watkins v. Ala. State Bd. of Educ., No. 84-H-746-N (M.D. Ala. Dec. 20, 1985).

437 Following the failure to draw new districts after the 1990 census, the Fifteenth Circuit Court of Alabama ordered the adoption of new districts in 1993. Orndorff, *supra* note 268, at 3B.

438 Following several U.S. Supreme Court rulings in the 1990s that reinterpreted the Voting Rights Act of 1965 and its amendments, the Northern District of Alabama ordered the adoption of new districts in 1996. Poovey, *supra* note 270, at 3B.

439 Act of Feb. 7, 2002, No. 73, 2002 Ala. Laws 175.

440 Act of June 15, 2011, No. 677, 2011 Ala. Laws 1822.

441 S.B. 2, 2021 Leg., 2d Spec. Sess. (Ala. 2021), https://arc-sos.state.al.us/ucp/L0773910.AI1.pdf [perma.cc/M2W9-ZZAP].

442 Act of Mar. 25, 1931, No. 169, 1931 Ark. Acts 476.

443 Act of Mar. 12, 1937, No. 244, 1937 Ark. Acts 875.

444 CAL. CONST. art. XIII, § 9 (1879).

445 The 1879 Constitution set the congressional districts, as they existed at the time, as the default districts for the Board of Equalization, but gave the legislature the power to "redistrict the State into four districts" for the Board. *Id.*

446 Act of May 18, 1923, ch. 175, 1923 Cal. Stat. 418.

447 Act of Dec. 17, 1971, ch. 1796, 1971 Cal. Stat. 3871.

448 Act of Jan. 2, 1983, ch. 6, 1983 Cal. Stat. 5556.

				separate districts (1925–present)	1991,[449] 2001,[450] 2011,[451] 2021[452]
California	Railroad Commission	1879[453]	1915[454]	Separate districts[455]	n/a
Colorado	Board of Education	1973[456]		Combination of statewide election and congressional districts[457]	1964,[458] 1972,[459] 1982,[460] 1992,[461] 2002,[462] 2012,[463] 2021[464]

449 Following the failure of the Governor and the legislature to agree on a set of districts, the California Supreme Court adopted districts in 1992. Wilson v. Eu, 823 P.2d 545 (Cal. 1992).

450 Act of Sept. 6, 2001, ch. 349, § 2, 2001 Cal. Stat. 3110, 3403–33.

451 CAL. CITIZENS REDISTRICTING COMM'N, FINAL REPORT ON 2011 REDISTRICTING 51–52 (Aug. 15, 2011), https://wedrawthelines.ca.gov/wp-content/uploads/sites/64/2011/08/crc_20110815_2final_report.pdf [https://perma.cc/6BPP-QVQR].

452 2020 CAL. CITIZENS REDISTRICTING COMM'N, *supra* note 431.

453 CAL. CONST. art. XII, § 22 (1879).

454 Act of June 2, 1913, ch. 96, 1913 Cal. Stat. 1744.

455 CAL. CONST. art. XII, § 23 (1879) (creating districts "[u]ntil the Legislature shall district the State").

456 Act of Mar. 16, 1973, ch. 376, 1973 Colo. Sess. Laws 1323.

457 *Id.*

458 Act of Apr. 30, 1964, ch. 1, 1964 Colo. Sess. Laws 2d Extraordinary Sess. 11.

459 Act of May 12, 1972, ch. 40, 1972 Colo. Sess. Laws 184.

460 Following the failure of the Governor and the legislature to agree on a set of districts, the District of Colorado adopted districts in 1982. Carstens v. Lamm, 543 F. Supp. 68 (D. Colo. 1982).

461 Act of Mar. 24, 1992, ch. 113, 1992 Colo. Sess. Laws 593.

462 Following the failure of the Governor and the legislature to agree on a set of districts, the Colorado Supreme Court adopted districts in 2002. Beauprez v. Avalos, 42 P.3d 642 (Colo. 2002) (en banc).

463 Following the failure of the Governor and the legislature to agree on a set of districts, the Colorado Supreme Court adopted districts in 2012. Hall v. Moreno, 2012 CO 14, 270 P.3d 961 (en banc).

464 *Final Approved Congressional Plan*, COLO. IND. REDISTRICTING COMM'NS, https://redistricting.colorado.gov/content/congressional-final-approved (last visited Nov. 28, 2023).

Colorado	University Regents	1973[465]		Combination of statewide election and congressional districts[466]	1982,[467] 1992,[468] 2002[469]
Hawai'i	Board of Education	1966[470]	2011[471]	Separate districts[472]	1974,[473] 1978[474], 1979,[475] 1984[476], 1992,[477] 2002[478]
Illinois	Board of Equalization	1869[479]	1919[480]	State Senate districts (1869–73);[481] congressional districts (1873–1919)[482]	1882,[483] 1893[484]

465 Act of Mar. 16, 1973, ch. 376, 1973 Colo. Sess. Laws 1323.

466 *Id.*

467 *See supra* note 460.

468 Act of Mar. 24, 1992, ch. 113, 1992 Colo. Sess. Laws 593.

469 *See supra* note 462.

470 HAW. CONST. art. IX, § 2 (1964).

471 HAW. CONST. art. X, § 2; *see* H.B. No. 2376, 2010 Haw. Sess. Laws 722.

472 Act of May 17, 1966, No. 50, 1966 Haw. Sess. Laws 129.

473 Following the failure to draw new districts after the 1970 Census, the District of Hawai'i reduced the size of the Board of Education from eleven to nine members and created nine new districts. Watanabe, *supra* note 273, at A-1.

474 HAW. CONST. art. X, § 2 (1978). The 1978 amendment to the Hawai'i Constitution created two districts and a varying number of members who would be elected from each district, one of whom was required to live in each "departmental school board district." *Id.*

475 Act of May 26, 1979, No. 125, 1979 Haw. Sess. Laws 287.

476 *Proclamation*, HONOLULU STAR-BULL., July 14, 1984, at B4.

477 *Proclamation*, HAW. TRIB.-HERALD, June 15, 1992, at 6.

478 *Proclamation*, HAW. TRIB.-HERALD, June 30, 2002, at 30.

479 Act of Mar. 8, 1867, 1867 Ill. Laws 105.

480 Act of June 19, 1919, 1919 Ill. Laws 718.

481 Act of Mar. 8, 1867, 1867 Ill. Laws 105.

482 Act of Apr. 3, 1872, 1871 Ill. Laws 380.

483 Act of Apr. 29, 1882, 1882 Ill. Laws 5. The Board districts were tied to congressional districts and, as such, the creation of a new congressional district in 1882 also affected the Board's districts.

484 Act of June 9, 1893, 1893 Ill. Laws 3. The Board districts were tied to congressional districts and, as such, the creation of a new congressional district in 1893 also affected the Board's districts.

Iowa	Board of Education	1858[485]	1864[486]	Judicial districts[487]	n/a
Iowa	Board of Education	1955[488]	1973[489]	Congressional districts[490]	n/a
Kansas	Board of Education	1969[491]		Separate districts combined from Senate districts[492]	1973,[493] 1980,[494] 1992,[495] 2002,[496] 2012,[497] 2022[498]
Kansas	Board of Railroad Assessors	1872[499]	1874[500]	Judicial districts[501]	n/a
Kentucky	Railroad Commission	1895[502]	2000[503]	Separate districts[504]	1932[505]

485 IOWA CONST. art. IX, pt. 1, § 1 (1857).

486 Act of Mar. 19, 1864, ch. 52, 1864 Iowa Acts 53. The Constitution allowed the legislature to abolish the Board of Education after 1863. IOWA CONST. art. IX, pt. 1, § 15 (1857).

487 IOWA CONST. art. IX, pt. 1, § 1 (1857).

488 Act of Apr. 22, 1953, ch. 114, 1953 Iowa Acts 194.

489 Act of July 10, 1967, ch. 244, 1967 Iowa Acts 482.

490 Act of Apr. 22, 1953, ch. 114, 1953 Iowa Acts 194.

491 KAN. CONST. art. VI, § 2.

492 Act of Mar. 14, 1968, ch. 246, 1968 Kan. Sess. Laws 517.

493 Act of Mar. 30, 1973, ch. 160, 1973 Kan. Sess. Laws 578.

494 Act of Mar. 26, 1980, ch. 111, 1980 Kan. Sess. Laws 504.

495 Act of May 11, 1992, ch. 238, 1992 Kan. Sess. Laws 1206.

496 Act of Apr. 23, 2002, ch. 87, 2002 Kan. Sess. Laws 367.

497 Following the failure of the Governor and the legislature to agree on a set of districts, the District of Kansas adopted districts in 2012. Essex v. Kobach, 874 F. Supp. 2d 1069, 1257–62 (D. Kan. 2012).

498 Act of Apr. 15, 2022, ch. 64, 2022 Kan. Sess. Laws 526.

499 Act of Mar. 2, 1871, ch. 150, 1871 Kan. Sess. Laws 329.

500 Act of Mar. 4, 1876, ch. 34, 1876 Kan. Sess. Laws 53.

501 Act of Mar. 2, 1871, ch. 150, 1871 Kan. Sess. Laws 329.

502 KY. CONST. § 209 (1891).

503 S.B. 70, ch. 399, 2000 Ky. Acts 1232 (repealing KY. CONST. § 209 and amending *id.* §§ 201, 218).

504 The 1891 Constitution initially provided that the Railroad Commission would be elected from "each Superior Court District" until the General Assembly created separate districts, KY. CONST. § 209 (1891), but the General Assembly did so in 1893, Act of Apr. 5, 1893, ch. 171, 1891–1892 Ky. Acts 612, 715.

505 Act of 1932, ch. 144, 1932 Ky. Acts 674.

Kentucky	Board of Equalization	1885[506]	1888[507]	Congressional districts[508]	n/a
Louisiana	Public Service Commission [509]	1898[510]		Separate districts[511]	1972,[512] 1975,[513] 1981,[514] 1992,[515] 2001,[516] 2011,[517] 2022[518]
Louisiana	Board of Elementary and Secondary Education[519]	1923[520]		Congressional districts (1922–93),[521] Public Service Commission	1969,[524] 1972,[525] 1982,[526]

506 Act of May 10, 1884, ch. 1336, [1883] 1 Ky. Acts 151.

507 Act of May 4, 1888, ch. 1562, [1887] 1 Ky. Acts 209.

508 Act of May 10, 1884, ch. 1336, [1883] 1 Ky. Acts 151.

509 When it was first created, it was titled the Railroad, Express, Telephone, Telegraph, Steamboat and other Water Craft, and Sleeping Car Commission, and known colloquially as the Railroad Commission. LA. CONST. of 1898, art. 283. The 1921 Constitution changed its name to the Public Service Commission. LA. CONST. of 1921, art. VI, § 8.

510 LA. CONST. of 1898, art. 283.

511 *Id.*

512 Act of May 16, 1972, No. 14, 1972 La. Acts 106.

513 Act of June 13, 1975, No. 4, 1975 La. Acts 46.

514 Act of Nov. 19, 1981, No. 19, 1981 La. Acts 2145.

515 Act of May 22, 1992, No. 23, 1992 La. Acts 319.

516 Act of Oct. 16, 2001, No. 2, 2001 La. Acts 3579.

517 Act of Apr. 14, 2011, No. 23, 2011 La. Acts 2289.

518 Act No. 2, 2022 Leg., 1st Extraordinary Sess. (La. 2022).

519 When it was first created, it was known as the Board of Education. The 1974 Constitution changed its name to the Board of Elementary and Secondary Education. LA. CONST. art. VIII, § 3(B).

520 LA. CONST. of 1921, art. XII, § 4.

521 The Board was elected from the "present Congressional districts" in 1921, *id.*, and the districts did not change until the 1970 election, which followed a 1968 constitutional amendment that tied the SBOE districts to the current congressional districts, *id.* art. XII, § 4 (1968). The 1974 Constitution modified this requirement by simply providing that the members of the reorganized BESE be elected from "eight . . . single-member districts which shall be determined . . . by law." LA. CONST. art. VIII, § 3(B). The legislature then tied the BESE districts to congressional districts. Act of July 16, 1975, No. 274, 1975 La. Acts 596.

524 Act of June 17, 1969, No. 29, 1969 La. Acts 116.

525 Act of June 1, 1972, No. 3, 1972 La. Acts 11.

526 Act of Nov. 19, 1981, No. 20, 1982 La. Acts 2147 (congressional districts).

				districts (1946–75),[522] separate districts (1993–present)[523]	1992,[527] 2001,[528] 2011,[529] 2022[530]
Louisiana	Board of Equalization	1907[531]	1916[532]	Congressional districts[533]	1912[534]
Louisiana	Board of Governors of the State Bar	1937[535]	1940[536]	Congressional districts[537]	n/a
Louisiana	Public Works Commission	1860[538]	1861[539]	Separate districts[540]	n/a

522 A 1946 constitutional amendment modified the composition of the Board of Education, providing for eleven elected members—eight of which would be elected from the 1921-era congressional districts, and three of which would be elected from the then-existing Public Service Commission districts. LA. CONST. of 1921, art. XII, § 4 (1946); Act of July 19, 1946, No. 307, 1946 La. Acts 996.

523 The Board of Elementary and Secondary Education had eight elected members, which aligned with the eight congressional districts that existed following the 1970 and 1980 censuses. However, the 1990 Census caused Louisiana to lose a congressional district, which prompted the legislature to draw separate districts.

527 Following the 1990 Census, the legislature created eight BESE districts, Act of July 17, 1991, No. 651, 1991 La. Laws 2062, but the U.S. Department of Justice denied preclearance, Letter from John R. Dunne, to Angie Rogers LaPlace, *supra* note 314. Accordingly, the legislature redrew the districts in 1992, Act of May 13, 1992, No. 6, 1992 La. Acts 8, and the DOJ granted preclearance.

528 Act of Oct. 16, 2001, No. 4, 2001 La. Acts 3594.

529 Act of May 31, 2011, No. 2, 2011 La. Acts 2.

530 Act No. 3, 2022 Leg., 1st Extraordinary Sess. (La. 2022).

531 Act of July 11, 1906, No. 182, 1906 La. Acts 331.

532 Act of July 5, 1916, No. 140, 1916 La. Acts 330.

533 Act of July 11, 1906, No. 182, 1906 La. Acts 331.

534 The Board districts were tied to congressional districts and, as such, the creation of a new congressional district in 1912 also affected the Board's districts. Act of July 11, 1912, No. 160, 1912 La. Acts 294.

535 Act of Nov. 21, 1934, No. 10, 1934 La. Acts 2d Extraordinary Sess.70.

536 Act of July 9, 1940, No. 54, 1940 La. Acts 364.

537 Act of Nov. 21, 1934, No. 10, 1934 La. Acts 2d Extraordinary Sess.70.

538 Act of Mar. 17, 1859, No. 279, 1859 La. Acts 229.

539 Act of Mar. 4, 1861, No. 71, 1861 La. Acts 2d Sess. 52.

540 Act of Mar. 17, 1859, No. 279, 1859 La. Acts 229.

Mass.	Governor's Council	1855[541]		Separate districts combined from Senate districts[542]	1856,[543] 1857,[544] 1866,[545] 1876,[546] 1886,[547] 1896,[548] 1906,[549] 1916,[550] 1926,[551] 1939,[552] 1948,[553] 1960,[554] 1970,[555] 1973,[556] 1977,[557] 1987,[558] 1993,[559] 1994,[560] 2001,[561]

541 MASS. CONST. amend. art. XVI (1855).
542 *Id.*
543 Act of June 6, 1856, ch. 307, 1856 Mass. Acts 243.
544 Act of July 30, 1857, ch. 310, 1857 Mass. Acts 780.
545 Act of May 9, 1866, ch. 221, 1866 Mass. Acts 221.
546 Act of Apr. 28, 1876, ch. 222, 1876 Mass. Acts 218.
547 Act of June 30, 1886, ch. 348, 1886 Mass. Acts 348.
548 Act of June 5, 1896, ch. 509, 1896 Mass. Acts 505.
549 Act of June 18, 1906, ch. 497, 1906 Mass. Acts 668.
550 Act of May 26, 1916, ch. 270, 1916 Mass. Acts 275.
551 Act of May 19, 1926, ch. 373, 1926 Mass. Acts 433.
552 Act of Aug. 12, 1939, ch. 507, 1939 Mass. Acts 753.
553 Act of Apr. 22, 1948, ch. 250, 1948 Mass. Acts 230.
554 Act of May 27, 1960, ch. 432, 1960 Mass. Acts 324.
555 Act of June 30, 1970, ch. 498, 1970 Mass. Acts 368.
556 Act of Aug. 21, 1973, ch. 663, 1973 Mass. Acts 661.
557 Act of May 13, 1977, ch. 180, 1977 Mass. Acts 133
558 Act of July 23, 1987, ch. 305, 1987 Mass. Acts 642.
559 Act of Nov. 22, 1993, ch. 274, 1993 Mass. Acts 1149.
560 Act of Apr. 14, 1994, ch. 12, 1994 Mass. Acts 17.
561 Act of Nov. 8, 2001, ch. 126, 2001 Mass. Acts 314.

					2011,[562] 2021[563]
Maryland	Public Works Commission	1852[564]	1864[565]	Separate districts[566]	n/a
Michigan	University Board of Regents	1851[567]	1864[568]	Judicial Districts[569]	n/a
Mississippi	Public Service Commission	1940[570]		Supreme Court districts[571]	1987[572]
Mississippi	Transportation Commission[573]	1921[574]		Congressional districts (1921–33),[575] Supreme Court districts (1933–present)[576]	1987[577]

562 Act of Nov. 3, 2011, ch. 152, 2011 Mass. Acts 641.

563 Act of Nov. 22, 2021, ch. 92, 2021 Mass. Acts 787.

564 MD. CONST. of 1851, art. VII, § 2.

565 MD. CONST. of 1864, art. VII, § 1 (constituting the Governor, Comptroller, and Treasurer as the Board of Public Works).

566 MD. CONST. of 1851, art. VII, § 2.

567 MICH. CONST., art. XIII, § 6 (1850).

568 MICH. CONST. OF 1850, art. XIII, § 6 (amended 1862).

569 MICH. CONST, art. XIII, § 6 (1850).

570 Act of Apr. 4, 1938, ch. 139, 1938 Miss. Laws 180. The Public Service Commission was the successor to the Railroad Commission, which was elected statewide. Act of 1892, ch. 72, 1892 Miss. Laws 166.

571 Act of Apr. 4, 1938, ch. 139, 1938 Miss. Laws 180.

572 Act of Apr. 20, 1987, ch. 491, 1987 Miss. Laws 660.

573 When it was first created, it was known as the Highway Commission. Act of Mar. 29, 1920, ch. 203, 1920 Miss. Laws 269. In 1992, it was reorganized as the Highway Commission. S.B. 2763, ch. 496, 1992 Miss. Laws 719.

574 Act of Mar. 29, 1920, ch. 203, 1920 Miss. Laws 269.

575 *Id.*

576 Act of Apr. 14, 1930, ch. 47, § 1, 1930 Miss. Laws 61, 61–63. In 1936, the legislature abolished the Highway Commission as it existed, and recreated it for the 1938 election. Act of Mar. 20, 1936, ch. 200, 1936 Miss. Laws 436.

577 Act of Apr. 20, 1987, ch. 491, 1987 Miss. Laws 660.

Mississippi	Board of Bank Examiners	1916[578]	1924[579]	Supreme Court districts[580]	n/a
Mississippi	Board of Penitentiary Trustees	1908[581]	1934[582]	Supreme Court districts[583]	n/a
Montana	Public Service Commission	1975[584]		Separate districts[585]	2003,[586] 2022[587]
Nebraska	Board of Education	1955[588]		Supreme Court districts[589]	1967,[590] 1971,[591] 1981,[592] 1991,[593] 2001,[594] 2011,[595] 2021[596]

578 Act of Mar. 9, 1914, ch. 124, 1914 Miss. Laws 107.

579 Act of Mar. 28, 1922, ch. 172, 1922 Miss. Laws 178.

580 Act of Mar. 9, 1914, ch. 124, 1914 Miss. Laws 107.

581 MISS. CODE § 3590 (1906).

582 Act of Apr. 2, 1934, ch. 147, 1934 Miss. Laws 347.

583 MISS. CODE § 3590 (1906).

584 Act of Mar. 28, 1974, ch. 339, 1974 Mont. Laws 1059. The Public Service Commission was the successor to the Railroad Commission, which was elected statewide. Act of Feb. 26, 1907, ch. 37, 1907 Mont. Laws 68.

585 Act of Mar. 28, 1974, ch. 339, 1974 Mont. Laws 1059.

586 Act of Apr. 11, 2003, ch. 294, 2003 Mont. Laws 1014.

587 Following the failure to draw new districts after the 2010 and 2020 censuses, the District of Montana ordered the adoption of new districts in 2022. Brown v. Jacobsen, 590 F. Supp. 3d 1273 (D. Mont. 2022).

588 Act of June 11, 1953, ch. 320, 1953 Neb. Laws 1053.

589 *Id.*

590 Act of Mar. 15, 1967, ch. 527, 1967 Neb. Laws 1750.

591 L.B. 735, 82d Leg., 1st Reg. Sess., 1971 Neb. Laws.

592 Act of May 28, 1981, 1981 Neb. Laws 1766.

593 Act of June 10, 1991, 1991 Neb. Laws 1632.

594 Act of May 31, 2001, 2001 Neb. Laws 1232.

595 Act of May 26, 2011, 2011 Neb. Laws 1115.

596 Act of Sept. 30, 2021, 2022 Neb. Laws 5.

Nebraska	Board of Regents	1923[597]		Congressional districts (1923–49);[598] Supreme Court districts (1949–71);[599] separate districts (1971–present)[600]	1969,[601] 1971,[602] 1981,[603] 1991,[604] 2001,[605] 2011,[606] 2021[607]
Nebraska	Public Service Commission [608]	1963[609]		Separate districts[610]	1971,[611] 1981,[612] 1991,[613] 2001,[614] 2011,[615] 2021[616]
Nevada	Board of Education	1933[617]		Separate districts (1933–2013);[618] congressional districts (2013–present)[619]	1947,[620] 1955,[621] 1969,[622] 1971,[623] 1973,[624] 1981,[625] 1991,[626] 2001,[627] 2011,[628] 2021[629]
Nevada	Board of Regents	1961[630]		Separate districts (1961–present)[631]	1967,[632] 1971,[633] 1973,[634] 1981,[635] 1991,[636] 2001,[637] 2011,[638] 2021[639]
Nevada	Board of Fish and Game Commissioner	1949[640]	1969[641]	Counties[642]	n/a

597 NEB. CONST. art. VII, § 10 (1920).

598 The 1920 Nebraska Constitution set the congressional districts, as they existed at the time, as the default districts for the Board of Regents, but gave the legislature the power to "divide the state . . . into six compact regent districts." *Id.*

599 Act of Feb. 15, 1947, ch. 351, 1947 Neb. Laws 1101. Because the Supreme Court districts were, themselves, based on the congressional districts as they existed in 1920, NEB. CONST. art. V, § 5 (1920), this did not result in a change to the Regent districts.

600 Act of May 20, 1969, ch. 847, 1969 Neb. Laws 3187.

601 *Id.*

602 L.B. 1035, 82d Leg., 1st Reg. Sess., 1971 Neb. Laws.

603 Act of May 28, 1981, 1981 Neb. Laws 1762.

604 Act of June 10, 1991, 1991 Neb. Laws 1621.

605 Act of May 31, 2001, 2001 Neb. Laws 1226.

606 Act of May 26, 2011, 2011 Neb. Laws 1112.

607 Act of Sept. 30, 2021, 2022 Neb. Laws 6.

608 When it was first created, it was known as the Railway Commission, Act of Apr. 4, 1905, ch. 233, 1905 Neb. Laws 791, but its name was changed in 1972, NEB. CONST. art. IV, § 20 (1972).

609 NEB. CONST. art. IV, § 10 (1962). The Railway Commission had previously existed as a statewide elected body, but the 1962 amendment to the state constitution converted it to district-based elections. *Id.*

610 Act of July 1, 1963, ch. 174, 1963 Neb. Laws 596.

611 L.B. 955, 82d Leg., 1st Reg. Sess., 1971 Neb. Laws.

612 Act of May 28, 1981, 1981 Neb. Laws 1757.

613 Act of June 10, 1991, 1991 Neb. Laws 1625.

614 Act of May 31, 2001, 2001 Neb. Laws 1230.

615 Act of May 26, 2011, 2011 Neb. Laws 1110.

616 Act of Sept. 30, 2021, 2022 Neb. Laws 3.

617 Act of Mar. 27, 1931, ch. 211, 1931 Nev. Stat. 362.

618 *Id.*

619 Act of June 15, 2011, ch. 380, 2011 Nev. Stat. 2299.

620 Act of Mar. 15, 1947, ch. 63, 1947 Nev. Stat. 91.

621 Act of Mar. 29, 1955, ch. 402, 1955 Nev. Stat. 794.

622 Act of Apr. 28, 1969, ch. 625, 1969 Nev. Stat. 1224.

623 Act of May 4, 1971, ch. 651, 1971 Nev. Stat. 1532.

624 Act of Mar. 13, 1973, ch. 93, 1973 Nev. Stat. 159.

625 Act of June 14, 1981, ch. 730, 1981 Nev. Stat. 1816.

626 Act of June 20, 1991, ch. 411, 1991 Nev. Stat. 1087.

627 Act of June 15, 2001, ch. 23, 2001 Nev. Stat. 17th Spec. Sess. 275.

628 Act of June 15, 2011, ch. 380, 2011 Nev. Stat. 2299.

629 Act of Nov. 16, 2021, No. 1, 2021 Nev. Stat. 33d Spec. Sess. 1.

630 Act of Mar. 4, 1959, ch. 78, 1959 Nev. Stat. 81.

631 Act of June 9, 2011, ch. 276, 2011 Nev. Stat. 1531.

632 Act of Mar. 24, 1967, ch. 191, 1967 Nev. Stat. 408.

633 Act of May 4, 1971, ch. 650, 1971 Nev. Stat. 1530.

634 Act of Mar. 31, 1973, ch. 183, 1973 Nev. Stat. 241.

635 Act of June 14, 1981, ch. 730, 1981 Nev. Stat. 1816.

636 Act of June 20, 1991, ch. 411, 1991 Nev. Stat. 1087.

New Hampshire	Executive Council	1793[643]		Counties (1793–1805);[644] separate districts (1805–present)[645]	1829,[646] 1873,[647] 1876,[648] 1891,[649] 1913,[650] 1963,[651] 1971,[652] 1979,[653] 1982,[654] 1992,[655] 2002,[656] 2012,[657] 2022[658]

637 Act of June 15, 2001, ch. 23, 2001 Nev. Stat. 17th Spec. Sess. 275.

638 Act of June 9, 2011, ch. 276, 2011 Nev. Stat. 1531.

639 Act of Nov. 16, 2021, No. 2, 2021 Nev. Stat. 33d Spec. Sess. 79.

640 Act of Mar. 22, 1947, ch. 101, 1947 Nev. Stat. 349.

641 Act of May 4, 1969, ch. 679, 1969 Nev. Stat. 1546.

642 Act of Mar. 22, 1947, ch. 101, 1947 Nev. Stat. 349.

643 N.H. CONST. pt. 2, art. 65 (1792).

644 The 1792 Constitution set the counties as the default districts for the Executive Council, but gave the General Court the power to "divide the state into five districts" for the Council. *Id.*

645 Following the creation of Coos County in 1803, the General Court added Coos County to Grafton County's council district, but this did not affect the distribution of the districts. Act of Dec. 24, 1803, 1803 N.H. Laws Nov. Sess. 15; Act of June 18, 1805, 1805 N.H. Laws June Sess. 24.

646 Act of Jan. 3, 1829, ch. 104, 1828 N.H. Laws 415.

647 Act of July 2, 1873, ch. 27, 1873 N.H. Laws 158.

648 Act of July 11, 1876, ch. 9, 1876 N.H. Laws 563.

649 Act of Mar. 12, 1891, ch. 16, 1891 N.H. Laws 312.

650 Act of May 21, 1913, ch. 152, 1913 N.H. Laws 685.

651 Act of Feb. 13, 1963, ch. 2, 1963 N.H. Laws 1.

652 Act of Sept. 29, 1971, ch. 576, 1973 N.H. Laws 22.

653 Act of June 25, 1979, ch. 436, 1979 N.H. Laws 663.

654 Act of Mar. 5, 1982, ch. 19, 1981–1982 N.H. Laws Spec. Sess. 42.

655 Act of Apr. 20, 1992, ch. 61, 1992 N.H. Laws 73.

656 Act of Apr. 22, 2002, ch. 40, 2002 N.H. Laws 66.

657 Act of June 11, 2012, ch. 170, 2012 N.H. Laws 191.

658 Act of May 6, 2022, ch.46, 2022 N.H. Laws.

New Mexico	Public Education Commission	1961[659]		Judicial districts (1961–73);[660] separate districts (1973–present)[661]	1972,[662] 1983,[663] 1991,[664] 2001,[665] 2012,[666] 2021[667]
New Mexico	Public Regulation Commission	1999[668]	2023[669]	Separate districts[670]	2002,[671] 2011[672]
Ohio	Board of Education	1955[673]		Congressional districts (1955–93);[674] separate districts	1967,[676] 1971,[677] 1982,[678]

659 N.M. CONST. art. XII, § 6 (1958).

660 *Id.*

661 Act of Feb. 24, 1972, ch. 24, 1972 N.M. Laws 140.

662 *Id.*

663 Act of Mar. 31, 1983, ch. 65, 1983 N.M. Laws 359.

664 Act of Oct. 4, 1991, ch. 4, 1st Spec. Sess., 1991 N.M. Laws 41.

665 Following the failure of the Governor and the legislature to agree on a set of districts, the First Judicial District of New Mexico adopted districts in 2002. Sanchez v. Vigil-Giron, No. D0101 CV 2001 02250 (N.M. Dist. Ct. Feb. 6, 2002).

666 Act of Oct. 5, 2012, ch. 4, 2012 N.M. Laws 31.

667 Act of Dec. 17, 2021, ch. 3, 2021 N.M. Laws.

668 N.M. CONST. art. XI, § 1 (1996).

669 *Id.* art. XI, § 1 (2020).

670 Act of Apr. 11, 1997, ch. 262, 1997 N.M. Laws 2533.

671 Act of Oct. 3, 2001, ch. 3, 2002 N.M. Laws 15.

672 Following the failure of the Governor and the legislature to agree on a set of districts, the First Judicial District of New Mexico adopted districts in 2012. *Egolf* Amended Findings of Fact, *supra* note 334.

673 Act of June 24, 1955, 1955–1956 Ohio Laws 655.

674 *Id.* The Board of Education was elected by the districts as they existed "on January 1, 1955," and did not change with the 1961 reapportionment. *Cf.* Heiser v. Rhodes, 305 F. Supp. 269, 272 (S.D. Ohio 1969). Accordingly, in the midst of a one-person, one-vote challenge, the General Assembly changed the districts to the congressional districts as they existed "on March 1, 1967," and then in 1971, provided that future changes in congressional districts would modify the SBOE districts, as well. Act of July 13, 1967, 1967–1968 Ohio Laws 2212; Act of July 29, 1971, 1971–1972 Ohio Laws 2085.

676 Act of July 13, 1967, 1967–1968 Ohio Laws 2212.

677 Act of July 29, 1971, 1971–1972 Ohio Laws 2085; Jan. 20, 1972, 1971–1972 Ohio Laws 2327.

678 Act of Apr. 5, 1982, 1981–1982 Ohio 4620.

				(1993–present)[675]	1992,[679] 2002,[680] 2012,[681] 2022[682]
Ohio	Board of Equalization	1853[683]	1910[684]	State Senate districts[685]	1861,[686] 1871,[687] 1881,[688] 1891,[689] 1901[690]

675 Act of May 19, 1992, 1991–1992 Ohio Laws A. The legislature was tasked with drawing new SBOE districts, but the failure to do so transferred authority to the Governor. *Id.*

679 Following the failure of the legislature to adopt a set of districts, the Governor issued an executive order that adopted districts. *Voinovich Announces State Board of Education Districts*, *supra* note 20, at 3.

680 Following the failure of the legislature to adopt a set of districts, the Governor issued an executive order that adopted districts. Ohio Exec. Order No. 2002-01T (Jan. 31, 2002).

681 Following the failure of the legislature to adopt a set of districts, the Governor issued an executive order that adopted districts. Candisky, *supra* note 22.

682 Following the failure of the legislature to adopt a set of districts, the Governor issued an executive order that adopted districts. 2022 SBOE District Designation, supra note 23.

683 Act of Apr. 13, 1852, 50 Ohio Laws 135 (1852).

684 Act of May 10, 1910, 1910 Ohio Laws 399.

685 Act of Apr. 13, 1852, 50 Ohio Laws 135 (1852).

686 Apportionment of the State of Ohio for Members of the General Assembly for the Second Decennial Period, 1861 Ohio Laws 196.

687 Apportionment of the State of Ohio for Members of the General Assembly, for the Third Decennial Period, 1871 Ohio Laws 237.

688 Apportionment of the State of Ohio for Members of the General Assembly, for the Fourth Decennial Period, 1881 Ohio Laws 448.

689 Apportionment of the State of Ohio for Members of the General Assembly for the Fifth Decennial Period, 1891 Ohio Laws 941.

690 The 1901 apportionment of the Ohio State Senate, completed by the Apportionment Commission, was apparently not published in the state's session laws. Despite my best efforts, I was unable to locate an official description of the reapportionment, and thus rely on a newspaper description of the districts. *Senator for Lucas: County Will Be Known as Thirty-Fourth District*, DEMOCRATIC EXPOSITOR, Apr. 11, 1901, at 1.

Oregon	Public Service Commission [691]	1909[692]	1929[693]	Congressional districts[694]	n/a
Oregon	Board of Control	1911[695]	1923[696]	Separate districts[697]	n/a
Oregon	Board of Equalization	1893[698]	1898[699]	Judicial districts[700]	1895[701]
Penn.	Executive Council	1776[702]	1790[703]	Counties[704]	n/a
South Carolina	Board of Equalization	1868[705]	1878[706]	Congressional districts[707]	n/a
Texas	Board of Education	1951[708]		Congressional districts	1971,[711] 1984,[712]

691 When it was first created, it was known as the Railroad Commission, but it was renamed the Public Service Commission in 1915. Act of Feb. 18, 1907, ch. 53, 1907 Or. Laws 67; Act of Feb. 24, 1915, ch. 241, 1915 Or. Laws 347.

692 Act of Feb. 18, 1907, ch. 53, 1907 Or. Laws 67.

693 Act of Mar. 3, 1927, ch. 246, 1927 Or. Laws 310.

694 The Railroad Commission was originally elected by congressional district, but the creation of a third congressional district in 1911 did not add a new member to the Railroad Commission. Act of Feb. 23, 1911, ch. 180, 1911 Or. Laws 290. Instead, the districts were simply referred to as the "district composed of the counties lying east" and the counties "lying west of the Cascade Mountains." Act of Feb. 15, 1915, ch. 71, 1915 Or. Laws 79.

695 Act of Feb. 24, 1909, ch. 216, 1909 Or. Laws 319.

696 Act of Feb. 22, 1919, ch. 94, 1919 Or. Laws 130.

697 Act of Feb. 24, 1909, ch. 216, 1909 Or. Laws 319.

698 Act of Feb. 21, 1891, 1891 Or. Laws 182.

699 Act of Oct. 13, 1898, 1898 Or. Laws Spec. Sess. 15.

700 Act of Feb. 21, 1891, 1891 Or. Laws 182.

701 Act of Feb. 20, 1895, 1895 Or. Laws 8; Act of Feb. 20, 1895, 1895 Or. Laws 11. The Board districts were tied to judicial districts and, as such, the creation of new judicial districts in 1895 also affected the Board's districts.

702 PA. CONST. of 1776, pt. 2, § 19.

703 *See generally* PA. CONST. of 1790.

704 PA. CONST. of 1776, pt. 2, § 19.

705 Act of Sept. 15, 1868, No. 22, 1868 S.C. Acts Spec. Sess. 28.

706 Act of Mar. 1, 1878, No. 383, 1877–1878 S.C. Acts 398.

707 Act of Sept. 15, 1868, No. 22, 1868 S.C. Acts Spec. Sess. 28.

708 Act of June 1, 1949, 1949 Tex. Gen. Laws 537.

711 Act of June 15, 1971, ch. 5, 1971 Tex. Gen. Laws 1st Called Sess. 25.

712 Act of July 13, 1984, ch. 28, 1985 Tex. Gen. Laws 117.

				(1951–84);[709] separate districts (1989–present)[710]	1991,[713] 2001,[714] 2011,[715] 2022[716]
Utah	Board of Education	1953[717]		Judicial districts (1951–73);[718] separate districts (1973–present)[719]	1972,[720] 1981,[721] 1992,[722] 2002,[723] 2011,[724] 2021[725]
Virginia	Board of Public Works	1854[726]	1870[727]	Separate districts[728]	n/a

709 Though Texas law provided that the SBOE districts would be coterminous with the "Congressional Districts of the State of Texas as they now exist [in 1949] and as they shall be changed from time," *id.* art. II, § 1, at 539, the SBOE districts remained the same. Accordingly, the legislature was ordered to redistrict the SBOE by the Northern District of Texas in 1969. Freeman v. Dies, 307 F. Supp. 1028, 1029 (N.D. Tex. 1969). In 1971, the legislature reapportioned the SBOE according to the congressional districts that existed at that point in time and tied SBOE districts to future congressional redistricting. Act of June 15, 1971, ch. 5, 1971 Tex. Gen. Laws 1st Called Sess. 25.

710 Act of July 13, 1984, ch. 28, 1985 Tex. Gen. Laws 117. In 1984, the legislature abolished the SBOE and briefly converted it to an appointed body. *Id.* It then condensed the number of districts and scheduled elections for 1988. *Id.*

713 Act of July 30, 1991, ch. 2, 1991 Tex. Gen. Laws 2d Called Sess. 2.

714 Following the failure of the Governor and the legislature to agree on a set of districts, the Northern District of Texas adopted districts in 2001. Miller v. Cuellar, No. 3-01CV1072-G, slip op. at 1–2 (N.D. Tex. Nov. 2, 2001).

715 Act of May 18, 2011, ch. 72, 2011 Tex. Gen. Laws 317.

716 Act of Oct. 25, 2021, ch. 8, 2021 Tex. Gen. Laws 4224.

717 UTAH CONST. art. X, § 8 (1950).

718 Act of June 16, 1951, ch 16, 1951 Utah Laws Spec. Sess. 23.

719 Act of Jan. 29, 1972, ch. 13, 1972 Utah Laws 47.

720 *Id.*

721 Act of Oct. 29, 1981, ch. 2, 1982 Utah Laws 1st Spec. Sess. 7.

722 Act of Oct. 8, 1991, ch. 5, 1992 Utah Laws 19.

723 Act of Oct. 11, 2001, ch. 2, 2002 Utah Laws 19.

724 Act of Oct. 13, 2011, ch. 3, 2012 Utah Laws 13.

725 Act of Apr. 1, 2013, ch. 455, 2013 Utah Laws 2663.

726 VA. CONST. of 1851, art. V, § 14.

727 VA. CONST. of 1871, art. IV, § 17.

728 Act of Mar. 9, 1853, ch. 56, 1852–1853 Va. Acts 59.