

# FAIR REFORMS FOR IDAHO’S REAPPORTIONMENT COMMISSION

BY: DANIELLE M. STROLLO\*

## ABSTRACT

*Every ten years, an ugly partisan battle embroils the union—not over policy proposals or the “people’s business,” but instead over who votes for whom in a changing nation. This process is called redistricting. Redistricting is a fraught process, complicated by unequal population growth and constrained by legal requirements. Each state’s method has problems. But when viewed more broadly, Idaho’s commission is worth preserving, if with a few tweaks.*

*In Section One, this paper will provide the historical legal context for Idaho’s current redistricting commission, identify what went wrong (and did not) with prior commissions, and explain proposed changes. Section Two will then examine two other states’ redistricting methods. Section Three will then suggest a few reforms.*

## TABLE OF CONTENTS

ABSTRACT .....	295
I. IDAHO’S REDISTRICTING COMMISSION .....	295
A. Pre-commission History .....	295
B. Idaho’s Reapportionment Commission .....	297
C. Republican Proposed Changes for 2021 .....	299
II. OTHER STATE COMMISSIONS AND POTENTIAL IDAHO REFORMS .....	300
A. Montana .....	300
B. Colorado .....	301
III. IDEAS FOR IMPROVING IDAHO’S COMMISSION .....	302
IV. CONCLUSION .....	303

## I. IDAHO’S REDISTRICTING COMMISSION

### A. Pre-Commission History

When the state of Idaho entered the Union in July of 1890, the new constitution apportioned a set number of representatives and senators based on

---

\* The author is a J.D. Candidate in the Class of 2021 at the University of Idaho College of Law. Special thanks to Professor Benjamin Cover for his help with this paper.

county boundaries that existed prior to statehood.<sup>1</sup> After the 1890 U.S. Census, the legislature passed its first apportionment statute in 1891.<sup>2</sup> The law was quickly challenged by a county denied a seat after an ill-fated county reorganization.<sup>3</sup> And in a decision that set the standard for the next seventy years, the Idaho Supreme Court in *Ballentine v. Willey* declared equal representation and full enfranchisement as basic governing principles of legislative districting.<sup>4</sup>

Like most of the country, Idaho's population began urbanizing.<sup>5</sup> But despite the first legislature's vision of equal apportionment, in 1912, the legislature changed the constitution to guarantee each county one state senator,<sup>6</sup> giving rural areas disproportionate control over state government.<sup>7</sup> Most states did exactly this, basing both their state house and senate maps largely on county boundaries.<sup>8</sup> And though most state constitutions had reapportionment provisions, Idaho was one of only fifteen states that actually did regularly reapportion its state house districts.<sup>9</sup> These (in)actions were challenged, but federal courts ruled that they were political questions until *Baker v. Carr* declared that questions of apportionment were justiciable as equal protection violations under the 14th Amendment.<sup>10</sup>

*Baker* opened the door to legal claims of malapportionment and vote dilution, and in *Reynolds vs. Sims*, the Court established the general rule that both state senate and house plans create districts "as nearly of equal population as is

1. IDAHO CONST. art. III, §§ 2–5 (1890). Section 2 set the original senate at eighteen seats, and the house of representatives at thirty-six, with a maximum of twenty-four and thirty-six respectively. Section 4 mandated proportional representation and gave each county one representative. Section 5 required contiguity in any district comprising more than one county and prevented breaking county boundaries.

2. Act of Mar. 31, 1891, 1890 Idaho Sess. Laws 195–96 (providing for apportionment of representatives).

3. Early county formation complicated apportionment. In 1891, the legislature attempted to divide and reconstitute Logan and Alturas as Lincoln and Alta counties. See *People ex rel. Lincoln Cty. v. George*, 26 P. 983, 3 Idaho 72 (1891). It was declared an unconstitutional violation of Art. XVIII, § 3's prohibition on abolishing counties without an election. *Id.* In *Sabin v. Curtis*, 32 P. 1130, 3 Idaho 662 (1893), the court held that the legislature can only make a new county without abrogation.

4. "[T]he legislature is prohibited from enacting an apportionment law which does not give to the people of one county substantially equal representation to that given each other county in the state, based either upon the entire or voting population or upon some other just and fair basis. . . . [The legislature] is prohibited from disfranchising." *Ballentine v. Willey*, 31 P. 994, 997, 3 Idaho 496, 506 (1893).

5. See generally U.S. CENSUS BUREAU, FOURTEENTH CENSUS OF THE U.S.: BULLETIN, POPULATION: IDAHO (1920).

6. *Idaho Senate and House of Representatives Composition, HJR 13 (1912)*, BALLETOPEDIA, [https://ballotpedia.org/Idaho\\_Senate\\_and\\_House\\_of\\_Representatives\\_Composition,\\_HJR\\_13\\_\(1912\)](https://ballotpedia.org/Idaho_Senate_and_House_of_Representatives_Composition,_HJR_13_(1912)) (last visited Aug. 13, 2020).

7. See generally ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, APPORTIONMENT OF STATE LEGISLATURES 21 (1962).

8. *Id.* at 20. ("While State constitutions called for apportionment according to population, in most instances they required that counties not be split when forming a legislative district.")

9. *Id.* at 17.

10. See, e.g., *Colegrove v. Green*, 328 U.S. 549, 552 (1946); *Baker v. Carr*, 369 U.S. 186, 239 (1962).

practicable” to provide equal legal protection.<sup>11</sup> *Reynolds* initiated a thirty-year span of bitter fights over legislative maps in Idaho, as the legislature grappled with the “one person, one vote” standard while struggling to protect county boundaries.<sup>12</sup> Fed up with multiple contentious redistricting rounds, the legislature amended the Idaho Constitution to create an independent redistricting commission in 1994<sup>13</sup>—one of only a few states in the country ever to do so of its own volition.<sup>14</sup>

#### B. Idaho’s Reapportionment Commission

Idaho’s Citizen Commission for Reapportionment is a bipartisan body consisting of six citizen members chosen by leaders in each of the state’s two major political parties.<sup>15</sup> The commission uses only Census data and adheres to eight key governing criteria requiring the preservation of communities of interest, creation of districts substantially equal in population, and avoiding county division.<sup>16</sup>

Idaho’s first redistricting commission convened on June 5, 2001 and devised two plans on 4-2 votes in 78 days, twelve days before its deadline.<sup>17</sup> The state legislative plan was immediately challenged on equal protection grounds, and a unanimous Idaho Supreme Court struck it down for an over ten percent population deviation absent any proof of a rational basis for it.<sup>18</sup> The commission reconvened on court order in December 2001 to make a new plan, accepting that “whatever we do, we are going to get sued,” and voted 4-2 (3 Republicans, 1 Democrat) on a new plan,<sup>19</sup> which was again struck down for the same reason.<sup>20</sup> The third convening voted 5-1 on a plan eventually upheld by the Court.<sup>21</sup>

---

11. *Reynolds v. Sims*, 377 U.S. 533, 577 (1964).

12. See generally Betsy Z. Russel, *Redistricting in Idaho Historically Sore Subject*, SPOKESMAN-REV. (Sept. 25, 2011), <https://www.spokesman.com/stories/2011/sep/25/redistricting-in-idaho-historically-sore-subject/>. This article is an excellent summary of the numerous fights over districting.

13. *Id.*

14. The process is called legislative referral, compared to citizen initiative. For the (short) list of the commissions created by legislative referral, see *Creation of Redistricting Commissions*, NAT’L CONFERENCE ST. LEGISLATURES (Apr. 6, 2018), <https://www.ncsl.org/research/redistricting/creation-of-redistricting-commissions.aspx>.

15. The commission’s actions and makeup are governed by Art. III, § 2 of the Idaho Constitution, with further rules set out in the Idaho Code, §§ 72-1501 through 1510. IDAHO CONST. art. III, § 2; IDAHO CODE §§ 72-1501 to 1510.

16. IDAHO CODE § 72-1506 (2019).

17. COMM’N ON REDISTRICTING, IDAHO’S FIRST COMMISSION ON REDISTRICTING (2001-2002) [https://legislature.idaho.gov/wp-content/uploads/redistricting/2001/commission\\_chronology.pdf](https://legislature.idaho.gov/wp-content/uploads/redistricting/2001/commission_chronology.pdf).

Two from each party voted for the congressional plan, while three Democrats and one Republican voted for the state plan.

18. See generally *Smith v. Idaho Comm’n on Redistricting*, 38 P.3d 121, 136 Idaho 542 (2001).

19. Idaho Comm’n on Redistricting, Meeting Transcript 84 (Dec. 12, 2001) [hereinafter Meeting Transcript, Dec. 12, 2001], [https://legislature.idaho.gov/wp-content/uploads/redistricting/2001/minutes2001\\_2002.pdf](https://legislature.idaho.gov/wp-content/uploads/redistricting/2001/minutes2001_2002.pdf).

20. See generally *Bingham County v. Idaho Comm’n on Redistricting*, 55 P.3d 863, 137 Idaho 870 (2002).

21. COMM’N ON REDISTRICTING, *supra* note 17, at 2.

Based on the meeting minutes,<sup>22</sup> the first commission's struggles were more about pre-existing precinct and county lines, but party pressure was an ongoing concern.<sup>23</sup> Regardless, the commission finished well ahead of the 2002 primaries.

Idaho's second commission convened on June 7, 2011.<sup>24</sup> Dr. Gary Moncrief from Boise State University, a nationally renowned expert on redistricting, warned the commissioners that any plan would likely be litigated, saying that more than 85% nationwide have been challenged.<sup>25</sup> He advised them to avoid a population deviation of over ten percent, and to have a thick skin, because many would dislike any plan.<sup>26</sup>

The commission started its business mindful of the mistakes of 2001, resolving to keep detailed records to prepare for litigation, and soliciting input from prior commissioners. Though the prior commissioners urged cooperation,<sup>27</sup> the final meeting of the commission deadlocked over the partisan split of Ada County,<sup>28</sup> necessitating a new commission.<sup>29</sup> Thus, on September 28, 2011, six new commissioners convened, and by October 18, the Commission approved a Congressional map 4-2, and a legislative plan 6-0.<sup>30</sup>

---

22. One commissioner said, "[A]s the Republican commissioner who 'voted with the Democrats' and subsequently [sic] taken a good deal of heel for that, I just would like to offer the thought that we are all commissioners here appointed by Democratic and Republican officials and we got a partisan responsibility. But we got first the responsibility to the citizens of Idaho . . . I must prefer it be characterized as four commissioners voted for a plan and one of them happened to be Republican as opposed to a Republican who voted with the Democrats." Meeting Transcript, Dec. 12, 2001, *supra* note 20, at 5 (statement of Commissioner Haagenson).

23. Idaho Comm'n on Redistricting, Meeting Minutes (June 5, 2001), [https://legislature.idaho.gov/wp-content/uploads/redistricting/2001/minutes2001\\_2002.pdf](https://legislature.idaho.gov/wp-content/uploads/redistricting/2001/minutes2001_2002.pdf). "Shurtliff expressed his opinion that, while this is certainly a partisan assignment, in his experience the vast majority of Idahoans are independent. . . . He urged that the sense of conflict brought up by the terms war room should be avoided." *Id.*

24. Idaho's Citizen Comm'n for Reapportionment, Meeting Minutes (June 7, 2011), [https://legislature.idaho.gov/wp-content/uploads/redistricting/2011/redistricting\\_0607\\_commissionmin.pdf](https://legislature.idaho.gov/wp-content/uploads/redistricting/2011/redistricting_0607_commissionmin.pdf).

25. *Id.* at 5.

26. *Id.*

27. *Id.* at 13–14.

28. Idaho's Citizen Comm'n for Reapportionment, Meeting Minutes (Sept. 6, 2011) [hereinafter Meeting Minutes, Sept. 6, 2011], [https://legislature.idaho.gov/wp-content/uploads/redistricting/2011/redistricting\\_0906\\_commissionmin.pdf](https://legislature.idaho.gov/wp-content/uploads/redistricting/2011/redistricting_0906_commissionmin.pdf).

29. Republican commissioners sued the commission for missing the deadline, but the Supreme Court held it lacked jurisdiction without a plan to review. *In re Constitutionality of Idaho Reapportionment Plan of 2002*, No. 39127-2011 (Idaho 2011), [https://legislature.idaho.gov/wp-content/uploads/redistricting/2011/supremecourt\\_order.pdf](https://legislature.idaho.gov/wp-content/uploads/redistricting/2011/supremecourt_order.pdf).

30. See Idaho's Citizen Comm'n for Reapportionment, Meeting Minutes (Sept. 28, 2011), [https://legislature.idaho.gov/wp-content/uploads/redistricting/2011/redistricting\\_0928\\_commissionmin.pdf](https://legislature.idaho.gov/wp-content/uploads/redistricting/2011/redistricting_0928_commissionmin.pdf) (first meeting of the new commission); Idaho's Citizen Comm'n for Reapportionment, Meeting Minutes (Oct. 17, 2011), <https://legislature.idaho.gov/wp->

Predictably, the legislative plan was challenged in two lawsuits, arguing that the counties were split more than necessary.<sup>31</sup> In the 4-1 *Twin Falls* decision, the Idaho Supreme Court asserted that Idaho constitutional history mandated preservation of county boundaries, that the commission could have complied with one person one vote with fewer county splits, and requested a new map.<sup>32</sup>

Justice Jones dissented, concluding that the standard on which the majority based its conclusion was too rigid, and that the intention of the legislature in the 1994 constitutional amendment was to give the commission flexibility.<sup>33</sup>

The reason we have a Commission is to bring the human element into the equation—to preserve traditional neighborhoods and local communities of interest, to avoid gerrymandered districts designated to protect particular political parties or incumbents. . . . If this Court imposes a strict requirement that the Commission adopt whatever plan meets the ten percent population deviation and produces the lowest possible number of county splits, the Commission's discretion will be limited to the point that it will have no realistic function.<sup>34</sup>

When the commission convened once more, it unanimously adopted a final plan, over a month before the primaries and still within its budgetary framework.<sup>35</sup>

### C. Republican Proposed Changes for 2021

In 2019, Republican Steven Harris proposed adding a tie-breaking seat to the commission to be appointed by the state's top-ranking officials, and requiring only four votes to approve a plan.<sup>36</sup> Given the state's current politics, this would mean that the Republican party would control the commission entirely. The rationale Mr. Harris gave was to avoid litigation, while another Republican said the proposal would be "just good policy."<sup>37</sup>

While Mr. Harris's proposal is not as extreme as the Idaho GOP's platform of doing away with the commission entirely,<sup>38</sup> it is still imprudent. Though each commission faced challenges to its maps, litigation is inevitable as Idaho continues

---

content/uploads/redistricting/2011/redistricting\_1017\_commissionmin.pdf (adopting Congressional map 6-0 and legislative plan 4-2); Idaho's Citizen Comm'n for Reapportionment, Meeting Minutes (Oct. 18, 2011), [https://legislature.idaho.gov/wp-content/uploads/redistricting/2011/redistricting\\_1018\\_commissionmin.pdf](https://legislature.idaho.gov/wp-content/uploads/redistricting/2011/redistricting_1018_commissionmin.pdf) (adjourning sine die).

31. *Twin Falls Cty. v. Idaho Comm'n on Redistricting*, 271 P.3d 1202, 152 Idaho 346 (2012).

32. *Id.*

33. *Id.* at 1215–16, 152 Idaho at 359–60 (2012) (Jones, J., dissenting).

34. *Id.*

35. LEGIS. COUNCIL, FY 2014 EXEC. BUDGET sec. B-153 (2014), <https://dfm.idaho.gov/Publications/exec/budget/fy2014/summary/sectionb/general-government/legislative-branch/legislative-services.pdf>.

36. Betsy Z. Russell & Nathan Brown, *Tempers Fray in Idaho House in Battle over Redistricting*, IDAHO PRESS (Feb. 8, 2019), [https://www.idahopress.com/news/local/tempers-fray-in-idaho-house-in-battle-over-redistricting/article\\_0d770dbe-28c2-5553-91d4-61d1565d934a.html](https://www.idahopress.com/news/local/tempers-fray-in-idaho-house-in-battle-over-redistricting/article_0d770dbe-28c2-5553-91d4-61d1565d934a.html).

37. *Id.*

38. IDAHO GOP, IDAHO REPUBLICAN PLATFORM (2018), <https://www.idgop.org/wp-content/uploads/2018/07/2018-Idaho-GOP-Platform-Updated.pdf>.

to grow, diversify, and urbanize. And while it is true that the commission deadlocked in 2011, adding partisanship is not the solution to a problem that seems to have been at least in part caused by partisanship.<sup>39</sup> If anything, other states demonstrate that less partisanship on redistricting commissions is the way forward.

## II. OTHER STATE COMMISSIONS AND POTENTIAL IDAHO REFORMS

Other states generally have not moved in the direction of Mr. Harris's proposal. In fact, twenty-six states, particularly in the West (Colorado, Arizona, California, Idaho, Washington, Montana, and Utah), have entrusted their redistricting and apportionment to advisory committees, independent commissions, or backup commissions, with most moving towards less partisan control and more consensus.<sup>40</sup> This reflects a national interest in protecting voters from partisan gerrymandering.

Below are two examples of recent redistricting reforms that demonstrate that the "tie-breaking" setup Mr. Harris suggests is not more efficient or successful.

### A. Montana

With only one Congressional district, Montana's redistricting commission has a slightly easier task. But for the state maps, Montana uses a tie-breaking commission like that urged by Mr. Harris. For the state maps, the leaders of the house and the senate from each party select one commissioner, and those selected commissioners select a fifth tie-breaking vote.<sup>41</sup> If the four commissioners fail to pick a fifth within twenty days, he or she is chosen by a majority of the state Supreme Court.<sup>42</sup>

To date, there have been no successful challenges to Montana's legislative redistricting plans in the courts.<sup>43</sup> However, deadlocking frequently occurs in selecting the tie-breaking vote. According to Professor Moncrief and Matthew May, since the commission's establishment in 1972, only once have the four selected members been able to agree on a fifth tie-breaker.<sup>44</sup> This means that frequently, the state Supreme Court chooses the fifth member, who ultimately picks the maps.<sup>45</sup>

---

39. See, e.g., Meeting Minutes, Sept. 6, 2011, *supra* note 29, at 3–7. This is only one example of the types of partisan jockeying, with more found throughout the commission's meeting minutes.

40. *Redistricting Commissions: State Legislative Plans*, NAT'L CONFERENCE ST. LEGISLATURES (Jan. 9, 2020), <http://www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx>.

41. *Districting and Apportionment Commission*, MONT. ST. LEGIS., <https://leg.mt.gov/districting/> (last visited Aug. 13, 2020).

42. *Id.*

43. The most recent challenge was in the federal district case *Old Person v. Brown*, which was dismissed after the plaintiffs failed to meet their burden of proof of vote dilution. 182 F. Supp. 2d 1002, 1020 (D. Mont. 2002).

44. Matthew May & Gary Moncrief, *Reapportionment and Redistricting of the West*, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST 39, 49 (Gary F. Moncrief, ed., 2011).

45. *Id.*

Montana's experience demonstrates that a tie-breaking commission would simply shift the partisanship from the commission to the courts and could still result in maps drawn to favor one political party over the other—defeating a main purpose of the commission. Worse, it may politicize the state courts, particularly if the justices are divided in picking the decisive vote that benefits one party. This offers a lesson to Idahoans who may seek to create a party-affiliated tie-breaker commission.

### B. Colorado

Colorado offers perhaps the clearest demonstration of the poor track record of tie-breaking commissions—and the movement away from them. Established in 1974, Colorado's redistricting commission had eleven members, up to six of whom could be from the same party.<sup>46</sup> In 2011, after many rounds of partisan battles, the Democratic governor chose an independent to be the tie-breaker on a commission with five Democrats and five Republicans.<sup>47</sup> After the courts rejected maps with bipartisan support, the independent chair sided with Democrats on final maps; so despite the independent tie-breaker, the 2011-12 process still felt unfair.<sup>48</sup>

The legislature decided to make a change in 2018 by creating a fully independent redistricting commission,<sup>49</sup> which now consists of four members from both of the two largest parties, and four unaffiliated members.<sup>50</sup> Citizens interested in being commissioners apply and are chosen by a panel of three retired judges, who "shall . . . [t]o the extent possible, ensure that the commission reflects Colorado's racial, ethnic, gender, and geographic diversity."<sup>51</sup> Eight votes, including two unaffiliated votes, are now required for any plan to pass.<sup>52</sup> And as another degree of separation, Colorado's commission now uses non-partisan legislative council and legal services staff to draft maps, which are then submitted for public comment.<sup>53</sup>

---

46. COLO. GEN. ASSEMB., AMENDMENT Z: LEGISLATIVE REDISTRICTING, at 1 (2018), [https://leg.colorado.gov/sites/default/files/initiative%2520referendum\\_final%20draft%20packet%20-%20amendment%20z.pdf](https://leg.colorado.gov/sites/default/files/initiative%2520referendum_final%20draft%20packet%20-%20amendment%20z.pdf) (this document is the final draft of a referendum to add an amendment to the Colorado constitution).

47. Josh Goodman, *Why Redistricting Commissions Aren't Immune from Politics*, PEW (Jan. 27, 2012), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2012/01/27/why-redistricting-commissions-arent-immune-from-politics>.

48. *Id.*

49. Sam Brasch, *Anti-Gerrymandering Effort Sails Through the Colorado Capitol on Its Way to the Ballot*, CPR NEWS (May 7, 2018), <https://www.cpr.org/2018/05/07/anti-gerrymandering-effort-sails-through-the-colorado-capitol-on-its-way-to-the-ballot/>.

50. *Colorado Amendment Z, Independent Commission for State Legislative Redistricting Amendment* (2018), BALLOTEDIA, [https://ballotpedia.org/Colorado\\_Amendment\\_Z,\\_Independent\\_Commission\\_for\\_State\\_Legislative\\_Redistricting\\_Amendment\\_\(2018\)](https://ballotpedia.org/Colorado_Amendment_Z,_Independent_Commission_for_State_Legislative_Redistricting_Amendment_(2018)) (last visited Aug. 8, 2020).

51. *Id.*

52. *Id.*

53. *Id.*

The Colorado commission also has a pre-approval mechanism with the state's Supreme Court under an abuse of discretion standard of review—in other words, the Court will not disturb the commission's plan unless they abused their discretion in applying constitutional requirements.<sup>54</sup> This pre-approval enables expedited review to avoid litigation later.

Colorado offers a compelling point of comparison for Idaho. For one, like Idaho, Colorado is growing rapidly, and with increasing diversity.<sup>55</sup> It, too, has the Western historical precedent for preserving county lines.<sup>56</sup> And like Idaho, a large percentage of its voters are unaffiliated.<sup>57</sup> With these recent changes to its redistricting process, Colorado has clearly decided that the way forward is not what Mr. Harris and other Idaho Republicans suggest. Instead, the state has moved away from partisan redistricting.

### III. IDEAS FOR IMPROVING IDAHO'S COMMISSION

Reforms could improve Idaho's commission. But as multiple commissioners have pointed out, the main concerns addressed should not be partisan ones, but whether and how reforms improve the process. The legislature's 1994 embrace of independent redistricting was an endorsement of good governance and fairness, and this should not be abandoned. Instead, it warrants expansion.

There are two main ways to change the commission: by statute and by constitutional amendment with voter approval. First, it is apparent from the experience of the 2011 commission that increased partisanship is a poison pill. Adding additional qualifications centered not around political ambitions may help. I propose considering a mix of traits in candidates, including education and expertise, similar to the criteria the Colorado Supreme Court will evaluate in 2021. The commission might benefit from educated input to consider complex plan implications.

Next, to address diversity, the commission might benefit from having a spot reserved for a member of a minority or historically disenfranchised group, like Latinos or Native Americans. With one person speaking for those too often ignored, the record may reflect that the commission considered those views, legitimizing the record upon a legal challenge. Additionally, the statute should explicitly require

---

54. *Id.* Colorado's main constitutional criteria for their General Assembly maps are equal protection ("in no event shall there be more than five percent deviation between the most populous and the least populous district in each house"), compactness ("aggregate linear distance of all district boundaries shall be as short as possible"), county and other political subdivision integrity, and the integrity of communities of interest as defined by "ethnic, cultural, economic, trade area, geographic, and demographic factors." COLO. CONST. art. V, §§ 46–47.

55. THE BELL POL'Y CTR., GUIDE TO ECONOMIC MOBILITY IN COLORADO 5 (2018), <https://www.bellpolicy.org/wp-content/uploads/2018/01/Guide-to-Economic-Mobility-FINAL.pdf>.

56. *See, e.g., In re* Colorado Gen. Assembly, 332 P.3d 108, 111 (Colo. 2011).

57. In Colorado, the split is about one-third Republican, one-third Democrat, and one-third Independent. Michael De Yoanna, *As Colorado's Unaffiliated Voters Grow, So Do Efforts to Engage Them*, KUNC (Sept. 12, 2018), <https://www.kunc.org/post/colorados-unaffiliated-voters-grow-so-do-efforts-engage-them#stream/0>.

geographical diversity. This Montana-like requirement, perhaps even with a mix of urban and rural commissioners, would add substantial diversity of view.

Constitutionally, the state could address Justice Jones' dissent in *Twin Falls* and change Art. III, § 5 to explicitly allow for the breaking up of county boundaries. Counties have their own governments, and plenty of influence in the legislature. Arguably, their concerns need not be doubly represented. Though theoretically allowed, splitting up counties is very difficult to do in practice—and now under case law, essentially illegal. According to commission meeting minutes, the public cares more about preserving communities of interest than county boundaries. A constitutional amendment allowing more flexibility to split counties would make redistricting less difficult, less contentious, and allow the commission the flexibility needed to protect minority communities. I suggest amending § 5 thusly:

A senatorial or representative district, when more than one county shall constitute the same, shall be composed of contiguous counties, and a county may be divided in creating districts ~~only to the extent it is reasonably determined by statute that counties must be divided to create senatorial and representative districts~~ which comply with the constitution of the United States.

This amendment would work in concert with the statutory guidance of minimizing county splits as much as possible.

A second constitutional reform idea is inspired by Colorado's balance of independents and the major parties. Studies have shown that adding independent voices promotes compromise and leads to better feelings about the process compared to tie-breaking.<sup>58</sup> Further, adding independent commissioners would balance party interests and give representation to unaffiliated voters. I propose adding three independent members and requiring six votes for a plan, including at least one from each party. This would demonstrate a serious commitment to independence.

Next, the result of the 2011 commission raises the possibility that the 90-day deadline is insufficient. With public meetings, private caucusing, software learning, and the inherent difficulty, an unnecessarily short timetable is a burden, not a benefit. Having another thirty days to solicit legal opinions from staff and outside counsel would help the commission find a map that checks all the necessary boxes. More time would also enable my final suggestion, a mechanism for pre-approval judicial review. Early review would preempt litigation entirely and allow the commission to support their findings with evidence.

#### IV. CONCLUSION

Idaho history proves that redistricting is a difficult process. The current independent commission is a step in the right direction. Though the possibility of a tie and a replay of the 2011 challenges always exists, the solution is not to make the

---

58. *Redistricting Commissions: What Works*, BRENNAN CTR. FOR JUST. (July 24, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/redistricting-commissions-what-works>.

process more partisan, but less. Some tweaks to the commission might save money or make the commission better reflect Idaho's electorate. But for a country—and a region—moving towards less partisan map-making, gutting the purpose of Idaho's independent commission would be the wrong way to fix its minimal problems.