

NOTES

REGULATION VIA DELEGATION: A FEDERALIST PERSPECTIVE ON THE *ARIZONA STATE LEGISLATURE V. ARIZONA INDEPENDENT REDISTRICTING COMMISSION* DECISION

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*Political gerrymandering has been a feature of our republic since the early days of the United States. The majority of states in the U.S. allow state legislators to draw the district lines for legislative elections. Legislator-led redistricting is plagued with legislator conflict of interest, producing elections that are spectacularly uncompetitive and rampant with partisanship. In the process, the interests of voters are in conflict with the party and individual interests of legislators, threatening the legitimacy of our republican form of government. The results are often incumbent entrenchment in “safe seats” and overt partisan-based district manipulation. While not necessarily indicative that the will of the people is being usurped by the ambitions of legislators, one must inevitably ask, are voters choosing their legislators or are legislators choosing their voters? Until recently, the Supreme Court has taken a “hands-off” approach to remedying the negative effects of the partisan gerrymandering that occurs in states employing legislator-led redistricting. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Supreme Court upheld Arizona voters’ right to transfer redistricting authority from state legislators to an independent commission of citizens via ballot initiative. This Note argues that the delegation theory applied by the Court in the *Arizona Independent Redistricting Commission* decision, and the authority of voters to be the supreme regulators of the political market, is supported by the Framers’ vision of political competition and accountability as articulated in *The Federalist Papers*.*

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INTRODUCTION

The one thing our Founding Fathers could not foresee—they were farmers, professional men, businessmen giving of their time and effort to an idea that became a country—was a nation governed by professional politicians who had an interest in getting re-elected. They probably envisioned a fellow serving a couple of hitches and then eagerly looking forward to getting back to the farm.

—Ronald Reagan¹

In *Arizona State Legislature v. Arizona Independent Redistricting Commission (AIRC)*,² the Supreme Court upheld Arizona voters’ right to transfer redistricting³ authority from the state legislature to an independent redistricting commission of citizens via ballot initiative.⁴ The *AIRC* decision marks the first time the Court has held that the people of a state can exercise exclusive state power over the constitutionally delegated authority. While the Court’s opinion focused a great deal on the meaning of “legislature” as it was used in the Elections Clause of the United States Constitution,⁵ one must look beyond the Elections Clause to fully grasp the implications of the decision. The *AIRC* decision was set against a backdrop of (1) the Court’s

¹ President Ronald Reagan, “Meet the Students” Taping for Television (Sep. 17, 1973).

² 135 S. Ct. 2652 (2015) [hereinafter *AIRC*].

³ This paper refers to “redistricting” and “congressional redistricting” throughout. References apply equally to state legislative redistricting and congressional redistricting.

⁴ See *AIRC*, 135 S. Ct. at 2677.

⁵ The Elections Clause, U.S. CONST. art. I, § 4, cl. 1, provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of [choosing] Senators.”

failure to articulate a manageable standard in political gerrymandering cases,⁶ (2) identification of the harms to be remedied in political gerrymandering cases, (3) the emergence of a viable remedy, and (4) limited Court precedent intimating support for the delegation theory adopted by the Court.⁷

In a few sentences,⁸ the *AIRC* decision vindicated voters' authority to take constitutionally granted authority from the elected legislative body and vest that authority in another, unelected body.⁹ While encouraging, the legal theory advanced in the *AIRC* decision was completely unprecedented. As Chief Justice Roberts correctly pointed out, the Court failed to provide support for its potentially sweeping delegation theory.¹⁰ This Note seeks to fill that gap by offering originalist support for the delegation theory adopted in *AIRC*.

This Note argues that the delegation theory applied in *AIRC*, and the supreme authority of voters to regulate the political marketplace, is consistent with the intent of the Framers of the U.S. Constitution as articulated in *The Federalist Papers*. This Note is structured to draw the connections between the Supreme Court's inability to address the harms in political gerrymandering cases and the theoretical underpinnings of the *AIRC* decision supported by the *Papers*. Part I briefly describes the Court's ineptitude in political gerrymandering cases and political responses to the inability to address the harms. Part II describes Arizona's redistricting history leading to the *AIRC* decision and evaluates the *AIRC* decision and its implications. Part III presents evidence of original intent for the delegation theory applied in *AIRC* by examining several of *The Federalist Papers*. It then explores the impact of the *AIRC* decision beyond the political gerrymandering context.

⁶ For the purposes of this Note, partisan and bipartisan gerrymandering—what I have termed “political gerrymandering”—is gerrymandering based on partisan concerns.

⁷ See *infra* Part II.B.

⁸ See *AIRC*, 135 S. Ct. at 2671 (“[W]e hold that the Elections Clause permits the people of Arizona to provide for redistricting by independent commission . . .”).

⁹ For a detailed analysis of this issue, see Derek T. Muller, *Legislative Delegations and the Elections Clause*, 1, 10–19 (Pepperdine Univ. Legal Studies Research Paper No. 2015/17) [hereinafter *Legislative Delegations*], <http://ssrn.com/abstract=2650432>.

¹⁰ *AIRC*, 135 S. Ct. at 2678–79 (Roberts, C.J., dissenting) (contesting the majority's constitutional construction of “the Legislature”).

I
GERRYMANDERING, JUDICIAL INADEQUACY,
AND RESPONSES

Before engaging with the *AIRC* decision, it is helpful to understand the limitations of the Supreme Court's prior gerrymandering decisions. Redistricting is one of the oldest and most complex features of our democracy.¹¹ Since our nation's founding, redistricting authorities have engaged in gerrymandering: drawing voting district lines to give one group a competitive electoral advantage at the expense of another.¹² Congress and the Supreme Court have attempted to remedy the negative effects of gerrymandering.¹³ In the majority of its decisions, the Court has chosen to target gerrymanders based on numerical disparities in population and racial considerations by focusing on individual rights.¹⁴ However, in the *Davis v. Bandemer*¹⁵ decision, the Court created an escape route for all ill-intentioned redistricting authorities to justify gerrymandered redistricting maps.¹⁶ This Part explores the limitations of prior gerrymandering jurisprudence and responses from the public. Section I.A explains the Court's inability to address the appropriate harms in its gerrymandering decisions, suggesting that the Court's history with gerrymandering cases is one of limited remedies, misunderstandings, and institutional inadequacy. Section I.B describes the role of redistricting initiatives as a mechanism for voters to remove redistricting authority from the state legislature and place that power in the hands of redistricting commissions.

¹¹ See generally Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment*, in *MINORITY VOTE DILUTION* 85, 85 (Chandler Davidson ed., 1984) (describing the origins of gerrymandering in the United States).

¹² *Id.* See also *Gerrymandering*, *BLACK'S LAW DICTIONARY* (10th ed. 2014) ("The practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength.").

¹³ See, e.g., 42 U.S.C. § 1973c (2012) (requiring that race cannot be the only factor considered in redistricting); 2 U.S.C. § 2c (2012) (requiring that congressional members be elected from geographically based districts, rather than elected from at-large statewide positions); see also *Baker v. Carr*, 369 U.S. 186, 209 (1962) (holding that legislative apportionment is a justiciable issue); *Shaw v. Reno*, 509 U.S. 630, 643–44 (1993) (holding that race-based redistricting must be held to a standard of strict scrutiny).

¹⁴ See *Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (requiring state legislative districts to be roughly equal in population); *Miller v. Johnson*, 515 U.S. 900, 911 (1995) ("Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks . . . it may not separate its citizens into different voting districts on the basis of race."); *Bush v. Vera*, 517 U.S. 952, 983 (1996) (finding a racially-motivated redistricting plan not narrowly tailored to serve a compelling state interest).

¹⁵ 478 U.S. 109 (1986).

¹⁶ See *infra* Section I.A.

A. *Political Gerrymandering and Judicial Ineptitude*

Since the early gerrymandering cases, the Court has sought to address concerns over the malapportionment of electoral districts.¹⁷ Later, the Court focused on racial considerations in gerrymandering, beginning with *Whitcomb v. Chavis*,¹⁸ in which the Court confronted the unpleasant but significant realization that political groups are not entitled to electoral representation proportional to their voting power, and later *Shaw v. Reno (Shaw I)*,¹⁹ in which the Court held that strict scrutiny applies to racial gerrymanders. These cases highlight the Court's struggle to create adequate remedies for the machinations developed through political gerrymandering. While the "one-person, one-vote" principle that emerged from the early malapportionment cases can be seen as an important benchmark for assessing the injurious effects of district manipulation,²⁰ and the *Shaw* line of cases can be viewed as a struggle for greater protection of individual rights against impermissible racial discrimination in gerrymandering cases,²¹ the emphasis on rudimentary principles of equality has proved to be of limited utility.²² The limitations of this jurisprudence in addressing the Court's concerns over gerrymandering became apparent in the area of political gerrymandering.²³

¹⁷ See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 596 (2002) [hereinafter *Cartels*] (describing the problem identified by the Supreme Court during the "reapportionment revolution").

¹⁸ 403 U.S. 124, 148–49 (1971) (rejecting the District Court's finding that multi-member district elections, which lead to underrepresentation of the "ghetto" population in the legislature, violated the Equal Protections Clause); see also *White v. Regester*, 412 U.S. 755, 765–66 (1973) ("To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential.").

¹⁹ 509 U.S. 630, 644 (1993).

²⁰ See Issacharoff, *Cartels*, *supra* note 17, at 596 (explaining that the "one-person, one-vote principle provided a preliminary fix" for harms "limited to numerical disparities among districts").

²¹ See *id.* at 597 (describing "the customary examination of the *Shaw* issues as simply another manifestation of the question of the level of equal protection scrutiny that should be afforded to race-conscious redistricting").

²² See generally *id.* (arguing for a different constitutional theory of redress in gerrymandering cases).

²³ See *id.* at 597–601 (describing the Supreme Court's inability to address the harm in partisan and bipartisan gerrymandering cases); but see Luis Fuentes-Rohwer, *Looking for a Few Good Philosopher Kings: Political Gerrymandering as a Question of Institutional Competence*, 43 CONN. L. REV. 1157, 1182–83 (2011) [hereinafter *Philosopher Kings*] (arguing that the Supreme Court "struck the right bargain" in partisan gerrymandering cases).

In *Davis v. Bandemer*,²⁴ the Court recognized that partisan gerrymandering could be a form of unconstitutional discrimination.²⁵ Democrats in Indiana challenged the state's 1981 apportionment plan for the state legislature, arguing that the plan represented unconstitutional political vote dilution.²⁶ The limitations of the Court's gerrymandering doctrine that began to rear its ugly head in *Chavis*—from which the Court foreclosed any claims that the Constitution requires proportional representation based on political affiliation or race²⁷—proved to be haunting. Citing *Chavis* and its progeny throughout the opinion,²⁸ the Court held that a claim for partisan gerrymandering required proof of discriminatory intent and proof of a *consistent degradation* in the voting power of the party bringing the claim.²⁹ A mere lack of proportional representation is not enough to prove unconstitutional discrimination. The exceptionally high standard developed by the Court in *Bandemer* proved to be ineffective, inviting litigation, but little redress.³⁰ Later, in *Vieth v. Jubelirer*,³¹ Pennsylvania Democrats challenged a legislator-drawn redistricting plan that sought to maximize the electoral prospects of Republicans. The Court further limited the virtually nonexistent *Bandemer* remedy, which applied in the limited circumstance where plaintiffs could meet the extremely high bar, by holding that there is not a manageable judicial standard for partisan gerrymandering claims.³² In the controlling opinion, Justice Kennedy wrote: "I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an estab-

²⁴ 478 U.S. 109 (1986).

²⁵ *Id.* at 132.

²⁶ *Id.* at 115.

²⁷ *See id.* at 130 (citing *Whitcomb v. Chavis*, 403 U.S. 124, 153, 156, 160 (1971), and *White v. Regester*, 412 U.S. 755, 756–66 (1973), *vacated*, 422 U.S. 935 (1975)) ("Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.").

²⁸ *See, e.g., Bandemer*, 478 U.S. at 119, 124, 130–31, 150.

²⁹ *See id.* at 132 ("[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.").

³⁰ *See Vieth v. Jubelirer*, 541 U.S. 267, 279 (2004) ("As one commentary has put it, '[t]hroughout its subsequent history, *Bandemer* has served almost exclusively as an invitation to litigation without much prospect of redress.'" (quoting SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* 886 (rev. 2d ed. 2002))).

³¹ 541 U.S. 267 (2004).

³² *See id.* at 307–08 (Kennedy, J., concurring) ("Because there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights.").

lished violation of the Constitution in some redistricting cases.”³³ The Court’s refusal to overrule *Bandemer* is evidence of judicial acquiescence to the tactfulness of legislators, rather than sanctioning of political gerrymandering.³⁴

Other decisions handed down by the Court suggest that remedies for political gerrymandering will likely come from the political process, not the judiciary.³⁵ As long as redistricting authorities create redistricting plans for “political” reasons—namely partisan considerations, accounting for individual rights concerns—those plans will likely survive judicial review.³⁶

³³ *Id.* at 306 (Kennedy, J., concurring).

³⁴ *Cf. id.* (leaving open the possibility of remedy in political gerrymandering cases if a proper rationale is located).

³⁵ See Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, “Fair Representation” and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 532 n.14 (2003) [hereinafter *Politics in Court*] (“To ask the Court to reform [the redistricting process] . . . is far more simple than doing the hard, yet requisite, work of re-forming the system through established political means.”).

³⁶ See, e.g., *Easley v. Cromartie*, 532 U.S. 234, 258 (2001) (finding that a raced-based redistricting plan did not violate the Equal Protection Clause because districts were drawn based on partisan concerns); *Gaffney v. Cummings*, 412 U.S. 735, 737–38, 751–52 (1973) (finding a redistricting plan with a maximum deviation of nearly eight percent between house districts constitutional because its purpose was to achieve “political fairness”). See also Noah Litton, Note, *The Road to Better Redistricting: Empirical Analysis and State-Based Reforms to Counter Partisan Gerrymandering*, 73 OHIO ST. L.J. 839, 844–50 (2012) (explaining the *Bandemer* standard and political reactions). In November 2016, a 2-1 federal panel decision declared that Wisconsin’s legislator-drawn redistricting plan was a product of unconstitutional partisan gerrymandering in *Whitford v. Gill*, No. 15-CV-421-BBC, 2016 WL 6837229, at *46–53, 65 (W.D. Wis. Nov. 21, 2016). Legal observers expect the Supreme Court to hear the case on appeal. E.g., Bernard Grofman, *The Supreme Court Will Examine Partisan Gerrymandering in 2017. That Could Change the Voting Map*, WASH. POST (Jan. 31, 2017) <https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/31/the-supreme-court-will-examine-partisan-gerrymandering-in-2017-that-could-change-the-voting-map/> (“When there is an appeal of that decision, it will almost certainly be heard by the Supreme Court.”). As the first time the Court would evaluate “social science approaches to partisan gerrymandering”, *Whitford* could bring great changes in the Court’s political gerrymandering jurisprudence. *Id.* *Whitford* may also be influenced by the Supreme Court’s recent decision in *Bethune-Hill v. Virginia State Board of Elections*, No. 15-680, 2017 WL 774194 (U.S. Mar. 1, 2017), a racial gerrymandering case in which the Court held that “a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering.” *Id.* at *9. As Professor Richard Pildes points out, this holding may have important consequences for *Whitford* on appeal “[i]f the Court applies the same principle . . . and holds that what would otherwise be an unconstitutional partisan gerrymander cannot be immunized merely because the legislature [argues that] the districts comply with traditional districting principles” Richard Pildes, *Today’s Important Decision in Bethune-Hill*, ELECTION LAW BLOG (March 1, 2017, 11:21 AM), <https://electionlawblog.org/?p=91415>.

1. *Institutional Incompetence*

The Court's gerrymandering jurisprudence can be viewed as a struggle to address difficult questions of democratic theory.³⁷ Professor Luis Fuentes-Rohwer argues that redistricting cases are not about equality or numerical disparities, but finding answers to often-elusive theoretical questions.³⁸ From this perspective, the concept of "fair representation" cannot easily be defined. Accepting that equal protection concerns focused on the voting population alone do not solve the issue, one must look for other principles to determine whether a gerrymandered district "fails to 'achiev[e] . . . fair and effective representation for all citizens.'" ³⁹

That gerrymandering jurisprudence concerns political questions is not a new observation.⁴⁰ Professor Fuentes-Rohwer argues that the Court is not the appropriate institution to address political gerrymandering; that is, political gerrymandering inherently involves political questions.⁴¹ Under this view, the responsibility to remedy the effects of political gerrymandering should be left to the other branches, with the judiciary playing a secondary role.⁴² Outside the scope of reapportionment and racial concerns, the judiciary should almost always defer to the judgment of the other branches when addressing issues of political gerrymandering.

In evaluating the *Bandemer* and *Vieth* decisions, it appears the Court agrees with the view that such questions should be left to the political branch. *Bandemer* created an extraordinarily high standard, and *Vieth* further limited a standard of minimal utility by holding that there is no manageable judicial standard in political gerrymandering

³⁷ See Fuentes-Rohwer, *Politics in Court*, *supra* note 35, at 545 (arguing that the judiciary should not address complicated political questions related to redistricting).

³⁸ See *id.* at 545–46 (arguing that determining what is "fair representation" is possibly intractable); see also Bruce E. Cain, *Election Law as a Field: A Political Scientist's Perspective*, 32 LOY. L.A. L. REV. 1105, 1107 (1999) (contending that, "even though democratic theory has not played a major role in [the voting/representation cases], the implicit democratic theory questions are actually quite important"); Samuel Issacharoff & Richard H. Pildes, *Not by "Election Law" Alone*, 32 LOY. L.A. L. REV. 1173, 1174 (1999) (contending that the voting rights arena "tak[es] democracy itself out of the background and plac[es] it squarely at the center of our inquiries").

³⁹ Fuentes-Rohwer, *Politics in Court*, *supra* note 35, at 546 (quoting *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964)).

⁴⁰ See *Baker v. Carr*, 369 U.S. 186, 323 (1962) (Frankfurter, J., dissenting) (surveying the host of complex issues raised by apportionment).

⁴¹ See Fuentes-Rohwer, *Philosopher Kings*, *supra* note 23, at 1180 (arguing that the judiciary should give "due deference" to state politics to solve gerrymandering issues).

⁴² See *id.* at 1181 (arguing that courts should play a deferential role in political gerrymandering cases).

cases, essentially giving political gerrymanders a free pass.⁴³ While one should not discount the fact that the Court did not overrule *Bandemer*, until a manageable standard to employ in political gerrymandering cases is developed, it appears the Court has conceded its inadequacy in the context of political gerrymandering.

2. *Conflict of Interest, Partisanship, and Competition*

There are glaring issues with the Court's apparent acquiescence in political gerrymandering cases. The Court's almost exclusive emphasis on individual rights under Equal Protection doctrine, while certainly valuable, can be seen as a distraction from the critical problem with most gerrymanders today: the conflict of interest inherent in allowing legislators to draw the districts that will determine their political survival and the future of their political party.⁴⁴ A number of scholars have identified legislator conflict of interest as a central concern of serious redistricting reform efforts.⁴⁵ For democratic theorists concerned about electoral fairness and representative accountability, incumbents determining the boundaries of the districts in which they will ultimately compete is obviously problematic.⁴⁶ Leaving redistricting authority in the hands of legislators is equivalent to accepting one of two outcomes: partisan gerrymandering—drawing district lines to give one party an affiliation-based numerical advantage in as many districts as possible; or bipartisan gerrymandering—drawing district lines to create as many safe seats as possible for both parties.

⁴³ See *Vieth v. Jubelirer*, 541 U.S. 267, 279 (2004) (“[B]ut for the fact that its application has almost invariably produced the same result (except for the incurring of attorney’s fees) as would have obtained if the question were nonjusticiable: Judicial intervention has been refused.”).

⁴⁴ See Issacharoff, *Cartels*, *supra* note 17, at 595–96 (“[A] focus on districting is only a subset of a concern over the ability of insiders to gain unfair advantage over the disorganized mass of the electorate who must . . . await the manner in which issues are presented to them on election day before trying to exercise their will.”); Jarret A. Zafran, Note, *Referees of Republicanism: How the Guarantee Clause Can Address State Political Lockup*, 91 N.Y.U. L. REV. 1418, 1449–50 (2016) (discussing political “lockups” in state elections).

⁴⁵ See, e.g., Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1817 (“The independent citizen commission design is the culmination of a reform effort aimed at lessening legislators’ ability to choose the district lines they run in.”); Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 U. CHI. J.L. & POL. 331, 332 (2007) [hereinafter *Reforming Redistricting*] (“Legislators’ self-interest and adverse court decisions leave critics of contemporary redistricting with only one promising avenue for reform: the popular initiative.”).

⁴⁶ See Issacharoff, *Cartels*, *supra* note 17, at 630 (“The concern over incumbent manipulation of redistricting to thwart electoral accountability becomes a subset of a broader strategy for ensuring the democratic accountability of elected representatives.”).

The principal problem with accepting the partisan-fueled conflict of interest inherent in the redistricting process in most states is that the legitimacy of the voting process is damaged.⁴⁷ Putting group-based discrimination and malapportionment aside, one is able to see the central problem: Political gerrymandering distorts the market in which voters exercise the right to choose *their* representatives.⁴⁸ Competitive integrity is critical for representative accountability.⁴⁹ The “ability of the citizens to participate primarily by choosing policymakers in competitive elections” is a democratic good in itself.⁵⁰ Allowing incumbent legislators to control the redistricting process diminishes the competitiveness of an electoral system already subject to significant political manipulation. Legislators are, to some extent, choosing their voters.⁵¹ To fully understand the political responses to political gerrymandering, it is essential to understand this central problem.

Our jurisprudence indicates that the Supreme Court views fair competition as an important, if not fundamental, principle of our democracy.⁵² The Court has invoked competition-based theories in a wide range of areas.⁵³ To be fair, the Court has identified impermis-

⁴⁷ *Id.* at 612 (“[T]he legitimizing function of the democratic accountability of elected officials depends on more than simply the ability of individuals and groups to participate in the electoral process.”).

⁴⁸ For a detailed description of the political market theory, see Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 *STAN. L. REV.* 643, 646 (1998) [hereinafter *Politics As Markets*].

⁴⁹ *See id.* at 646 (“Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interest and views of citizens.”).

⁵⁰ Issacharoff, *Cartels*, *supra* note 17, at 622 (quoting G. BINGHAM POWELL, JR., *ELECTIONS AS INSTRUMENTS OF DEMOCRACY* 3 (2000)).

⁵¹ *See Some Lawmakers Want to Put Politics Aside*, NPR (July 22, 2013, 1:58 PM), <http://www.npr.org/templates/story/story.php?storyId=204550145> (“We’re at a place now in this country where voters are not picking their representatives anymore.” (quoting Congressman Reid Ribble)). *See also* Fuentes-Rohwer, *Politics in Court*, *supra* note 35, at 551 (“This is the central argument offered against gerrymandering: that incumbents are able to manipulate district lines for self-serving ends, benefiting themselves at the expense of the public at large.”).

⁵² *See, e.g.*, *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (“[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”); *Int’l Salt Co. v. United States*, 332 U.S. 392, 396 (1947), *abrogated by Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 41–46 (2006) (“Not only is price-fixing unreasonable, per se . . . but also it is unreasonable, per se, to foreclose competitors from any substantial market.”).

⁵³ *Cf. Gratz v. Bollinger*, 539 U.S. 244, 271–75 (2003) (holding state university’s admissions policy violated the Equal Protection Clause because its ranking system gave an automatic point increase to all racial minorities rather than making individual determinations, thus placing the non-minority students at a competitive disadvantage); *Schlesinger v. Ballard*, 419 U.S. 498, 506–10 (1975) (upholding a federal statute that

sible restrictions in gerrymandering cases using competition-based theories.⁵⁴ However, in such cases the Court's primary concern has been the harm caused to partisan legislators, not to voters.⁵⁵ To date, the only practical remedy available for voters is to support independent redistricting commissions via ballot initiative,⁵⁶ a reality looming in the background of the *AIRC* decision.

B. Delegation Through Direct Democracy

The Supreme Court's gerrymandering decisions have positioned legislators as the primary beneficiaries of redistricting plans.⁵⁷ Judicial acquiescence to legislator conflict of interest has provided legislators with room to manipulate district lines as they please, justified by "political" concerns. Today, one can look at a map of state legislative or congressional districts and see districts that have no identifiable shape; disregard geographic, municipal, and communal boundaries; or blatantly package voters from specific communities to minimize their collective voting power.⁵⁸

Initiatives give voters the power to have statutory and constitutional amendments placed directly on a state ballot.⁵⁹ Reformers consider these initiatives to be an appropriate mechanism to improve

granted female naval officers more time to be promoted to account for competitive disadvantages placed on women in the promotion process).

⁵⁴ For example, see *Reynolds v. Sims*, 377 U.S. 533, 566–68 (1964) (holding that state legislature districts had to be roughly equal in population to prevent malapportionment), and its progeny.

⁵⁵ See *Gaffney v. Cummings*, 412 U.S. 772, 772–75 (1973) (holding that an otherwise acceptable reapportionment plan was not made constitutionally vulnerable by the fact that its purpose was to provide districts that would achieve "political fairness" between major political parties).

⁵⁶ See Stephanopoulos, *Reforming Redistricting*, *supra* note 45, at 332–33 n.8 ("Redistricting initiatives are clearly a second-best solution since they must be conducted separately in each state, and are unavailable entirely in twenty-six states."). The Elections Clause does not explicitly grant Congress the authority to pass national legislation to remove redistricting authority from state legislatures. See *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2253 (2013) ("The Elections Clause has two functions. Upon the States it imposes the duty ('shall be prescribed') to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether."). However, the likelihood of such a bill passing both Houses of Congress is minimal, especially in the era of congressional gridlock. See Issacharoff, *Cartels*, *supra* note 17, at 629 (noting that as congressional districts are increasingly dominated by one party, there is "more difficulty in forming legislative coalitions across party lines").

⁵⁷ See Stephanopoulos, *Reforming Redistricting*, *supra* note 45, at 332–33 & n.8 (describing legislators as the primary beneficiaries of redistricting plans).

⁵⁸ For visual examples of some of these districts, see *The 10 Most Gerrymandered Districts in America*, BUZZFEED (Aug. 15, 2013, 7:35 PM), <http://www.buzzfeed.com/qshamed/the-10-most-gerrymandered-districts-in-america-dh45#pe6ZdYP1B>.

⁵⁹ *E.g.*, Stephanopoulos, *Reforming Redistricting*, *supra* note 45, at 332–33.

redistricting practices.⁶⁰ In the context of political gerrymandering, the interests of the public and state legislatures are in direct opposition.⁶¹ In the political market for redistricting, initiatives allow voters to avoid the suppression of their free choice caused by legislator conflict of interest and partisanship.⁶²

However, redistricting initiatives have limitations. So far, only twenty-four states allow these initiatives in some form.⁶³ Initiatives can only be implemented one state at a time,⁶⁴ and are subject to common problems associated with direct democracy, such as a lack of information available to voters and misleading campaigns.⁶⁵ Redistricting initiatives also involve costly, drawn-out political battles that are not likely to pay off, evidenced by the fact that most redistricting initiatives fail.⁶⁶

⁶⁰ See, e.g., DENNIS F. THOMPSON, *JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES* 173–75 (2002); Christopher C. Confer, *To Be About the People's Business: An Examination of the Utility of Nonpolitical/Bipartisan Legislative Redistricting Commissions*, 13 KAN. J. L. & PUB. POL'Y 115, 115 (2004); Robinson O. Everett, *Lessons from North Carolina's Redistricting Litigation*, 6 TEX. REV. L. & POL. 205, 221 (2001); Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1647, 1691–98 (1993); Gene R. Nichol, *The Practice of Redistricting*, 72 U. COLO. L. REV. 1029, 1030 (2001); Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 839–41 (1997).

⁶¹ See Stephanopoulos, *Reforming Redistricting*, *supra* note 45, at 336 (“Legislators want to win reelection handily and to have their party obtain as many seats as possible [T]he public is more interested in elections whose outcome is not a forgone conclusion”).

⁶² See Note, *Judicial Approaches to Direct Democracy*, 118 HARV. L. REV. 2748, 2765 (2005) (“[D]irect democracy is most effective when partisan politics or special-interest influence has so distorted the proper operation of political markets that democratic government ceases to be responsive to voters’ concerns.”). There are those who oppose the use of direct democracy to solve political problems. As Julian Eule argues, “direct democracy bypasses internal safeguards designed to filter out or negate factionalism, prejudice, tyranny, and self-interest.” Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1549 (1990). However, this criticism is insufficient in the context of political gerrymandering. The self-interest in the redistricting arena comes from the internal process itself. See Issacharoff & Pildes, *Politics As Markets*, *supra* note 48, at 650. From this perspective, redistricting commissions remove a market restraint that prevents voters from fully exercising their right to choose.

⁶³ See INITIATIVE & REFERENDUM INSTITUTE, *STATE I & R*, http://www.iandrinstitute.org/statewide_i&r.htm (last visited Sep. 19, 2016) (displaying map of states where citizens have the right to use an initiative or referendum).

⁶⁴ See Stephanopoulos, *Reforming Redistricting*, *supra* note 45, at 337 (“Moreover, the intrinsic state-by-state nature of direct democracy means that redistricting reform by initiative must unfold slowly and incrementally, rather than in a single national legislative or judicial thunderclap.”).

⁶⁵ See *id.* (“[T]heir accompanying media campaigns are often extremely misleading”).

⁶⁶ *Id.* at 333 (“[T]he biggest problem with redistricting initiatives: the fact that they generally fail.”).

Scholars have identified obtaining an electoral system free of undue constrictions and bias as a key attribute of democratic responsiveness and accountability.⁶⁷ To evaluate the *AIRC* decision, this Note assumes that redistricting initiatives presently represent the best method to remove unnecessary constrictions on political competition.⁶⁸

The states employ numerous methods and procedures in the redistricting process.⁶⁹ Variations include legislature-controlled redistricting, commission-controlled redistricting, and court-controlled redistricting.⁷⁰ cursory descriptions of a few different redistricting body classifications are helpful to understand the significance of the Arizona Independent Redistricting Commission.

Some states use legislature-controlled partisan systems for redistricting.⁷¹ This system employs a redistricting board with a majority of members from one political party, dependent upon which party won the majority of votes in the last round of statewide elections before redistricting. Members of the second-place party are included, but outnumbered by members of the dominant party. To illustrate, Ohio uses this form of partisan redistricting.⁷² In Ohio, a simple majority vote from the redistricting board is all that is required to enact a redistricting proposal.⁷³ Districts are drawn to maximize the influence of

⁶⁷ See, e.g., Issacharoff & Pildes, *Politics As Markets*, *supra* note 48, at 646 (“Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interests and views of citizens.”).

⁶⁸ See Stephanopoulos, *Reforming Redistricting*, *supra* note 45, at 332–33 (“Redistricting initiatives . . . [are] the only realistic way to curb political gerrymandering.”). Discussing the effectiveness of redistricting commissions is beyond the scope of this Note. For scholarship on the effectiveness of independent redistricting commissions, see Barry Edwards et al., *Can Independent Redistricting Commissions Lead Us Out of the Political Thicket*, 9 ALB. GOV’T L. REV. 288, 318–25 (2016) (reviewing empirical political science on the impact of independent redistricting commissions).

⁶⁹ JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, A CITIZEN’S GUIDE TO REDISTRICTING 34–36 (2010), https://www.brennancenter.org/sites/default/files/legacy/Democracy/CitizensGuidetoRedistricting_2010.pdf (displaying various redistricting procedures used by states).

⁷⁰ See Litton, *supra* note 36, at 853 (describing the different types of redistricting procedures).

⁷¹ For examples of legislature-controlled partisan systems for redistricting, see OHIO CONST. art. XI, § 1; ARK. CONST. art. VIII, § 4, *amended by* ARK. CONST. amends. XXIII, XLV; and ALA. CONST. art. VI, § 8.

⁷² See OHIO CONST. art. XI, § 1 (explaining the composition of the redistricting board).

⁷³ See *id.* (“Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine House of Representative districts and thirty-three Senate districts.”).

the controlling party. Two attempts to reform Ohio's redistricting process using voting initiatives have failed.⁷⁴

Another form of legislature-controlled redistricting, bipartisan redistricting is also used by many states.⁷⁵ Redistricting bodies in bipartisan systems usually include an equal number of legislators (or officials) from each major political party.⁷⁶ A neutral member, who is not a member of either party, is chosen by the members to serve as a tiebreaker.⁷⁷ While a bipartisan system may sound better than a partisan system in theory, legislator conflict of interest still presents a serious risk of political market constriction. Bipartisan redistricting does nothing to solve the conflict of interest problem, as so-called "sweetheart" gerrymandering—when district lines are drawn to preserve as many incumbents as possible for both parties by making districts that are extremely favorable to incumbents—becomes a foreseeable outcome.⁷⁸

II

THE ARIZONA INDEPENDENT REDISTRICTING COMMISSION DECISION AND DELEGATION

Against a backdrop of judicial acquiescence to political gerrymandering, the emergence of redistricting initiatives, Arizona's history of dysfunctional redistricting, and a philosophical struggle between legislators and reformers, the Supreme Court granted certiorari to decide *AIRC*.⁷⁹ The Arizona State Legislature brought an action against the state's independent redistricting commission, arguing that creating the commission via ballot initiative violated the Elections Clause.⁸⁰ The issue before the Court seemed to be a mere matter of interpretation: "Does the provision of the Arizona Constitution that divests the Arizona Legislature of any authority to prescribe congressional district lines violate the Elections Clause of the United

⁷⁴ See Stephanopoulos, *Reforming Redistricting*, *supra* note 45, at 357–60, 374–77 (describing two failed redistricting initiatives in Ohio).

⁷⁵ For example, Pennsylvania's five-member commission consists of "the majority and minority leaders of both the Senate and the House of Representatives" and the chairman. PA. CONST. art. II, § 17(b).

⁷⁶ See *id.* (mandating that the reapportionment commission consist of two minority leaders and two majority leaders).

⁷⁷ See *id.* (explaining the procedure for selecting the fifth commissioner who serves as chairman).

⁷⁸ See Issacharoff, *Cartels*, *supra* note 17, at 600 ("Since the bilateral cartelization of political markets neither tramples individual rights to participate in the political process nor disadvantages one political party relative to another, the practice stays safely off the constitutional radar screen.").

⁷⁹ Order Granting Certiorari, *AIRC*, 135 S. Ct. 2652 (2015) (No. 13-1314).

⁸⁰ *AIRC*, 135 S. Ct. at 2658–59.

States Constitution, which requires that the time, place, and manner of congressional elections be prescribed in each state by the ‘Legislature thereof?’”⁸¹ Writing for the majority, Justice Ginsburg’s opinion focused mainly on the meaning of “legislature” as it was used in the Elections Clause of the U.S. Constitution.⁸² However, in the opening paragraph of the opinion, Justice Ginsburg made clear what she believed the case was really about: political gerrymandering.⁸³ She immediately cited Justice Kennedy’s concurrence in *Vieth*,⁸⁴ otherwise an odd choice as the issue in *Vieth* was political gerrymandering, not the interpretation of the Constitution. In doing so, Justice Ginsburg signaled that the *AIRC* decision was at least partly concerned with providing a remedy to voters for the ills of political gerrymandering.

The opening paragraph of the opinion set the tone for the remainder of the Court’s decision, in which the majority held that history and judicial precedent did not limit the definition of “legislature” to traditional state legislatures.⁸⁵ Instead, the Court’s interpretation encompassed any method of general lawmaking authority constituted by the state.⁸⁶ This lawmaking authority pertains to the laws that govern elections, including the redistricting process. By adopting such an expansive reading of “legislature,” the Court effectively shifted traditional notions of legislative authority and sanctioned the broadening of this authority to include the voters themselves. The Court, however, provided little support for the delegation theory applied in the case. This Part evaluates the implications of the delegation theory adopted by the Court in *AIRC*. As background for this discussion, Section II.A chronicles the history and development of the Arizona Redistricting Commission. Section II.B then argues that the *AIRC* decision should be viewed as decisive action by the Court to reassert the regulatory function of voters in the political marketplace.

⁸¹ Order Granting Certiorari, *supra* note 79 (quoting U.S. CONST. art. I, § 4).

⁸² See *AIRC*, 135 S. Ct. at 2668 (explaining that “legislature” has different meanings throughout the Constitution depending on the context in which it is used).

⁸³ See *id.* at 2658 (addressing the issue of “partisan gerrymandering,” a term synonymous with “political gerrymandering”).

⁸⁴ See *id.* (“‘[P]artisan gerrymanders,’ this Court has recognized, ‘[are incompatible] with democratic principles.’” (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004))).

⁸⁵ See *id.* at 2659 (“[W]e hold that lawmaking power in Arizona includes the initiative process . . . and the Elections Clause permit[s] use of the *AIRC* in congressional districting in the same way the Commission is used in districting for Arizona’s own Legislature.”). For a critical view of the *AIRC* decision, see Saikrishna Bangalore Prakash & John Yoo, *People ≠ Legislature*, 39 HARV. J.L. & PUB. POL’Y 341, 370 (2016) (“Today a malleable interpretation of ‘Legislature’ has the effect of curbing gerrymandering. Tomorrow a more conventional interpretation may do the same. But having the meaning of ‘Legislature’ turn on such considerations is no way to decide cases.”).

⁸⁶ *AIRC*, 135 S. Ct. at 2669.

A. *The Arizona Example*

Arizona has redistricting procedures that are the “boldest departure[] from the traditional legislative redistricting model.”⁸⁷ Like California, Arizona employs independent redistricting commissions.⁸⁸

The events that led to the passing of the Arizona redistricting initiative exemplify many of the themes in the controversial world of political gerrymandering. Arizona’s redistricting history includes judicially overturned, vetoed, and federally rejected redistricting plans.⁸⁹ Arizona also has a reputation for eliciting complaints about the bizarre shapes of some electoral districts in the state.⁹⁰ Many commentators expressed concern that Arizona’s state and federal elections were overwhelmingly anticompetitive, virtually guaranteeing continued wins for incumbents.⁹¹ One could consider these conditions evidence of a political market failure in Arizona by the time the redistricting initiative was placed on the ballot in 2000.⁹²

Proposition 106 was created to eliminate legislator conflict of interest from Arizona’s redistricting process by giving the redistricting power to unelected citizens.⁹³ Once approved by popular vote, Proposition 106 amended the Arizona Constitution to establish the Arizona Independent Redistricting Commission (Commission), a bipartisan commission tasked with redrawing district lines indepen-

⁸⁷ Cain, *supra* note 45, at 1812. Iowa also uses a unique non-partisan redistricting process, which could equally claim to be a great departure from traditional redistricting practices. A nonpartisan legislative agency draws a redistricting plan based solely on objective criteria. The legislature and Governor must then pass the proposed plan, or an alternative plan, until an expiration date. See IOWA CODE §§ 42.2, 42.4 (2011) (identifying objective criteria that the agency must consider when drawing district lines, such as population size, contiguity, and compactness).

⁸⁸ The focus of this Note is limited to Arizona’s redistricting procedure. For a detailed description of California’s redistricting commission, see Cain, *supra* note 45, at 1821–27.

⁸⁹ See Barbara Norrander & Jay Wendland, *Redistricting in Arizona, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST* 177, 178–93 (Gary F. Moncrief ed., 2011) (detailing Arizona’s redistricting history).

⁹⁰ See, e.g., Pat Flannery, *Keeping Politics in Line*, ARIZ. REPUBLIC, Aug. 23, 2000, at 1 (describing a district as “a beast gobbling up disparate communities”).

⁹¹ See, e.g., Chris Moeser, *House Supports Redistricting Plan*, ARIZ. REPUBLIC, Mar. 5, 1999, at A23 (noting that seventeen state senators and twenty-two state representatives had no opponent in the last election); Editorial, *Put the Crayons Back in the Box!*, ARIZ. REPUBLIC, June 27, 1999, at B6 (explaining that incumbents won 96 percent of their races since 1992).

⁹² See Francis M. Bator, *The Anatomy of Market Failure*, 72 Q. J. ECON. 351, 351 (1958) (describing market failure as “the failure of a more or less idealized system of price-market institutions to sustain ‘desirable’ activities or to estop ‘undesirable’ activities”).

⁹³ Prop. 106, Ariz. 2000 Ballot Prop. (2000) (enacted) (“Proposing an amendment to the Constitution of Arizona . . . ending the practice of gerrymandering and improving voter and candidate participation in elections by creating an *independent commission* of balanced appointments to oversee the mapping of fair and competitive congressional and legislative districts.” (emphasis added)).

dent of the state legislature.⁹⁴ Under Proposition 106, the Commission consists of five members, of which four are appointed by the majority and minority leaders in the state house and senate, each choosing from a pool of twenty-five citizens selected by Arizona's Commission on Appellate Court Appointments.⁹⁵ The pool is made up of both citizens with no political affiliation and those who are members of one of the two major political parties.⁹⁶ In order to limit partisan bias, the Commission follows neutral criteria and disregards inherently partisan considerations like incumbency and majority-minority constituent districts in the initial gridline draft.⁹⁷

Arizona's Proposition 106 was unique in that it enjoyed the support not only of obvious political stakeholders, like the Arizona Democrats⁹⁸ who were often on the losing end of elections, and government reform groups such as Common Cause and the League of Women Voters,⁹⁹ but also some prominent Arizona Republicans.¹⁰⁰ The opposition to Proposition 106 came almost exclusively from the Republican legislators who had the most to lose from a redistricting process that no longer allowed them to secure electoral outcomes.¹⁰¹ These incumbents unsuccessfully attacked the initiative on the

⁹⁴ *Id.*

⁹⁵ See ARIZ. CONST. art. IV, pt. 2, § 1(3)–(6) (outlining the process for selection of commission members).

⁹⁶ *Id.* § 1(5).

⁹⁷ See Prop. 106, *supra* note 93, § 14(A)–(F).

⁹⁸ See, e.g., Andy Nichols, *Let Commission, Not Legislature, Redistrict State*, ARIZ. REPUBLIC, Jan. 3, 1999, at 6B (expressing support, as Democratic State Representative, for the redistricting commission); Robbie Sherwood, *Nov. Ballot May Carry 17 Questions*, ARIZ. REPUBLIC, July 7, 2000, at A1 (“This will create more competitive districts where you have strong candidates fighting each other over ideas. Will it work or be perfect? Who knows? But it’s a good start.” (quoting Democrat Attorney General Janet Napolitano)); Editorial, *Voters Deserve Fair Redistricting*, ARIZ. REPUBLIC, Feb. 5, 1999, at B6 (“Republicans like competition in everything except their own seats.” (quoting failed Democratic congressional candidate Sam Coppersmith)).

⁹⁹ Flannery, *supra* note 90, at 1.

¹⁰⁰ See David K. Pauole, Comment, *Race, Politics & (In)Equality: Proposition 106 Alters the Face and Rules of Redistricting in Arizona*, 33 ARIZ. ST. L.J. 1219, 1220 (2001) (“The initiative . . . enjoyed strong political support from a number of elected officials, past and present: Janet Napolitano, Arizona Attorney General; Lisa Graham Keegan, Arizona Superintendent of Public Instruction; Rose Mofford, former Governor of Arizona; Grant Woods, former Arizona Attorney General; . . . [and] several mayors, including Skip Rimsza, Mayor of Phoenix.”); Chris Moeser, *Redistricting Change Sought*, ARIZ. REPUBLIC, Sept. 14, 1999, at B1 (“I don’t believe our Legislature has reflected the will of Arizonans on the most important issues very often in the ‘90s.” (quoting Republican and former Attorney General Grant Woods)); Editorial, *Voters Deserve Fair Redistricting*, *supra* note 98, at B6 (noting support of leaders from both major parties).

¹⁰¹ See Stephanopoulos, *Reforming Redistricting*, *supra* note 45, at 370 (“Opposition to the initiative stemmed almost entirely from Republican legislators and a handful of pro-business interest groups.”).

grounds that it would “lack accountability to voters” and “prove less representative of the state as a whole.”¹⁰² Despite their efforts, Arizona voted in favor of Proposition 106 by a twelve-percent margin.¹⁰³

While the results of Proposition 106 were not perfect, the 2001 Arizona Commission escaped any large-scale backlash within the state.¹⁰⁴ The Commission’s initial redistricting plan faced challenges from the U.S. Department of Justice (DOJ), which determined that it would violate Section 5 of the Voting Rights Act by reducing the number of majority-Latino voting districts.¹⁰⁵ However, the plan was subsequently revised and cleared by the DOJ.¹⁰⁶

Partisanship became a major point of contention during Arizona’s 2011 redistricting process.¹⁰⁷ Functional problems arose within the Commission: First, the commissioners, themselves appointed by partisan legislators, needed additional support staff—whose political affiliations are not addressed by Proposition 106¹⁰⁸—with redistricting expertise to assist in drawing district lines. Next, the Commission hired a Democratic consulting firm, which Republicans ultimately contested.¹⁰⁹

In sum, although legislator conflict of interest was virtually eliminated by removing the legislature from the redistricting process, partisan bias was still a factor. One party will inevitably have a sense that it lost something after a redistricting process.¹¹⁰ Arizona Republicans unhappy with new district lines challenged the congressional district

¹⁰² Pauole, *supra* note 100, at 1221.

¹⁰³ See Stephanopoulos, *Reforming Redistricting*, *supra* note 45, at 371 (noting the popular vote resulted in fifty-six percent in favor of Proposition 106 to forty-four percent against).

¹⁰⁴ The redistricting maps were challenged in state court, however, the challenge was rejected. See *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n*, 208 P.3d 676, 689 (Ariz. 2009) (en banc) (finding insufficient proof that the redistricting plan lacked a reasonable basis).

¹⁰⁵ See Letter from Ralph F. Boyd, Jr., Assistant Att’y Gen., U.S. Dep’t of Justice, to Lisa T. Hauser & José de Jesús Rivera, AIRC (May 20, 2002), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_020520.pdf (objecting to Arizona’s 2001 legislative redistricting plan). The number of majority-Latino voting age districts was reduced by three. Cain, *supra* note 45, at 1832.

¹⁰⁶ Cain, *supra* note 45, at 1832. For a detailed explanation of the preclearance process, see *What is Preclearance?*, THE ROSE INSTITUTE OF STATE AND LOCAL GOVERNMENT (2012), <http://roseinstitute.org/what-is-preclearance/>.

¹⁰⁷ Cain, *supra* note 45, at 1833 (“[P]artisan suspicion and disappointment over the likely political consequences of the new lines undermined the AIRC design.”).

¹⁰⁸ See Prop. 106, *supra* note 93, § 19 (explaining that the redistricting commission can hire staff without any mention of the party affiliations of staffers).

¹⁰⁹ For a detailed description of problems that arose in relation to partisanship during the 2011 Arizona redistricting process, see Cain, *supra* note 45, at 1833–37.

¹¹⁰ See *id.* at 1836 (describing the “sore loser problem” in redistricting).

map adopted in 2012.¹¹¹ In doing so, the Republican legislators claimed that the Commission violated the Elections Clause, essentially arguing that the Constitution expressly delegated the exclusive authority over redistricting to state legislatures.¹¹²

B. Reinforcing the Political Marketplace

The developments in Arizona provided the backdrop for the Supreme Court's *AIRC* decision, considered by some political observers to be the most important decision of the term.¹¹³ Other commentators have called the decision a signal of gerrymandering's imminent death.¹¹⁴ While reformers are aware that delegation of

¹¹¹ *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047, 1049 (D. Ariz. 2014).

¹¹² For those interested in increasing the legitimacy of the redistricting process, independent redistricting commissions may be both theoretically and practically superior to legislator-controlled redistricting. See Stephanopoulos, *Reforming Redistricting*, *supra* note 45, at 388 (“[R]edistricting commissions are in theory better suited to district-drawing than state legislatures, and empirically have produced more competitive elections and more representative results.”). Independent commissions solve the legislator conflict of interest problem and reduce the role of partisanship in the redistricting process. As Congressman Earl Blumenauer and former Representative Jim Leach argued, “commissions offer the best hope for taking partisanship out of the redistricting process.” Earl Blumenauer & Jim Leach, *Redistricting, a Bipartisan Sport*, N.Y. TIMES, July 8, 2003, at A23. For some, the acceptance of those factors in redistricting procedures has made our electoral process undemocratic. See *Some Lawmakers Want to Put Politics Aside*, *supra* note 51 (“I think the American people have a misperception of elections. We’re at a place now in this country where voters are not picking their representatives anymore. Representatives, through the gerrymandering process and redistricting, are picking their voters.” (quoting Congressman Reid Ribble)). The empirical value of redistricting commissions as a method to make legislative elections more competitive is subject to much debate. However, redistricting commissions have been shown to make elections more competitive. See Jamie L. Carson et al., *Reevaluating the Effects of Redistricting on Electoral Competition, 1972–2012*, 14 ST. POL. & POL’Y Q. 165, 168–74 (2014) (presenting empirical data demonstrating that court- and commission-drawn districts are more competitive than legislative-drawn districts). Additionally, it is not clear that eliminating legislator conflict of interest and limiting partisanship will be sufficient to create more competitive elections. There are several other factors to consider, such as the geographic preferences of voters, incumbency advantages, and the requirements of the Voting Rights Act of 1965.

¹¹³ See, e.g., Mark Joseph Stern, *Supreme Court Breakfast Table: Ginsburg’s Redistricting Decision Could Be the Most Important One of the Term*, SLATE (June 29, 2015, 3:42 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2015/scotus_roundup/ginsburg_decision_in_arizona_case_supreme_court_rules_against_gerrymandering.html (“I suspect that, in a few decades, this case will be considered one of the most important of the term.”).

¹¹⁴ See Jessica Taylor, *Could Supreme Court Decision Lead to Death of the Gerrymander?*, NPR (June 29, 2015, 4:53 PM), <http://www.npr.org/sections/itsallpolitics/2015/06/29/418643541/could-supreme-court-decision-lead-to-death-of-the-gerrymander> (“Now that the Constitution has been cleaned up, the green light is definitely visible through this.” (quoting Nicholas Stephanopoulos of the University of Chicago)).

redistricting authority to an independent commission is a remedy limited to only twenty-four states,¹¹⁵ there should be optimism. This Section addresses the implications of the Court's *AIRC* decision, arguing that the delegation theory applied by the Court should be viewed as reconfirming the regulatory function of voters in our representative democracy.

With the *AIRC* decision, the Court has reasserted itself in the redistricting arena. Independent redistricting commissions created via ballot initiative are constitutional.¹¹⁶ Putting the challenges of launching a successful initiative aside, voters in states where initiatives are available may now have a real choice in the political marketplace.¹¹⁷ In states where voters want reform, the Court has constitutionalized a viable remedy. While certainly a win for independent redistricting initiatives, the *AIRC* decision may have much larger implications.

Significantly, *AIRC* marks the first time the Court has held that citizens of a state can take constitutionally delegated authority from the legislative body and delegate that authority to another body via ballot initiative.¹¹⁸ Chief Justice Roberts wrote: "The majority provides no support for the delegation part of its theory, and I am not sure whether the majority's analysis is correct on that issue."¹¹⁹

The majority opinion seems to address this point by citing two cases in which the Court defined "'the Legislature' in the Elections Clause as '*the representative body* which ma[kes] the laws of the people.'"¹²⁰ The majority's reference is unsatisfying, however, because the cases cited do not directly address the delegation issue in *AIRC*. In the first case, *Ohio ex rel. Davis v. Hildebrant*, the Court held that the people of each state reserve the right to approve or disapprove, by referendum, a redistricting plan for congressional elections.¹²¹ In

¹¹⁵ See *id.* ("There will be movements in some other states . . . but it really is in those states that have the initiative process and are comfortable using it." (quoting Stanford Law Professor Nathaniel Persily)); Stephanopolous, *Reforming Redistricting*, *supra* note 45, at 332 (noting availability of voting initiatives in twenty-four states).

¹¹⁶ See *AIRC*, 135 S. Ct. at 2659 ("[W]e hold that lawmaking power in Arizona includes the initiative process . . . and the Elections Clause permit[s] use of the *AIRC* in congressional districting in the same way the Commission is used in districting for Arizona's own Legislature.").

¹¹⁷ For a detailed analysis of successful and failed initiatives, see Stephanopoulos, *Reforming Redistricting*, *supra* note 45, at 377–82.

¹¹⁸ See *AIRC*, 135 S. Ct. at 2687 (Roberts, C.J., dissenting) ("Nothing in *Hildebrant*, *Smiley*, or any other precedent supports the majority's conclusion that imposing some constraints on the legislature justifies deposing it entirely.").

¹¹⁹ *AIRC*, 135 S. Ct. at 2678–79 (Roberts, C.J., dissenting).

¹²⁰ *Id.* at 2678 (Roberts, C.J., dissenting) (citing *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (quoting *Hawke v. Smith* (No. 1), 253 U.S. 221, 227 (1920))).

¹²¹ *Hildebrant*, 241 U.S. at 568.

Hawke v. Smith, the issue was whether a state had the authority to give its voters the right to review its legislature's ratification of a federal amendment—specifically, the Eighteenth Amendment establishing the prohibition of alcohol—through use of a referendum.¹²² Both cases involved referendums, whereas *AIRC* involved the use of an initiative to grant lawmaking authority to an independent commission.

Initiatives and referendums are both forms of direct democracy, so what is the issue? What appears to be a small distinction is actually critical to understanding the implications of the majority opinion. A referendum is a citizen proposal to repeal a law that was *previously* enacted by the state legislature.¹²³ An initiative is a proposal of a *new* law or constitutional amendment that is placed on a ballot after receiving a certain number of citizen signatures.¹²⁴ A referendum takes place *after* the legislature has acted, whereas an initiative takes place *independent of* and *before* the legislature acts.

This distinction was a central point of Chief Justice Roberts's dissent. While conceding that referendums after a redistricting process are constitutional under the Court's precedent, the Chief Justice wrote: "There is a critical difference between allowing a State to *supplement* the legislature's role in the legislative process and permitting the State to *supplant* the legislature altogether."¹²⁵ In contrast, there are only a few sentences in the majority opinion addressing this distinction. On point, Justice Ginsburg wrote, while the Elections Clause was not adopted to diminish a state's power to delineate its lawmaking processes, the "fundamental premise" that all power flows from the people does not distinguish instances where the people take initial control of the lawmaking process from those where they seek to correct the laws already proscribed by the legislature.¹²⁶ In support, the majority opinion invoked *The Federalist Papers*. Justice Ginsburg reasoned that, although "[t]he Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the . . . legislature," the process is "in

¹²² *Hawke*, 253 U.S. at 225–26.

¹²³ See *What Are Ballot Propositions, Initiatives, and Referendums?*, INITIATIVE & REFERENDUM INSTITUTE (2014), <http://www.iandrinstute.org/quick-facts.cfm> (last visited Sept. 28, 2016) (explaining the meaning of "referendum").

¹²⁴ *Id.* (explaining the meaning of "initiative").

¹²⁵ *AIRC*, 135 S. Ct. at 2687 (Roberts, C.J., dissenting). Justice Thomas highlighted the inconsistency of the Court's handling of constitutional challenges to the products of direct democracy (i.e., referenda and initiatives) in a separate dissent. *Id.* at 2697–99 (Thomas, J., dissenting). For a detailed analysis of his argument, see Michael E. Solimine, *Judicial Review of Direct Democracy: A Reappraisal*, 104 KY. L.J. 671, 671–73 (2016).

¹²⁶ *AIRC*, 135 S. Ct. at 2677.

full harmony with the Constitution's conception of the people as the font of governmental power."¹²⁷

After years of acquiescence, the *AIRC* Court finally answered the cry of reformers calling for remedies for political gerrymandering to reinforce the legitimacy of electoral competition, an essential feature of our representative democracy.¹²⁸ The Court's goal was to reduce the legislator-imposed constrictions on the freedom of voters to exercise their choice in the political market. Justice Ginsburg made that much clear, stating: "Independent redistricting commissions . . . have not eliminated the inevitable partisan suspicions associated with political line-drawing. But 'they have succeeded . . . [in limiting the conflict of interest implicit in legislative control over redistricting].' They . . . impede legislators from choosing their voters instead of facilitating the voters' choice of their representatives."¹²⁹

Still, the Chief Justice was not entirely mistaken to accuse the majority of "relying instead on disconnected observations about direct democracy" and "naked appeals to public policy" to reach the decision in *AIRC*.¹³⁰ It is true that the Court did not fully explain its reasoning. Surprisingly, while the Chief Justice admitted he was unsure whether the majority's delegation analysis was correct, he failed to articulate an alternative theory.¹³¹

In *AIRC*, the Court sent a forceful message about democratic legitimacy and accountability, ensuring that debilitating restraints on one of the core principals of our republican government—"that the voters should choose their representatives"¹³²—are alleviated. While encouraging, the reasoning provided by the Court in *AIRC* to justify adopting this delegation theory was not clear. The Court did not provide much guidance on the critical distinction between initiatives and referendums, leaving potentially broad implications in the political marketplace of ideas.¹³³

¹²⁷ *Id.* at 2674–75 (citing THE FEDERALIST NO. 37, at 223 (Madison)). For a detailed evaluation of THE FEDERALIST PAPERS as they relate to this case, see *infra* Part III.

¹²⁸ See *infra* Part III (discussing the intent of the framers with regard to our republican form of government).

¹²⁹ *AIRC*, 135 S. Ct. at 2676 (alteration in original) (citation omitted) (quoting Cain, *supra* note 45, at 1808).

¹³⁰ See *id.* at 2678 (Roberts, C.J., dissenting).

¹³¹ See *id.* at 2679 (Roberts, C.J., dissenting) ("I am not sure whether the majority's analysis is correct on that issue.").

¹³² Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 781 (2005).

¹³³ One important note addresses the Seventeenth Amendment. Chief Justice Roberts compared the delegation of authority to independent redistricting commissions with the power to elect U.S. Senators, arguing that a national Constitutional Amendment is required to take redistricting power from state legislators. See *AIRC*, 135 S. Ct. at 2677–78 (Roberts, C.J., dissenting). The Seventeenth Amendment analogy is dependent on an

III A SEARCH FOR “ORIGINAL INTENT”

In *AIRC*, the Court noted that initiatives and referendums were not invented when the Founding Fathers drafted the Elections Clause.¹³⁴ Evidenced by the decisions in *Hildebrant* and *Hawke*, this fact did not prohibit the Court from holding that the definition of legislature is not limited to an elected representative body alone.¹³⁵ But the critical takeaway from *AIRC* is that voters have the power to delegate, exclusively, constitutionally granted lawmaking authority via ballot initiative.¹³⁶ In this way, the holding in *AIRC* is unprecedented.

So where can one find support for the leap the Court made? The majority chose to survey dictionaries, its own precedent involving referendums, and democratic theory to support its holding. The dissent applied an intratextual approach to infer a definition of “legislature.”¹³⁷ In the end, it is not clear that either approach is well-suited to properly explain the delegation theory applied by the Court. Interestingly, the majority referenced *The Federalist Papers* in the opinion. Citing *Federalist No. 43*, Justice Ginsburg wrote: “[I]t is characteristic of our federal system that States retain autonomy to establish their own governmental processes.”¹³⁸ Later, Justice Ginsburg cited *Federalist No. 37* for the proposition that “power should be derived from the people.”¹³⁹ However, originalist support for the delegation theory applied by the Court is limited to these observations.¹⁴⁰

assumption that “neither the state legislature itself nor the people acting via initiative” could delegate *electoral* power. Muller, *Legislative Delegations*, *supra* note 9, at 23. When one takes a closer look, there is a difference between *electing*, or choosing Senators and *regulating*, or making the laws which govern how voters elect their representation.

¹³⁴ See *AIRC*, 135 S. Ct. at 2659 (“Direct lawmaking by the people was ‘virtually unknown when the Constitution of 1787 was drafted.’” (quoting Todd Donovan & Shaun Bowler, *An Overview of Direct Democracy in the American States*, in *CITIZENS AS LEGISLATORS* 1 (Shaun Bowler et al. eds., 1998))

¹³⁵ See *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916) (holding that the Elections Clause does not bar “treating the referendum as a part of the legislative power for the purpose of apportionment, where so ordained by the state Constitutions and laws”); *Hawke v. Smith*, 253 U.S. 221, 230 (1920) (“Congress had itself recognized the referendum as part of the legislative authority of the state for the purpose [of making the laws which govern elections].”).

¹³⁶ See Muller, *Legislative Delegations*, *supra* note 9, at 1, 25.

¹³⁷ For a detailed description of the intratextual approach applied by the dissent, see generally Michael T. Morley, *The Intratextual Independent “Legislature” and the Elections Clause*, 109 Nw. UNIV. L. REV. 847 (2015).

¹³⁸ *AIRC*, 135 S. Ct. at 2673.

¹³⁹ *Id.* at 2674–75 (internal citation omitted).

¹⁴⁰ Justice Ginsburg also cited FEDERALIST NO. 61 in the opinion. *Id.* at 2657 (internal citation omitted) (“[R]eading the [Elections] Clause to permit the use of the initiative to control state and local elections but not federal elections would ‘deprive several States of

This Part fills the gap left by the majority opinion, and argues that *The Federalist Papers* validate the supreme authority of “the people” to change and regulate our political processes in the name of representative democracy. Section III.A explains why *The Federalist Papers* are an important source of our original understandings of the principles underlying the U.S. Constitution. Section III.B analyzes several relevant passages from the *Papers*. Section III.C then explores the implications of the *AIRC* decision beyond gerrymandering cases, arguing that the delegation theory applied in *AIRC* has the potential to alter our political landscape.

A. Why “Original Intent” Matters

The importance of *The Federalist Papers* as a source of the original intent of the Framers of the U.S. Constitution is widely recognized.¹⁴¹ The principles recorded in *The Papers* were considered by some to be greatly influential in the drafting of the Constitution.¹⁴² As a result, they are viewed as a significant interpretive aid for understanding the thoughts and motivations of those who voted for ratification.¹⁴³ Throughout the history of the Supreme Court, Justices have relied on the ideas expressed in the *Papers* to provide legal support for theories advanced by the Court on complicated issues of constitutional law.¹⁴⁴ This practice has increased in recent years.¹⁴⁵

As evidenced by the Court’s reliance on originalist intent throughout the years, the Constitution should be interpreted in light of the principles expressed in *The Federalist Papers*. This is especially true of the most controversial cases.¹⁴⁶ The *AIRC* decision arose from such a case. Its unprecedented nature allowed the majority to invoke the *Papers* in making important statements about democratic account-

the convenience of having the elections for their own governments and for the national government’ held . . . in the same manner.”).

¹⁴¹ See, e.g., Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 820 (2007) (“Many writers have cited the Federalist Papers as evidence of the original intent of the Framers.”).

¹⁴² See *id.* at 822 (discussing the theory that *The Federalist Papers* were influential due to their use by participants of the state ratifying conventions).

¹⁴³ See *id.* (noting judicial use of *The Federalist Papers* as an important interpretive aid).

¹⁴⁴ See *id.* at 821 (“The Supreme Court has cited the Federalist Papers specifically as evidence of the original intent of the Framers.”).

¹⁴⁵ See Pamela C. Corley et al., *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, 58 POL. RES. Q. 329, 329 (2005) (“Over the past several decades many on the Supreme Court have increasingly cited the Federalist Papers in majority, concurring and dissenting opinions.”).

¹⁴⁶ See *id.* (“The Supreme Court has cited the Federalist in many of the most controversial cases over the past several years . . .”).

ability and the regulatory function of the voting public. In short, the *Papers* supplement the theories of democracy that guided the *AIRC* decision.

*B. Legitimacy, Competition, and the Supremacy of the People:
A Federalist Perspective*

To demonstrate an originalist justification for the *AIRC* Court's delegation theory, this Section highlights several prominent themes from *The Federalist Papers*. For decades, scholars have been arguing that the real harm in legislator-controlled redistricting is that constrictions are placed on the competitive process through which voters choose their representation.¹⁴⁷ Legislator conflict of interest and partisanship concerns become serious impediments to placing the interests of voters first. Manipulation by legislators can threaten the ability of voters to choose their representatives.¹⁴⁸ While the Founding Fathers did not speak of the electoral process in market terms, several of *The Federalist Papers* provide adequate support for belief that in a properly functioning republic, when legislators have failed to place the interests of the public first and the government has failed to provide an adequate remedy, the power to regulate the political marketplace ultimately lies in the hands of the people at large.

1. Political Legitimacy

The Framers felt that political legitimacy was an essential feature of a well-functioning republic.¹⁴⁹ In order for “the people” to consent to being governed by representatives, their representation must be legitimate from their perspective. Alexander Hamilton wrote that it is “a general rule[] that their confidence in and obedience to a government[] will commonly be proportioned to the goodness or badness of its administration.”¹⁵⁰ The delegation theory adopted in *AIRC* acknowledges this political reality, and is based on the assumption

¹⁴⁷ See, e.g., Issacharoff, *Cartels*, *supra* note 17, at 600 (“The basic move here is to argue that the risk in gerrymandering is not so much that of discrimination or lack of a formal ability to participate individually, but that of constriction of the competitive processes by which voters can express choice.”).

¹⁴⁸ See *AIRC*, 135 S. Ct. 2652, 2676 (2015) (“[Redistricting commissions] thus impede legislators from choosing their voters instead of facilitating the voters’ choice of their representatives.”).

¹⁴⁹ See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“That to secure these Rights, Governments are instituted among Men deriving their just Powers from the Consent of the Governed; that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it . . .”).

¹⁵⁰ THE FEDERALIST NO. 27, at 172 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

that the people hold the authority in their consensual relationship with government.¹⁵¹

Similarly, while discussing the Guarantee Clause of the Constitution,¹⁵² James Madison referred to our “republican principles,”¹⁵³ adding that the republican form of government must be “*substantially* maintained.”¹⁵⁴ States have the right to alter their governments as needed, so long as they maintain a republican form. Madison wrote: “The only restriction imposed on [the states] is[] that they shall not exchange republican for anti-republican Constitutions”¹⁵⁵ Here, Madison supports the broad authority of individual states to make laws as they please, so long as those laws do not conflict with the authority of the federal government.¹⁵⁶ Combining this principle with the understanding that all power is dependent on the people,¹⁵⁷ allowing the public to amend a state constitution—to better ensure our republican form of government—is acceptable.

In a later paper, while responding to claims that those elected to Congress would have the “least sympathy with the mass of the people,”¹⁵⁸ Madison wrote that the assertion “strikes at the very root of republican government.”¹⁵⁹ Once again, there is an implication that the legitimacy of democratic government relies on accountable government. Madison thus endorsed mechanisms such as term limits and periodic elections to prevent legislators from betraying the trust of the people.¹⁶⁰ Free and fair elections are a necessary limitation on the power exercised by legislators.¹⁶¹ Considering that redistricting commissions are a viable remedy for legislator conflict of interest and partisanship that has developed, allowing citizens to change the process to remove barriers to competition is one possible solution. If the root

¹⁵¹ See *AIRC*, 135 S. Ct. at 2677 (“The people of Arizona turned to the initiative to curb the practice of gerrymandering and, thereby, to ensure that Members of Congress would have ‘an habitual recollection of their dependence on the people.’” (quoting *THE FEDERALIST* NO. 57, at 386 (James Madison) (Jacob E. Cooke ed., 1961))).

¹⁵² U.S. CONST. art. IV, § 4.

¹⁵³ See *THE FEDERALIST* NO. 43, at 291 (James Madison) (Jacob E. Cooke ed., 1961).

¹⁵⁴ See *id.*

¹⁵⁵ *Id.* at 292.

¹⁵⁶ Authority later reaffirmed by the Tenth Amendment, which reserves power not delegated to the federal government to the states or the people. See *id.*; U.S. CONST. amend. X.

¹⁵⁷ See *infra* Section III.B.3 (describing the Framers’ perspective on the supremacy of “the people” as articulated in *The Federalist Papers*).

¹⁵⁸ See *THE FEDERALIST* NO. 57, at 384 (James Madison) (Jacob E. Cooke ed., 1961).

¹⁵⁹ See *id.*

¹⁶⁰ See *id.* at 384, 386.

¹⁶¹ See *id.* at 385 (“If we consider the situation of the men on whom the free suffrages of their fellow citizens may confer the representative trust, we shall find it involving every security which can be devised or desired for their fidelity to their constituents.”).

of republican government is the will of the people, then the power to delegate, in addition to elections, serves as an auxiliary mechanism through which the people can express their will.

2. *Political Competition*

The Framers envisioned periodic, competitive elections in which political candidates would compete for the privilege to serve as representatives of the people. Drawing from sentiments expressed by Henry St. John Bolingbroke,¹⁶² Madison viewed the British Septennial Act of 1716 as the quintessence of non-constitutionality because it allowed the assembly to postpone reauthorization by the people by only holding parliamentary elections every seven years.¹⁶³ The system in the United States is unique in that the Framers vested in the people the full power to influence and change the composition and structure of government.¹⁶⁴ The essential nature of our democracy is a government “created by our choice” and “dependent on our will.”¹⁶⁵

Legislator conflict of interest and overt partisanship are incompatible with these sentiments. In his writings on political factions, Madison provided an argument for how one should view the conflict of interest problem: In regard to man being “allowed to be a judge in his own cause,”¹⁶⁶—a situation analogous to legislators being allowed to determine the districts in which they will be “judged” by the public—Madison believed that “his interest would certainly bias his judgment.”¹⁶⁷ The remedy is not to rely on legislators to curb this inclination to put their own interests first, but to control the effects of the problem.¹⁶⁸

¹⁶² As Stephen Holmes explains, “Bolingbroke used the Septennial Act to exemplify unconstitutionality not because it violated private rights but because it overrode the right of the electorate to purge the House of Commons of those members who had succumbed to the allure of place, privilege, favoritism, and money” See Stephen Holmes, *Constitutions and Constitutionalism*, in MICHEL ROSENFELD & ANDRAS SAJO, *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 209 (Michel Rosenfeld & András Sajó eds., 2012).

¹⁶³ See *id.* at 208–09 (describing the source of Madison’s belief that frequent elections are an essential component of a government dependent on the consent of the people).

¹⁶⁴ As Madison wrote, “[t]he important distinction so well understood in America between a constitution established by the people, and unalterable by the government; and a law established by the government, and alterable by the government, seems to have been little understood and less observed in any other country.” *THE FEDERALIST* NO. 53, at 360 (James Madison) (Jacob E. Cooke ed., 1961).

¹⁶⁵ *THE FEDERALIST* NO. 25, at 161 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

¹⁶⁶ See *THE FEDERALIST* NO. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961).

¹⁶⁷ *Id.*

¹⁶⁸ See *id.* at 60 (“[T]he causes of faction cannot be removed; and that relief is only to be sought in the means of controlling its effects.” (emphasis in original)).

Madison suggested two methods of control: First, by preventing the interest or passion from existing, and second, by preventing parties with common interest or passion from “carrying into effect schemes of oppression.”¹⁶⁹ While the second method is difficult to implement given the limited number of restrictions placed on legislative bodies, it has been done—as evidenced by redistricting commissions—to eliminate legislator conflict of interest and reduce partisanship in the context of gerrymandering.¹⁷⁰ Madison’s reasoning in this paper relies on the assumption that legislators serve only by consent of the people they represent.¹⁷¹ If one considers the “ends-oriented manipulation” by legislators to be an unacceptable distortion of the political market in which voters make their choices,¹⁷² then delegation of redistricting authority by the people to another body may be an adequate response to ensure that legislators serve by the consent of their constituents.

Discussing the separation of powers, Madison articulates a point that is helpful. Recognizing the “great difficulty” in framing a republican government, Madison wrote: “You must first enable the government to [control] the governed; and in the next place, oblige it to [control] itself.”¹⁷³ Madison added that “dependence on the people is no doubt the primary [control] on the government; but experience has taught mankind the necessity of auxiliary precautions.”¹⁷⁴ Although Madison’s words refer to the need for separate internal structures in the federal government, it is appropriate to draw an analogy to the redistricting process. If the voting public is the body that gives the government its authority, and the process in which that authority is granted becomes tainted by government actors with the means to accomplish illegitimate ends, there should be remedies developed to address the problem. In the face of judicial acquiescence and lack of realistic alternatives, the people may exercise the power to delegate lawmaking authority where they see fit.

Madison opposes “increasing returns” to power.¹⁷⁵ This theme, present throughout *The Papers*, is important for understanding the

¹⁶⁹ *Id.* at 61.

¹⁷⁰ See Jamie L. Carson et al., *supra* note 112, at 165–77 (“[O]ur probit estimates . . . reveal that commission and court-drawn districts experience more competition on average than those drawn by legislatures.”).

¹⁷¹ See *id.* at 61 (describing the objective of FEDERALIST NO. 10).

¹⁷² Issacharoff, *Cartels*, *supra* note 17, at 595.

¹⁷³ THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

¹⁷⁴ *Id.*

¹⁷⁵ Increasing returns occur when increasing input by a certain amount (variable *m*) leads to an increase in output that is more than input (variable *m* plus additional gains). See, e.g., Mike Moffat, *Increasing, Decreasing, and Constant Returns to Scale*, ABOUT.COM,

Framers' perspective on political competition. A system in which representatives can manipulate the political process to maximize their control of election outcomes and sidestep popular government—in this case, drawing district lines to thwart competition and preserve legislative power—threatens to undermine our system, which relies on democratic accountability and periodic authorization by the people to function.¹⁷⁶

3. Supremacy of “the People”

The Framers viewed the people as the supreme authority and the chief regulators in a properly functioning republic. For Madison, the “genius of Republican liberty[] seems to demand on one side; not only that *all* power should be derived from the people; but, that *those entrusted* with it should be *kept in dependence on the people*[] by a short duration of their appointments”¹⁷⁷ Judging from this statement, it is hard to imagine that Madison did not envision a government continually dependent upon the consent and will of the electorate. The goal of redistricting commissions is to enhance the ability of voters to hold their representatives accountable. While the Framers did not support direct democracy in mass,¹⁷⁸ the *Papers* evidence their likely support for the initiative and referendum processes had they been invented at the time the Constitution was drafted.¹⁷⁹ Further, the use of delegation via direct democracy to reinforce our

http://economics.about.com/cs/studentresources/a/economic_scale.htm (last updated July 31, 2016).

¹⁷⁶ Justice Ginsburg quoted a passage from John Locke in *AIRC*. *AIRC*, 135 S. Ct. 2652, 2675 (2015). According to Locke, the people have supreme authority over the legislature “to [re]move or alter” legislative authority when the legislature has acted illegitimately. JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 149, at 328 (Hollis ed., 1689). In exercising their right to change legislative authority, the people may place power “where they shall think best for their safety and security.” *Id.* Further, an idea influential to the Framers, Locke believed that a legislative body created by malapportionment—in this case districts created to serve the interest of political parties and legislators without regard for maximizing voter influence—should not be given the responsibility to reapportion the districts. *Id.* § 158, at 337–38. While Locke assigns reapportionment to the monarch, his argument *against* placing reapportionment power in the elected assembly is consistent with the people of a state placing redistricting authority in the hands of another body.

¹⁷⁷ THE FEDERALIST NO. 37, at 234 (James Madison) (Jacob E. Cooke ed., 1961) (emphasis added).

¹⁷⁸ See, e.g., THE FEDERALIST NO. 10, at 61–62 (James Madison) (Jacob E. Cooke ed., 1961) (“Democracies have ever been spectacles of turbulence and contention . . . and have in general been as short in their lives, as they have been violent in their deaths. . . . A Republic . . . opens a different prospect, and promises the cure for which we are seeking.”).

¹⁷⁹ See Todd Donovan & Shaun Bowler, *An Overview of Direct Democracy in the American States*, in CITIZENS AS LEGISLATORS 1–21 (Shaun Bowler, Todd Donovan & Caroline J. Tolbert eds., 1998) (describing the history of referendums and initiatives in the U.S.).

republican form of government, not supplant it, is consistent with the Framers' vision.¹⁸⁰

Madison's insistence that the source of all power is derived from the people is consistent with the notion that the people also have the authority to regulate and change that power through the processes by which they elect their representation in government.¹⁸¹ If legislator-controlled redistricting allows incumbents to manipulate district lines to accommodate the interest of legislators and not the people, the legitimacy of the republic is called into question, particularly for those interested in democratic accountability.¹⁸² More pointedly, Madison referred to partisan politics as "the disease[] most incident to deliberative bodies, and most apt to contaminate their proceedings."¹⁸³ Given that legislator-controlled gerrymandering is plagued with partisan considerations and often leads to the diminished ability of citizens to control the outcome of elections, it is not hard to see that Madison would support delegation via democracy as a viable remedy.

In discussing the distinct characteristics of the republican form of government, Madison stated: "It is *essential* to such a government, that it be derived from the great body of the society," not from small or isolated interest groups.¹⁸⁴ In a republic, it is "*sufficient* for such a government[] that the person[] administering it be appointed, either directly or indirectly, by the people."¹⁸⁵ No candidate is entitled to an overt advantage, and a system which facilitates a built-in advantage for incumbents is actively working against one of the central features of our republican form of government: the prohibition on titles of nobility.¹⁸⁶ Allowing legislators to engage in ends-oriented manipulation of districts to increase their likelihood of winning an election is tantamount to sanctioning a conspiracy to create aristocrats among the legislative body, something expressly rejected by the Framers.

¹⁸⁰ See THE FEDERALIST NO. 39, at 251 (James Madison) (Jacob E. Cooke ed., 1961) ("[W]e may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people.").

¹⁸¹ See *AIRC*, 135 S. Ct. at 2675 (citing U.S. CONST. pmbl.) ("[O]ur fundamental instrument of government derives its authority from 'We the People.'").

¹⁸² See Issacharoff, *Cartels*, *supra* note 17, at 595 ("For political theorists, a focus on districting is only a subset of a concern over the ability of insiders to gain unfair advantage over the disorganized mass of the electorate.").

¹⁸³ THE FEDERALIST NO. 37, at 239 (James Madison) (Jacob E. Cooke ed., 1961).

¹⁸⁴ THE FEDERALIST NO. 39, at 251 (James Madison) (Jacob E. Cooke ed., 1961). Madison actually used the phrase "tyrannical nobles." *Id.* (emphasis added).

¹⁸⁵ *Id.* (emphasis added).

¹⁸⁶ *Cf. id.* at 253 ("Could any further proof be required of the republican complexion[sic] of this system, the most decisive one might be found in its absolute prohibition of titles of nobility.").

The Framers' vision is also incompatible with the creation of entrenched legislators. Discussing the preference for biennial elections, Madison believed that it was "essential to liberty" that government "should have a common interest with the people."¹⁸⁷ The Framers believed that the legislative branch of any government should have an "immediate dependence on, [and] an intimate sympathy with[,] the people."¹⁸⁸ Holding biennial elections helps to ensure that government has an "intimate sympathy" with the people by allowing the people to reassess their chosen representation on a frequent basis and ensuring that their legislators remain responsive to their needs.

In evaluating the appropriateness of granting Congress the power to regulate congressional elections, Alexander Hamilton made a very important point. Hamilton openly acknowledged that election laws are subject to change as the nation changes.¹⁸⁹ The question of whether state governments or the national government should have ultimate authority to create the election laws required elaboration. Hamilton expressed the need for Congress to have a regulatory role over the states: "[W]ith so effectual a weapon in [state legislators'] hands as the exclusive power of regulating elections for the National Government . . . a few such men, in a few of the most considerable States . . . might accomplish the destruction of the Union . . ." ¹⁹⁰ If neither Congress nor state governments have exclusive authority over elections, it is plausible that the Framers thought the people had at least some authority over elections as well.¹⁹¹

It must be noted that Madison, as expressed in what is arguably the most cited of *The Papers*, *Federalist No. 10*, was opposed to direct

¹⁸⁷ THE FEDERALIST NO. 52, at 355 (James Madison) (Jacob E. Cooke ed., 1961).

¹⁸⁸ *Id.*

¹⁸⁹ See THE FEDERALIST NO. 59, at 398 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("It will not be alleged that an election law could have been framed and inserted into the Constitution, which would have been always applicable to every probable change in the situation of the country . . .").

¹⁹⁰ *Id.* at 402.

¹⁹¹ Relatedly, FEDERALIST NO. 60 specifically discusses the construction of the Elections Clause. As stated previously, there is a recognized distinction between electing and lawmaking. See *supra* note 133. Further explaining the limitations on Congress's role in regulating elections, Hamilton wrote: "[T]he greatest influence in the matter[] will be the dissimilar modes of constituting the several component parts of the government. The house of representatives being to be elected immediately by the people; the senate by the state legislatures . . ." THE FEDERALIST NO. 60, at 405 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). On the regulatory power of Congress in Senate elections, Hamilton wrote: "[I]t is impossible that any regulation of 'time and manner' . . . can affect the spirit which will direct the choice of its members." *Id.* These statements partly dispel notions that the dissent was correct in stating that the circumstances in *AIRC* were analogous to the election of Senators.

democracy for practical and theoretical reasons.¹⁹² The primary reasons for Madison's—as well as other Founding Fathers'—opposition to direct democracy stem from concerns over the tyranny of majority will and the potential problems associated with minority dissatisfaction, namely rebellion.¹⁹³ While Madison and Hamilton both highlight the important principles of democratic accountability and the allocation of power throughout their writings, there is no support for direct democracy in *The Federalist Papers*. Based on this absence, one might assume that the Framers would have never supported the use of direct democracy within states to delegate government authority.

However, the *AIRC* decision is consistent with the intent of the Framers as expressed in *The Federalist Papers* for three reasons: first the delegation theory applied in *AIRC* is intended to supplement our republican form, not supplant it; second, congressional oversight, the Supremacy Clause, and the Guarantee Clause function as necessary checks on the authority granted to the people under the *AIRC* Court's delegation theory;¹⁹⁴ finally, and most importantly, the principles reiterated throughout the *Papers* support creating a government that is continually reliant on the will of the people, and that seeks to maximize the welfare of the people. Those principles also support reinforcing mechanisms, like free and fair periodic elections, to control the adverse effects of actions by those who would use the political process to further their own interests. The delegation theory applied in *AIRC* reinforces our republican form of government and is sufficiently limited by the Constitution, making it consistent with the

¹⁹² See FEDERALIST NO. 10, at 61 (James Madison) (Jacob E. Cooke ed., 1961) (“A common passion or interest will . . . [often] be felt by a majority of the whole; . . . and there is nothing to check the inducements to sacrifice the weaker party . . . [Thus,] Democracies have ever been spectacles of turbulence and contention; . . . [and] as short in their lives . . .”). Other Founding Fathers shared this view. See, e.g., John Adams, Letter to John Taylor (Dec. 17, 1814), <https://founders.archives.gov/documents/Adams/99-02-02-6371> (“Remember, Democracy never lasts long. It soon wastes exhausts and murders itself. There was never a Democracy Yet that did not commit suicide.”).

¹⁹³ Shays' Rebellion is referenced at various points throughout *The Federalist Papers*. See, e.g., THE FEDERALIST NO. 21, at 131 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“The tempestuous situation, from which Massachusetts has scarcely emerged, evinces that dangers of [domestic insurrection] are not merely speculative.”); THE FEDERALIST NO. 25, at 162 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“The conduct of Massachusetts affords a lesson on the [presence of standing armies] . . . [Massachusetts] was compelled to raise troops to quell a domestic insurrection, and still keeps a corps in pay to prevent a revival of the spirit of revolt.”).

¹⁹⁴ See U.S. CONST. art. I, § 4, cl. 1 (establishing congressional authority over state-created election laws); U.S. CONST. art. VI, cl. 2 (establishing that federal laws take precedence over states laws and state constitutions); U.S. CONST. art. IV, § 4 (establishing that every state in the union must maintain a republican form of government).

Framers' vision of democratic accountability as expressed in *The Federalist Papers*.

Some might view this evidence of originalist support for the *AIRC* Court's delegation theory as limited to the distinct area of election law, as it is not entirely clear that the same constraints on the will of the people, and subsequently the political market, are present in other areas where lawmaking authority is constitutionally vested in the states. However, as it stands, the delegation theory applied in *AIRC* has not been advanced in any way that is inconsistent with the ideas expressed by the Framers throughout *The Federalist Papers*. Still, the implications of the *AIRC* decision outside of the context of political gerrymandering are potentially expansive.

C. Beyond Gerrymandering

Distinct from the perception that the delegation theory adopted in *AIRC* is limited to the context of political gerrymandering, the magnitude of the Supreme Court's decision was understood by observers interested in direct democracy.¹⁹⁵ The case was never entirely about gerrymandering. Dozens of other election laws were potentially in jeopardy.¹⁹⁶ If the Court had chosen to interpret "legislature" narrowly and ruled in favor of the Arizona legislature, the use of independent redistricting commissions, as well as many other election laws enacted via ballot initiative, would have been vulnerable to constitutional attack.¹⁹⁷

Against the backdrop of judicial acquiescence and controversy surrounding political gerrymandering, it is easy to see how one could overlook the delegation theory and the distinction between initiatives and referendums. Since Justice Kennedy's concurrence in *Vieth*, the shadow of a judiciary incapable of adequately addressing the problems associated with political gerrymandering—problems that raise serious questions about the legitimacy of our republican form of

¹⁹⁵ See, e.g., *Arizona State Legislature v. Arizona Independent Redistricting Commission* (*Amicus Brief*), BRENNAN CTR. (June 29, 2015) [hereinafter *Brennan Center Amicus Article*], <https://www.brennancenter.org/legal-work/arizona-state-legislature-v-arizona-independent-redistricting-commission> ("[T]he Court preserved a valuable tool used by citizens across the country to reform redistricting practices.").

¹⁹⁶ *Could the Supreme Court Make Dozens of State Election Laws Unconstitutional?*, BRENNAN CTR., <http://www.brennancenter.org/supreme-court-could-make-dozens-election-laws-unconstitutional> (last visited Oct. 4, 2016) ("If Arizona's independent commission is struck down as unconstitutional, dozens of other state laws also could be at risk.").

¹⁹⁷ *Brennan Center Amicus Article*, *supra* note 195 ("Had the Court reached the opposition conclusion, it could have had far reaching ramifications, throwing into doubt a number of longstanding state practices across the country.").

government—has hung over the Court.¹⁹⁸ The stage was set by legislators from a state with an ugly redistricting history and creative reformers for the Court to answer the essential question: Would the Court continue to stand idle and allow state legislators to deny voters the opportunity to elect representatives free of legislator manipulation, or would the Court affirm voters' authority to remedy those restrictions in the name of democracy? The Court chose the latter.

Due to the insufficient justification provided by the Court for the delegation theory applied in the case, the *AIRC* decision presents new issues to consider: How far does the reach of this delegation theory extend? Will this delegation theory only apply to the laws that govern elections? If not, what other constitutional provisions could potentially be impacted? What are the limits on the power of “the people” in the states? The majority opinion seems to allow citizens to change the political process and exclude members of a branch of government from the decisionmaking process. In this sense, *AIRC* served as a vehicle for the Court to reaffirm the power of voters to secure and regulate the political market free from the nasty politics of redistricting.¹⁹⁹

It is possible for the delegation theory adopted in *AIRC* to be extended to other areas where state lawmaking authority is delegated by the Constitution. Professor Derek Muller argues that affirming the right of voters to use an initiative in this manner could impact other areas of our democracy, such as the right to change a state's manner in choosing electors,²⁰⁰ or consenting to a state division into several parts.²⁰¹ It appears citizens of the several states do have this authority

¹⁹⁸ Political gerrymandering has been an issue in our democracy since the days of James Madison. See *supra* Part I (describing the history of political gerrymandering).

¹⁹⁹ For a detailed description of a politics as markets approach in election law, see Issacharoff & Pildes, *Politics As Markets*, *supra* note 48 (analyzing the application of corporate-law scholarship to democratic politics).

²⁰⁰ Muller, *Legislative Delegations*, *supra* note 9, at 25. See also Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372 (2008) (discussing the National Popular Voted Interstate Compact (NPV Compact), which was an attempt to abolish the Electoral College). Other scholars believe the *AIRC* decision has the potential to lead to greater impact of the NPV Compact on our electoral process. See, e.g., Vikram David Amar, *Constitutional Change and Direct Democracy: Modern Challenges and Exciting Opportunities*, 69 ARK. L. REV. 253, 281 (2016) (“[T]he path for direct democracy adoption of the NPV Plan or similar reforms seems unobstructed, constitutionally speaking at least.”); T. Hart Benton, Case Note, *Congressional and Presidential Electoral Reform After Arizona State Legislature v. Arizona Independent Redistricting Commission*, 62 LOY. L. REV. 155, 186 (2016) (“[T]he Court’s interpretation of the scope of the legislature in *AIRC* could be instrumental in ensuring that voters may constitutionally enact legislation adopting the Compact in their respective states.”).

²⁰¹ Muller, *Legislative Delegations*, *supra* note 9, at 25; see also U.S. CONST. art. IV, § 3, cl. 1 (outlining the ways states may not be formed from other states).

and potentially much more.²⁰² The majority signaled which way the Court might rule in cases involving delegation of constitutionally conferred state legislative authority. Following an appeal to federalist sentiments, Justice Ginsburg wrote: “We resist reading the Elections Clause to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process.”²⁰³ If laws impacting federal elections will not be the *one* area singled out by the Court, what laws can be singled out? The statement suggests that the delegation theory can be used by the people of a given state to impact other areas of the law.

A state’s “legislature” is referenced seventeen times in the Constitution.²⁰⁴ Creative reformers could see the *AIRC* delegation theory as an opportunity to make large-sweeping changes to state laws using the references to state legislatures in the Constitution. The potential mechanisms and their effects are difficult to predict.²⁰⁵ Can voters change the process for choosing a state’s electors via initiative? Does the delegation theory applied in *AIRC* authorize voters to initiate the division of a state? If voters can change their state’s redistricting process to exclude legislator input altogether, unprecedented developments are not farfetched.²⁰⁶ Moreover, political innovations designed to reinforce our republican form of government are consistent with the Framers’ vision of our democracy.²⁰⁷ The delegation

²⁰² The Court’s holding in *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 133 (1912), which held that Congress has the exclusive authority to determine whether a state has ceased to be republican in form because of its adoption of the initiative and referendum, in combination with the *AIRC* decision, suggests voters in eligible states have flexibility to use initiatives and referendums as they see fit when state legislative authority is granted by the Constitution—subject to congressional oversight. Congress itself may be able to enact a national initiative process.

²⁰³ *AIRC*, 135 S. Ct. 2652, 2673 (2015).

²⁰⁴ See *AIRC*, 135 S. Ct. at 2692–94 (Roberts, C.J., dissenting) (appending a copy of the Constitution to illustrate that “legislature” appears seventeen times).

²⁰⁵ The *AIRC* decision’s potential to adversely affect minority-voting populations, however, is immediately apparent. Consider the outcome of *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), in which the Supreme Court’s decision to free Arizona from the preclearance requirement in the Voting Rights Act of 1965 had the effect of diluting the voting power of Latino voters throughout the state. Similarly, redistricting in Arizona by way of independent commission has led to the loss of representation for minorities in the past. See Cain, *supra* note 45, at 1832 (describing the loss of Latino congressional representation in Arizona following a districting plan created by an independent commission).

²⁰⁶ See Samantha Lachman, *Supreme Court Upholds Arizona’s Independent Redistricting Commission*, THE HUFFINGTON POST (June 29, 2015, 10:28 AM), http://www.huffingtonpost.com/2015/06/29/arizona-redistricting-supreme-court_n_7470488.html (describing the impact of the *AIRC* decision on election laws nationwide).

²⁰⁷ See *supra* Part III.B (intimating that the Framers’ vision of the republican form of government recognized the need for flexibility).

theory applied by the Court in the *AIRC* decision can be supported by themes present throughout *The Federalist Papers* in a number of contexts.²⁰⁸ However, that support is likely limited to innovations that preserve republican government.

CONCLUSION

Just as a statute should be interpreted in light of the Constitution, the Constitution should be interpreted in light of the Framers' intent that government be accountable to the people. This principle of accountability, expressed in *The Federalist Papers*, is incompatible with processes that allow legislators to perpetuate their reelection by diminishing the power of voters to remove them. Instead, it speaks in favor of promoting legitimacy, political competition, and the regulatory function of the people in the political marketplace.

In the opening paragraph of the Supreme Court's *AIRC* opinion, Justice Ginsburg made clear that the Court would not eliminate a viable remedy for political gerrymandering.²⁰⁹ The Court, however, needed the correct legal theory to apply. Drawing on originalist sentiments expressed by the Framers, the Court found its delegation theory. Though unprecedented, the Court's affirmation of the peoples' right to delegate lawmaking authority to an independent commission via ballot initiative finds ample support in *The Federalist Papers*. While certainly exciting for champions of political legitimacy and accountability, the potential reach of this delegation theory beyond the context of political gerrymandering remains to be seen.

²⁰⁸ Exploring other potential applications of the *AIRC* delegation theory that can be supported by the Framers' vision of our democracy is beyond the scope of this Note.

²⁰⁹ See *supra* Part II.B (examining the Supreme Court's affirmance of independent redistricting committees as a remedy to political gerrymandering).

