

Testimony of FairVote – The Center for Voting and Democracy
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About FairVote

Formerly known as the Center for Voting and Democracy, FairVote is a non-partisan, non-profit thinktank and advocacy organization working since 1992 on reforms ranging from election administration to electoral systems. FairVote has advised non-governmental organizations and policy-makers at all levels on the conduct of elections including U.S. Representative John Tanner on the Fairness and Independence in Redistricting Act (2005) and U.S. Representative Cynthia McKinney on the Voters' Choice Act (1999). Our Board of Directors includes Hendrik Hertzberg of the *New Yorker* Magazine, a long-time resident of New York City and astute analyst of elections and reform.

Introduction

This public hearing is concerned with three broad questions: (1) whether the present redistricting process in New York State ensures a “fair and efficient” outcome, (2) what proposals for change make sense and (3) how changes could better meet the exigencies of the U.S. Department of Justice, federal Voting Rights act and other federal requirements.

In New York, a bipartisan committee of state legislators currently draws electoral districts. Proposals are likely to call for ways that process can be made more independent of partisan calculations. Advocates make such calls against a backdrop of rising public concern about gerrymandering and uncompetitive elections, citing all-time-high incumbency rates in legislatures across the country.

Independent redistricting schemes can be useful for creating more districts that are competitive,

but their efficacy is limited by the need to meet other criteria during redistricting processes and by the general reality of our political geography where few areas of New York State are balanced evenly between the major parties. To satisfy more criteria simultaneously, independent redistricting schemes must be combined with modest changes to how districts themselves operate, namely, the number of members they return and the voting systems used in them. These changes can be built into the powers given to a redistricting commission that seeks to combine the goals of political accountability, fair representation and voter choice.

Expectations About Legislative Districts

In general, there are three categories of criteria we would like to satisfy when settling on a map. One is aesthetic; how does it look on a map? This follows from a sort of common sense. A district that looks gerrymandered seems intuitively unfair; it looks like, during its construction, some other concern took precedence over having genuine competitions for office. This was Justice Sandra Day O'Connor's concern in *Shaw v. Reno* (1993) when she argued a majority-minority district in North Carolina was “so bizarre” that the map must be held to strict scrutiny. There also is the reality that districts preserving local political jurisdiction lines establish a more coherent political experience for voters.

Another set of criteria around the goals of fair representation necessarily leads to the purposeful creation of 'safe' districts. Certainly a critically important goal of elections is fair representation of different viewpoints and different communities. It seems intuitively wrong to divide pre-existing communities of interest exhibiting relatively cohesive voting patterns. It is illegal under the Voting Rights Act in certain, protected districts to dilute racial minority voting strength by dividing those populations among other districts. It seems unfair to punish a several-term incumbent by eliminating his or her district solely because 'rampant incumbency' is in the public eye. From a more technical perspective, safer districts minimize wasted votes; the more people vote for winners, the fewer voters walk away from the polls with their ballots not having mattered.

At the same time, it's important to have 'in play' districts, both so that voters have real choices and a reason to vote and so that they can hold their elected leaders accountable. Incumbency is at an all-time high, both nationally and in New York State, while the parties running the state senate and state assembly haven't changed in more than three decades, and the U.S. House of Representatives has had only one change in more than five decades. Some districts are so noncompetitive that challengers have stopped running, and parties have chosen to ignore them in favor of concentrating on districts where resources might be more effectively used to target voters. Overly safe districts, moreover, can mean lack of accountability; the representative is beholden to no one if he or she has minimal concern about losing the next election. Leaders can act with impunity if they know they are almost impossible to displace from power.

What Independent Redistricting Can Confer

Independent redistricting can be a useful tool for ensuring fairer, more legitimate legislative elections because it takes overt partisanship out of the process.

Redistricting processes, and gerrymandering more specifically, rose to public prominence following mid-decade redistricting decisions made well after the last census, most notably with respect to Texas' congressional map. In that case, a Republican-dominated state legislature added seven Republican seats to the U.S. House of Representatives at an unexpected point in time simply by changing the lines that bound Texas voters. The 2006 Supreme Court decision in *League of United Latin American Citizens v. Perry* stoked public ire, bringing memories of the Texas map back to the fore and declaring mid-decade redistricting a non-justiciable, political question beyond the reach of the judicial branch.

Independent redistricting, therefore, can have intrinsic and instrumental value where it takes the partisanship out of drawing legislative maps. Its intrinsic value is the public legitimacy it brings to legislatures and legislative elections; voters have the sense that they matter, that the elected have not

determined election outcomes before elections are even held. Its instrumental value is that it makes redistricting processes capable of giving fair consideration to criteria other than the benefit of the dominant party. Independent commissions can draw safer districts where the Voting Rights Act and historical communities of interest compel them to do so. They can ensure a proportion of in-play districts where voting behavior is somewhat predictable but populations more heterogeneous. They can endeavor to minimize “bizarre” looking districts.

What Independent Redistricting Cannot Confer

Independent redistricting processes, by their very nature, lend legitimacy to electoral maps. By depoliticizing a highly political process, they can meet almost all of these criteria – but not for every voter. Some districts will meet the first set, some the second, and some the third, but seldom will a district meet two or three sets simultaneously. A geographically compact district is not necessarily competitive, nor does it preserve a contiguous community of interest or color. A competitive district, by definition, cannot guarantee one group the ability to elect a candidate of choice. A competitive district, by definition, will maximize wasted votes. The ideal competitive district is one that, based on historical voting patterns, is drawn to contain equal numbers of voters from either major party. At any given election, roughly half the voters in that district will have wasted their votes, that is, will be effectively without representation. Across the state, the percentages of votes cast for Republicans and Democrats may come close to the percentages of seats held by each, but some voters will find themselves buried in safe districts where they have little chance to affect outcomes. Safe districts are the price of maximizing effective votes.

Some Evidence

The records of independent redistricting in other states speak to some of these points. Arizona and Iowa are two states that have experimented with reform for both state and federal district maps. In

either case, reformers argued removing the partisanship from redistricting would result in increased competitiveness, accountability and fairness in the forms of fewer wasted votes and more accurate representation for pre-existing groups. These goals have not come to fruition in either state.

In fact, since Arizona's 2001 implementation of independent redistricting, 15 of 16 U.S. House races have been won by landslide margins of at least 20%. Competitiveness remains low, and so does accountability. No incumbent in the last two cycles has come close to losing there. Of 30 state senate seats elected in 2004, no race was competitive, and roughly half went uncontested. Despite the promise of fairer representation, Latino groups in Arizona have found reason to sue their state map, which has been in continuous litigation since 2002.

Iowa's incumbency rate has remained near 98% since adoption of independent redistricting.

In either state, no woman has been elected to Congress since adoption of independent redistricting. In fact, women candidates have won fewer votes in primary and general elections in both states after each redistricting plan. While more accurate representation of women may not be a conventional districting criterion, women as a group have a direct interest in the content of politics but remain severely under-represented at all levels of government in the United States. This speaks to one reform the New York State Assembly could consider as a way to not only elect more women but satisfy more criteria simultaneously for more districts and more individual voters.

Multi-seat Districts with Proportional Voting

Proportional voting systems in multi-seat districts have a long history in municipal and even state legislative elections. New York City was one of two dozen American municipalities using such a format to elect its city councils during the Progressive Era. Illinois elected its state legislature in three-seat districts using a proportional voting system from 1870 to 1980 with the result that fewer votes were wasted; downtown Chicago districts would elect one Republican and districts in DuPage County would elect one Democrat. In 1993, the Goldmark Commission suggested a system similar to what

FairVote proposes: constitutional conventions in which three delegates are elected from each state senate district using a proportional voting system. The commission made its recommendation on the grounds it would increase minority presence – be it from the partisan minority in any given district, or communities of color – at the convention.

Under proportional voting in a three-seat district, each candidate needs to win roughly one third of the vote to earn a seat. By contrast, in a winner-take-all, single-seat district, a group needs to equal over 50% of the population to be guaranteed the opportunity to win representation. The benefit of proportional voting in multi-seat districts is straightforward: it can allow an independent redistricting commission to meet more criteria at the same time for the same district and the same voters. For example, a geographically compact district can be drawn that ensures a VRA-protected community can elect a candidate of choice while, at the same time, allowing the political minority there to cast a meaningful ballot. Multi-seat districts, moreover, encourage the nomination of female candidates because there is less pressure to target swing voters who may be deterred by platforms heavy on issues of primary concern to women. By eliminating the dichotomy between 'safe' and 'in play,' proportional systems ease the legal and partisan balancing acts independent commissions can face following a census.

Note that there are different proportional voting methods that can be used within multi-seat districts. The Illinois House of Representatives used cumulative voting, a system where voters have as many votes as seats and can choose to allocate more than one of their votes to a single candidate. The Goldmark Commission recommended the one-vote system, which would mean that all voters have one vote each to cast. The City of New York used choice voting for its five city council elections from 1937 to 1945, and it is used today for national elections in such nations as Ireland and Australia. All are candidate-based; all can be tailored to accommodate the criteria of a fair and effective redistricting plan that essentially are impossible to balance within single-member districts.

Proportional voting systems in multi-seat districts are not a magic bullet, and independent

redistricting procedures are still wise and necessary ways to ensure a contentious process leads to fair and legitimate outcomes. Alone, neither can achieve what voters, lawmakers and the law expect and require of district maps. Together, however, they can go a long way. New York should at least consider using them in tandem. We recommend that any redistricting commission be given the power to consider multi-seat district plans with clearly defined criteria governing their decision to potentially use them in all or part of the state.

We thank you for your consideration of these ideas and suggestions and would be pleased to provide additional information.