

Keynote Address

GETTING FROM HERE TO THERE IN REDISTRICTING REFORM

HEATHER K. GERKEN*

This symposium has been largely devoted to whether and how we ought to reform our districting process. Today I want to talk about a related but often neglected question: if we are serious about reform, how do we make it happen? I will thus set aside some of the important normative and practical questions associated with what kind of redistricting reform we should pursue and focus instead on how to get from here to there.

As we think about getting redistricting reform passed, we ought to ask ourselves three questions. First, what should our goals be during the 2010 cycle? Second, moving from principle to practice, what specifically can we do to promote reform during this period? Third, if we succeed in getting some traction with reform post-2010, what kind of reform proposals should we push?

My answers to these questions are united by a single theme: the key to successful reform is harnessing politics to fix politics. Reformers and academics have typically tried to take the politics out of election regulation by creating a nonpartisan districting process.¹ Nonpartisan districting is surely a noble cause and a perfectly sensible long-term goal. But we have allowed that instinct for nonpartisanship to

* J. Skelly Wright Professor of Law, Yale Law School.

1. For a sampling of articles that run against this trend, see, e.g., Justin Buchler, *The Inevitability of Gerrymandering: Winners and Losers Under Alternative Approaches to Redistricting*, 5 DUKE J. CONST. L. & PUB. POL'Y 17; Christopher S. Elmendorf, *Representation Reinforcement through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366 (2005); Heather K. Gerken, *The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics*, 6 ELEC. L. J. 184 (2007); Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667 (2006). Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002).

shape our short and medium-term strategies for achieving reform. That is a mistake. Ours is a system where the foxes are guarding the henhouse, where legislators set the rules of the game at the same time they play it. Needless to say, they are loathe to give up this power. Yet most reform strategies turn on asking politicians to ignore their own interests and do the right thing. Perhaps unsurprisingly, these strategies have not produced much by way of results. If we are interested in getting reform passed, we have to do something more than appeal to self-interested political actors to ignore their self-interest. We need to realign the incentives of the foxes with those of the hens, to redirect competitive political energies into healthier channels.

GOALS FOR 2010

Political self-interest is the key barrier to reform—and the key to thinking about getting around that barrier. If you want to get reform passed, you need an environment where it's possible to do so. Right now, we do not have such an environment, precisely because self-interested politicians have no reason to push for change. Until we figure out how to change current political incentives, we are unlikely to make much headway in districting reform.

Reform is always tough to pass, of course. But districting reform is even more challenging. Ask anyone who works for a good governance group—a “goo goo,” as they are affectionately known. Redistricting is one of those rare areas where the people who know the most about reform and care the most about reform are the politicians who oppose it.

Politicians would, of course, have reason to care about districting reform if voters held their feet to the fire. But voters tend to care about substantive outcomes, not process reforms. That leaves politicians to do as they please on the districting front. And it rarely occurs to partisans to give up the power to draw their own districts, the power to choose their constituents before their constituents can choose them. Even our goo-goo-in-chief—Barack Obama, a longtime advocate of election reform—took advantage of this legislative perk when he was in Illinois. In 2001, Obama worked with fellow Democrats to draw his “ideal map,” uniting his “North Side fund-raising base and his South Side political base.”² While some thought the story tar-

2. Ryan Lizza, *Making It: How Chicago Shaped Obama*, THE NEW YORKER, July 21, 2008, at 61, available at http://www.newyorker.com/reporting/2008/07/21/080721fa_fact_lizza.

nished Obama's reform credentials,³ anyone with redistricting experience took it as proof that Obama was a pragmatist who would not allow himself to get rolled. The fact is that politicians will take advantage of their power for as long as voters let them.

Sometimes a cause can be saved by a "Big Bang," a scandal big enough to force legislators to do something. But in redistricting, the real scandal is how districting works—backroom deals, egregious self-dealing, vicious partisanship—and it has never prompted the public to raise a collective eyebrow, let alone a political ruckus. Absent a sex-for-boundary-lines exchange, it is hard to see a Big Bang moment on the horizon.

How, then, should we think about reform in the short term? In my view, the best we can hope to get out of the 2010 cycle is what I call a "here to there" solution.⁴ In election reform, we almost always have a good sense of the "here" (the problems with our current system) and lots of ideas about the "there" (how things ought to work in the future). But we rarely spend time thinking about the "here to there"—how to create an environment in which meaningful reform might actually take root. Instead, we tend to announce reform proposals as if we could "just add water" and they would magically get passed.

The problem is that we cannot just add water. Reform battles are usually fought on quite hostile terrain. We need to spend more time imagining how to change that terrain. We should think harder about the small-scale interventions that would make bigger, better reform more likely. "Here to there" proposals are not about the journey's end; they are about smoothing the path that leads there.

It is a bit surprising that we have a "here to there" problem in election reform. After all, most arguments for election reform depend on a single premise: process shapes substance.⁵ Academics are quick

3. For a sampling of such views from across the political spectrum, see Isaac Chaitner, *Obama's Chicago Days*, THE PLANK, July 16, 2008, <http://www.tnr.com/blog/the-plank/obamas-chicago-days>; Tom Elia, *Another Piece to the Obama Puzzle?*, THE NEW EDITOR, July 14, 2008, <http://theneweditor.com/index.php?/archives/8271-Another-Piece-to-the-Obama-Puzzle.html>; Jim Geraghty, *Obama's Changed Tune on Redrawing District Lines*, THE CAMPAIGN SPOT, July 14, 2008, <http://www.nationalreview.com/campaign-spot/9309/obamas-changed-tune-redrawing-district-lines>; Gerrymandering Movie Blog, <http://gerrymanderingmovie.com/news/?p=20&c=2> (July 16, 2008).

4. For further development of this idea in the context of election administration reform, see HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR SYSTEM IS FAILING AND HOW TO FIX IT* (2008). The next few paragraphs are drawn from that book.

5. The notion has become so central that it serves as the opening argument in one of the field's major casebooks: SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 1 (3d ed. 2007) ("institutional arrangements . . . influence the range of possible outcomes that formal

to tell you that the structure of our political process (campaign finance law, redistricting rules) helps determine the substance of our policies (who gets elected, what gets passed). But we do not apply that lesson to election reform. The structure of our political process also determines what kind of election reform gets passed. Or, in the case of the United States, this structure creates an environment where precious little gets passed.

The “here to there” problem is not confined to the academy. Blue ribbon panels and good governance groups often propose overhauling our election system or enacting laundry lists of proposals. Though reformers who labor in the political trenches are painfully aware that we cannot “just add water” to get change passed, most are unable to spend much time on fashioning a political environment that is receptive to change.

Reformers, of course, spend a lot of time on the “here to there” for specific projects. They work tirelessly to build support for this or that proposal—educating the public, lobbying officials, filing lawsuits. But good governance groups lack the resources they need to grapple with the “here to there” problem writ large. That is because reformers are beholden to funders. And funders tend to favor big over small, end goals over interim solutions, silver bullets over institutional tweaks, substantive proposals over procedural fixes. As one reform advocate ruefully told me, “process is not sexy.”⁶ And the “here to there” question is process squared—changing the reform process to make more significant procedural reforms possible. For funders anxious to see concrete results—bills passed, reports issued, news articles written—smoothing the path for election reform looks like a nebulous project indeed. The result is that the people who know the most about how the reform process actually works have the fewest opportunities to change it.

In my view, there is little point in continuing to fight the same fight on redistricting reform unless we change the terrain on which the battle is fought. We should take a step back and figure out how to create an environment that is more receptive to change generally.

Consider, for instance, the subject of one of this conference’s panels: “Is There a Way to Design an Apolitical Redistricting Process?” It would be great if a nonpartisan districting process were created. The

elections and subsequent policymaking can achieve”).

6. Telephone Interview with Justin Levitt, Counsel, Democracy Section, Brennan Center for Justice at New York University School of Law (June 14, 2007).

harder question, though, is how we get from here to there. Nonpartisan bureaucracies do not spring, like Athena, from the head of a god. They get created by a somebody, usually a political somebody. And that returns us to the “here to there” problem.

You can see, then, why I think it would be quite impressive if we would come up with a few “here to there” solutions for the 2010 redistricting cycle. Those outside the districting world might think that a “here to there” solution seems quite modest compared to the broad-gauged reform that we need. But my bet is that most of the people who have experience with redistricting would think my proposal is still pretty ambitious. The reason is simple. In most places, it is too late to hope for serious districting reform before 2010. The party that controls the levers of change is usually the one that will control redistricting and thus has no incentive to pass reform. If we get real reform anytime soon, it is likely to come immediately after the districting cycle, when the parties look to 2020 and cannot be sure who will be on top when the next cycle arrives. The best we can hope for, then, is to create an environment in which reform might happen when the parties are behind the veil of ignorance and still stinging (we hope) from the bad publicity about the last redistricting cycle. If our “here to there” approaches manage to put some constraints on the most egregious forms of gerrymandering during the 2010 cycle, all the better.

REFORM STRATEGIES AVAILABLE FOR 2010

If we are searching for a “here to there” solution for 2010, what kind of approaches are available? Let me start with what we should *not* do. If I may offer a prayer to the god of districting: please let it not be another public education campaign. In 1970, we had a public education campaign. In 1980, we had a public education campaign. In 1990 and 2000, we had public education campaigns. If it is true that the definition of insanity is doing the same thing over and over again while expecting a different result, then perhaps good governance reformers ought to be checking in with their shrinks. Public education campaigns have not gotten traction on this issue; they have not changed political incentives. A public education campaign is, without question, a crucial factor in the reform calculus. But, standing alone, it is not enough.

In thinking about the “here to there,” then, we need to remember that political self-interest is not just the problem for redistricting reform; it may also be the solution. That is because political self-interest

is a double-edged sword.⁷ Scholars and reformers familiar with its perverse consequences in the elections arena tend to lament its existence, but political self-interest is also the engine that fuels a vibrant political system. The key is to figure out how to align the interests of partisans with the interests of voters, to redirect political energies into healthier channels. The key is to harness politics to fix politics.

Stated in these terms, the idea seems unobjectionable, maybe even banal. Of course, one thinks, we should be attentive to partisan self-interest in thinking about reform. But while most agree with the basic idea, scholars have not been sufficiently attentive to all of its implications. This is an idea worked out in the “apps,” an idea whose significance becomes apparent only in the application, only when one digs into the questions of institutional design and election reform that are the bread-and-butter of elections scholarship.

Open-Source Software. Let me talk about specifics—the “apps” available to harness politics to fix politics in the redistricting context. The first and most essential prerequisite for change is to release user-friendly, open-source districting software of the sort that Michael McDonald and Micah Altman have created,⁸ along with the necessary redistricting data (both the Census data and relevant political data). The hope would be that the “grass tops”—civil rights organizations, good governance groups—could use this technology to draw districting plans that would shame state legislatures into doing a better job drawing district lines. I cannot emphasize how important it is to have this software. Most of the other reforms I describe here turn on its existence.

Redistricting Contests. If we want to get a bit more ambitious, we could try something like the Ohio redistricting contest, a beta version of which was run last year by the Secretary of State with the help of several nonprofits and academics.⁹ Ohio residents were invited to draw districting plans, and a set of “winners” was announced at the

7. For a more in-depth development of this idea, see Heather K. Gerken & Michael Kang, *Harnessing Politics to Fix Politics*, in RACE, REFORM, AND THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY (Guy-Uriel Charles et al. eds)(forthcoming 2010).

8. Micah Altman & Michael P. McDonald, *BARD: Better Automated Redistricting*, 34 J. STATISTICAL SOFTWARE (forthcoming 2010).

9. For excellent discussions of this process, see Steven Huefner, *Don't Just Make Redistricters More Accountable to the People, Make Them the People*, 5 DUKE J. CONST. L. & PUB. POL'Y 37 (2010), and Justin Levitt, *Drawing the Lines in Ohio: A Big Step Forward*, Brennan Center for Justice, June 24, 2009, http://www.brennancenter.org/blog/archives/drawing_the_lines_in_ohio_a_big_step_forward.

end of the contest. Each winning plan, perhaps unsurprisingly, looked a good deal better than the plan the legislature had created. Though the data were outdated and the rules simplified, this beta version of a redistricting contest gave a sense of how public attention could be directed toward the redistricting process. The contest did not just draw people into the process; it also ginned up useful publicity, all the while producing a set of maps that could serve as baselines for evaluating the legislative plan.

Open Redistricting Project. More ambitious still is an idea proposed by Travis Crum to create an “Open Redistricting Project.”¹⁰ Imagine the Ohio contest run through a social networking program. The goal would be to create a site where citizens could draw their own districting plans. Then, using social networking tools, the project would produce an ideal plan through an iterative, wiki-based process, with each new contributor improving on the plans created by the last. The hope would be to produce plans that the net roots would then champion and put pressure on politicians to produce a plan that is just as good. Here again, you can see how the open redistricting project might soften the terrain for reform—you generate press, create opportunities for public input, and produce a baseline plan.

Model Districting Commissions. Still more ambitious is a proposal I have made: creating model districting commissions to run in tandem with—or shadow—the legislative districting process.¹¹ This idea has been picked up by the Joyce Foundation, which will fund this process in two states.¹²

The idea behind these commissions is that they would (1) model what an inclusive and transparent districting process looks like, and (2) produce a districting plan or plans that would serve as a baseline for assessing what the legislature ultimately puts forward. The model commissions would, in effect, serve as a challenge to the legislature by showing how districting ought to work.

10. Travis Crum, *The Open Redistricting Project*, BALKINIZATION, Apr. 6, 2009, <http://balkin.blogspot.com/2009/04/openredistricting-project.html>.

11. Heather K. Gerken, *Out of the Shadows: Private Redistricting Plans Can Help Overcome Lawmakers' Partisanship*, LEGAL TIMES, May 5, 2008, at 62, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=900005634464&hblogin=1>; Heather K. Gerken, *Shortcuts to Reform*, 93 MINN. L. REV. 1582, 1614 (2009); Heather K. Gerken, *Getting From Here to There in Election Reform: A Trio of Ideas* (unpublished manuscript on file with the author) (April 12, 2010).

12. The Joyce Foundation, Grant List, <http://www.joycefdn.org/content.cfm/grant-list?GrantID=32086&GrantDetails=1> (last visited April 18, 2010).

The proposal is quite flexible, easily adapted to local conditions, and builds naturally on the other ideas I have just outlined. The districting commission could be composed of citizens or experts or stakeholders or respected nonpartisans. In producing the baseline plan, the commission might adopt a model akin to Sam Hirsch's redistricting proposal, which asks stakeholders to compete to produce the best plan.¹³ Or the commission could invite members of the public to submit their own plans, like the Ohio redistricting contest.¹⁴ Or it could adopt an interactive wiki-based approach for choosing the best plan, as Travis Crum has suggested.¹⁵ Or the commission could simply ask a group of nonpartisan experts to draw up a bunch of plans and choose among them. All that the model commission requires is a process that is transparent and open, which produces a plan to compete with the legislative one.

Note that this is a quintessentially "here to there" proposal. It does not pry redistricting out of the hands of partisans (reformers' most ambitious goal), nor does it place direct constraints on self-interested gerrymandering (the more realistic goal of reform). Instead, it pushes toward those goals by smoothing the path that leads there. Model commissions are modest reforms designed to make bigger, better reform possible. Thus, while the model commission should place some modest constraints on the districting process in the short-term, its core purpose is to build the case for change in the medium-term. And by building the case for change in the medium-term, keep in mind what I just observed—that there are at least two major aims of redistricting reform. The most ambitious version is to take redistricting entirely out of the hands of partisans. The more realistic is to place some substantive constraints on districting. Model commissions move us closer to each.

Short-term effects. In the short-term, a model districting commission can be used to shame legislators engaged in egregious gerrymandering. It should work for the simplest of reasons: it is always better to show that you can do something than claim you can. Typically, the mantra of reformers in redistricting is "do more, do better." This kind of argument, however, is hard for the public to process and journalists

13. Sam Hirsch, A Proposal for Redistricting Reform: A Model State Constitutional Amendment, delivered at the American Mathematical Society's Special Session on the Redistricting Problem (Jan. 8, 2009), available at <http://www.americansforredistrictingreform.org/html/documents/HirschRedistrictingPaperforAmerMathSociety.pdf>.

14. Levitt, *supra* note 9.

15. Crum, *supra* note 10.

to report. With a model commission, in lieu of vague admonitions that the process should be “more open” or “more inclusive,” reformers could identify a process that is more open and more inclusive. In lieu of atmospheric claims that the legislature could have produced a “better plan,” reformers could show what a better plan looks like.

For the cynics who think that legislators simply cannot be shamed on this front, I should note that the model plan poses a more concrete threat to politicians, and here I offer a lesson from my prior life as a litigator. Politicians fear litigation; it poses the risk that the redistricting deal they brokered will be blown up by a judge. And judges are always on the hunt for a neutral yardstick. For this reason, the model plan will inevitably be featured in any lawsuit challenging the legislative plan. The model plan should therefore reduce at least some of the incentives for engaging in the worst forms of redistricting.

Smoothing the path for reform. In the medium term, a model districting commission should build the case for future reform along two dimensions. First, it is a sensational press vehicle for driving home the one argument about redistricting that gets traction with the public: legislators should not draw their own districts. Citizen commissions are especially likely to draw the public’s attention to the problem. The press cannot resist a human interest story, and the phrase “citizen commission” is an evocative shorthand for voters.¹⁶ Moreover, any party dissatisfied with the process is likely to draw attention to the model districting plan, which means that partisan competition will serve as an engine for publicizing the problem.

Second, the model commission should push toward a more serious debate about how we might impose substantive constraints on districting (an issue that has thus far caused our regulator-in-chief—the Supreme Court—to throw up its hands¹⁷). A well-run model process should make clear that it is possible to impose substantive constraints on redistricting without mandating witless districting.

Right now many think that our choice on the redistricting front is either witless districting or a legislative free-for-all. There has been a long and not-so-merry war between reformers who think that the key

16. See, e.g., Fred Cutler, et al., *Deliberation, Information, and Trust: The British Columbian Citizens’ Assembly as Agenda Setter*, in *DESIGNING DELIBERATIVE DEMOCRACY* 166, 173–82 (Mark E. Warren & Hilary Pearse, eds., 2008).

17. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (rejecting a constitutional challenge to a political gerrymander on the grounds that no judicially manageable standard exists for evaluating such claims).

is to place objective constraints on the districting process (the kinds of metrics you could just plug into a computer) and those who insist that districting cannot be reduced to a formula. Objective criteria are superficially attractive, but there are always trade-offs in districting. A strict compactness requirement, for instance, can cause salient political groups to be underrepresented.¹⁸ Creating more competitive districts may result in a legislature that is less representative.¹⁹ While objective criteria are intuitively appealing (and far easier to get enacted), they fail to capture the reasons why we create districts in the first place. Districting necessarily involves discretionary decisions about how to weigh attractive normative principles against one another. You can conceal those discretionary decisions by plugging them into a computer, but someone is still making them.

You can see the problem for those who worry about witless districting but still want to impose constraints on the process. The moment that debates get an inch deep, reformers have to admit that districting involves choices. That admission, in turn, prompts defenders of the status quo to insist that if this all involves judgment calls anyway, we should just leave redistricting to democratically elected representatives. Reformers on this side of the debate hardly want to continue with the legislative free-for-all. But the only alternative that seems to exist is extremely hard to achieve: a fully nonpartisan process that takes districting entirely out of the hands of politicians.

There is a middle ground in this debate.²⁰ The fact that districting cannot be reduced to a mathematical formula does not mean that it must remain unconstrained. While any sensible districting process will produce a range of plans, that range has limits, and many legislative plans fall well outside that range. *That* is what a model commission should demonstrate.

The key to constraining self-interested legislators is not to identify the perfect plan, but to prevent legislators from adopting plans at the

18. Micah Altman, *Modeling the Effect of Mandatory District Compactness on Partisan Gerrymanders*, 17 POL. GEOGRAPHY 989, 989 (1998).

19. See, e.g., Persily, *supra* note 1, at 650 (collecting sources).

20. The next three paragraphs draw entirely upon conversations I have had with Dan Goroff and work done by Michael McDonald and Micah Altman. See Micah Altman, *The Computational Complexity of Automated Redistricting: Is Automation the Answer?*, 23 RUTGERS COMPUTER & TECH L.J. 81 (2007); Altman & McDonald, *supra* note 8; Micah Altman, et al., *From Crayons to Computers: The Evolution of Computer Use in Redistricting*, 23 SOC. SCI. COMP. REV. 334 (2005); Micah Altman, et al., *Party Lines: Competition, Partisanship, and Congressional Redistricting*, in PUSHBUTTON GERRYMANDERS? HOW COMPUTING HAS CHANGED REDISTRICTING (Thomas E. Mann & Bruce Cain, eds. 2005).

extremes. There are always trade-offs between districting criteria, but it is possible to find lots of plans that do well along a variety of sensible dimensions. And we can now make meaningful comparisons between districting plans, thanks largely to advances in districting software pioneered by Micah Altman and Michael McDonald.²¹

The model districting commission, then, would find that sweet spot—something roughly akin to what social scientists would call the “Pareto optimal frontier”²²—where you have done as well as you can do along some set of basic requirements. Imagine, for instance, that someone comes forward with a plan that features three Latino-opportunity districts and high compactness scores, but gives Democrats a disproportionate share of legislative seats. Another person might come forward with a plan that has the same number of Latino-opportunity districts and the same compactness scores, but is fairer along partisan lines. If no one can beat that plan, you have reached the Pareto frontier.

I do not mean to suggest that the general public is going to be moved by talk of Pareto optimality. But the basic point—that there is a range of reasonable plans, and the public should not accept a plan that falls outside that range—is easy to grasp. It is not just easy for the public to grasp; it is also easy for judges to grasp, a fact that may matter a good deal given how much election reform ultimately emanates from the courts. In any case, regardless of the source of regulation, if legislators in 2020 were forced to work within a sensible range of districting criteria, that would be a huge step forward.

The question of legitimacy. One might ask whether we need a model commission to impose this sort of constraint on legislators. Why not use Ohio’s districting contest or Travis Crum’s wiki-based approach? Or why not just have a political scientist crunch the numbers?

While all of these ideas are quite promising, they lack one feature that the model commission possesses: legitimacy. The model commission provides not just a plan, but a process. Dismissing a model commission’s proposed plan is much harder than sidestepping plans

21. See generally Altman & McDonald, *supra* note 8.

22. Pareto optimality is, of course, a term of art referring to individual well-being. BLACK’S LAW DICTIONARY 1138 (7th ed. 1999). It is used to describe a situation, in which resources have been distributed in such a way that no one can be made better off without making someone else worse off. Here, I am using the term loosely to describe a situation in which one cannot improve on one districting criterion without reducing a plan’s score for another criterion.

drawn by private individuals or public interest groups. The model commission's process thus lends legitimacy to the plan the process produces.

Think, for instance, what happened during the 2000 redistricting cycle. Redistricting software was cheap enough that some civil-rights and good-governance groups drew plans to compete with the legislatures. Unfortunately, these plans did not get much traction. In California, for instance, a "unity" plan drawn by civil-rights groups "sat on the shelf," as one participant ruefully observed, because it looked like it came from just one set of constituents rather than "the people."²³ Similarly, redistricting contests—run like that in Ohio or via a wiki—still require someone to set the criteria by which the plan is being judged, running you again into the question of legitimacy. By both modeling a fair process and producing a baseline plan, the model districting commission gives people a reason to regard the baseline plan as something more than special pleading.

Citizen commissions are particularly useful in this regard. Reform proposals are always subject to political deflection. Political opponents dismiss those behind the reform as "partisan," "ivory tower academics," or "sore losers." But no politician worth her salt is going to levy such accusations at a group of everyday citizens. Moreover, voters always used shorthand in evaluating policy—they look to the word "Democrat" or Republican" in lieu of working through all the policy details. The phrase "citizen commission" provides a potentially useful shortcut here.²⁴

REFORM POST 2010

Finally, let's say it works. Imagine we managed to gin up enough publicity and political pressure so that some politicians in some places are in the mood for change. What kind of change should reformers propose?

Here, let me offer another prayer to the god of redistricting: please let it not be a proposal that takes redistricting entirely away from the politicians. If you look into the intellectual filing cabinets of most reform groups and academics, my guess is that is just the kind of proposal you will find.

23. Email from anonymous reformer, dated July 29, 2009.

24. *Supra* text accompanying note 16; see generally Heather K. Gerken & Doug B. Rand, *Creating Better Heuristics for the Presidential Primary: The Citizen Assembly*, 125 POL. SCI. Q. (forthcoming 2010).

The impulse to move to a nonpartisan process is perfectly understandable. Anyone involved in election reform is familiar with the problem with which I began—foxes guarding henhouses. We all know what happens when we leave the regulation of politics *to* politics. Most reform proposals go immediately from the diagnosis—that politics is the disease—to the conclusion that the only viable cure is to rid the process of politics, to move the power to regulate elections entirely outside of the political system.

Maybe this will happen. I am perfectly willing to accept that if we had magic wands, waving them to produce a nonpartisan districting process would be a perfectly sensible idea. My worry, though, is that it is quite unrealistic to expect a reform of this magnitude after the 2010 cycle. Given political realities, it is too far, too fast. My guess—and it is just a guess—is that post-2010, we are more likely to have a shot at developing redistricting reform that goes some way toward nonpartisanship but still leaves room for politicians to have some influence over the process. That strikes me as the first step toward a healthy districting process.

For this reason, I would like to see a diverse set of proposals in reformers' hands when the time comes. For instance, we ought to be developing more proposals like Sam Hirsch's baseball-style arbitration process—with each party competing to submit the best plan, as judged by a neutral arbitrator.²⁵ The advantage of Hirsch's proposal is that while it will not produce a plan that the parties like, it will produce a plan that they can live with, something that might help reformers wring the last few votes that they need to pass the proposal.

Or perhaps we should push for something like Michael Kang's proposal that redistricting plans be approved by voters via referendum before being put in place.²⁶ Here, politicians control what kind of plan gets put forward. But they will have to sell it to the public, which means that they will have to take some constraints on gerrymandering into account, lest they push too far and lose public support.

Or perhaps there should be an officially blessed model districting process to shadow the legislative process for every cycle, much as some countries have shadow governments to shame the party in power into doing better.²⁷ Even a model commission that lacked power could constrain the process by identifying where the Pareto

25. See generally Hirsch, *supra* note 13.

26. See generally Kang, *supra* note 1.

27. Cf. Elmendorf, *supra* note 1 (discussing advisory commissions and election reform).

frontier is and putting pressure on politicians to satisfy some basic set of districting requirements.

I would even be happy with efforts to make the redistricting process more transparent,²⁸ as modest a goal as that might seem. By giving public interest groups greater access to the process and making it easier for reporters to tell a story about it, these proposals might also prod politicians to do better.

To return to the theme with which I began, proposals like these all harness politics to fix politics—they are all solutions for getting us from “here” to “there.” Hirsch re-channels the parties’ energies into crafting the best districting plan rather than the harshest gerrymander. Kang pushes elites to sell their plans to the public, enlisting their help in framing the issues and putting redistricting on the public’s agenda. Model districting commissions give voters a shorthand in sorting out reform debates and push toward both procedural and substantive districting reform. Even more transparency may help in the long term as the Google generation comes into its own. All of these proposals offer something that politicians might be able to live with, and yet, at the same time, push them to think about something other than pure self-interest.

These suggestions might seem quite disappointing to those who want to shield districting entirely from the taint of politics. But even the much-praised Iowa process is not actually fully nonpartisan. It is an iterative process that leaves the legislature an opportunity to have input, even to pull the plug. Indeed, even if one had the good fortune to encounter a sufficient concentration of reform-minded legislators ready to create a nonpartisan districting commission—or a magic wand—the problem of capture remains in the long term. Indeed, there is a cottage industry in administrative law devoted to identifying the many ways in which administrative independence can be undermined by legislative self-interest.²⁹

28. For an excellent example, see Campaign Legal Center, MODEL LEGISLATION FOR TRANSPARENCY OF REDISTRICTING PROCESS, <http://www.campaignlegalcenter.org/attachments/2058.pdf>.

29. Much of this literature builds on the seminal work of the “McNollgast” trio concerning the use of procedural rules and institutional design strategies to control agencies. See Matthew McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987); see also Murray J. Horn & Kenneth A. Shepsle, *Commentary on “Administrative Arrangements and the Political Control of Agencies”*: *Administrative Process and Organizational Form as Legislative Response to Agency Costs*, 75 VA. L. REV. 499 (1989); Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J. L., ECON. & ORG. 93 (1992); Barry R. Weingast & Mark J. Moran, *Bu-*

Politics, in other words, is the likely terrain for this battle no matter what path one chooses. And given that any reform proposal has to survive in the Serbonian bog that we call politics, maybe it is not such a bad idea to introduce a little bit of politics into our reform proposals in order to inoculate them against the more serious diseases circulating in that swamp.

reaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission, 91 J. POL. ECON. 765 (1983). For a critical and thoughtful response, see Steven P. Croley, *Public-Interested Regulation*, 28 FL. ST. L. REV. 7 (2000). For efforts to apply the insights of this literature to the debate over agency independence, see Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 730–35, 757, 799 (2005) (documenting the dangers of capture even for independent agencies with lawmaking authority); Elmendorf, *supra* note 1, at 1379 (based on an analysis of all of the models in the U.S., concluding capture as “a live possibility, if not an inevitability”).

**IS THERE A WAY TO DESIGN AN
APOLITICAL REDISTRICTING
PROCESS?**

