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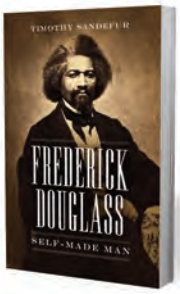

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Politicians, Voters, and Gerrymandering

BY WALTER OLSON

Redistricting reform has been on the march in recent years, with about a dozen states embarking on systematic reforms of how district lines are drawn, especially out West (California, Arizona, Colorado, Washington, Idaho, and Alaska) but also spreading to states back East, including Ohio and New Jersey. And gerrymandering has become a front-page issue nationwide, fueled by Barack Obama and other leading Democrats who have decried Republicans' fiendish ingenuity in stacking the process to their advantage—although their own party has done likewise in many states where it has had a chance to call the shots. Republicans such as former California governor Arnold Schwarzenegger have joined the chorus. And the constitutionality of partisan gerrymandering is before the U.S. Supreme Court—not for the first time—in cases from Wisconsin and Maryland.

Through all this, libertarians have mostly stayed on the sidelines. When I mention that I am active in efforts to curb gerrymandering, some people react with surprise: "Oh, is that a libertarian issue?"

It should be, I think. Libertarians are in some ways especially well-situated to spot the harms that can result when politicians get to select which constituents they would like to represent rather than vice versa. And the issue fits well into a long tradition of classical liberal thinking about the electoral process and representation, among the goals of which is to restrain existing establishments from gathering too much power unto themselves. Voters should choose legislators, not the other way around. But first, some background.

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On January 18 Maryland Governor LARRY HOGAN announced that he would join a Supreme Court case challenging gerrymandering in Maryland's congressional districts. Cato's WALTER OLSON (behind Hogan on left) has co-chaired the Maryland Redistricting Reform Commission since 2015.

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DECIDING WHO DECIDES—AND HOW

In any system based on geographical representation, someone must decide which voters should be grouped into which districts. As population grows and voters move around, someone must also redraw the lines periodically to reflect those shifts, at least under modern standards of fairness. Under our system, both state and federal legislative districts must be reapportioned at least every 10 years to reflect new census results.

Here in the United States, the task of apportioning both congressional and state legislative seats has historically fallen to state governments. Note, however, that the U.S. Constitution, from its start, has expressly granted Congress a role in overseeing how states hold elections for its own members. Article I, Section 4 of the document 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."

With the power to draw lines comes the power to punish or favor selected candidates. Even before we had the familiar name—derived from the dragon-shaped Massachusetts state senate district that Gov. Elbridge Gerry helped devise back in 1812—gerrymandering was a well-known practice. Historians debate whether Patrick Henry used it to draw a deliberately unfavorable Virginia district for James Madison in hopes of keeping him out of the House in the 1789 election. (Madison won anyway.)

But it has grown more acute in our own time with the rise of database technologies that can efficiently sort voters by political sympathy down to precincts, city blocks, and even individual buildings. Last year, the *Washington Post* cited Maryland's third congressional district as among the nation's worst offenders. It snakes through four counties and Baltimore city, connected at various points only by water; its silhouette has been compared to that of a praying mantis, a "broken-winged pterodactyl" (a federal judge's phrase), and the blood spatters at a crime scene.

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The first line of defense against the practice is to specify clear rules in advance governing how districts are drawn and make them legally binding upon the line-drawers. Compactness in districts, for example, is almost universally acknowledged to be one good principle, and success in achieving it need not be left to intuition: mathematical formulas are available to quantify the compactness of a map and compare it to alternatives. Likewise with another common redistricting principle, the congruence of district lines with smaller political subdivisions, such as counties and towns: a state can adopt a rule minimizing the number of county splits or providing that more populous counties should be split rather than less populated counties. In safeguarding against manipulation, clear and specific marching orders are better than broad grants of vague authority for line-drawers to balance multiple factors or to discern so-called communities of interest. Additionally, states can enact more or less effective methods of judicial review to ensure that line-drawers follow the announced principles.

These background rules account for no small part of the difference in the gerrymandering landscape. States with firm rules tend to have less gerrymandering than those without. And that suggests one way in which state-by-state reform, without need for institutional or legal innovation, can improve matters: enact clear and objective marching orders backed by judicial review.

WHY IT MATTERS

In a world with many injustices and bad government policies, is this an issue worth caring about? Elections will always have unhappy losers, after all, and complaints of unfairness can seem amorphous, especially if no one's individual rights have been violated.

Every imperfection in a representational system introduces a bias for or against some political group: large or small states, rural or urban constituents, committed or indifferent voters. But gerrymandering introduces a bias specifically to the benefit of incumbents and those they favor.

In this respect, one is reminded of the movement for term limits, in which libertarians have been prominent. Could America, or some parts of it, have developed a dominant political class that tends to perpetuate itself, shutting out rivals and newcomers? If so, then high among its preoccupations will be to keep its grip on office. One symbol of this entrenchment is the five-term senator or fifteen-term representative, who is too powerful and feared for anyone to dislodge. But another symbol is the dominant party that cannot be ousted from its control of a legislature unless the other party manages to score a sweeping win: with not 50 percent of the vote, but more like 55 or 60 percent.

These days, the gerrymander is known, above all, as an instrument of party advantage: the governing party draws as many districts as it can in which its own adherents hold a comfortable though not overwhelming lead, while packing opposition voters as densely as possible into as few districts as it can.

Gerrymandering serves to entrench incumbents in other ways as well. Within a party, for example, it can safeguard incumbents from challenge in the primary elections. Unfriendly internal factions can be broken up or submerged in opposition districts. And since districts that sprawl are also more expensive to campaign in—the cost of advertising in multiple media markets is higher, for example—the advantage may go to those incumbents who can raise money readily and cultivate allies among those interest groups that can turn out disciplined voters statewide.

The threat of drawing a hostile district can also be an important means of preventing

dissident voices from being heard within a majority party: cross the leadership, and you just might get cut into a tough new district next time. And carving up a coherent political community, such as a county or small city, among numerous districts can spare weak incumbents from scrutiny of their performance. Residents who do not even know who their representative is, as is common with a scrambled map, are less likely to keep track of how well that representative is serving their interests. With multiple districts, races, and incumbents to follow, press outlets are less likely to do a thorough job of covering any of them.

Beyond all this, rotation in office has a claim to standing itself among the safeguards of liberty. When there is no plausible prospect of being thrown out in favor of a rival party, there is less constraint on the thievery and high-handedness of the party in power, and less likelihood that the light of scrutiny will be cast upon it.

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BEYOND PARTISANSHIP

The fight over gerrymandering can sometimes come off as a battle between partisan insiders. But that can put libertarians—who often feel as though they stand outside the main political tribes—in a position to offer some distinctive perspectives.

Consider, for example, one of the most common fixes offered for redistricting problems, the bipartisan commission. What could be a more straightforward fix than to empanel a half-dozen loyal Republican lawmakers, a half-dozen of their Democratic colleagues, and perhaps a tie-breaking retired dignitary to supervise the drawing of a district map?

Libertarians will perhaps be quicker than many others to spot the weak points of this plan: to begin with, bipartisan does not mean nonpartisan. Maps drawn by such methods may avoid gross bias between parties by adopting a cozy "you can protect your members if we can protect ours" approach. But independent and third-party voters—not to mention insurgent political movements not yet represented in insider circles—will have no one to look out for their interests.

Or consider the question of "blinding," that is, directing a panel not to acquire or consider data on such matters as current party registration or past voting records in assembling population blocks. An even more powerful technique is to blind a panel to the residence of any individual, such as any incumbent. Many bipartisan panels consisting of Republican and Democratic loyalists would reject such a proposal out of hand, while an outsider might be more intrigued by it as a way to help avoid catering to incumbent interests.

Then again, libertarians will often have in mind the constitutionalist maxim that official powers may be best divided among actors with some jealousy of each other, with ambition checking ambition and interest checking interest. When redistricting plans are adopted through the ordinary state legislative process, there is already some of that: a governor's political goals and interests will often diverge from key legislators', so that a veto threat can serve as a check on certain excesses.

But there might also be other ways to divide power or counterpoise interest against interest. Under some reform plans, for example, multiple interested parties, or members of the public at large, are invited to submit proposed maps, and the redistricting panel then chooses the plan it considers to hew most closely to the stated redistricting principles. One big advantage of this approach can be to lay a more favorable groundwork for later judicial review, since the panel that rejects a facially better plan may find its decision coming under later scrutiny by a court. The Pennsylvania Supreme Court, for instance, invalidated a map drawn by lawmakers as clearly inferior to a map that had been submitted by Amanda Holt, an Allentown piano teacher.

IN SEARCH OF A PROCESS

A more fundamental and challenging question is: Is there some way that is both practicable and constitutionally sound to take the whole process out of the hands of those with a vested interest?

It's not as easy as it may sound. For example, "hand the whole thing over to the courts" might look like an attractive option. But judges are incumbents, too, and if they are not federal judges they probably lack tenure. In some states the bench is already too politicized for comfort, and one consequence of giving judges more authority to draw district lines might be to incentivize other actors to politicize state judicial selection further.

These days a lot of the momentum backs the idea of placing the responsibility with independent redistricting commissions made up of citizen volunteers. The Arizona and California models, and others proposed since, each have their own details. They typically exclude persons who are considered too close to elected officials and involve a stage in which some neutral entity screens citizen-volunteers in search of those with enough civic aptitude to rise to the complexities involved. A randomization stage—think jury selection—may be used to reduce the likelihood that any existing powers can stack a panel with known and trusted friends.

How have these innovations worked in practice? Arizona's has been in operation for two census cycles, California's for one, and both have results that could be described as mixed. Arizona's independent commission has come under pressure from litigation and political meddling, while in California, savvy interest groups managed to organize

quietly to influence some of the proceedings, as a ProPublica investigation found. Still, many observers believe the quality of districting has improved in both states, and both systems are works in progress, capable of correcting design problems as they go and attracting new constituencies to monitor and counteract attempts to manipulate them from the outside. In short, it's still too early to pronounce with confidence on how they will do.

We may dare to hope, however, for an enduring success. The great British classical liberals, such as John Bright and Thomas Babington Macaulay, did not draw a sharp distinction between the substantive reforms for which they crusaded—say, reducing tariffs or removing legal hardships for minority religions—and the reform of representation, the franchise, and electoral procedure. Among the goals of the Great Reform Act of 1832 was to do away with the notorious "pocket" or "rotten" boroughs: settlements, sometimes tiny or half-abandoned, which had ancient rights to elect members to Parliament and which were, in practice, usually in the possession of some great landowner who directed his tenants' choice. Gerrymandering is neither as flagrant, nor as readily abolished, an evil as the pocket boroughs, else it would not have lasted so long. But in a sense it recalls a particular subgroup of the pocket boroughs, the "crown boroughs," in which the landlord was the admiralty or some other department of state, and which could thus be voted by the government itself to advance its majority at the next election.

> "Is there some way to take the whole process out of the hands of those with a vested interest?"

The crown boroughs were, at length, abolished, and no one misses them. ■