Partisan Gerrymandering

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Introduction

What is it?
How does it work?
What limits might there be?

Partisan Gerrymandering

What is it?

- Drawing district lines to intentionally give a political party an unfair advantage in elections to a legislative body.

Gerrymandering

- Partisan gerrymandering
  - Republicans vs. Democrats
- Racial gerrymandering
  - Whites vs. Blacks & Hispanics
- Community of interest gerrymandering
  - Rural interests vs. urban interests

How Does it Work?

- Packing
- Cracking
- Pairing
- Kidnapping
- Creating a Gerrymander

How to Steal an Election

Steven Nass (Facebook, Feb. 21, 2015)
Limits on Gerrymandering

- People
  - Who draw the plans
- Principles
  - Districts that result
- Process
  - Data that may be used
  - Review by others

People

- No legislators
- No appointees of a legislator
- No public officials
- No politicians
- Minority party represented
- Equal number from majority & minority
- Neutral tie-breaker

Principles

Districting Principles for 2010s Plans

- Populations equal - 50 states
- Not discriminate against minorities - 50 states
- Territory contiguous - 50 states
- Territory compact - 40 states
- Political subdivisions preserved - 42 states
- Communities of interest preserved - 25 states

Process - Limits on Data

- No party registration
  - Constitutional
    - CA, FL, NY, OH, WA
  - Statutory
    - DE, HI, IA, ID, MT, OR
  - Guideline
    - NE
- No election results
- No socio-economic data
- No incumbent residences
  - Arizona, California, Idaho, Iowa, Montana, Wyoming

Principles

Districting Principles for 2010s Plans

- House districts nested in Senate - 19 states
- Cores of prior districts preserved - 11 states
- Avoid pairing incumbents - 12 states
- Not favor incumbents - 13 states
- Politically competitive - 3 states

Process - Limits on Data

- No party registration
  - Idaho, Iowa, Montana, Nebraska
- No election results
  - Idaho, Iowa, Montana, Nebraska
- No socio-economic data
  - Idaho, Iowa, Nebraska
- No incumbent residences
  - Arizona, California, Idaho, Iowa, Montana, Wyoming
Process - Review by Others

- Public hearings
  - Commission states
  - Iowa
- Preliminary plan
  - Commission states
  - Iowa
- Judicial review
  - Colorado
  - Florida
  - Kansas

Decisions of Prior Decades

U.S. Supreme Court Limits on Gerrymanders

- Racial gerrymanders
- Partisan gerrymanders

Racial Gerrymanders

- Don’t Draw Districts With Bizarre Shapes

North Carolina

Congressional District 12 - 1992

“Reapportionment is one area in which appearances do matter.”


Racial Gerrymanders


- Draw Districts that are “Reasonably Compact”
Racial Gerrymanders

- Don’t Let Race Be Your Dominant Motive

Georgia

Congressional District 4 - 1996

North Carolina


- State claimed boundaries based on partisan advantage, not race
- Plaintiffs failed to prove boundaries based on race
  - Race correlates closely with partisanship
  - Insufficient evidence that race predominated
North Carolina
Congressional District 12 - 2000 (1997)

Traditional Districting Principles
- Contiguous Territory
- Compact Territory & Population
- Preserve Political Subdivisions
- Preserve Communities of Interest
- Protect Incumbents
  - Preserve Cores of Prior Districts
  - Avoid Pairing Incumbents

Strict Scrutiny
- A Compelling Governmental Interest
- Narrowly Tailored to Achieve that Interest
  - Remediying Past Discrimination
  - Avoiding a Violation of VRA § 2

Illinois
Congressional District 4 - 1992

Partisan Gerrymandering
- A Justiciable Issue
  - Davis v. Bandemer (1986)
- Can it Be Proved?

Decisions this Decade
- Applying a state constitution in state court
- Applying U.S. Constitution in federal court
Decisions this Decade
State Constitution in State Court

- Florida
  - Explicit prohibition on partisan gerrymandering
  - Compact territory
  - Don't split counties or cities
- Pennsylvania
  - Compact territory
  - Don't split counties or cities

Florida
Fair Districts Amendment (2010)

- Tier-One Principles
  - Not intend to favor or disfavor political party or incumbent
  - Not discriminate against racial or language minorities
  - Contiguous territory

Florida
Tier-Two Principles

- Equal population
- Compact territory
- Use existing political and geographic boundaries

Florida
2012 Regular Session

- A swing state in votes statewide
- One-party control
- Open process, masking secret process
  - Party operatives drew maps
    - Submitted secretly to legislators
    - Submitted publicly under false names

Florida
In re: Senate Res. of Legislative Apportionment 1176
(Senate) (Mar. 9, 2012)

- Numbering scheme rejected
  - Favored incumbents by allowing them to serve for 10 years, rather than 8
- 8 Senate districts rejected
  - Violation of tier-two principles
    - Not compact
    - Did not use existing political or geographic boundaries

Florida
In re: Senate Res. of Legislative Apportionment 1176
(Senate) (Mar. 9, 2012)

- Evidence of intent to violate tier-one principles
  - 8 of 8 to favor incumbent
  - 4 of 8 to favor a political party
Testimony & documents showed intent to favor party & incumbents
- Preserved cores of prior districts
- Avoided pairing incumbents
- Districts not compact
- Divided more counties & cities than competing plans

2015 Special Session failed to enact plan
- Court adopted plan drawn by plaintiffs
  - Slightly more compact than plans offered by House & Senate
  - Fewer county & city splits than plans offered by House & Senate
    - Reduced from 2012
    - Counties from 21 to 18
    - Cities from 27 to 13

9 of 27 districts were competitive
- 3 of 9 previously held by Republicans
- 1 seat flipped R to D (17 R to 16 R)

Senate admitted plan intended to favor incumbents & party
- 2015 Special Session failed to enact plan
- Court adopted plan drawn by plaintiffs
  - More compact
  - Fewer city splits
  - One more Hispanic-performing district

4 of 40 districts were competitive
- All 4 previously held by Republicans
- 1 seat flipped R to D (26 R to 25 R)

A swing state in votes statewide
- One- party control of legislative process
  - No public opportunities to participate in drafting the map
  - Democratic senators not shown map until shortly before time to vote
- Plan packed & cracked Democratic voters
Pennsylvania

2011 Congressional District 7

Democratic candidates won
- 51% of votes statewide
- 28% of seats (5 of 18)
- 76% average vote for winner

Republican candidates won
- 72% of seats
- 60% average vote for winner

Efficiency Gap was 24% for Republicans

Efficiency Gap
- Counts wasted votes
  - Votes cast for winning candidates that exceed number needed to win (packed districts)
  - Votes cast for losing candidates (cracked districts)
- Compares wasted votes for each party as percentage of total votes cast
- Difference in percentage is Efficiency Gap

2011 plan violates Pa. Constitution

Free & Equal Elections Clause
- "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."
- Pa. Const. (1776) predates U.S. Const. (1787)
- U.S. Const. has no comparable provision

Packing & cracking dilute votes, making them unequal

Pa. Const. mandates legislative districts
- Be contiguous & compact
- Preserve political subdivisions

Appropriate for mandate to apply to congressional districts
Pennsylvania


- Legislature failed to enact new plan by deadline Feb. 15
- Court adopted new plan Feb. 19
  - More compact
  - Splits reduced
    - Counties from 28 to 13
    - Municipalities from 68 to 19
  - Dem plurality (2016 Trump v. Clinton)
    - increased from 5 to 8 (of 18)

Pennsylvania

2018 Congressional District 6

Application to stay decision denied twice
- Before new plan drawn (Feb. 5, 2018)
- After new plan drawn (Mar. 19, 2018)

Petition for certiorari filed (June 21, 2018)

Challenge to state court’s decision rejected for lack of standing (Mar. 19, 2018)

Decisions this Decade

U.S. Constitution in Federal Court

- Maryland
  - 1st Amendment Freedom of Speech
  - Article I, § 2 Representation, § 4 Elections
- Wisconsin
  - 14th Amendment Equal Protection Clause
- North Carolina
  - 14th Amendment Equal Protection Clause
  - 1st Amendment Freedom of Speech
  - Article I, § 2 Representation, § 4 Elections

U.S. Constitution

Article I

- Section 2
  - “The House of Representatives shall be composed of Members chosen . . . by the People . . . .”
- Section 4, clause 1 (the Elections Clause)
  - “The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof . . . .”
### Maryland

**2011 Session - Congressional Plan**
- No principles for congressional districts
- Not a swing state
- One-party control of legislative process
- Open process, masking secret process
  - Gov’s Redistricting Advisory Comm in public
  - Consultants outside legislature in private
- No meaningful minority party input

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**Fletcher v. Lamone (2011 Complaint)**
- CDs 2, 3, 6, 7, 8 challenged as partisan gerrymanders
  - Fragment communities of interest & political subdivisions without justification
  - Violate 14th Amendment Equal Protection Clause
- Complaint dismissed
  - Plaintiffs failed to prove claim because Supreme Court has not articulated a standard to decide it

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**2012 Election for Congress**
- **Democrats won**
  - 63% of votes statewide
  - 87.5% of seats (7 of 8)
- **Republicans won**
  - 33% of votes statewide
  - 12.5% of seats (1 of 8)
- CD 6 flipped from R to D
- No competitive districts

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**Benisek v. Mack (2013 Complaint)**
- CDs 4, 6, 7, 8 challenged
  - De facto non-contiguous, discordant structure
  - Violates U.S. Constitution
    - Article I, § 2 Representatives chosen by the People
    - 14th Amendment Equal Protection Clause
    - 1st Amendment Freedom of Association
- Complaint dismissed without appointing 3-judge court
  - Did not allege plaintiffs had been shut out of the political process

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**Benisek v. Lamone (2016 2nd Amended Complaint)**
- CD 6 challenged as partisan gerrymander
  - Not compact
  - Splits political subdivisions
  - Cracks Republican voters
  - Violates U.S. Constitution
    - 1st Amendment Freedom of Speech
    - Article I, § 2 Representation, § 4 Elections
Maryland

Benisek v. Lamone (2016 2nd Amended Complaint)

- Alleged CD 6 would remain Democratic throughout the decade
  - Dems have safe seats, not competitive

Maryland

Benisek v. Lamone (2017)

- Preliminary injunction denied
  - Failed to prove likely to prevail
    - No clear standard to determine which plans are unconstitutional
  - Action stayed pending outcome of Gill v. Whitford

Maryland

Benisek v. Lamone (U.S. June 18, 2018)

- District court did not abuse discretion in denying preliminary injunction
  - Plaintiffs not reasonably diligent in pursuing preliminary injunction six years after plan enacted
  - Law on partisan gerrymandering still unsettled

It’s Not Always About Shapes

- Wisconsin & North Carolina complied with Traditional Districting Principles
- They still drew plans that allegedly subordinated the minority & entrenched the majority
- We know that because their partisan impact can be measured by election results

Wisconsin

2011 Session - State Assembly Plan

- A swing state in votes statewide
- One-party control of legislative process
  - Plan drawn by law firm outside legislature
  - Democrats not shown maps until shortly before time to vote
- Plan packed & cracked Democratic voters
  - Dems wasted more votes than Republicans
  - 2012 Efficiency Gap was 13%

Wisconsin

2012 Election for State Assembly

- Democrats won
  - 51% of votes statewide
  - 39% of seats (39 of 99)
- Republicans won
  - 49% of votes statewide
  - 61% of seats (60 of 99)
Wisconsin

Whitford v. Gill (2015 Complaint)
- Plan challenged as partisan gerrymander
  - Intent to secure partisan advantage
  - Discriminatory effect shown by Efficiency Gap over 7%
  - Not justified
    - Due to state’s political geography
    - Due to state’s districting principles
- Defendants had drawn many other plans that accomplished their districting goals with less partisan advantage

Wisconsin

Whitford v. Gill (Nov. 21, 2016)
- Court: plan violates 14th Amendment Equal Protection Clause
  - Intentionally burdens representational rights of Democratic voters by impeding their ability to translate votes into seats, throughout the decade
- Defendants had drawn many other plans that accomplished their districting goals with less partisan advantage

Wisconsin

Whitford v. Gill (Nov. 21, 2016)
- Not justified by Wisconsin’s political geography
  - Defendants’ other plans with lower Efficiency Gap
- Not justified by Traditional Districting Principles
  - Plans with lower Efficiency Gap also adhered to Traditional Districting Principles

Wisconsin

Gill v. Whitford (U.S. June 18, 2018)
- Plaintiffs lacked standing to bring the claims they did
  - Some plaintiffs lived in districts not alleged to be packed or cracked
  - Plaintiffs did not seek to prove
    - Lived in packed or cracked district
    - Packing or cracking caused them harm as individuals

North Carolina

2011 Session - Congressional Plan
- No state constitutional limits on congressional districts
- A swing state in votes statewide
- One-party control of legislative process
  - Plan drafted by consultant in secret
  - Final form before first hearing by committee
North Carolina
Congressional District 12 - 2011

Democrats won
- 51% of votes statewide
- 31% of seats (4 of 13)

Republicans won
- 49% of votes statewide
- 69% of seats (9 of 13)
- 3 of 13 seats flipped from D to R
- 2 competitive districts

North Carolina

2012 Election for Congress

Democrats won
- 51% of votes statewide
- 31% of seats (4 of 13)

Republicans won
- 49% of votes statewide
- 69% of seats (9 of 13)
- 3 of 13 seats flipped from D to R
- 2 competitive districts

North Carolina

Harris v. McCrory (2016)
(Congress)

- Districts 1 & 12 were racial gerrymanders
- Race was predominant motive
  - Testimony of members who drew plan
  - Racial population statistics showed Blacks were packed

North Carolina

2016 Special Session for Congressional Plan

- A swing state in votes statewide
- One-party control of legislative process
- Past elections used to predict future election results ("the industry standard")
- Plan completed in secret before principles adopted

North Carolina

2016 Contingent Congressional Plan

- NCGA adopted new principles
  - Not use racial data (a race-blind plan)
  - "Eliminate the current configuration of the Twelfth District"
  - Preserve "Partisan Advantage"
    - 10 Republican districts, 3 Democratic districts
- Contingent on U.S. Supreme Ct
  - Aff'd sub nom. Cooper v. Harris (2017)
North Carolina

Common Cause v. Rucho (Congress) (Jan. 9, 2018)

- Plan violates 14th Amendment Equal Protection Clause
  - Subordinates Democratic voters & entrenches Republican representatives in power
    - Packs Dems into 3 districts likely to win
    - Cracks Dems among 10 districts likely to lose
  - Incumbents in cracked districts won’t be responsive to Democratic voters’ needs

North Carolina

Common Cause v. Rucho (Congress) (Jan. 9, 2018)

- Discriminatory effects not attributable to:
  - Political geography
    - Dems clustered in urban areas, but plan cracked them
  - Avoiding pairing incumbents
    - Contingent plan paired 2 incumbents
    - Plaintiffs drew 1,000 plans that did not pair incumbents

North Carolina

Common Cause v. Rucho (Congress) (Jan. 9, 2018)

- Plan violates First Amendment
  - Viewpoint discrimination against voters who oppose
    - Republican platform
    - Republican candidates
  - Speaker discrimination against
    - Non-Republican candidates
    - Voters who support non-Republican candidates

North Carolina

Rucho v. Common Cause (U.S. June 25, 2018)

- Vacated and remanded for further consideration in light of Gill v. Whitford

North Carolina

Common Cause v. Rucho (Congress) (Jan. 9, 2018)

- Plan violates Elections Clause
  - State legislative authority to regulate “the Times, Places and Manner of holding Elections for . . . Representatives” does not authorize a state legislature to disfavor interests of a particular candidate or party when drawing congressional districts

Proving a Partisan Gerrymander

Peter’s Proposal

- Discriminatory intent
- Discriminatory effect
- Causation
- Without justification
  - State’s political geography
  - Districting principles
  - Voting Rights Act
Proving a Partisan Gerrymander

Discriminatory Intent


Legislators assumed to know partisan impact of plan
- One-party control of legislative process
- Minority party shut out of drafting

Proving a Partisan Gerrymander

Discriminatory Effect

Requires data on:
- Election results
- Incumbent residences
  - (Less important for Congress)
- Plan drafters need data when drawing
  - Incumbents drawing a plan have them
  - Others must acquire them
- Courts must resolve data conflicts

Proving a Partisan Gerrymander

Discriminatory Effect - Election Results

- Seats proportional to statewide vote
  - Not required by U.S. Constitution or VRA
  - May be evidence of discrimination
- Minority voters packed & cracked
  - More wasted votes
  - Lopsided wins by minority
  - Median vote substantially below average vote
  - Uniform wins by majority

Proving a Partisan Gerrymander

Discriminatory Effect - Election Results

- Few competitive districts
  - Most candidates of both parties have safe seats they win easily
  - First election under new plan flips seats to legislative majority

Proving a Partisan Gerrymander

Discriminatory Effect - Predicting Future Elections

- Past elections do predict future election results
  - Not party registration
  - Key is which elections to use for party index
- Could Cambridge Analytica have predicted voter behavior?
  - As well as election results?
  - Better?
Proving a Partisan Gerrymander

Discriminatory Effect - Predicting Future Elections

- **Entrenchment**
  - Majority will retain its advantage throughout decade
    - Seats are safe, not competitive

Proving a Partisan Gerrymander

Justification

- State’s political geography
- Districting principles
  - State-specific
  - Traditional (federal common law)
- Voting Rights Act

Proving a Partisan Gerrymander

Justification

- Can alternative plans do better?
  - Give minority a fair opportunity to win more seats, while still adhering to districting principles?
- Alternative plans
  - Considered by defendants
  - Offered during legislative process
  - Offered in court

How Much is Too Much?

Equal Population

- Court need not set maximum in first case
  - *Baker v. Carr* (1962) - 19 times the population
  - *Gray v. Sanders* (1963) - 99 times the voting power
  - *Gaffney v. Cummings* (1973) - 8% was OK, maximum may be 10% for legislative plans
    - Equal population for congressional plans, unless justified by legitimate state objective

How Much is Too Much?

Partisan Gerrymandering

- Strike down plans that are extreme
  - Compared to historical plans
  - Compared to alternative plans
- Allow plans that:
  - Cost the minority less than one seat
  - In some years would permit a majority of votes statewide to elect a majority of seats
    - Enough competitive districts

Ohio

Proportional Representation

- Required in legislative plans
  - “The statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio.”
Partisan Gerrymandering

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