Partisan Gerrymandering

Peter S. Wattson

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Partisan Gerrymandering

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?

Gerrymandering

- 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
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
Principles

Districting Principles for 2010s Plans

▪ Not favor party - 12 states
  ▶ Constitutional
    – CA, FL, NY, OH, WA
  ▶ Statutory
    – DE, HI, IA, ID, MT, OR
  ▶ Guideline
    – NE
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
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”
North Carolina
North Carolina

Congessional District 12 - 1998
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
  - Remedying Past Discrimination
  - Avoiding a Violation of VRA § 2
Illinois

Congressional District 4 - 1992
Partisan Gerrymandering

- A Justiciable Issue

- 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

Fair Districts Amendment (2010)

- 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 publicy 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
Florida

League of Women Voters v. Detzner
(Congress) (July 9, 2015)

- 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
Florida

League of Women Voters v. Detzner
(Congress) (Dec. 2, 2015)

▪ 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
Florida

2016 Election for Congress

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

League of Women Voters v. Detzner (Senate) (Dec. 30, 2015)

▪ 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
Florida

2016 Election for Senate

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

2011 Session - Congressional Plan

- 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
Pennsylvania

2011 Congressional District 7

2016 Trump v. Clinton
New York Times
Pennsylvania

2012 Election for Congress

- 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
Pennsylvania

2012 Election for Congress

- 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
Pennsylvania


- 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
Pennsylvania


- 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
Pennsylvania

Federal Court

- U.S. Supreme Court
  - 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)

- District court
  - 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
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
Maryland

2011 Congressional Districts
Maryland

Fletcher v. Lamone (2011 Complaint)

- CDs 2, 3, 6, 7, 8 challenged as partisan gerrymanders
  - Fragment communities of interest & political subdivisions without justification
  - Violate 14 Amend Equal Protection Clause

- Complaint dismissed
  - Plaintiffs failed to prove claim because Supreme Court has not articulated a standard to decide it
Maryland

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
Maryland

*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
Maryland

*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
Wisconsin

*Whitford v. Gill* (Nov. 21, 2016)

- Not justified by Wisconsin’s political geography
  - Defendants’ other plans with lower Efficiency Gap
  - Plaintiffs’ 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
Wisconsin

Gill v. Whitford (U.S. June 18, 2018)

- Case returned to district court
  - May amend complaint to add plaintiffs
    - Who live in challenged districts
      - May submit proof of harm to them caused by packing & cracking
    - Who have statewide claims
      - May submit proof of harm to their ability to carry out the functions of a state party
        - Fundraising
        - Registering voters
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
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
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
North Carolina

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

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

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
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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
  - *Reynolds v. Sims* (1964) - 41 times the population
  - *Gaffney v. Cummings* (1973) - 8% was OK, maximum may be 10% for legislative plans
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.”
Videos

- Gerrymandering: Last Week Tonight with John Oliver (HBO) Apr. 9, 2017 (19:33)
  - https://www.youtube.com/watch?v=A-4dllmaodQ
  - https://www.youtube.com/watch?v=P_QNH7EYvcQ
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