

1. Redistricting and the Constitution

- Fed Constitution says nothing specific
- State Constitutions mostly assign redistricting to the state legislatures
 - unconventional by international standards, because of obvious conflicts
- in 1960s U.S.S.Ct., for the first time, says that the equal protection clause applies
- at the time wide population variations, to the disadvantage of urban residents
- ultimately establishes an equal population standard
 - deviations of up to 10% possible if there is “neutral” reasons for them
- about the same time Court says that equal protection also precludes racial gerrymanders
 - related to expansion of franchise to African-Americans in the South by the Voting Rights Act of 1965
 - generally requires an intent to disadvantage a racial group, & success in doing so (called intent and effects tests)
- from the 1970s various challenges to redistricting as discriminating by partisan identity
 - several S. Ct. decisions but nobody has ever won
 - However a majority of the S.Ct. has never said that it was impossible to win
- the problem was that a majority could not agree on a test for what was an improperly excessive partisan gerrymander. Some partisan bias deemed acceptable, perhaps unavoidable.
- Justice Kennedy appears to be key swing vote. He has indicated that he is interested in the idea of partisan symmetry, meaning

2. How is partisan gerrymandering done?

- distinguish funny shaped districts, which is where the term “gerrymandering” comes from
- we are concerned with “votes/seats” curve: the majority should govern
- packing and cracking, what the terms mean
- in WI almost all the districts with predicted 75% majorities are Dem
- GOP more likely to have 60% majorities
- few truly competitive districts (less than 52-3% for either party, predictably)
- in 2012, Dems received a majority (52%) of votes for assembly candidates statewide, but won only 39% of the seats
- 2014 was a much more favorable year for GOP, they had a majority of statewide assembly votes, but they gained only 3 seats. This shows that there are few “swing” districts, which makes the apportionment “enduring”
- through apportionment, legislators pick their voters, not voters pick their legislators

3. This is a national problem.

- the Republican 2010 program called redmap
- detailed in Dave Dailey’s book “Ratf**ked”
- one expert report in our case (by Simon Jackman) compared the degree of partisan gerrymandering in many states over 40 years, and found a significant concentration of the most partisan gerrymanders in the post-2011 period.
- linked importantly to single party control. After 2010 elections about 40% of states in complete GOP control, including TX, FL, NC, PA, MI & OH.

- unless we win our case, reasonable to expect even more partisan gerrymandering after 2020, given the consensus that redmap has had significant success, both in state legislatures and Congress
- DLCC and Republican efforts

4. The Wisconsin Litigation Situation

- the 1960s S.Ct. decisions effectively required states to redistrict after each census
- because WI normally has divided government, courts have done most of redistricting
- 2010 wave election brought unified government, leading to the 2011 redistricting
- challenged in a case known as *Baldus*
 - partisan gerrymandering part of original complaint but dropped before trial as to state legislature. Court did not consider it.
 - a racial gerrymandering claim involving two districts in the south side of Milwaukee sustained, and map adjusted as to those districts

5. Starting Our Lawsuit

- In 2013, after the *Baldus* case, some persons interested in this matter began meeting once a month or so to consider what could be done.
- Decided that it would be possible to bring another suit challenging the redistricting as a partisan gerrymander.
- We looked around for some lawyers who might be willing to take the case pro bono.
- After striking out a couple of times (it is a huge commitment), we were referred by an academic election law expert to Nicholas Stephanopoulos, a young Chicago Law Prof.
- With a co-author, Nick had written an article proposing a new metric, called the efficiency gap, for measuring how partisan a reapportionment is. Designed to satisfy Justice Kennedy
- Conveniently, the metric showed the WI legislative apportionment to be one of the most extreme is 40 years.

6. Putting together the Legal team, and getting experts

- Nick Stephanopolous was then dating (they are now married) a young woman, Ruth Greenwood, who was director of voting rights for the Chicago Lawyers Committee for Civil Rights Under Law (CLCCRL)
- CLCCRL agreed to take the case. They brought in as co-counsel a partner from a major Chicago firm who is an expert appellate litigator.
- Peter Earle and Nick Stephanopoulos also joined the team
- Next job was to get experts who could apply the efficiency gap metric rigorously using 2012 election results
- These expert reports are attached to the complaint, as exhibits 2 and 3. Complaint and other litigation documents, as well as opinions in the case, can be found at www.fairelectionsproject.org. Together they show that WI apportionment one of most partisan of modern history and extremely unlikely to yield a Democratic Assembly majority under this apportionment.
- Doug Poland and the Campaign Legal Center later join the lawyer team.
- <http://www.campaignlegalcenter.org/>.

7. The Lawsuit

- filed in July 2015 in federal court in Madison
- 3 judge district court, with direct appeal to U.S. Sup. Ct.
- 4 day trial in May, 2016
- decision in our favor in November, 2016. One judge dissented.
- further opinion in Jan., 2017 on remedies, requiring state to draft a contingent redistricting while appeal proceeds.

8. The opinion

- We proposed, and the majority adopted, a three part test, borrowed directly from the racial gerrymandering cases
 - intent to discriminate against a partisan group
 - success in discriminating, called the effects test – here is where the efficiency gap metric comes in
 - inability to justify the discrimination as necessary to achieve traditional redistricting norms, like contiguousness, compactness
- Opinion stresses enduring quality of the discrimination. Finds Republicans have an “entrenched” majority in WI Assembly
- Opinion sets no boundary line on degree of partisanship, nor privileges any particular measure of partisanship, such as the efficiency gap
- Rather it says that in discriminatory effect WI far exceeds any possible reasonable boundary
- State argued that WI has a “natural” partisan bias, if districts are contiguous, because of a concentration of Democrats in cities. Court finds a minor “natural” effect but not enough to justify the extent of discrimination.

9. What is the efficiency gap?

- wasted votes; relationship to packing and cracking
- numerator = the difference between the two parties’ total wasted votes
- denominator = total votes
- in a 2 party competitive state a fair apportionment will have an efficiency gap close to zero
- anything above 7% is worrisome

10. Remedies

- Legislature gets first crack at redistricting. Which is worrisome.
- What the trial court did to insure the plaintiffs a 2018 remedy in Wisconsin
- Supreme Court stays that order but schedules argument for 1st week of October, 2017

11. The Appeal to the U.S. Supreme Court

- State appeals directly to U.S.S.Ct., in a special procedure for districting cases
- Probable jurisdiction noted, oral argument 1st week of October.
- Lots of national press attention. Understood that if we win, lots of implications for other

states.

- but the precise constitutional limits on partisan gerrymandering likely only determined insubsequent litigation

- implications for congressional districting also to be determined later

- If we lose, may mean S.Ct. will not set limits on partisan gerrymandering for many years.

12.. The parallel public advocacy projects,

- Fair Elections Project is Wisconsin based. Co-chaired by two retired state senate majority leaders (one Dem and one GOP). <http://www.fairelectionsproject.org>.

- often advocates for fundamental redistricting reform, including formation of a commission to draft legislative and congressional boundaries, as is done in most countries.

- similar efforts nationally by Common Cause, League of Women Voters

<http://www.fairelectionsproject.org>.