

Partisan Gerrymandering

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Minnesota Citizens for Clean Elections

Edina Public Library
Edina, Minnesota

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Partisan Gerrymandering

Introduction

- What is it?
- Has it been a problem for Minnesota?
- How does it work?
- What can be done to stop it?

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Partisan Gerrymandering

What is it?

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

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Gerrymandering

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

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A Problem for Minnesota?

- One party controls process
- Lack of limits

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Minnesota's Divided Government

- 1959
 - Democratic House
 - Republican Senate
 - Democratic Governor
- 1961
 - Democratic House
 - Republican Senate
 - Republican Governor

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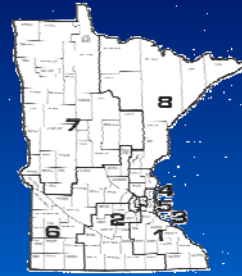
Minnesota's Divided Government

- 1966
 - Republican Legislature, Democratic Governor
- 1971-72
 - Republican Legislature, Democratic Governor

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Minnesota's Divided Government

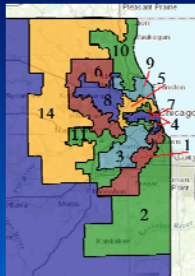
1971 Congressional Districts



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Illinois Ingenuity

2012 Congressional Districts - Chicago Area



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Minnesota's Divided Government

- 1981-82 & 1991-92
 - Democratic Legislature, Republican Governor
- 2001-02
 - Republican House
 - Democratic Senate
 - Independence Party Governor
- 2011-12
 - Republican Legislature, Democratic Governor

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The Facts of Life

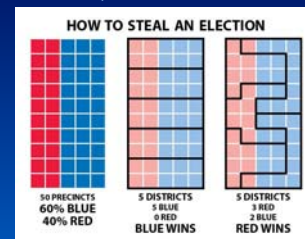
Gerrymandering

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

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How to Steal an Election

Steven Nass (Facebook, Feb. 21, 2015)



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The Need for Limits

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

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People

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

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Principles

Districting Principles for 2010s Plans

- Populations equal - 50 states
- Not discriminate against minorities - 50
- Territory contiguous - 50 states
- Territory compact - 39 states
- Political subdivisions preserved - 44 states
- Communities of interest preserved - 25

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Principles

Districting Principles for 2010s Plans

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

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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

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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

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Process - Review by Others

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

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Decisions of Prior Decades

U.S. Supreme Court Limits on Gerrymanders

- Racial gerrymanders
- Partisan gerrymanders

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Racial Gerrymanders

- Don't Draw Districts With Bizarre Shapes

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North Carolina

Congressional District 12 - 1992



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

O'Connor, J., *Shaw v. Reno* (1993)

Racial Gerrymanders

Bush v. Vera, 517 U.S. 952 (1996)

- Draw Districts that are “Reasonably Compact”

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North Carolina

Congressional District 12 - 2000 (1997)



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North Carolina

Congressional District 12 - 1998



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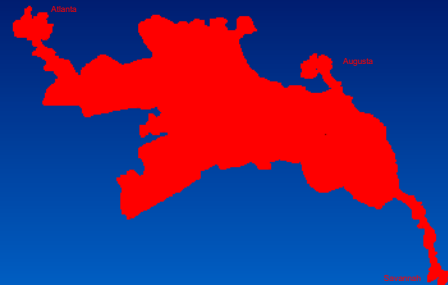
Racial Gerrymanders

- Don't Let Race Be Your Dominant Motive

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Georgia

Congressional District 11 - 1992



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Georgia

Congressional District 4 - 1996



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North Carolina

Easley v. Cromartie, 532 U.S. 234 (2001)

- 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

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North Carolina

Congressional District 12 - 2000 (1997)



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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

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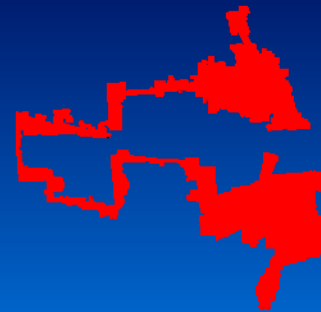
Strict Scrutiny

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

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Illinois

Congressional District 4 - 1992



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Partisan Gerrymandering

- A Justiciable Issue
 - *Davis v. Bandemer* (1986)
- Can it Be Proved?
 - *Vieth v. Jubelirer* (2004)
 - *LULAC v. Perry* (2006)

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Decisions this Decade

- Applying a state constitution in state court
- Applying U.S. Constitution in federal court

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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

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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

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Florida

Fair Districts Amendment (2010)

- **Tier-Two Principles**
 - Equal population
 - Compact territory
 - Use existing political and geographic boundaries

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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

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Florida

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

- **Numbering scheme rejected**
 - Favored incumbents by giving them 4-year terms (open seats got 2-year terms)
- **8 Senate districts rejected**
 - Violation of tier-two principles
 - Not compact
 - Did not use existing political or geographic boundaries

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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

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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

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Florida

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

- 2015 Special Session failed to enact plan
- Court adopted plan drawn by plaintiffs
 - More compact
 - County & city splits reduced from 2002
 - Counties from 30 to 18
 - Cities from 110 to 13
- 2016 - 1 of 27 seats flipped R to D
 - From 17 to 16 (of 27)

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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 county & city splits
- 2016 - 1 of 40 seats flipped R to D

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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

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Pennsylvania

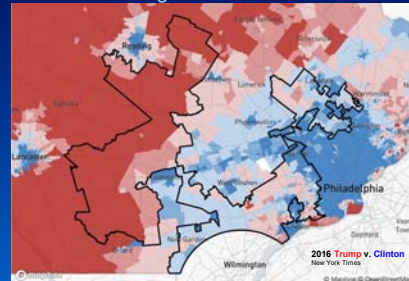
2011 Congressional District 7



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Pennsylvania

2011 Congressional District 7



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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

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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

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Pennsylvania

League of Women Voters of Pa. v. Pennsylvania
(Congress) (Feb. 7, 2018)

- 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

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Pennsylvania

League of Women Voters of Pa. v. Pennsylvania
(Congress) (Feb. 7, 2018)

- 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

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Pennsylvania

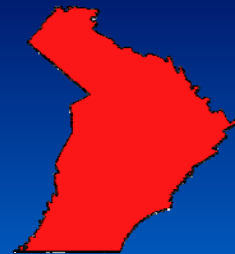
League of Women Voters of Pa. v. Pennsylvania
(Congress) (Feb. 19, 2018)

- 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)

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Pennsylvania

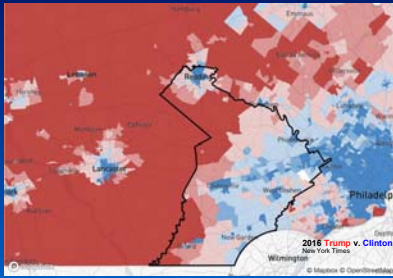
2018 Congressional District 6



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Pennsylvania

2018 Congressional District 6



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

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Decisions this Decade

U.S. Constitution in Federal Court

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

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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 . . ."

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Maryland

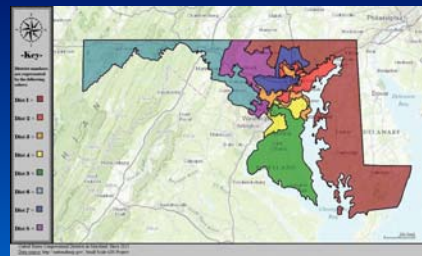
2011 Session - Congressional Plan

- No limits on congressional districts
- Not a swing state
- One-party control of legislative process
- Open process, masking secret process
 - Gov's Redistricting Advisory Comm public
 - Consultants outside legislature in private
- No meaningful minority party input

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Maryland

2011 Congressional Districts



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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

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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

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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 political process

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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

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Maryland

Benisek v. Lamone (2016 2nd Amended Complaint)

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

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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*

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Maryland

Benisek v. Lamone
U.S. Supreme Court 17-333

- Oral argument March 28, 2018
 - Questions whether appeal was brought too soon
- Decision expected by June

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It's Not Always About Shapes

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

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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 Repubs
 - 2012 Efficiency Gap was 13%

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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)

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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

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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

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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

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Wisconsin

Gill v. Whitford
U.S. Supreme Court 16-1161

- Oral argument October 3, 2017
 - ▶ Questions whether individual voters had standing to bring statewide challenge
- Decision expected by June

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North Carolina

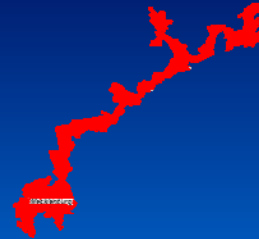
2011 Session - Congressional Plan

- 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

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North Carolina

Congressional District 12 - 2011



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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

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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

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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

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North Carolina

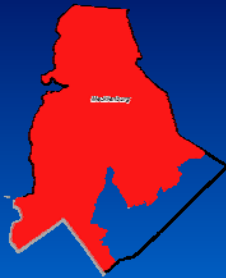
2016 Contingent Congressional Plan

- 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)

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North Carolina

Contingent Congressional District 12 - 2016



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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

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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

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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

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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

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North Carolina

Rucho v. Common Cause
U.S. Supreme Court 17-1295

- Stay granted - Jan. 18, 2018
- Jurisdictional statement filed - Mar. 12, 2018
- Too late for oral argument this term

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Proving a Partisan Gerrymander

Peter's Proposal

- Discriminatory intent
- Discriminatory effect
- Causation
- Without justification
 - State's political geography
 - Districting principles
 - Voting Rights Act

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Proving a Partisan Gerrymander

Discriminatory Intent

- Intent to “subordinate adherents of one political party and entrench a rival party in power” - *Ariz. State Leg v. Ariz. Indep. Redist. Comm'n* (U.S. 2015)

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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

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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

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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

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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

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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?

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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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Proving a Partisan Gerrymander

Justification

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

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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

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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 pop.
 - *Gaffney v. Cummings* (1973) - 8% was OK, maximum may be 10% for legislative plans
 - *Karcher v. Daggett* (1983)
 - Equal population for congressional plans, unless justified by legitimate state objective

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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

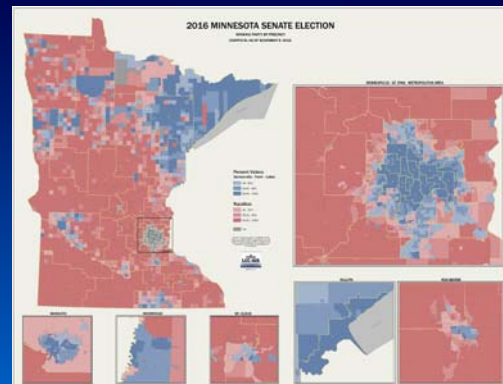
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Ohio

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.”
- On ballot May 8 for congressional plans

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Pending Minnesota Legislation

Principles and a Commission

- Principles
 - SF 3656, as amended by the House May 3, 2018, to substitute the content of HF 4099, art. 14, § 3, p. 228 (Knoblach)
- Commission
 - SF 370 (Isaacson)/ HF 246 (Schultz) (in committee)

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Videos

- Gerrymandering: Last Week Tonight with John Oliver (HBO) Apr. 9, 2017 (19:33)
 - <https://www.youtube.com/watch?v=A-4dlIlaodQ>
- Gerrymandering: A Threat to Democracy (CBS, Mo Rocha) Jan. 14, 2018 (10:54)
 - https://www.youtube.com/watch?v=P_QNH7EYvcQ

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