Drawing Maps That Will Stand Up in Court

Peter S. Wattson
National Conference of State Legislatures
Getting Ready to Redistrict
Providence, Rhode island
June 22, 2018

Why Redistrict?
- Reapportionment of Congressional Seats

Congressional Reapportionment 2020
National Conference of State Legislatures
2018 Election Data Services Projections

Why Redistrict?
- Population Shifts within State

The Facts of Life
Equal Population
- Absolute Numbers are Less Important than Relative Numbers
- Growth Slower than Average
  - Area Will Grow
- Growth Faster than Average
  - Area Will Shrink

2017 Minnesota House District Populations
State Demographer Estimates
The Facts of Life

Gerrymandering

- Packing
- Cracking
- Pairing
- Kidnapping

Ohio

2003 Congressional District 9

Ohio

2011 Congressional District 9

The Facts of Life

Creating a Gerrymander

- Minority party not evenly distributed
- Get packed & cracked
- Districts look like monsters

Equal Population

- Measuring Population Equality Among Districts
  - Ideal Population
  - Deviation
  - Overall Range

Congressional Districts

- Strict Equality
- Unless Necessary to Achieve “Some Legitimate State Objective”
  - Compact
  - Preserve Political Subdivisions
  - Preserve the Cores of Prior Districts
  - Avoid Contests Between incumbents
Legislative Districts

- An Overall Range of Less than 10 Percent
  - Unless Proof of Intentional Discrimination
- Unless Necessary to Achieve Some “Rational State Policy”
  - Affording Representation to Political Subdivisions
  - Other State Policies

Racial and Language Minorities

- Blacks
- Asians
- American Indians
- Alaskan Natives
- Hispanic

Voting Rights Act § 2

- No Discriminatory Effect
- *Thornburg v. Gingles* - Three Preconditions
  - Minority Population Sufficiently Large and Geographically Compact
  - Minority is Politically Cohesive
  - Bloc Voting by White Majority Usually Defeats Minority’s Preferred Candidate
- Totality of the Circumstances
- Realistic Opportunity to Elect Candidates of Choice

Equal Protection Clause of the Fourteenth Amendment

- You May Consider Race in Drawing Districts
- Avoid Drawing a Racial Gerrymander

Racial Gerrymanders

- Don’t Draw Districts With Bizarre Shapes

North Carolina

Congressional District 12 - 1992
Racial Gerrymanders

- Draw Districts that are “Reasonably Compact”

Racial Gerrymanders

- Don’t Let Race Be Your Predominant Motive

Georgia

Congressional District 11 - 1992

Traditional Districting Principles

- Contiguous Territory
- Compact
- Preserve Political Subdivisions
- Preserve Communities of Interest
- Protect Incumbents
  - Preserve Cores of Prior Districts
  - Avoid Contests Between Incumbents
- Nest House Districts within Senate Districts
Partisan Gerrymandering

- A Justiciable Issue
    - Discriminatory intent
    - Discriminatory effect
      - Pervasive - degrade influence of the minority party "on the political process as a whole"
      - Long lasting - the life of the plan

Partisan Gerrymandering

- Beware of Your State Prohibitions
  - Before 2010 Census
    - 6 Statutory - DE “Each district shall, insolar as is possible . . . [n]ot be created so as to unduly favor any . . . political party.”
    - HI, OR, IA, ID, MT
    - 3 Constitutional - HI, WA, CA
  - After 2010 Census
    - 1 Statutory - UT
    - 6 Constitutional - FL, NY, OH, CO, MI, MO

Florida

State Constitution, Art. III
- § 20 (Congressional)
- § 21 (Legislative)
Adopted 2010
- Don’t intentionally favor or disfavor party or incumbent
- Don’t discriminate against racial or language minorities
- Compact territory
- Don’t split counties or cities

Florida

*League of Women Voters v. Dettner* (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

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

- Art. I, § 5 - 1776
  - “Elections shall be free and equal”
- Art. II, § 16 Legislative districts - 1968
  - Compact territory
  - Don’t split counties or cities

Pennsylvania
2011 Congressional District 7

Pennsylvania
2018 Congressional District 6

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
**Decisions this Decade**

New Standards Being Developed by Federal Courts

- Wisconsin (2016)
- North Carolina (2018)
- Maryland (2018)
- Michigan (2019)
- Ohio (2019)

---

**Definition**


- Partisan gerrymandering - “the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power”

---

**Fourteenth Amendment**

Equal Protection Clause

- Discriminatory intent
- Discriminatory effect
- Without justification

---

**Fourteenth Amendment**

Discriminatory Intent

- Predominant intent to subordinate and entrench
- Direct evidence
  - Statements & correspondence
    - Legislators, staff, consultants

---

**Fourteenth Amendment**

Discriminatory Intent

- Indirect evidence
  - Excluding minority from drafting process
  - Drafting maps with excessive partisan lean
  - Packing & cracking minority voters
  - Excessive splits of political subdivisions
  - Unnecessarily pairing minority party incumbents
  - Bizarre shapes & lack of compactness

---

**Maryland**

2011 Congressional District 3
Fourteenth Amendment

Discriminatory Effect

- Measures of subordination
  - Number of districts likely to be won by each party
  - Efficiency gap - compares wasted votes
  - Uniform swing analysis - vote share vs. seat share
  - Mean-median gap - more seats than average vote
  - Declination
  - Uniform wins by majority
  - Lopsided wins by minority

- Measures of entrenchment (durability for a decade)
  - Few competitive districts
    - Most candidates of both parties have safe seats they win easily
  - Simulated elections show favored party likely to win, even if votes decline within historic range
  - Large efficiency gap likely to be durable
  - Elections under new plan show favored party wins

How the people voted

State Assembly popular vote

- Democrat: 54%
- Republican: 46%

State Assembly seats won

- Democrat: 54
- Republican: 46

State Senate popular vote

- Democrat: 51 million votes
- Republican: 50 million votes

State Senate seats won

- Democrat: 9 seats
- Republican: 11 seats

Governor popular vote

- Democrat: 129 million votes
- Republican: 129 million votes

Attorney General popular vote

- Democrat: 129 million votes
- Republican: 129 million votes

State Treasurer popular vote

- Democrat: 129 million votes
- Republican: 129 million votes

Secretary of State popular vote

- Democrat: 129 million votes
- Republican: 129 million votes

Justification

- State’s political geography

Fourteenth Amendment

- Traditional Districting Principles
  - Compact
  - Not split counties or cities
  - Maintain communities of interest
  - Preserve cores of prior districts
  - Avoid pairing incumbents

- Voting Rights Act
  - Minority voters packed so they can elect representatives of choice
Fourteenth Amendment

Justification

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

North Carolina

Contingent Congressional District 12 - 2016

Alternative Plans

Graphing the Partisan Lean

Lessons Learned

What Not to Do

- Articulate goal is to favor your party
- Draw a plan that favors your party more than any other plan possible
- Draw districts so bizarre they inspire public ridicule
- Exclude minority party from drafting plan

U.S. Supreme Court

Decisions Expected June 24-28, 2019

- Rucho v. Common Cause (U.S. 18-422)
- Lamone v. Benisek (U.S. 18-726)

Drawing Maps That Will Stand Up in Court

Peter S. Wattson

National Conference of State Legislatures
Getting Ready to Redistrict

Providence, Rhode Island
June 22, 2018