I. Introduction to redistricting
   • In the U.S., electoral districts (for state legislature and U.S. House seats) must be redrawn every ten years, following the release of Census data. Idea is to maintain rough equality in size, tracking population change.
   • Redistricting is handled at the state level. Most states leave it up to the legislature. A few use independent commissions.
   • Where legislatures are in charge, well-intentioned lawmakers, both Democrats and Republicans, typically draw the lines to benefit the members of their own party.
   • Important recent example is Wisconsin. State legislative districts created after 2010 Census are now being challenged in the U.S. Supreme Court. Case is called Gill v. Whitford. Oral arguments took place Oct. 3, 2017.

II. What is gerrymandering?
   • Geographical constituencies: not the only way to organize political representation, but the one we have
   • Gerrymandering is the manipulation of the redistricting process (described above) for political ends. Named for Elbridge Gerry, Governor of Massachusetts, whose 1812 law redrawing the lines benefited members of his party.
   • Gerrymandering can target individuals: e.g., Patrick Henry against James Madison in Virginia. It can target racial groups: e.g., attempts to limit the effective voting power of African-Americans. (Governed by the Voting Rights Act of 1965). It can aim to create minority representation, e.g., election of a Latino to represent Illinois’s 4th congressional district.
   • Once quite primitive: unreliable (James Madison was elected anyway) and easy to spot (misshapen districts). Now highly sophisticated: data pinpointing voters and predicting their likely votes, and software capable of creating thousands of hypothetical maps. Can now promote political ends reliably, and with normal-looking districts.
   • Partisan gerrymandering very common, undertaken by both Democrats and Republicans. Not just a partisan issue. Although GOP benefiting more at the moment, several GOP governors argue against it in Gill.
• Two methods: “packing” (concentrating) partisans into a few districts, and “cracking” them (or spreading them out) across many districts.

III. What’s wrong with partisan gerrymandering?
• Very consequential. Can change the policies enacted at state and federal level for 10 years (or more, if the partisan advantage prevents the next round of redistricting from passing into the hands of the opposition).
• Justice Ginsburg: “the precious right to vote” and democratic apathy.
• Arguably contributes to the sense that politics is “rigged.”
• Constitutionally, main problems seems to be Equal Protection; the disfavored party gets less voting power. 14th Amendment. Some claims are also brought under the 1st Amendment and under Art. I, Sec. 2.

IV. What’s law got to do with it?
• On one theory, nothing. “Political question” doctrine says that courts can only address legal issues. If matter is entrusted to political branch, or courts lack tools to decide, then not “justiciable.”
• For most of the history of the U.S., districting and redistricting were not justiciable. Matters for political debate at the state level.
• Warren Court changes all that. Makes redistricting a legal issue. Still, litigation is a slow, uncertain response to bad maps.
• Baker v. Carr (1962): Tennessee, where no redistricting had occurred since before 1900. Big debate about whether this should still be considered a political question. Court changes course: now justiciable. Powerful dissent from retiring Justice Frankfurter.
• Reynolds v. Sims (1964): Alabama, where existing discrepancies between district sizes were 16:1 for state House districts and 41:1 for state Senate districts. Courts holds that Equal Protection Clause requires redistricting of state legislative districts after each Census.
• Wesberry v. Sanders (1964): Holds the same thing for congressional districts, using Art. I, Sec. 2.
• Fast forward to partisan gerrymandering claims. First is Bandemer (1986): justiciable, but no holding on substance. Then Vieth (2004), in which Court was deeply divided. J. Kennedy’s concurring opinion held out hope that some workable standard might be found. Ever since, lawyers and political scientists have tried to find one. Court was divided again in LULAC (2006). Will Gill v. Whitford be the case in which a legal standard is identified and endorsed by a majority?
V. Can courts really manage this problem?

- To be justiciable, need “judicially discoverable and manageable standards.” The problem has been finding them.
- One traditional approach: compactness, contiguity, and conformity to preexisting political boundaries. Doesn’t work in contemporary cases of partisan gerrymandering, b/c maps are good enough to satisfy this.
- New measure called “efficiency gap,” invented by a political scientist in 2014. At center of the debate in Gill v. Whitford. Compares how “efficiently” the parties translate votes into seats. EG of 0 means parties are on equal footing (“partisan symmetry”).
- Trouble is that EG is just a measure. It’s like MPH: just a measure that doesn’t tell you, on its own, what the speed limit should be.
- J. Breyer in the oral argument from Gill tries to come up with a workable test: (1) One party control of redistricting? (2) Can one party get majority w/ less than half of votes, and/or is EG high? (3) Is map an extreme outlier across a range of possible votes? (4) Lastly, even if previous questions are answered yes, is there some innocent explanation?
- C. J. Roberts: Court will lose legitimacy if it enters this political domain. Will be required to pick the winner and loser of every election.

VI. Takeaways

- One simple takeaway: partisan gerrymandering is potentially very troubling, and a common occurrence by both parties, even with well-intentioned legislators.
- Three more interesting ones:
  - Constitutional law is an evolving argument. Responds to changing circumstances, including changing technology. You’re involved in the argument when you make claims about what’s required by the Equal Protection Clause, for example.
  - Judges and courts are political, but not in the simplistic way that is often assumed. This is a substantive debate about the court’s capacity. Judges are engaged in a kind of statecraft.
  - Partisan gerrymandering reveals the promise and pitfalls of law. Waiting for litigation versus preventive measures like independent, non-partisan commissions for redistricting.

Interested in learning more?
Want to follow what happens in Gill v. Whitford?

[ tinyurl.com/gerrymandering-Augie ]