

Policy 360- Episode 59-Gerrymandering Part 1: is Change Possible? Transcript

Kelly Brownell: Hello, welcome to Policy 360. I'm Kelly Brownell, Dean of the Sanford School of Public Policy at Duke University. There's a lot of disagreement about whether North Carolina's congressional map, that's the map that divides the state into voting districts, should be used.

This month, a panel of federal judges declared the maps unconstitutional because they had been drawn by Republicans and they tilted heavily in the Republican's favor. When the judge's made their ruling, many Democrats around the state were pleased. The ruling required lawmakers to redraw the maps by the end of the month, but then the U.S. Supreme Court, in a split decision, put that ruling on hold.

Here to talk about these recent events and how they apply to North Carolina and beyond is Tom Ross. Tom served as a judge in North Carolina's Superior Court for 17 years. He also served as president of two colleges in the state, and recently he spent some time at Duke looking into how independent redistricting in the state might work.

Tom is now president of the nonpartisan Volcker Alliance, which is working to rebuild public trust in government. Tom, welcome to Policy 360.

Tom Ross: Thank you, Kelly. It's an honor to talk with you, and I want to begin by thanking you for the great work you've done as our dean at Duke.

Kelly Brownell: Well, thank you very much.

First, let's talk about gerrymandering. It happens everywhere, and not just by Republicans, am I right?

Tom Ross: Absolutely. I say often that you can blame Democrats, you can blame Republicans, they're both guilty and, you know, I spent 17 years as a judge and I know guilty when I see it.

Kelly Brownell: If everyone does it, what's the problem?

Tom Ross: Well, I think, you know, it's interesting. If you're the one being gerrymandered, that is, you're in the minority, then you're in favor of reform and you think the system ought to be changed. Lo and behold, once you get in power, you refuse change, and all of a sudden you think that the system works great, and we've seen that in North Carolina.

We had a long history of Democrats doing gerrymandering and Republicans introducing bills for a nonpartisan system, advocating strongly to change the way we did business. Then, when the Republicans took over, they have forgotten their previous positions, and nowadays are in favor of leaving things

like they are, while the Democrats, on the other hand, now have found their way to the right answer by saying we should change the process.

So, both sides have been a bit ... We've seen a bit of hypocrisy between the two sides changing their positions one way or the other, and the reason they change is when they're in control they don't want to give up the power.

Kelly Brownell: Well, it will be interesting to get your ideas on how this what seems to be unbreakable cycle might get interrupted, but before we do that, how big of a problem is it in North Carolina?

Tom Ross: Well, North Carolina is normally cited as if not the worst gerrymandered state, certainly in the top two or three worst gerrymandered states in the Union. There are other problems in Michigan and Pennsylvania, in Virginia and Georgia, and lots of other states, but I think North Carolina has done gerrymandering at a very high level.

Kelly Brownell: And how big of an effect does this have on the results of elections?

Tom Ross: Well, you know, you never know, but if you look at the ... Probably the best way to judge this is if you look at the total number of votes cast for congress in North Carolina in 2016, 53% of those votes went to a Republican candidate, 47% went to a Democrat candidate.

And, so, it was pretty balanced, you know? If you have 13 seats, like we do, you would expect with that vote division to come out with seven Republican and six Democrat, but what you came out with was 10 Republican and three Democrat. So, clearly, the way the maps were drawn created that imbalance. And I think, you know, you can look back in history and see the same kind of activity by Democrats to try to protect seats for them.

Kelly Brownell: So, how do you know the gerrymandering is responsible for that, rather than just, say, the state tilting in one direction or another? And what's to say that wouldn't have been the outcome of elections anyway?

Tom Ross: Well, again, I think you have to look at the way the total vote was cast, and, you know, if only ... If 53% of the people voted for a Republican candidate that would not be the kind of majority that would result in 10 seats. So, you have to assume that if the maps were drawn fairly that that might be done in a different way. And we actually did a project at Duke that helped demonstrate that there was a better way, there is a better way, that you can create fair districts, and that the outcome will be more politically aligned with the way the voters are.

Kelly Brownell: And we'll be talking about that, but before we do, people talk about partisan gerrymandering and racial gerrymandering, and historically the courts have not been open to considering questions based on partisan gerrymandering, only racial gerrymandering. Why is that?

Tom Ross:

Well, you know, there's a long-held tradition in the courts that they don't take up what they call political questions. That's been a doctrine of the courts in our country really since our founding. The theory is that, you know, you have three independent, separate branches of government, and that when it's a political question that ought to be handled by the political branches, both the executive and the legislative branch, and not by the courts, which are really not a political body.

But I think we've seen, historically, where the line becomes gray between what is clearly a political question and what is a potential constitutional violation. You know, maybe one good example, just point out in history, is a case, Baker vs. Carr, in 1962, which was the Supreme Court of the United States deciding that however you drew districts that there had to be pretty close to, as near as possible, proportionality by population among each district. In other words, each district needed to have about the same number of voters so that each vote would count the same, and to do otherwise would be unconstitutional.

And I think, you know, that was clearly dealing with the issue of drawing districts, which one could argue is a political question, but it was also a pretty important constitutional principle for this country that we want each vote to count, and that we want each vote to count generally equally.

Kelly Brownell:

So, Tom, is that landscape changing with the most recent court decisions about ... Are courts now willing to take into account partisan issues?

Tom Ross:

Well, certainly we've seen some decisions that reflect a possible change. We don't have a case from the Supreme Court yet, although it's very likely we will have one this spring, but we've seen, you know, a federal court in Wisconsin throw out legislative maps based on partisan gerrymandering.

We've seen partisan gerrymander attacks on congressional districts in Maryland by the Republicans claiming the Democrats had gerrymandered. And in our own state, in North Carolina, we have a case now, handed down earlier this month, in which a three-judge panel, federal judges, rules that the North Carolina congressional maps were drawn with partisan intent and partisan effect, and that that violated the constitution as a violation of equal protection.

And then most recently the Supreme Court of Pennsylvania threw out the congressional maps in Pennsylvania on the grounds that they, too, were drawn for partisan advantage, and that that violated the Constitution. And, so, we are beginning to see courts take up this issue and decide it based ... That there can, in fact, be extreme partisan gerrymandering that requires some constitutional remedy.

Two cases, now, the Wisconsin case and the Maryland case, are in the hands of the Supreme Court. The Wisconsin case has been argued. I think the Maryland

case is scheduled, if it hasn't already been argued, it's scheduled to be argued before very long. Most people anticipate a decision in those cases by June.

It's certainly possible that the Supreme Court could decide to expedite the appeal of the North Carolina case, and bring it up, and allow it to be briefed, and argued, and included in the decision that comes down later this term, assuming one does come down. So, that's a possibility, or they could simply leave the stay in place pending the outcome of the cases now pending.

Kelly Brownell: Tom, given the current composition of the Supreme Court, how would you expect them to react if they heard a case?

Tom Ross: Well, I don't think you ever know with the Supreme Court, that's what makes it interesting as a place to be an observer and to watch how they act, but I think we have seen, in decisions in the past, you know, the beginnings of ... Certainly some statements by some of the justices, that show a beginning of a willingness to consider this issue.

You know, Justice Kennedy, for example, and intimated that if you have extreme partisan gerrymandering, and if you can bring to the court some objective measure of how you can determine what's too much gerrymandering, then the court might be open to hearing an argument that that is unconstitutional. There seems to be, probably, four justices that are open to hearing this and determining that it's not a political question, that it is indeed a potential constitutional violation.

You have a couple of others that seem pretty firmly of the view that it is a political question. I'm not sure, you know, that we necessarily know where the other three justices are, but, you know, Justice Thomas has made some statements that, you know, you could interpret to show that he's open to considering this. On the other hand, that would not be a position you would think he would likely take.

So, I think it's hard to know. I think a lot of people, a lot of legal scholars that know more than I do, think it's a four-four split with Justice Kennedy being the likely deciding vote.

Kelly Brownell: So, let's talk about the gerrymandering project that you ran here at Duke. How was the project set up?

Tom Ross: Well, we did it along with Common Cause and, you know, let me say that it has been a very high honor for me to be the Terry Sanford Distinguished Fellow in Public Policy for the last two years, and I'm still in that role, and still doing a lot of work around redistricting with Duke, and have been thrilled to have had the opportunity to work on this issue.

When I first came I was approached by Common Cause with the idea of doing a simulation of what it would be like to do redistricting with an independent commission that only considered factors that did not include any political information. That is, it did not include party registration, did not include voting history, but simply were based on nonpartisan criteria.

You know, I thought it was a great idea. It was a great educational opportunity for the students at Duke, and perhaps for some of the faculty as well. It was a great educational opportunity for the public, and I think it was a good education for some policymakers.

So, we did a three-part series. The first meeting was a public meeting in which we brought together 10 retired judges and justices, five of whom, by the way, had been chief justices of the Supreme Court, one had been an associate justice on the Supreme Court, then we had two Court of Appeals judges and two trial judges. And those ten judges were divided, five had run for office as Republicans and five had run as Democrats. So, it was as close to we could get as a nonpartisan or bipartisan group that could consider nonpartisan redistricting.

In that first meeting we did a lot of education, you know, with the intent of educating the judges but really, more broadly, trying to use that as a mechanism to educate students, faculty, and the public. So, we brought in a demographer, we had some legal experts talk about the restrictions that the Voting Rights Act places on redistricting. We had a long discussion about what it means to have one person, one vote, what does Baker vs. Carr really mean in terms of the variance in population that might be allowed. It was a, I think, an educational day.

It was a good day, and then the second session was designed for the judges to draw the maps. So, we had some software for them to use. We had legal experts. We divided them into two teams, and each of the two teams was asked to draw a congressional map using the software program and using, as their criteria, simply that the districts had to be compact as possible, that they had to be contiguous, that they could not consider voting history or party registration, nor could they consider the ... Where incumbents lived.

And, so, we had the two judges draw the maps. One of them we instructed to start in Mecklenburg and Wake Counties, because those two counties are too large to have a self-contained district, they have to be split because of their population size. And we had the other team start out West.

They drew two maps. We, you know, displayed those maps to the entire group at the end of the day, told them that we would want to bring them back together after we verified that the maps, indeed, would comply with the Voting Rights Act and with one person one vote, and that we would be asking them, then, to vote on which map they wanted to adopt.

So, we had a third session. In the meantime we ran the maps through the legislative software that the legislature uses to be sure that they comply with the Voting Rights Act, as best can determine that, and to be sure that the map that came out was one that would withstand scrutiny in terms of being fair and in compliance with the law.

We brought the two maps back to the judges and asked them to vote. They had a long discussion and ultimately opted to vote in secret ballot, and we did end up with a majority adopting one of the two maps.

We then had a press conference at the legislature to share the map and talk about the process with ... We had a number of legislators that were present, but we also had a lot of press and the public there, and I think it was a really good opportunity to keep the issue alive, to explain to people there is a better way to do this. There's a way to let the ... You know, to let voters pick their politicians instead of what a lot of people think is happening now, which is the politicians are picking their own voters.

Kelly Brownell: Tom, how did the legislators react to this?

Tom Ross: Well, I think, you know, it was interesting. You would expect those people who were supportive of partisan redistricting, not many of them showed up. Those that are interested in nonpartisan process came. I think they were delighted to see that this is possible, and that it actually wasn't that difficult to do, and, you know, we had a number of questions from them.

And, by the way, there are a number of Republican legislators that support a nonpartisan process. This is not a strict party line kind of situation at all. And certainly, in the public, if you look at registered voters, both Democrats, Republicans, and independents, all three of those groups, by large majority, support a nonpartisan redistricting process.

Kelly Brownell: So, Tom, how does this cycle get interrupted? Because just take North Carolina as an example, the Democrats are feeling stung by the Republican's redrawing of the maps. If the Democrats come into power then the Republicans ... Then they're going to want to do the redistricting themselves, the Republicans will get stung, and this cycle just continues as people come in and out of power. How in the world does this get interrupted?

Tom Ross: Yeah, we've certainly seen that pattern for many, many years in North Carolina and in most states, actually, and I think the way it gets interrupted is the people have to speak out. And we've seen that in several states, Arizona, California, for example, where they have citizen referendums, and they put citizen referendums on the ballot and they passed overwhelmingly requiring nonpartisan redistricting.

North Carolina doesn't have a citizen referendum process, but we do have a constitutional process where you can amend the constitution. And I think the best solution, at least from my perspective, is to have a constitutional amendment put before the voters that would require a nonpartisan redistricting process. Put that in the Constitution, where it becomes very hard for either party to change it.

Therefore, each party can trust that there is going to be, indeed, a nonpartisan process. And I think the key to that process is simply avoiding the use of any kind of data, voting history data or party registration data, that allows people to know how the various voters in various places are going to vote. That way they, you know, I think you can avoid the partisan gerrymandering no matter who draws the maps.

But it may be that an independent commission would also be very helpful. You know, you often get into a squabble about who ought to appoint the people on the commission, and, you know, how many should be on the commission, and how many from each party, should independents be represented, all that. I think that's an interesting and healthy debate, but I don't think it's near as important as what the criteria are for how you draw the districts.

So, I hope that the people of North Carolina are tired of this, they're tired of the uncertainty, they're tired of the massive amounts of money that get spent on litigation. I mean, think about the fact that this is 2018 and we're still litigating maps based on the 2010 census, and are likely to be litigating them maybe until the end of the decade.

So, you know, I think people are frustrated by it. So, if we can convince people that we need a constitutional amendment, and they can convince their legislators to let the people decide, you know, legislators don't have to vote for or against it if they choose not to, but if they'll put it on the ballot and let the people decide I think that's the solution for North Carolina.

Kelly Brownell:

Well, and your work has been so instrumental in helping move the state, and the nation, toward that kind of a goal. Let me ask you about a speech you gave here at Duke not too long ago, the Terry Sanford lecture, where you ... So, you said, and I quote, "I believe that a case can be made that our democracy is, at this very moment, inching towards failure." What did you mean by that?

Tom Ross:

Well, I mean, I think one of the problems with gerrymandering is that the vote of many, many people really doesn't count. If you are a Republican and you're put in a gerrymandered Democratic district in which there is a closed primary, the winner of that election is going to be determined in a Democratic primary and you, as a Republican voter, can't vote in that primary, and when the general election comes around, even if there is a Republican candidate, they don't have a chance because it's been gerrymandered so carefully to ensure Democratic victory.

Same is true is you're a Democrat in a Republican district. The worst case is for the independents, doesn't matter what district you're in if the outcome is going to be decided in the primary you're left out of the process. And I think we've seen, over the last number of years, there are polls that reflect this, that increasingly voters are becoming disengaged. They no longer believe that their vote counts.

You don't need to look very far to see that, just look at voter turnout data. And even in the very, very hotly contested 2016 presidential election, I think people are surprised to learn that less than half of eligible voters in America voted in that presidential election. Less than half.

You know, any form of government depends upon the support of the people, and if the people are disillusioned, if the people don't trust the government any longer, if they don't trust the democracy in the way its working, if they feel like they've been left out of the democracy, then at some point they no longer really are inspired to support and be vigilant about protecting the democracy. And if you're not, it does have the ability to end, to crumble, and to move to a different form of government.

We've seen in our world history a number of different countries with different forms of government that have seen those forms of government fail for one reason or another, and democracy is no different. It's not here forever. You know, we didn't create it in our constitution and have a right to it being here forever, it can fail, and the fastest way to failure is for the public to lose confidence in the way it works, and I'm afraid that's what's happening right now.

Kelly Brownell:

So, Tom, looping back to the work that you did in North Carolina, in our next episode of this podcast we're going to talk with Duke Math Professor Jonathan Mattingly, and I know he and his students have been testing, and working with you, on the competitiveness of variations of the district that your team drew up. I imagine his work must have been very helpful to you.

Tom Ross:

Oh, extremely helpful, and I think one of the few really good things I've done is to get Jonathan involved in this in a very direct way. He had had an interest in it before, and I had read some of his material, but I went to see him for the express purpose of seeing if he could help me figure out a easy way to test for extreme partisan gerrymandering to be able to show, graphically, that it was possible to do this in a much fairer way.

And he and his students came up with a very, you know, I think, easy to explain and easy to depict, in a graph, system that allows you to test for extreme gerrymandering. And I think he explained to me that he used a Monte Carlo algorithm, which I wouldn't have thought of because I don't even know what it is, but he can think of things like that because he's a brilliant, brilliant guy and very interested in this issue.

His work, Kelly, has been so important that he was called as a witness in the North Carolina case, and if you read that 207 or 17-page opinion you will see his name spread all through that opinion, because the judges relied heavily on his testimony. And the reason his testimony was so important is because it is a way, an objective way, if you remember what I said from Justice Kennedy, that you need an objective way to show that partisan gerrymandering has gone too far.

And that's what Jonathan's work allows you to do, and I'm so thankful that he's been involved, and so thankful to Duke that I was able to be there, and to get to know him, and to work with him. And, as you know, we've had, now, two national conferences at Duke, one in which we invited a number of people from around the country that were working on this issue, whether they were academic scholars such as Nick Stephanopoulos, who is at University of Chicago and came up with the methodology used in the Wisconsin case, or ... And other academic folks from around the country, as well as advocates on this issue.

And then, the second conference Jonathan put together for ... Really, for computer scientists and mathematicians that are focused on this issue and how you can test for partisan gerrymandering. And, so, Duke has had a very important leadership role, and the Sanford School particularly, I think, has taken an important leadership role through [inaudible 00:24:15] and through your support.

And I think ... I'm very grateful, and I think it has really made a difference. We'll see if it has been the key difference when the courts end up deciding our case, but I think it's no question that it's moved the needle significantly.

Kelly Brownell:

So, Tom, let me end with a question. I'm reading your mind here, but I'm guessing you're optimistic about where this is all going given that mathematicians are working with political experts and legal experts like you, there's much more attention to this issue in the press recently, and the court decisions seem to be showing a willingness of the court to change the way they're looking at things. Does this argue for a positive future?

Tom Ross:

Well, I'm always optimistic, and I think that, you know, we are seeing a lot of positive signs. You know, when you've had, now, four or five courts that have accepted the idea that partisan gerrymandering can go beyond a simple political question into an unconstitutional act, that's certainly a positive sign.

I think you have seen the voters ... You know, one of the things I've been able to do with Duke is go around the state and co-sponsor ... Duke has been great in co-sponsoring events with the League of Women Voters, and with other nonpartisan organizations, so that I've been able to go and talk about redistricting.

And, you know, I've given a lot of talks in my time, and, you know, you pick a subject like redistricting, you don't necessarily expect a big crowd, but I was in

Wilmington last week, in an auditorium on UNC Wilmington's campus. It held 300, and it was full.

You know, people are really enthused about this, seeing reform, and seeing change, and so I think the combination of the courts' enthusiasm and the public, the pressure that's building on the policy makers, the broad support in the public, if you look at the polls. Yeah, I think there's something happening here that could result in a positive outcome.

The Supreme Court decision, no question, will be really critical, but, you know, we can fix this no matter what the court does. You know, we can pass a constitutional amendment in our state. We can change this like Arizona and California have changed their systems. We can do it if the people are willing to support a constitutional amendment, and I do think there's broad support on both sides for it.

Kelly Brownell: Well, Tom, it's been wonderful having you as a guest, and hearing your thoughts, and hearing more about your work on this incredibly important issue. So, I want to thank you again for joining us and, of course, for being part of the Sanford community and the Duke community, what a difference you have made. So, thank you, again.

Tom Ross: Well, thank you, Kelly. It's been one of the greatest honors of my life to carry Terry Sanford's name, and to try to do as he would have done, which is to fight for democracy and for good government.

Kelly Brownell: Well, thank you. Tom Ross is president of the Volcker Alliance, which is working to rebuild public trust in government. Previously, he served as the very first Terry Sanford Distinguished Fellow here at the Sanford School of Public Policy at Duke University. He joined me for today's conversation from the NPR studios in New York City. We'll have a link to those non-gerrymandered North Carolina congressional maps that came out of the project Tom has been talking about with us today at our website, Policy360.org.

Until next time, I'm Kelly Brownell.