Outline: William C. Whitford Talk to League of Women Voters

1. How is partisan gerrymandering done?
   - packing and cracking, what the terms mean
   - in WI almost all the districts with predicted 70+% majorities are Dem
   - GOP districts more likely to have 60% majorities
   - few truly competitive districts (less than 52-3% for either party, predictably)
   - examples, from power point slide
   - in 2012, Dems received a majority (52%) of votes for assembly candidates statewide, but won only 39% of the seats. With few prospects for improvement
   - 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
   - through apportionment, legislators pick their voters, not voters pick their legislators

2. 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.
   - can 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

3. What harm does partisan gerrymandering do?
   - because of the caucus system in legislatures, little bi-partisanship
   - and because of gerrymander, general elections don’t matter in most districts
   - the consequence is that the most important election, in terms of influencing the substance of legislation, is the GOP primary; a very small part of the electorate has undue power on legislative output. Gun control legislation is an example.

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
   - first challenged in a case known as Baldus. Challenged both legislative and Congressional districting.
     - partisan gerrymandering was not considered in the legislative case because those plaintiffs did not push it
     - a racial gerrymandering claim involving two Assembly districts in the south side of Milwaukee sustained, and map adjusted as to those districts
     - congressional case, with James Olson as lawyer, did raise a partisan gerrymandering claim
     - claims raised by those plaintiffs denied, so basically the 2011 districting was upheld, except for the 2 Milwaukee Latino 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. Included Peter Earle, a lawyer for the Hispanic plaintiffs in *Baldus*, and Fred Kessler, a longtime Democratic Assemblyperson from Milwaukee and a long time personal friend.
   - We decided that it would be possible to bring another suit challenging the legislative redistricting (only) as an unconstitutional partisan gerrymander under the U.S. Constitution. No case on this ground had ever succeeded, though several had tried.
   - But a close reading of earlier precedents convinced us that Justice Anthony Kennedy might be open to such a theory if presented with the right facts.
   - And we felt that we had those facts.
   - but we knew that to win, would have to win at U.S. S.Ct. level. State why.
   - 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 some of Justice Kennedy’s concerns expressed in the earlier cases.
   - Conveniently, the metric showed the 2011 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.
   - finding plaintiffs.
   - 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.

7. The Lawsuit
   - filed in July 2015 in federal court in Madison.
   - Redistricting cases get a special procedure: 3 judge district court, with direct appeal to U.S. Sup. Ct.
   - the judges, how appointed, background.
   - State files motion to dismiss, saying no court has ever recognized our legal theory. In Dec., 2015, trial court unanimously denied. Case begins to attract some national attention.
   - Doug Poland, and the Campaign Legal Center (out of DC) join legal team.
- 4 day trial in May, 2016
- decision in our favor in November, 2016. One judge dissented.

8. The opinion (very long)
- We proposed, and the majority adopted, a three part test,
  - 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, because of a concentration of Democrats in cities. Court finds a minor “natural” effect but not enough to justify the extent of discrimination.

9. 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 in June, 2017, oral argument 1st week of October.
  - why probable jurisdiction was no surprise to insiders
- Lots of national press attention. Understood that if we win, lots of implications for other states.
- If we lose, may mean S.Ct. will not set limits on partisan gerrymandering for many years.
- A lot of ceremony involved in the oral argument, which lasts only one hour.
- Briefs and Amicus Briefs (about 60 in total) probably more significant
- Oral argument consists mostly of questions from the Justices, who came to the argument very prepared.
- Reading the tea leaves. We were encouraged by the questions that Kennedy asked the lawyers for the State
- However, decision not likely before May or June, 2018
- Even if we win, remedy in Wisconsin may not happen until after 2018 elections

10. Litigation in other states
- Most waiting to file until after the decision in our case
- Md. Case, involving one badly gerrymandered Congressional District. U.S. S.Ct. has granted review. Argued on March 28th. Probably decided with our case later this spring.
- NC Congressional districting. Decided in plaintiff’s favor at trial level. Some of our lawyers representing plaintiffs. S.Ct. has put off review until after our case, and prevented any remedy in NC until after S.Ct. Review.
- NC state legislative districting. This case began long ago and a partial remedy is being implemented now. But theory is racial districting, not partisan gerrymandering.
PA Congressional districting. Decided in plaintiff’s favor. Based on state constitution so there is no S.Ct. Review. 2018 remedy.

11. What to look for when the S.Ct. Decision comes down
- Theory of plaintiffs in MD case very different from ours
  - they rely on the 1st Amend, and analyze on a district by district basis
  - we rely (mostly) on the 14th Amend (equal protection) and our analysis is a statewide one. Explain what I mean by statewide theory
  - if court sustains only one theory, one group of plaintiffs lose.
- if court sustains our approach, will they set a “line” or leave that for future decisions
  - will there be any possibility of a remedy before the 2018 elections

11. 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)
- advocates for fundamental redistricting reform, including formation of a commission to draft legislative and congressional boundaries, as is done in most countries.
- and has been in some states, including Iowa.
- similar efforts nationally by Common Cause, League of Women Voters
- May be an issue in 2018 Wis. Governor election. There has been a big increase in public awareness and interest in this issue in the past few years.

12. Closing Thoughts
- Because of current interest in the topic, might seem like our case represents an idea whose time has come
- but from our perspective in 2013, when we started, we were people with a problem.
  Looked to law for a solution because we could think of no other. And we had to craft a new precedent in order to win
- some thought we were undertaking an extreme long shot. We thought we had a good chance, basically because the facts in WI were so extreme.