

TURNER:

Hello, and welcome back to Wisconsin law and action. A podcast where we discuss new and forthcoming scholarship with University of Wisconsin Law School professors. I'm your host, Kris Turner, and my guest today is associate professor and faculty co-director of the state democracy research initiative, Robert Yablon. Professor Yablon is here today to discuss Gerrylaundersing, his newest article, which was recently published in the NYU Law Review. The article introduced the concept of gerrylaundersing to best describe mapmakers efforts to lock in their favorable position by preserving key elements of their existing maps. The article then applies this new term to the existing redistricting discourse to explain how people in power can use this strategy to cement their hold on power in a less radical manner than outright gerrymandering. Thank you for joining the podcast today, Professor Yablon.

PROF. YABLON:

Thanks for having me, Kris.

TURNER:

Absolutely. Let's start this discussion by learning a bit more about your background. What's your professional experience, what led you to researching gerrymandering and the newly minted concept of gerrylaundersing?

PROF. YABLON:

Well, I have been on the UW law faculty since 2014, and among other things I teach the law of democracy, which involves voting rights, campaign finance, the legal status of political parties and redistricting. And redistricting has obviously been a high profile issue in Wisconsin. In particular, we've had litigation in recent years over partisan gerrymandering in the state, which went all the way up to the US Supreme Court. And in the past couple of years we've been in the midst of a redistricting cycle, and so it's been a natural time to think about redistricting. And when you think about what's gone on in the past decade plus, one of the defining characteristics of the post 2010 redistricting cycle was the aggressiveness of some of the gerrymanders that we saw, not just in Wisconsin, but around the country.

PROF. YABLON:

And as we got into the 2020 cycle, I started thinking about the implications of these aggressive post 2010 gerrymanders. And one implication is that if you've gerrymandered successfully last time around, there's less need for you to reinvent the wheel when it comes time to redistrict, and so you might be able to achieve your goals simply by perpetuating the status quo. And that's where the concept of gerrylaundersing really came from, the idea that sometimes you can achieve your partisan goals during redistricting, not by overhauling a map, but simply continuing a map that already stacks the deck in your favor.

TURNER:

Great. And I just want to mention that law of democracy class you mentioned is consistently one of the most popular over wait listed classes here, so I'm always jealous I didn't get a chance to take it. So I'm glad to learn from you now about all this good stuff.

PROF. YABLON:

You're welcome to audit anytime.

TURNER:

Okay. I'll try and fit it in somewhere. I appreciate it. Let's start to discuss this article in a little more detail, first by getting a brief overview of the current legal landscape of gerrymandering, you started to discuss that already, but are the recent attempts at gerrymandering any different than those encountered by previous generations of gerrymandering?

PROF. YABLON:

Sure. Well, gerrymandering has a deep history. Some listeners are probably aware the term dates back to the early 19th century, where there was some redistricting mischief in the state of Massachusetts. In 1812, the legislature there was in the hands of the Democratic-Republican Party and they were concerned that they were on the verge of losing power to the Federalist Party, and so they overhauled the state's electoral districts in an effort to try to maintain their advantage. And the governor at the time, a guy named Elbridge Gerry, signed off on that new map and some creative newspaper editors noted that one of the new contorted districts resembled a salamander and so they dubbed it the gerrymander and the rest is history. So this has been going on for more than 200 years, but gerrymanders in recent years, they've grown more sophisticated and more potent, and so in *Rucho v. Common Cause*, which was the partisan gerrymandering case that reached the US Supreme Court in 2019, it involved maps from North Carolina and Maryland.

PROF. YABLON:

Justice Kagan wrote in her dissent in that case, "These are not your grandfather's, let alone the framers, gerrymanders." And in particular, there are a few important differences when we're thinking about gerrymandering today. One is technology today allows map makers to generate and analyze millions of maps to test their potential partisan effects and figure out which ones they think are going to work best. And they're aided in that effort by the fact that they have better data than ever before, much more granular data about voter behavior, about demographics and so on, and so they really are able to predict with more accuracy than they might have in the past what effects particular lines will have. And that's all the more so because today we live in an era of pretty polarized politics. And that means if partisan affiliations are relatively stable, you can have more confidence from election to election that the districts are not going to change in a significant way in their partisan balance.

TURNER:

If gerrymandering has been around for 200 years, what's the difference between gerrymandering and gerrylaunders?

PROF. YABLON:

When we think of classic gerrymanders, we tend to think of situations when maps are being overtly manipulated. So as in Massachusetts, those in power were overhauling the lines in an effort to try to secure and increase their political advantage. And the idea behind gerrylaunders, as I alluded to before, is that when it comes time to redistrict, sometimes those in power don't actually need to engage in an overhaul, the existing map might be serving them very well. Maybe it's a map that they themselves gerrymandered a decade ago. And so they might prefer to just try to perpetuate the existing district boundaries. Now, they can't usually perpetuate them completely because one of the reasons that we have, decennial redistricting, is to ensure the districts remain equally populated. So the lines need to be tweaked, but they can focus on continuity rather than change. They can start with the existing map and they can just shift the lines around slightly to restore population equality without really overhauling

things completely. And so if gerrymandering is about tilting the playing field, gerrylaundersing is more about keeping the playing field tilted.

TURNER:

Okay. So they're looking for continuity in an already gerrymandered map is what they're looking for?

PROF. YABLON:

Yeah. That's right.

TURNER:

What type of materials did you draw on in your research? Did these materials that you located suggest gerrylaundersing is endemic to one particular party?

PROF. YABLON:

Part of my research centered on trying to identify the prevalence of gerrylaundersing as a practice around the country and so I looked at a range of materials. On the more qualitative side of things I looked at legislative materials at local media coverage from around the country, particularly during the post 2010 redistricting cycle, trying to see how legislators characterized their work, did they talk about limiting changes from the prior map, did they talk about trying to minimize the number of people that were shifting between districts, maybe minimize the extent to which incumbents were getting paired with one another. That is a sign of gerrylaundersing, so I looked at that. And then I also took a more quantitative approach and I looked at census data, specifically data compiled by the Missouri Census Data Center, which lets you see population overlap between newly drawn congressional and state legislative districts and their predecessor districts, and so this is something that's sometimes referred to as core retention. If a new map takes the old map as its starting point and just tweaks the lines somewhat, you'll see high core retention rates.

PROF. YABLON:

On the other hand, if the map makers weren't trying to preserve the old map and instead they drew the new map from scratch, you'll generally see lower core retention scores. And so I looked at the relative levels of core retention scores from place to place around the country. So what I discovered is the gerrylaundersing is common for congressional districts, for state legislative districts, and it's not the exclusive domain of a single party, both parties do it. It's a common technique for whatever parties is in power. I would say that in 2020 we probably saw more gerrylaundersing when Republicans controlled the redistricting process. And that's partly because in 2010 there were more places where Republicans had the opportunity to engage in aggressive gerrymanders. And having done so, and in many cases, those gerrymanders worked very well, they were in a position to preserve what they had already gained for themselves.

PROF. YABLON:

In 2020, there were more instances actually of Democrats who were engaging in gerrymanders because they may have had opportunities that they didn't have in 2010. And so in places like Illinois or New York, for example, they were trying to overhaul maps and gain seats rather than just preserve what they had before.

TURNER:

So in 2030, we could see potentially more gerrylaundersing from the Democrats since they have done the gerrymandering in 2020, potentially they could do gerrylaundersing if they wanted to preserve the power?

PROF. YABLON:

That's a possibility. Yep.

TURNER:

By the way, I appreciate you discussing all the materials that you pulled on for this, my librarian heart sings to hear about the research that you did here. So I just wanted to get that in here for sure.

PROF. YABLON:

And the library of course was very helpful during the process.

TURNER:

Good. You got to the point that I wanted to get to there. Excellent. What are some common techniques that map makers use in gerrylaundersing?

PROF. YABLON:

When we talk about gerrymandering, you often hear about the techniques of cracking and packing. Map makers will sometimes try to advantage one political party by cracking the voters of the other party between multiple districts so that those voters aren't sufficiently numerous in any one district to be able to form a majority, so that's cracking. Or sometimes they may try to pack the other party's voters, so they jam as many of the other sides voters into one district as they can so those voters then can't prevail in more districts. So when we talk about gerrymandering, we're often talking about cracking and packing. Well, with gerrylaundersing, it's a little bit different because you're trying to preserve a favorable scheme that already exists. You're not affirmatively doing new cracking and packing, maybe that cracking and packing was done in the past.

PROF. YABLON:

Now, because rhymes are apparently helpful in this area of the law, my article refers to the techniques of gerrylaundersing as locking and stocking. Locking means that the map makers are trying to lock in the prior district configurations populating those new districts with as many residents of the prior districts as they can given the need to reestablish population equality. Stocking means that they're trying to stock each of those new districts with one and only one existing office holder, so they're trying to avoid instances in which incumbents end up in the same new district and then have to face off with each other during the next election.

TURNER:

Interesting. I have to say that rhyming helps in any instance, but especially in law of democracy, so I appreciate the newly minted rhyming scheme that you've come up with here. It helped me while I was reading the article. How have courts reacted to the locking and stocking and cracking and packing, but specifically the locking and stocking of gerrylaundersing?

PROF. YABLON:

Well, by and large, courts have been accepting of gerrylaunders. Remember that the US Supreme Court has held that federal courts shouldn't even be attempting to curb gerrymandering. They've said that partisan gerrymandering is a non-justiciable political question, again, at least as a federal constitutional matter. And so courts that are declining to do anything about gerrymandering, they're not going to do much about gerrylaunders either. And gerrylaunders, after all, has this veneer of legitimacy. When map makers gerrylaunders, they can portray what they're doing as an appropriately restrained approach. They'll say, for example, that retaining the cores of prior districts or avoiding contests between incumbents helps to ensure stability, helps to preserve the representational links between office holders and their constituents, and courts at least sometimes have just accepted these assertions at face value. There have been instances in which courts have described core retention or the avoidance of incumbent pairings as neutral redistricting principles, even though those techniques do very predictably serve to benefit those who are already in power.

TURNER:

Is there a time when gerrylaunders is appropriate within the designated redistricting laws of states? So really is there legal legitimacy to these efforts?

PROF. YABLON:

This is something interesting that I found as I was doing my research. I surveyed the redistricting laws of all 50 states and as a legal matter it turns out that gerrylaunders is rarely something that is required or even encouraged. So most of the relevant law here is state law. There are a lot of state constitutions that establish redistricting principles that map makers are supposed to follow. The state constitution might say, for instance, that districts are supposed to be compact or they're supposed to respect political subdivision boundaries. So you try to keep cities and counties together to the extent that you can and you don't needlessly divide them. But there are very, very few states that include, in their list of required redistricting criteria, preserving prior boundaries. In fact, there are only three states that I identify that have constitutional or statutory provisions that even weakly endorse core retention.

PROF. YABLON:

And there are none that affirmatively encourage incumbency protection. So in two of those states, New York and New Mexico, core retention is a discretionary factor that map makers may consider, but it's not something that they have to. In Utah, preserving the cores of prior districts is one of a long list of enumerated criteria that map makers are supposed to comply with to the extent practicable, but there's no state that really tells map makers you need to start with the old map and maintain, preserve it as much as you can. So when this does happen, map makers are really doing it, it's a discretionary choice, they're not doing it to comply with legal directives.

TURNER:

In the absence of any legal directives, are there any practical or normative reasons for gerrylaunders? Can those overrule this lack of legal necessity?

PROF. YABLON:

I alluded to this a little bit, this idea of a veneer of legitimacy. There are things that you can say in favor of gerrylaunders that do make some logical sense. But the question is whether those reasons are

really good enough to outweigh the concerns that we may have about gerrylaunders as a way for those in power to try to entrench themselves. And so my view is that the rationales in favor of gerrylaunders are pretty weak. So consider, for example, the argument that preserving old maps can help to ensure stability and respect the existing relationships between representatives and their constituents. Well, stability can have its virtues, I don't want to deny that. It is true that representatives often will invest in learning about their district, they'll have knowledge, and that gets disrupted when you redistrict. Similarly, voters may organize on a district level and redistricting can disrupt their organizational efforts.

PROF. YABLON:

And I really don't mean to diminish any of that, it's a reason why we probably wouldn't want to redistrict after every election, but stability is a value that you try to optimize, not maximize. So it's not just about stability. Dynamism is also an important value in a political system. You want to give new voices an opportunity to emerge, you want to give new alliances an opportunity to be created. And so 10 years strikes me as maybe a reasonable balance. You have existing districts that last for 10 years, and then you have an opportunity through redistricting for a fresh start. And the idea of a fresh start I think makes sense, especially given that there are all sorts of other ways that our system advantages incumbents and tends to skew toward entrenchment. And redistricting is a nice occasion actually to introduce a little bit of dynamism and disruption that we might not otherwise have.

TURNER:

Interesting. I like that way of looking at it is to introduce the dynamism so things aren't locked into place. I think people tend to think of these districts as in one spot, but this allows for a little bit more freedom of movement. So what happens next? What are the implications or consequences of gerrylaunders on the upcoming elections and how will courts react to it?

PROF. YABLON:

One way to think about gerrylaunders is that in many instances, it is a way to extend the lifespan of a gerrymander. So one implication of having gerrylaunders is that you will just get more of the same. We are seeing this right now in Wisconsin. There was a fairly aggressive gerrymander after the 2010 census in the state and this time around the redistricting process went to the courts because we had had divided government and there was very active litigation over what kind of a new map the court, the Wisconsin Supreme Court should adopt. And the Wisconsin Supreme Court decided that it would essentially adopt a gerrylaunders map. It accepted the arguments from the legislature that the court should choose a map that minimized changes from the existing gerrymandered map. And so for upcoming elections in Wisconsin, we can expect to see the same kinds of partisan balances or imbalances that we've been seeing for the last decade.

PROF. YABLON:

And there are other states where the story is going to be fairly similar. What might courts do about this? Well, it's hard to say. There are some state courts that have become a little bit more active in reigning in gerrymanders. We've seen state courts, this redistricting cycle in places like North Carolina, Pennsylvania, New York that have invalidated maps that they concluded were too skewed. Now, that skew may be the product of an overt gerrymander, or it may be a function of a gerrylaunders. Either way, you may have state courts step in. One bit of uncertainty here is that the US Supreme Court this fall is slated to hear a case involving the so-called independent state legislature doctrine, and that case is Moore

v. Harper. It comes from North Carolina and it is possible, depending on the result in that case, that it may actually be more difficult, maybe even impossible for state courts to reign in gerrymandering or gerrylaunders for congressional districts. That case though won't affect what state courts or it shouldn't affect what state courts are able to do with respect to state legislative districts.

TURNER:

You touched on this a little bit, but I want to dig in a little bit more is so what is this dynamic redistricting, as opposed to entrenchment? Can dynamic map making help with gerrylaunders maps then?

PROF. YABLON:

My article talks a little bit about this notion of dynamic redistricting, and that's just the notion that redistricting really ought to be thought of it as an opportunity for a fresh start. That's not to say that there shouldn't be or there won't be any continuity between an old map and a new map, there often will be. If one of your animating redistricting principles is that you should be preserving political subdivision boundaries, then many political subdivisions that were intact under the old map will remain intact in a single district under the new map and that's totally fine, but the idea is that map makers, they shouldn't prioritize continuity with the prior map. Instead, they should be making contemporary judgements about where lines should be drawn given today's community dynamics, given the populations today of different political subdivisions, given today's demographics, rather than letting decisions that were made in the past under one set of circumstances outlive their usefulness.

TURNER:

So it's giving map makers in some ways more freedom?

PROF. YABLON:

Well, I want to be a little bit careful here about more freedom, because here's what I wouldn't want. I wouldn't want to suggest that a fresh start should mean that this is an excuse for opportunistic map makers to try to undertake a fresh gerrymander. So in many of the places that are moving toward dynamic redistricting, they're doing so as part of broader redistricting reforms. So they're trying to take the redistricting process out of the hands of partisan actors, or at least put some constraints on those actors. And as part of that process, they're saying don't prioritize continuity with the old map, instead here's what you should do. In some cases, in Arizona, for example, they actually have instructions on how the independent redistricting commission there should progress, essentially start in one corner of the state and draw districts from there and so they really are effectively prohibited from giving priority to prior redistricting decisions. And I tend to think that those kinds of reforms can be fairly effective.

TURNER:

What do you most hope readers take away from your article?

PROF. YABLON:

Well, I think we've gotten at this already. I would hope that they take away a sense that redistricting really can be and should be an opportunity to make our electoral system more responsive and dynamic. We in some ways are fortunate that we do have laws that require this decennial revisiting of our electoral district lines. It provides an opportunity for updating. So we have districts that reflect current

communities and current community needs, and can open the door to new voices, new perspectives in our political process. And it is, to some extent, a shame when we don't take advantage of that opportunity and instead redistricting is just an excuse to tweak existing lines, but largely perpetuate the past.

TURNER:

Where can researchers find more of your work?

PROF. YABLON:

Well, they can probably find it on my SSRN page, the UW law repository, of course, is a place where my work can be found, and I suppose wherever else fine legal scholarship is available.

TURNER:

Exactly, emphasis on fine in this case. I really appreciate it and enjoyed your article, and I thank you again for joining us on the podcast today. We have been discussing Professor Yablon's recently published article, Gerrylaundrying, published in the NYU Law Review. Again, you can find the full text of this article in SSRN, as professor Yablon mentioned, and it'll be linked on our podcast page. Thank you all for listening. For a complete listing of Professor Yablon's work visit the University of Wisconsin Law School repository. Find these links and all our previous podcasts at [wilawandaction.law.wisc.edu](http://wilawandaction.law.wisc.edu). Stay up to date on Wisconsin Law School scholarship by subscribing to this podcast via the Apple iTunes Store or follow either [@WisconsinLaw](https://twitter.com/WisconsinLaw) or [@UWlawprofs](https://twitter.com/UWlawprofs) on Twitter for updates and news on faculty publications. See you next time. Happy researching.