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COUNT:**

ENDING PARTISAN GERRYMANDERING

THE
CAMPAIGN
LEGAL CENTER



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Executive Summary

The partisan gridlock we currently see in American politics, not just at the federal level, but in state legislatures across the nation, has reached unprecedented levels. This gridlock has resulted in an inability to govern, record low voter turnout and a distrust in government soaring to all-time highs.

Contributing to this environment of hyper-partisanship is the practice of partisan gerrymandering, which has been allowed to run rampant nationwide. Partisan gerrymandering creates an unrepresentative and unfair democracy and encourages self-interested politics. This calculated practice, which undermines the power of voters, has gone on for far too long and must end.

The solution to this growing problem is for the courts to require that voting maps treat the parties equally, which can be measured using simple arithmetic. Working with experts, the Campaign Legal Center has built a test that can serve as a national standard to curb the undemocratic practice of partisan gerrymandering.

Throughout this report you will learn more about the problem of partisan gerrymandering and the solution that the Campaign Legal Center has built.

We are committed to this cause and will fight all the way to the U.S. Supreme Court to ensure that we have a democracy that gives every voter a voice.

PARTISAN
GERRYMANDERING
CREATES AN
UNREPRESENTATIVE
AND UNFAIR
DEMOCRACY



Letting the Foxes Guard the Hen House Does Not Work

Partisan gerrymandering occurs when political parties manipulate district lines for their own partisan advantage, and voters are denied an effective voice in electing their representatives. Letting politicians manipulate voting maps is like putting the fox in charge of the hen house. Currently, politicians are allowed to choose their own voters and draw voting maps that benefit themselves, at the expense of American voters and our democracy as a whole.

REDISTRICTING

Every ten years, the United States Constitution requires states to redraw their congressional and state legislative district lines. We call this redistricting. Every district that elects a representative to Congress or a state legislature must be roughly equal in its total population.

The term **“gerrymander”** derives from 1812, when the term was coined in response to a redistricting plan signed by Massachusetts Governor (and future Vice President) Elbridge Gerry.⁹ The salamander district was drawn to benefit Gerry’s Democratic-Republican Party, and soon the term “Gerry’s salamander,” or “Gerry-mander,” was born.

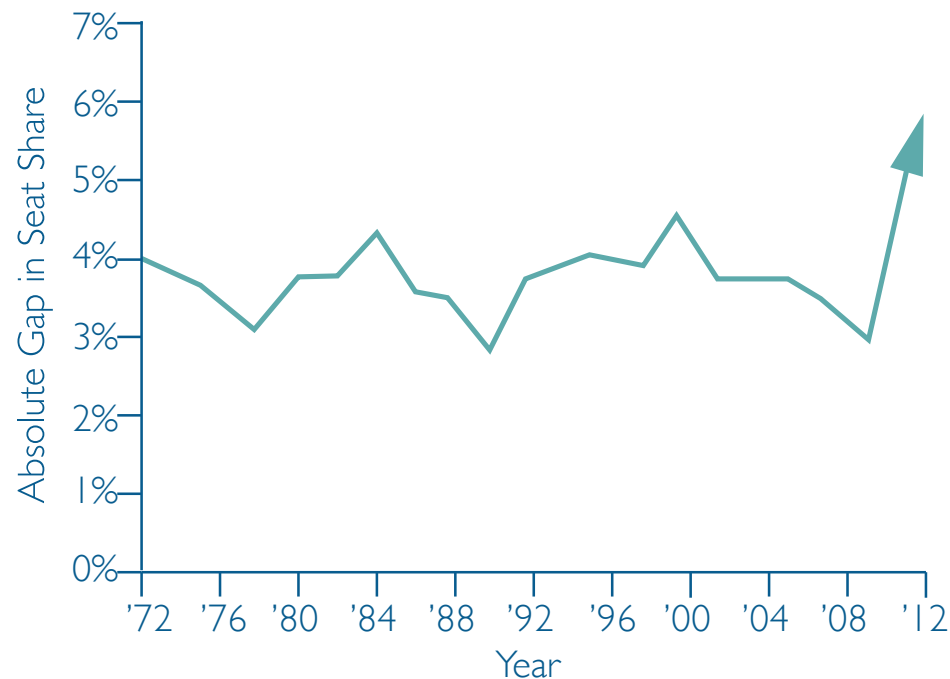


In most states, the state legislature is able to pass a redistricting plan like it would pass any ordinary bill. **This means that the state legislators are able to draw the boundaries for the districts that they will then run for office in for the next 10 years.** In a democracy, we think that voters can choose their representatives through elections. But, **when those representatives get to choose their own districts, we can end up with legislators choosing their voters instead.**

PARTISAN GERRYMANDERING IS OUT OF CONTROL

Partisan gerrymandering has never been worse in modern American history than it is today. The size of partisan asymmetry at the state legislative level has spiked in 2012 and 2014 to the highest level in 40 years.

The extent of partisan gerrymandering can be measured by the efficiency gap, the larger the gap, the more extreme the gerrymander.¹



What is the **efficiency gap**?

The efficiency gap measures the level of partisan symmetry in a redistricting plan.

- A lower number means both parties are treated more equally in the way they can convert votes into seats.
- A higher number means one party has an advantage in the way it translates its vote share into seat share. (see page 16 for more details)



The manipulation of district lines to prevent legislatures from being “collectively responsive to the popular will,” often by stopping “a majority of the people in a State [from] elect[ing] a majority of that State’s legislators” has long been recognized by the United States Supreme Court as unconstitutional.² In 2012 alone, there were six state house plans in which the gerrymandering party received a minority of the statewide vote but still retained control of the legislature, and five congressional plans.³

In these states, there is no doubt that gerrymandering exacts a terrible democratic toll, including:

- Enabling the legislative enactment of laws that the people oppose and that would never have been passed under a neutral map.
- Distorting the lawmaking process by awarding the gerrymandering party more seats, and more influence over policy, than it otherwise would have had.
- Unfairly diluting the opposing party's ability to represent the interests of its supporters.

This is not a problem that legislatures will fix on their own:

- Officeholders who benefit from gerrymandering – who owe their positions and authority to it – are the last people who should be expected to limit the practice.
- There is no sign that gerrymandered legislatures plan to adopt independent redistricting commissions or stringent map-making criteria.
- Where progress has been made toward these reforms, **it has occurred almost exclusively through the ballot box**, when voters have had the opportunity to vote to reform state redistricting practices (a process that is unavailable in Wisconsin and many other states).

Gerrymandering represents a paradigm case of incumbents warping the electoral process to keep themselves, and their party, in power. There are few circumstances that call as urgently for judicial intervention.⁴



REDISTRICTING LAW WILL BE DISTORTED AS LONG AS THERE IS NO SUPREME COURT STANDARD FOR PARTISAN GERRYMANDERING

As a result of not having a Supreme Court judicial standard for partisan gerrymandering, litigants often try to squeeze partisan grievances into the available doctrinal categories such as one-person, one-vote doctrine, the Voting Rights Act and racial gerrymandering. Unfortunately, squeezing partisan grievances into these other categories simply does not work, even though partisan manipulation of districts is just as unfair and hurtful to voters and our democracy.

As Campaign Legal Center Executive Director J. Gerald Hebert said in his closing argument in *Whitford v. Gill*:⁵

Partisan gerrymandering cases today masquerade as racial cases. And why? Because we lack a robust partisan gerrymandering jurisprudence and so everybody has to take their challenges and awkwardly fit them into a racial sphere, creating a doctrinal mess frankly in the racial gerrymandering field and perversely encouraging legislators to boast about their parti[san] gerrymandering so that they don't have to get caught up in a racial gerrymander.⁶

If we are able to set a judicial standard for partisan gerrymandering, then the areas of redistricting law that are currently warped by partisans will develop to the advantage of those harmed. For example, racial gerrymandering claims could be left to plaintiffs that seek to ensure that lines are drawn fairly with respect to the race and ethnicity of voters, rather than plaintiffs claiming partisan-based harms.



Why is Partisan Gerrymandering So Bad Now?

Partisan gerrymandering continues to get worse. The recent spike, which is on track to continue without intervention, has occurred as a result of the increased technological sophistication of mapping and data software, along with the belief by those in power that partisan gerrymanders will not be struck down by the courts.

TECHNOLOGICAL ADVANCEMENT

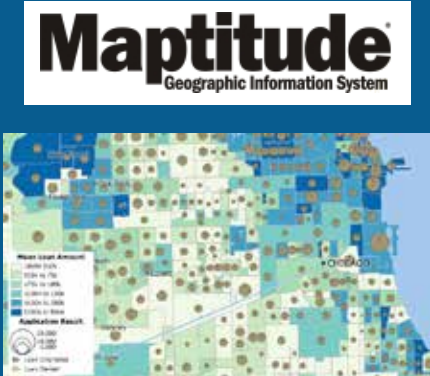
Redistricting, the drawing of new legislative lines, does not happen on a whim. The process is one of deep strategy and analysis that in today's sophisticated world relies heavily on technology and data.

The technology that is used to map out new legislative lines is similar to the digital technology we see being used in political campaigns to target and attract voters. Mapping experts along with political strategists use sophisticated geographical information systems (GIS) software packages, like Maptitude, and complex regression models to determine the precise legislative maps that will benefit their political party the most. This technology incorporates election results and demographics to make predictions, with pinpoint accuracy, for where supporters and opponents of particular parties and candidates live, and where they may move, as the decade unfolds. This technology is not being used for the benefit of voters, but rather to ensure political gain.

THERE IS NO JUDICIAL STANDARD TO STOP PARTISAN GERRYMANDERING

The United States Supreme Court first found partisan gerrymandering to be a constitutional violation in 1986, after Susan Davis sued the state of Indiana for the partisan district lines drawn for the Indiana state house and senate in 1981.⁷

Since then, the courts have not struck down a single redistricting plan as a partisan gerrymander, because they have not found a workable standard that can be used to distinguish between lawful and unlawful plans. **Put simply, the court has yet to determine “how much is too much?” when it comes to the partisan effects of redistricting.**⁸

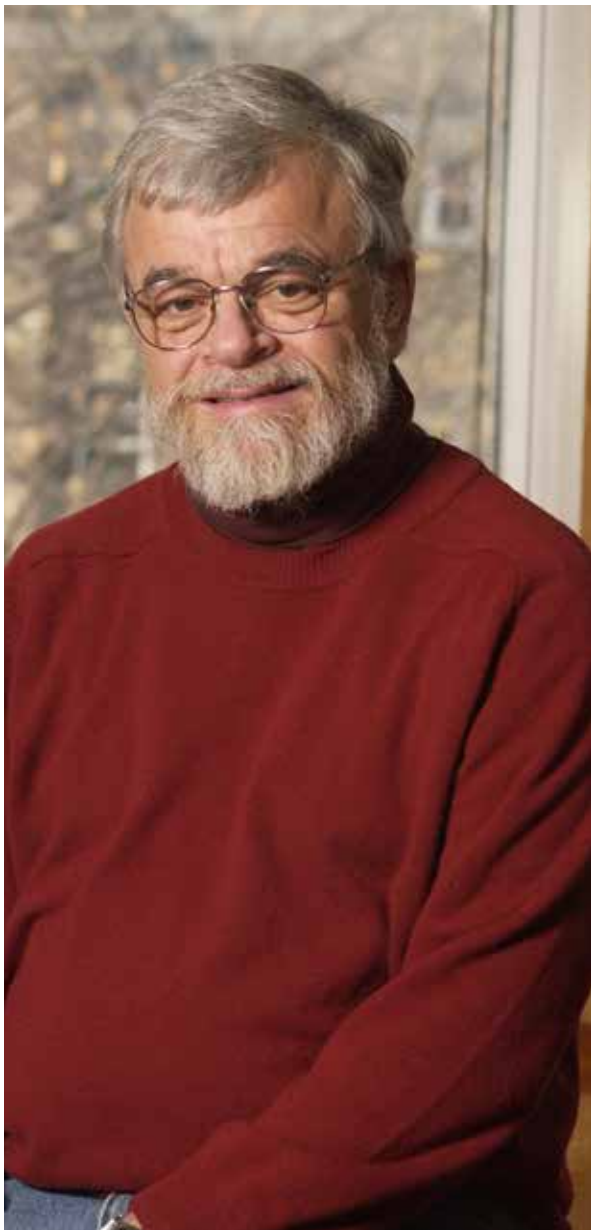


Maptitude
Geographic Information System

Sophisticated mapping software like Maptitude is used to create modern legislative districts.



Who is Affected by Partisan Gerrymandering?



Partisan gerrymandering may be accomplished by drawing lines on a map, but it is voters across the country who lose out when gerrymanders are implemented.

A lifelong Wisconsinite, **Professor Bill Whitford** has been an active member of the Democratic Party from an early age. Whitford was president of the Young Democrats at the University of Wisconsin-Madison in 1960-61, and has always volunteered to help get Democrats elected across Wisconsin by door-knocking, phone-banking, recruiting campaign donors and donating to Democratic candidates, because it matters to him that Democrats are elected statewide and can implement the policies he cares about.

Whitford lives in Madison, which regularly elects Democrats to state office, but he feels his voice is stifled by the gerrymandered State Assembly plan. He feels this way because no matter how much effort he puts into getting Democrats elected, the Assembly maps are so rigged in favor of Republicans that even if the Democrats get more votes, the Republicans will likely retain power in the Assembly, leaving the voices of Democratic voters to be drowned out by the Republican minority.



Who is Affected by Partisan Gerrymandering?



Helen Harris is a retired school principal from Milwaukee, Wisconsin. She received both her undergraduate degree in elementary education and her masters in educational administration from the University of Wisconsin Milwaukee. Harris still devotes much of her time to volunteering at schools in Milwaukee.

A lifelong Democrat, Harris has always lived in one of the three majority black State Assembly districts on the northwest side of Milwaukee, most recently in the 12th. In 2011, the redistricting plan drawn by the Republicans, “cracked” her and her (solidly Democratic) neighbors away from their former district and combined them with the “ruby red” suburbs of Milwaukee in the 22nd State Assembly District, thereby diluting their votes.



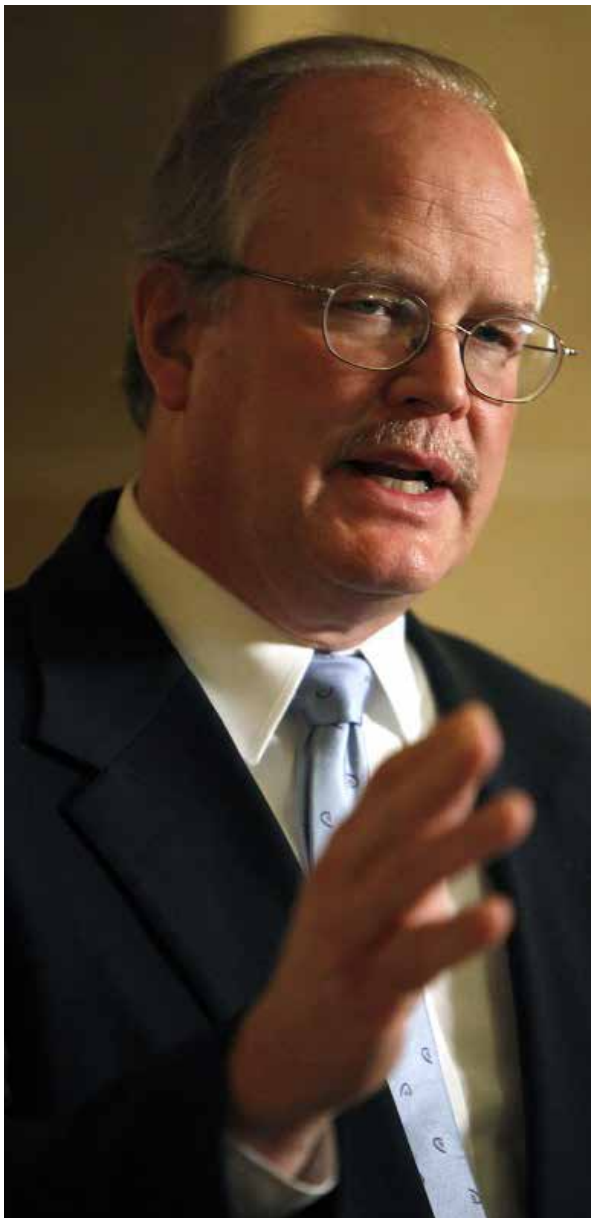
Who is Affected by Partisan Gerrymandering?



Wendy Sue Johnson was a local school board member in Eau Claire, Wisconsin, from 2010-2016. Johnson lives in Wisconsin's 91st State Assembly District.

In 2011, the district was redrawn to include almost the entire city of Eau Claire, which contains a large percentage of Democratic voters. In drawing the district to include most of Eau Claire, the Republican map drawers took Democratic voters out of surrounding districts and “packed” them into Johnson’s district, making the surrounding districts significantly easier for Republicans to win. As a result, many of Johnson’s neighbors live in a different district, because the 68th Assembly district is right across the street. Johnson believes that because she was packed into the 91st district, her vote does not matter as much as if she lived across the street, a consequence intended by the Republicans who drew the district map in 2011.

Who is Affected by Partisan Gerrymandering?



Dale Schultz is a former Republican state legislator in Wisconsin, who served in the state legislature for more than 30 years. Schultz served in both the State House and State Senate, rising all the way to State Senate Majority Leader. In 2014, Schultz announced that he would retire and not seek reelection, as a result of the increasingly partisan environment in Wisconsin politics.

As a legislator, Schultz personally felt the negative effects of partisan gerrymandering, noting the unprecedented gridlock in the legislature and the lack of a role for moderate politicians. After the 2011 districts were drawn, Schultz's district had become so conservative that a moderate Republican like himself was no longer an attractive choice. In 2014, Schultz led a push to adopt a nonpartisan redistricting process in Wisconsin, proposing a set of bills that would have taken the ability to draw districts out of the hands of legislators. The Republican-led legislature refused to even hold hearings on the bills.

Creating a Gerrymander

At its most simple, the way to advantage one party when drawing a redistricting plan is by packing and/or cracking the opposing party's voters:

PACKING

Creating districts that include a super-majority of the opposing party's voters and few of the gerrymandering party's voters; the opposing party wins these districts by overwhelming margins.

CRACKING

Distributing the opposing party's voters across a large number of districts in which they are modestly outnumbered; the opposing party loses these districts by relatively small (but reliable) margins.

How much packing and cracking there is in a district plan can easily be measured by adding up the surplus and lost votes for each party and comparing them:

- **Surplus votes** are the votes cast for the winning party in a district in excess of 50% plus one vote.
- **Lost votes** are the votes cast for the losing party in a district.

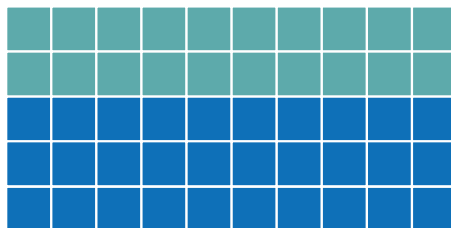
MEASURING PACKING AND CRACKING: THE EFFICIENCY GAP

Assume that in the following state, there are 50 precincts, each with 10 voters, for a total of 500 voters, and assume there are 300 voters who support the blue party and 200 voters who support the teal party. For simplicity, they are distributed like this:

50 PRECINCTS

40% Teal

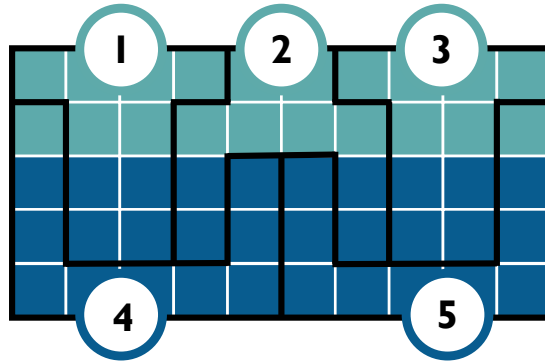
60% Blue



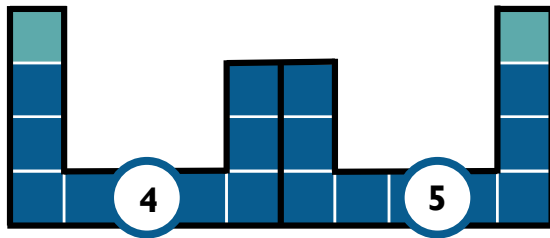
A POSSIBLE DISTRICT PLAN

Here is a district plan that could be drawn to make sure that more teal legislators are elected than blue ones:

5 Districts
3 Teal
2 Blue
TEAL WINS



THE PACKED DISTRICTS

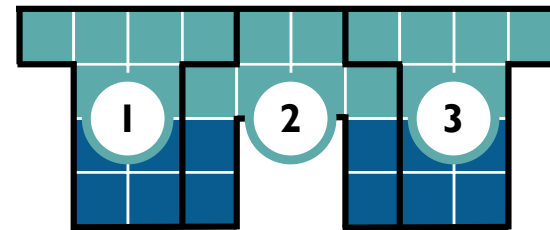


In each of these two districts, blue voters are packed, because out of 10 precincts, 9 are blue and 1 is teal. This means that the blue voters will elect their candidate with 90% of the vote, but they only needed 51 votes to win.

In each district:

- Surplus votes: The blue party has 39 surplus votes
- Lost votes: The teal party has only 10 lost votes

THE CRACKED DISTRICTS



In each of these three districts, blue voters are cracked, because out of 10 precincts, 6 are teal and only 4 are blue. This means that teal voters win each of their districts with 60% of the vote, while all of the 40% of blue voters votes are lost.

In each district:

- Surplus votes: The teal party has 9 surplus votes
- Lost votes: The blue party 40 lost votes



CALCULATING THE EFFICIENCY GAP

As you can see from the example above, the teal voters are **more efficiently** distributed throughout the districts in the state. The **efficiency gap** is a metric that places a number on how efficiently voters are distributed for one party or the other, so that every single state house, senate and congressional plan can be compared using a single number, expressed as a percentage.

The efficiency gap simply adds up the surplus and lost votes for each party, and compares them to each other. In the example above, the calculations are as follows:

FOR THE TEAL PARTY

District	Surplus or Lost Votes
1	9
2	9
3	9
4	10
5	10
Total	47

FOR THE BLUE PARTY

District	Surplus or Lost Votes
1	40
2	40
3	40
4	39
5	39
Total	198

THE EFFICIENCY GAP

=

Teal party's
total lost or
surplus votes

-

Blue party's
total lost or
surplus votes

Total Votes

=

47

-

198

500

=

30.2% Efficiency Gap in
favor of the teal party

An efficiency gap of 30.2% means that the teal party is getting 30.2% more seats than we would expect it to get under a neutral redistricting plan.



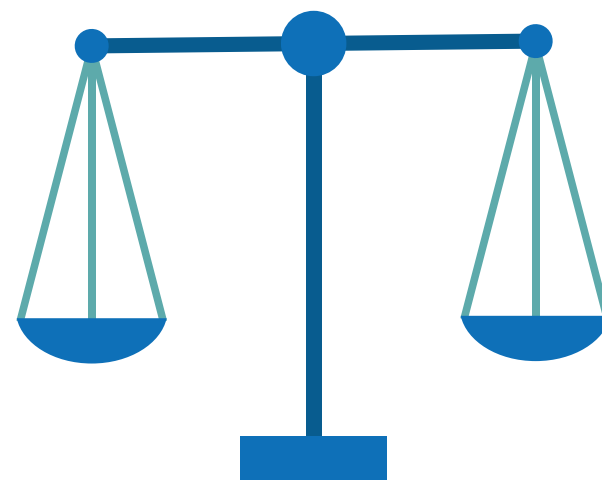
Establishing a Legal Limit on Partisan Gerrymandering

We know that the United States Supreme Court is open to a legal standard for determining partisan gerrymandering. In two recent high-profile partisan gerrymandering cases taken up by the Supreme Court, *Vieth v. Jubelirer*, 541 U.S. 267 (2004), and *LULAC v. Perry*, 548 U.S. 399 (2006), Justice Kennedy was the swing vote. Justice Kennedy did not articulate a specific test for how to identify a partisan gerrymander, but in *LULAC* he made positive comments about the possible use of **“partisan symmetry” as the basis for a test to limit partisan gerrymandering**. Four other justices in *LULAC* also wrote encouragingly about the usefulness of a partisan symmetry standard.

WHAT IS PARTISAN SYMMETRY?

Political scientists call the concept of balance between the parties in a district map “partisan symmetry.” **Partisan symmetry describes a level playing field, not tilted one way or the other.** It does not require that parties necessarily get legislative seats in proportion to their vote shares. Instead, it requires that parties be able to translate their votes into seats with similar ease.

By design, however, a gerrymandered map treats the parties unfairly—that is, asymmetrically. The gerrymandered map requires one party to receive more votes than its opponent would need in order to win any given number of seats. One party’s voters are concentrated in a few heavily packed districts that it wins by overwhelming margins, while the other party’s voters are allocated more efficiently across a greater number of districts that it wins by smaller margins. **As a result, the parties’ votes do not translate into seats with equivalent ease.**



The unique appeal of a test based on partisan symmetry is that several justices spoke favorably about it in the 2006 *LULAC* ruling. Justice Stevens observed that it is “widely accepted by scholars” and a “helpful (though certainly not talismanic) tool.” Justice Souter cited the “utility of a criterion of symmetry as a test” and remarked that “[i]nterest in exploring this notion is evident.” Most promisingly, Justice Kennedy noted symmetry’s “utility in redistricting planning and litigation.” No other idea has attracted such positive comments in recent years.

THE ELUSIVE TEST FOR PARTISAN GERRYMANDERING

The Campaign Legal Center has worked with expert political scientists and law professors to develop a test that will allow the courts to determine when a redistricting plan so advantages one party as to be unconstitutional. The test is relatively straightforward:

1. Discriminatory Intent

- Did the party in power intend to advantage itself through the redistricting plan?
- This can be determined using circumstantial or direct evidence (for example, a secretive redistricting process kept away from the public eye, emails between legislators asking for more voters of one party to be put in their district, summaries of partisan scores for the districts for each draft redistricting plan).

2. Discriminatory Effect

- Did the party in power in fact advantage itself through its redistricting plan?
- This can be determined by calculating the efficiency gap (EG) for the redistricting plan and comparing it to the EGs for all redistricting plans from 1972 to the present. If the EG is an outlier by historical standards, then it fails this part of the test.

3. No Reasonable Justification

- Are there any reasons in state or federal law that would mean that the redistricting plan drawn by the party in power is required?
- For example, does the state require that counties be kept whole, or is it not possible to draw a plan with a smaller EG?



Applying the Theory:

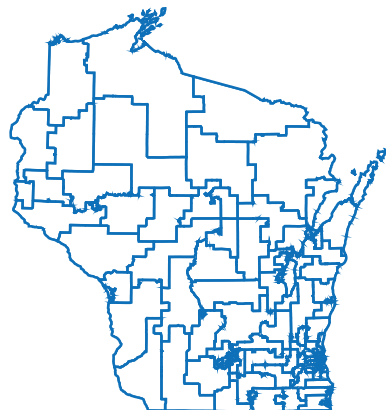
Whitford v. Gill

In July 2015, twelve plaintiffs, represented by the Campaign Legal Center and local attorneys, filed suit in Wisconsin alleging that the Wisconsin State Assembly redistricting plan is a partisan gerrymander in violation of the U.S. Constitution. After successfully defending against a motion to dismiss and motion for summary judgment, the legal team went to trial in May 2016.

Plaintiffs presented a mountain of evidence to show that in making the Wisconsin State Assembly plan, there was **raw partisan motivation**, including emails from internal party operatives asking that lines be moved to create more partisan districts; and spreadsheets from the map drawers, naming successive versions of their redistricting plans “basic,” “assertive” and “aggressive.”

As to **effect**, no previous plaintiffs have ever presented courts with comparative or historical data about partisan symmetry. These data definitively show that the Wisconsin Plan is one of the most skewed in modern American history.

And as to **justification**, plaintiffs’ presented multiple fair plans confirming beyond any doubt that the partisan asymmetry of the Wisconsin Plan cannot be explained with neutral justifications.



Next Steps:

WHITFORD V. GILL

The decision of the three-judge district court in the *Whitford* case can, and likely will, be appealed by either side directly to the Supreme Court. If the Supreme Court embraces the proposed test for unlawful gerrymandering, the impact will be enormous for our democracy.

For the first time, there will be a limit on the degree of partisan unfairness that is tolerable in a district plan. Future plans will be drawn with the bias threshold firmly in mind, and the courts will likely strike down plans that exceed the threshold. The result would be an end to the most glaring vote-seat distortions and improved representation at all levels of government.

States may also be more likely to hand over redistricting to independent bodies if it were too difficult to achieve significant partisan advantage through the line-drawing process. In fact, there is already great bipartisan interest in supporting fair redistricting around the country, including in Arizona, California, Florida, Illinois and Ohio.

NEW CASES

Partisan gerrymandering is a scourge on our national politics. It undermines the power of the voters, twists our democracy and fosters an environment of self-serving politics. If the Supreme Court adopts the Campaign Legal Center's partisan gerrymandering test, it will go a long way to ending partisan gerrymandering across the country.

The test outlined in this brief can be used to identify partisan gerrymanders drawn by Republicans or Democrats. The Campaign Legal Center is actively investigating cases in states other than Wisconsin.



About the Authors

J. Gerald Hebert: Executive Director, Campaign Legal Center

J. Gerald Hebert (“Gerry”) has served as the executive director and director of litigation at the Campaign Legal Center since 2004. For nearly 20 years, Gerry worked at the U.S. Department of Justice, serving in many supervisory capacities, including acting chief, deputy chief and special litigation counsel in the voting section of the Department of Justice Civil Rights Division. During that time, he was the lead attorney in numerous voting rights and redistricting lawsuits and chief trial counsel in more than 100 voting rights cases, a number of which were ultimately decided by the Supreme Court of the United States.

In 1994, Gerry opened a solo law practice in Alexandria, Virginia, which specializes in election law and redistricting. Gerry’s legal practice is national in scope, representing clients (including many local governments) in Texas, California, New York, South Carolina and Virginia, among other states. From 1999 to 2002, Gerry served as general counsel to IMPAC 2000, the National Redistricting Project for Congressional Democrats.

In addition to his law practice, Gerry is an adjunct professor of law at Georgetown University Law Center and New York Law School.

Gerry is also the founder of the Voting Right Institute, a project of the American Constitution Society, Campaign Legal Center, and Georgetown University Law Center.

Ruth Greenwood: Senior Redistricting Counsel, Campaign Legal Center

Ruth is the senior redistricting counsel with the Campaign Legal Center. Ruth has worked in voting rights law and policy since 2009. Her work focuses on redistricting and minority representation. She has been involved in litigation and advocacy in Illinois, Wisconsin, New Hampshire and Ohio. She received her LL.M from Columbia Law School in 2009, and her LL.B./B.Sc. from the University of Sydney in 2005. Ruth is admitted to practice as an attorney in Illinois and New York.

Ruth is a 2016 Chicago Civic Leadership Academy Fellow and was awarded an Exceptional Service Award by the Chicago Board of Elections in 2014 for her work on Chicago Democracy Week. She is also a board member of Independent Map Amendment (Illinois), and an adjunct professor, teaching election law, at Loyola University Chicago Law School.



Background on the Campaign Legal Center

The Campaign Legal Center's (CLC) mission is to improve our democracy and protect the fundamental right of all Americans to participate in the political process. As a nonpartisan, nonprofit organization based in Washington, DC, CLC believes that the issues of campaign finance and voting rights represent the core of what is at stake for our democratic system – the right to a voice in a political landscape not overwhelmed by powerful interests. Since 2002, CLC has worked in legal and administrative proceedings to attack laws and regulations that undermine the fundamental rights of all Americans to participate in the political process, and to defend and help shape laws that protect these interests.

Endnotes

¹ Plaintiffs' Post-Trial Reply Brief, *Whitford v. Nichol*, No. 15-cv-421 at 12 (W.D. Wis. Jun. 20, 2016), ECF No. 157.

² *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

³ Nicholas O. Stephanopoulos & Eric M. McGhee, Partisan Gerrymandering and the Efficiency Gap, 82 U. Chi. L. Rev. 831, 879 (2015).

⁴ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); John Hart Ely, Democracy and Distrust 103 (1980).

⁵ See page 17 for details on *Whitford v. Gill*.

⁶ Closing Argument of J. Gerald Hebert, Transcript of the Fourth Day of Court Trial, held 5/27/2016 at 277-278, *Whitford v. Nichol*, No. 15-cv-421 (W.D. Wis. Jun. 10, 2016), ECF No. 150.

⁷ *Davis v. Bandemer*, 478 U.S. 109 (1986).

⁸ *Vieth v. Jubelirer*, 541 U.S. 267, 344 (2004).

⁹ Gary W Cox and Jonathan N. Katz, *Elbridge Gerry's Salamander*. 3 (2002).





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