The Case Against Gerrymandering
How a U.S. Supreme Court ruling will effect our rights as voters

BY ELIZABETH ELVING

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Rep. Fred Kessler (D-Milwaukee) and other Wisconsin activists banded together to challenge Act 43

*Gill v. Whitford* is one of the most significant and closely watched cases of the U.S. Supreme Court’s current term. Based on a lawsuit from 12 Wisconsin voters, it is now poised to rein in a practice that has obstructed voting rights and undermined democracy for hundreds of years: partisan gerrymandering.

While both Democrats and Republicans have long been guilty of manipulating districts to secure political power, the Supreme Court has resisted getting involved. In 1986, the court’s justices first acknowledged the issue was “justiciable” (i.e., something courts could decide on) in *Davis v. Bandemer*. Nearly 20 years later, in *Vieth v. Jubelirer*, perennial swing-vote Justice Anthony Kennedy called for a “manageable” standard to determine when gerrymandering crossed a constitutional line. Many hope *Whitford* will provide that standard.
This momentous case began in a tearoom in Downtown Milwaukee where a small group of lawyers and elections experts devised a plan to counter extreme partisan gerrymanders in Wisconsin and beyond. “We knew that we wanted to build a case that would go to the Supreme Court and resolve these issues once and for all,” says Peter Earle, a civil rights lawyer who represents the Whitford plaintiffs. “We dared to dream that.”

**Building a Case**

In the 2010 election, Republicans won the Assembly, Senate and governorship at the best possible time. The Wisconsin Legislature is responsible for redrawing its districts every 10 years after the census is taken. On the heels of a new census and a grand slam electoral win, Republicans had unchecked control over the next decade of legislative maps. The result was Act 43—a districting plan that gave Republicans an insurmountable advantage. Rep. Fred Kessler (D-Milwaukee), a redistricting expert, concluded that Democrats would never get more than 40 Assembly seats under that plan.

“I was really discouraged, looking at it,” he says. “I said, if we don’t challenge this in some way, we’re not going to have any ability to influence the state for a decade.”

So Rep. Kessler decided to challenge it. He called several friends who had all expressed frustration with gerrymandering in the past and invited them to meet at Watts Tea Room on Jefferson Street. Among them was Earle, who had recently litigated *Baldus v. Brennan*, another redistricting case. More joined over time, including retired UW-Madison law professor William Whitford, who would become their lead plaintiff.

Over biweekly breakfast meetings, the colleagues developed a strategy for challenging the gerrymander on constitutional grounds. To succeed, they would need to prove three things: that Republican leaders intended to reduce the influence of Democratic votes; that their maps had a discriminatory effect; and that the effect could not be explained by outside factors.

With persistence (and some amount of serendipity) this team assembled a suit that satisfied all three points of this test and prevailed before a three-judge federal panel in the fall of 2016. The state appealed, and in June 2017, the U.S. Supreme Court agreed to hear the case.

**Proving Partisan Intent**

To prove that Wisconsin’s legislative maps were drawn with partisan intent, Kessler and his team needed to access the documents from the drafting process. This was no easy feat. The process was carried out in a heavily restricted “map room” in the Madison law offices of Michael Best and Friedrich, across the street from the state capitol. Behind closed doors, legislative aides Tad Ottman and Adam Foltz and consultant Joseph Handrick, spent months tweaking and testing a sequence of maps. They used advanced voter data and the redistricting software autoBound, which, Earle explains, allowed them to map “with a scalpel instead of a cleaver.”

Every time the drafters moved a line on their computerized maps, a customized “composite partisan score” showed how the change affected the partisan makeup of that area. So, while their map appeared to be divided into logical segments—a far cry from the infamous salamander-shaped voting districts that the practice is named after—individual districts had been subtly, endurably, transformed.

“Having that data on hand makes it possible to cut these lines pretty precisely,” says Matthew Lynch, special counsel at the law firm Foley and Lardner. “A swerve here and a swerve there can add votes
and take votes away. You do that enough times, you can create heavily partisan districts that otherwise look like normal contiguous blocks.”

‘Totally and Completely Bogus’

The drafters’ work was highly secretive. Republican leaders had to sign nondisclosure agreements before seeing the maps and were permitted to view only their own districts. When lawyers for the Baldus case requested the drafting documents, the firm refused. “They argued that they didn’t have to produce the documents because they were covered by attorney-client privilege,” Earle says. “It was totally and completely bogus.” A panel of judges agreed and repeatedly ordered that Michael Best and Friedrich hand over the documents—fining them $17,000 when they resisted. Even then, the information the firm released was incomplete, with key data missing.

In 2012, Democrats briefly regained control of the Senate (after several recall elections) and demanded that the remaining documents be released. Under court order, Republicans provided three computers—with hard drives that had been tampered with. “Somebody had taken a hammer to them,” Earle recalls. “Hundreds of thousands of documents had been erased.”

Forensic investigator Mark Lanterman retrieved many of the deleted files, including Excel spreadsheets revealing how the drafters had revised successive versions of the map to produce a stronger Republican majority, one that would hold through multiple election cycles. Finally uncovered, this information was enough to satisfy the three-judge panel. In the majority opinion, Judge Kenneth Ripple wrote:

 “[T]he evidence establishes that one of the purposes of Act 43 was to secure Republican control of the Assembly under any likely future electoral scenario for the remainder of the decade; in other words, to entrench the Republican Party in power.”

Measuring Discriminatory Effect

In addition to evidence of partisan intent, the Whitford plaintiffs needed a bright-line rule showing that the maps were so discriminatory that they violated Democrats’ constitutional rights. That elusive standard had been the Holy Grail for gerrymandering critics ever since Justice Kennedy requested it in Vieth. Kessler’s group had been working to formulate something, but struggled to find a solution.

Then, in 2014, they got a lucky break. Richard Pildes, a New York University School of Law professor with whom they’d been in contact, sent them an unpublished paper he was reviewing about a new measure called the “Efficiency Gap” (EG).

“We saw the article and said, ‘This is the magic bullet,’” Kessler says. “‘We can prove what Wisconsin has done.’”

In a gerrymander, legislators “crack” the opposing party into different districts where they’ll be in the minority, and “pack” them into concentrated areas where they’ll win by wide margins. These maneuvers increase a party’s “wasted” votes that either back the losing candidate or exceed a simple majority. The EG—developed by University of Chicago Law School professor Nicholas Stephanopoulos and political scientist Eric McGhee—counts how many votes are “wasted” by each party and divides the difference by the total number of votes cast.

Applying this formula to past elections across multiple states, political scientist Simon Jackman found that if one party wins an election with an EG of 7% or higher, that party is pretty much guaranteed to
keep winning for as long as the districting plan is in effect. Wisconsin’s EG was well above that threshold: 13% in 2012 and 11% in 2014.

“[Stephanopoulos] measured a number of states that had done a 2011 redistricting, and found that Wisconsin’s was the most extreme,” Kessler says. “This was the most egregious map he had come across.”

The Whitford team invited Stephanopoulos to Milwaukee for a meeting at Watts Tea Room. He was joined by his fiancée, Ruth Greenwood, who was at the time working for the Chicago Lawyers Committee for Civil Rights and is now senior legal counsel on redistricting for the Campaign Legal Center. The couple, who have since married, became involved in building the case; both are now on the legal team for the Whitford plaintiffs.

Creating Fair Maps

The final prong of Whitford’s three-part test is whether a map’s partisan slant can be justified by legitimate factors, like traditional redistricting criteria, or the high concentration of Democrats in Milwaukee and Madison. Kenneth Mayer, a UW-Madison professor and expert for the plaintiffs, addressed this argument by creating a “Demonstration Map” with another computer program called Maptitude for Redistricting.

Mayer’s map “was equivalent to Act 43 on population deviation, municipal splits, compliance with the Voting Rights Act and better on compactness,” but with no partisan intent. Its EG was only 2.2%, showing that external factors alone cannot account for the state’s vast imbalance. When the EG is lower, elected leaders are more vulnerable to political shifts and have more incentive to pursue moderate policies that have widespread support.

“Creating districts that are more competitive forces legislators to compromise more and to cater to the mainstream of political opinion,” Lynch says. “Some of the things the legislature has done in the last 10 years, like the anti-union legislation, those were not meet-in-the-middle kinds of policies.”

If Whitford prevails, Wisconsin will have to create a new, balanced map in time for the 2018 elections. It would then be a fairly elected legislature tasked with the next round of redistricting in 2021, which Earle says would put an end to a “dark era of divisive politics” for the state. The case would also set nationwide guardrails—preventing extreme partisan gerrymanders in other states. Whether districts are drawn by legislatures, courts or independent commissions, Kessler says, setting a standard is paramount.

“So long as there’s a standard that takes into account real, two-party politics and can be reviewed for fairness,” he says. “A standard that there cannot be excessive partisan redistricting. That’s good enough for me.”

A Supreme Court decision on Gill v. Whitford is expected by June, 2018.