



The Conference Board Policy Watch

Fixing Our Broken Redistricting Practices
February 2018



Some of the critical questions and issues we will be answering today

- What is gerrymandering and how does it impact our democracy
- How can we best draw equitable district lines that adequately represents the voters
- How competitive are our elections
- Is there a role for business in the debate



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Today's Presenters



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GILL V. WHITFORD

Ending Extreme Partisan Gerrymandering

Committee for Economic Development

February 1, 2018

Paul M. Smith, Vice President for

Litigation and Strategy



The Federalist No. 3 at 234 (James Madison)

- “The genius of republican liberty seems to demand ... not only that all power should be derived from the people, but that those entrusted with it should be kept in dependence on the people.”



And yet . . .

- “Whether one considers aggregated or disaggregated data, it is thus clear that the scale and skew of today’s gerrymandering are unprecedented in modern history.”

FIGURE 5. AVERAGE NET AND ABSOLUTE EFFICIENCY GAPS FOR CONGRESSIONAL PLANS, 1972–2012

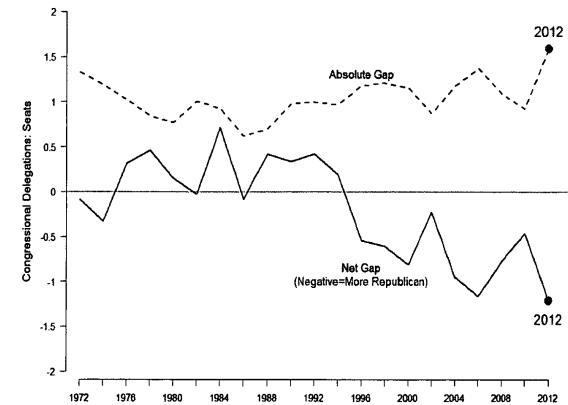
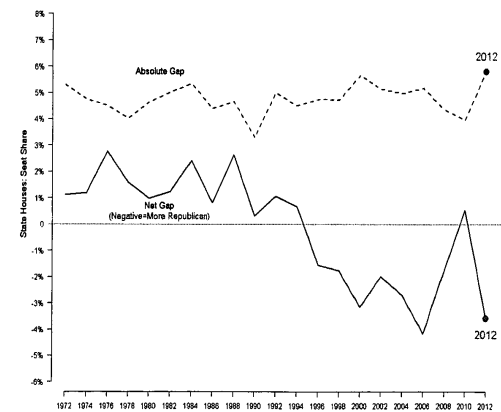


FIGURE 6. AVERAGE NET AND ABSOLUTE EFFICIENCY GAPS FOR STATE HOUSE PLANS, 1972–2012



PARTISAN GERRYMANDERING

Overview



What is Partisan Gerrymandering?

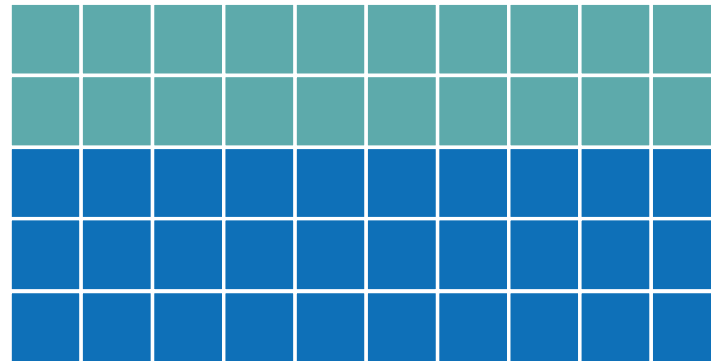
- The **deliberate** drawing of district lines to gain a **systematic advantage** for one political party over another. Accomplished through disparate “packing” and “cracking”



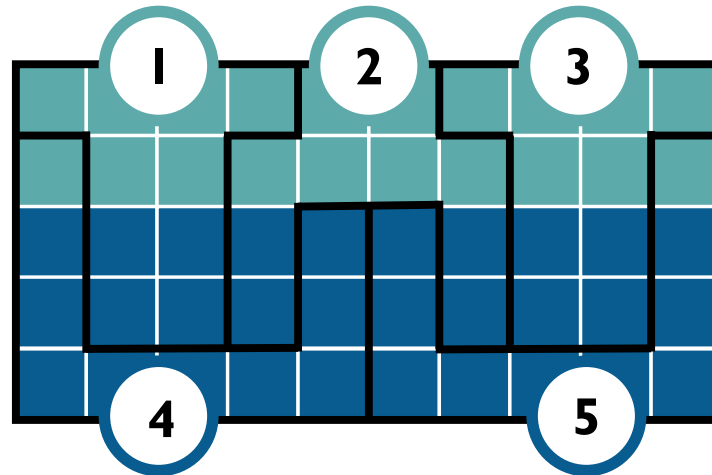
Packing and Cracking

50 PRECINCTS

40% Teal
60% Blue



5 Districts
3 Teal
2 Blue
TEAL WINS



A Jurisprudential Quandary?

VIETH V. JUBILERER (2004)

- 4 Justices: Not Justiciable
- 4 Justices: Justiciable, different standards
- Justice Kennedy:
 - “I would not foreclose all possibility of judicial relief *if* some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.”
 - Focused on extreme cases, not trying to eliminate politics from the process altogether.



A Test for Partisan Gerrymandering?

1. Partisan intent
2. Partisan effect
3. Partisan effect is not justified by adherence to state or traditional redistricting criteria

Partisan Gerrymandering and the Efficiency Gap

Nicholas O. Stephanopoulos[†] & Eric M. McGhee^{††}

The usual legal story about partisan gerrymandering is relentlessly pessimistic. The courts did not even recognize the cause of action until the 1980s; they have never struck down a district plan on this basis; and four sitting justices want to vacate the field altogether. The Supreme Court's most recent gerrymandering decision, however, is the most encouraging development in this area in a generation. Several justices expressed interest in the concept of partisan symmetry—the idea that a plan should treat the major parties symmetrically in terms of the conversion of votes to seats—and suggested that it could be shaped into a legal test.

In this Article, we take the justices at their word. First, we introduce a new measure of partisan symmetry: the efficiency gap. It represents the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast. It captures, in a single tidy number, all of the packing and cracking decisions that go into a district plan. It also is superior to the metric of gerrymandering, partisan bias, that litigants and scholars have used until now. Partisan bias can be calculated only by shifting votes to simulate a hypothetical tied election. The efficiency gap eliminates the need for such counterfactual analysis.

Second, we compute the efficiency gap for congressional and state house plans between 1972 and 2012. Over this period as a whole, the typical plan was fairly balanced and neither party enjoyed a systematic advantage. But in recent years—and peaking in the 2012 election—plans have exhibited steadily larger and more pro-Republican gaps. In fact, the plans in effect today are the most extreme gerrymanders in modern history. And what is more, several are likely to remain extreme for the remainder of the decade, as indicated by our sensitivity testing.

Finally, we explain how the efficiency gap could be converted into doctrine. We propose setting thresholds above which plans would be presumptively unconstitutional: two seats for congressional plans and 8 percent for state house plans, but only if the plans probably will stay unbalanced for the remainder of the cycle. Plans with gaps above these thresholds would be unlawful unless states could show that the gaps either resulted from the consistent application of legitimate policies or were inevitable due to the states' political geography. This approach would

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This Article builds on our earlier legal and political science work on redistricting. It is part of a larger project aimed at grasping the consequences—and improving the law—of this important and intricate activity. For helpful comments, we are grateful to Bruce Cain, Jowei Chen, Chris Elmendorf, Andrew Gelman, Michael Gilbert, Ruth Greenwood, Bernie Grofman, Rick Hasen, Benjamin Highton, Simon Jackman, Vlad Kogan, Justin Levitt, and Rick Pildes. We are pleased as well to acknowledge the support of the Robert Helman Law and Public Policy Fund at The University of Chicago Law School.



PROVING OUR CASE

Partisan Intent

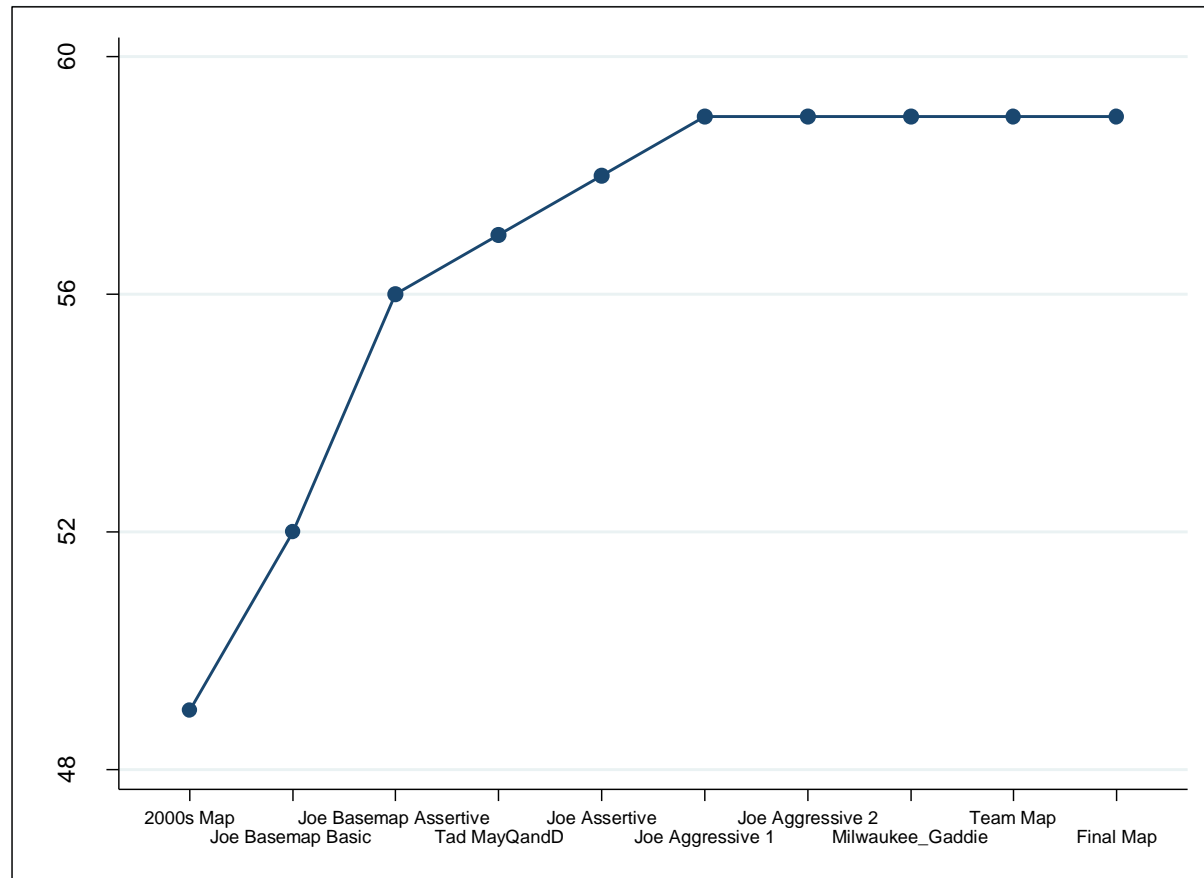


Proving our Case: Partisan Intent



Proving our Case: Partisan Intent

No. of seats for Republicans (of 99)



Proving our Case: Partisan Intent

“it is clear that the drafters were concerned with, and convinced of, the *durability* of their plan.”

Whitford v. Gill, Nov 21, 2016



PROVING OUR CASE

Partisan Effect

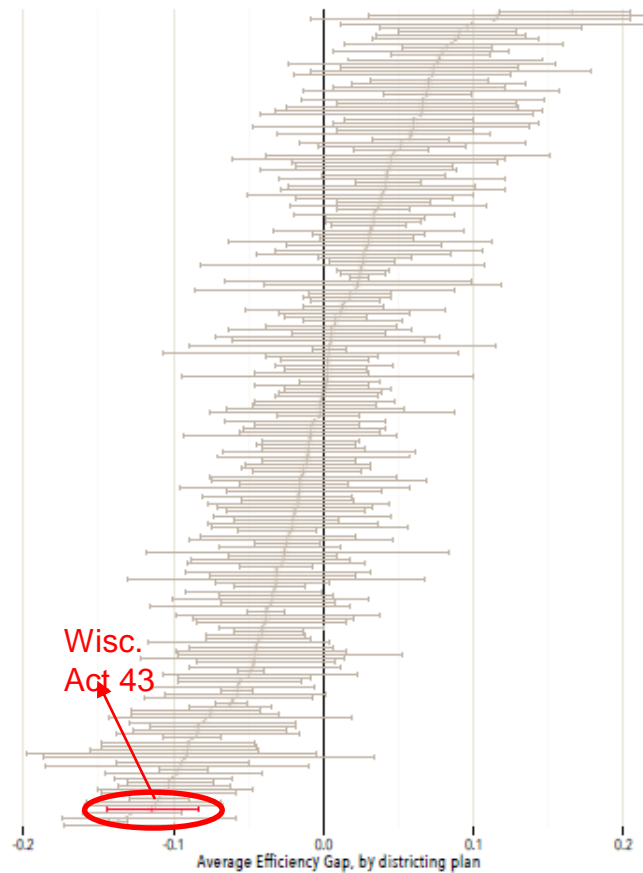


Partisan Effect: Measuring Packing and Cracking

- The Efficiency Gap is a formula for comparing the packing and cracking of each party's voters by calculating the total wasted votes for each party's candidates.



Proving our Case: Partisan Effect



Proving our Case: Partisan Effect

Year	Estimated Democratic vote share	Democratic Seat share
2012	51.4%	39%
2014	48%	36%



Proving our Case: Partisan Effect

“Act 43 also achieved the intended effect: it secured for Republicans a lasting Assembly majority.”

Whitford v. Gill. Nov 21. 2016

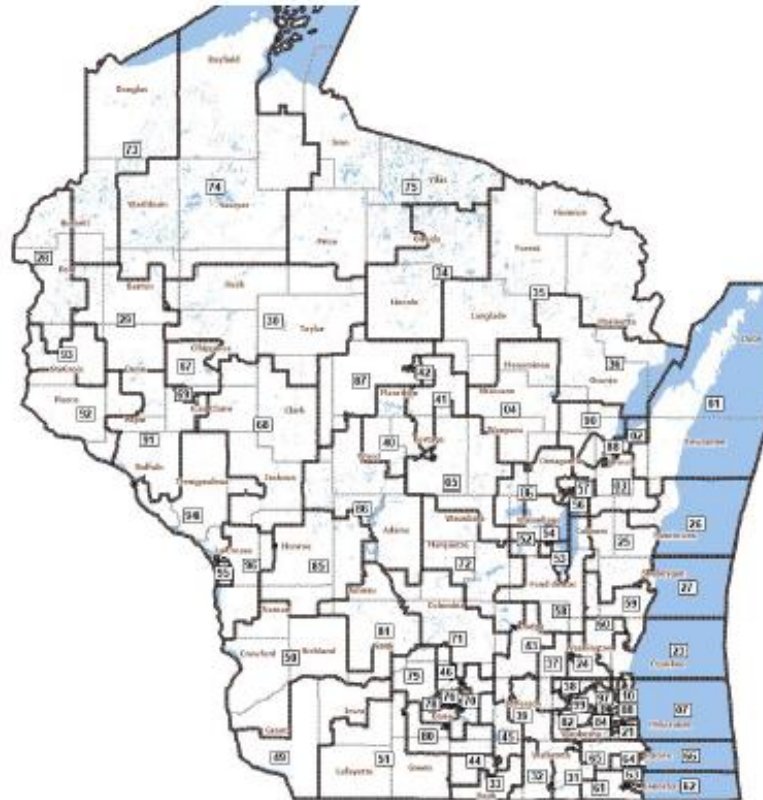


PROVING OUR CASE

No justification



Proving our Case: No Justification



Proving our Case: No Justification

“Act 43’s partisan effect cannot be justified by the legitimate state concerns and neutral factors that traditionally bear on the reapportionment process.”

Whitford v. Gill. Nov 21. 2016



THE SUPREME COURT



Briefing and Argument in the Supreme Court

- Used strong factual record and findings.
- Strong amicus showing aimed at buttressing social science tests and showing bipartisan support.
- Making clear to the Court that this is a critical juncture and temporizing is no longer an option.



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Michael Petro
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Do you have suggestions for future topics? Please feel free to contact Michael Petro at: MPetro@ced.org

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