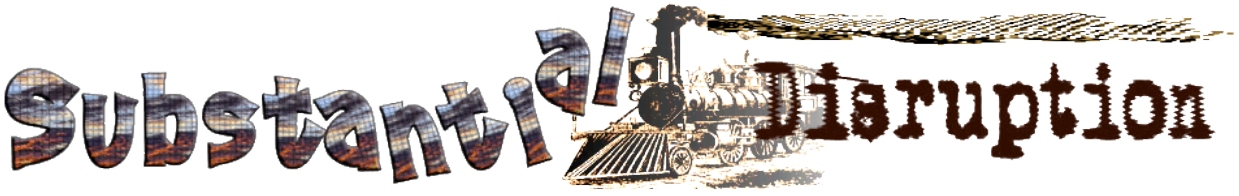

Badgering the Gerrymander

By Mike Tully

"Badger" is a noun and a verb. As a noun, it refers to an animal found in most of North America. As a verb, it means to harass, pester, or nag. It is also the Wisconsin state mammal. On November 21, 2016, a federal court in Wisconsin sought to badger the legal system into addressing partisan gerrymandering. Will it work?

The case, *Whitford* v. *Gill*, was brought by Democrats but the issue isn't partisan because either party may be victimized by gerrymandering. The "ox" being gored could be a donkey or an elephant. Gerrymandering can elevate a political minority over a majority. Democratic candidates for the U. S. House of Representatives in 2012 cumulatively won nearly one and half million more votes than Republicans. Yet, Democrats were a minority in the new Congress.

In 2010, Republicans gained control of both houses of the Wisconsin legislature and the Governorship, were free to adopt a redistricting map without Democratic input and passed Act 43 in 2011. Republicans gained seats in the 2012 and 2014 elections. The *Whitford* Court noted: "Act 43 … achieved the intended effect: it secured for Republicans a lasting Assembly majority. It did so by allocating votes among the newly created districts in such a way that, in any likely electoral scenario, the number of Republican seats would not drop below 50%."

The Court added: "(T)he evidence establishes that one of the purposes of Act 43 was to ... entrench the Republican Party in power." The Court conceded the Supreme Court had never upheld a redistricting challenge based on partisan grounds (as opposed to, for example, racial grounds), but found a legal basis for doing so: "We conclude … the First Amendment and the Equal Protection clause prohibit a redistricting scheme which (1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds."

The Court said Republicans intended to "place a severe impediment on the effectiveness" of Democrats when they altered redistricting maps to achieve a built-in Republican bias. "They labeled their maps by reference to their partisanship scores," wrote the Court, "they evaluated partisan outcomes of the maps, and they compared the partisanship scores and partisan outcomes of the various maps." The result: "The map that emerged from this process reduced markedly the possibility that the Democrats could regain control of the Assembly even with a majority of the statewide vote."

There is no constitutional right to proportional representation, but there is no controlling opinion barring a challenge to a partisan redistricting process. Justice Anthony Kennedy left the door open in *League of United Latin American Citizens v. Perry*, an unsuccessful challenge to a Texas redistricting: "(A)ssuming a court could choose reliably among different models of shifting

voter preferences," he wrote, "we are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs. Presumably such a challenge could be litigated if and when the feared inequity arose."

The Wisconsin challenge is not "hypothetical," given the intent of the Act 43 drafters and the results: the 2012 and 2014 elections. The *Whitford* Court adopted a new Constitutional standard: the Efficiency Gap, defined as "the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast." An example was provided by the plaintiffs:

> "Suppose … that there are five districts in a plan with 100 voters each. Suppose also that Party A wins three of the districts by a margin of 60 votes to 40, and that Party B wins two of them by a margin of 80 votes to 20. Then Party A wastes 10 votes in each of the three districts it wins and 20 votes in each of the two districts it loses, adding up to 70 wasted votes. Likewise, Party B wastes 30 votes in each of the two districts it wins and 40 votes in each of the three districts it loses, adding up to 180 wasted votes. The difference between the parties' respective wasted votes is 110, which, when divided by 500 total votes, yields an efficiency gap of 22% in favor of Party A."

The Court found that an "efficiency gap" in excess of 7% was excessive. The Act 43 map produced gaps in excess of that in 2012 and 2014, consistent with projections that predicted such an outcome. The efficiency gap, standing alone, does not prove a constitutional violation, which also requires proof of intent and results. When all factors are present, the Court held that remedial action was necessary.
Assuming the Court's analysis is sound and the efficiency gap model is viable, there is a major roadblock: the lack of a constitutional right to proportional representation. The *Whitford* Court ruled that sufficiently *disproportionate* representation amounts to a constitutional violation. That is still an argument for proportional representation.

Gerrymandering is a political malady that cries out for a cure. Democrats are enthusiastic about *Whitford* because it opens the door to challenge Republican gerrymanders. But the case is flawed because it protects a constitutional right that does not exist: the right to proportional representation. For that reason, despite the hopes of my liberal colleagues, *Whitford* v *Gill* will not be the cure.