The League of Women Voters of Dane County, Inc.

Presents....

General Meeting and Issues Forum

Fair Voting Maps

*Gill v. Whitford*, the Wisconsin gerrymander case, how it began, developed, and its current status

**William C. Whitford**, Professor Emeritus, UW Law School

**Wednesday, April 11, 2018**

7:00 – 8:30 p.m.

Capitol Lakes Grand Hall

333 West Main Street in downtown Madison

The event is free and open to the public.
Free parking in the ramp across the street.

Committee: Joan Schwarz and Ingrid Rothe

**LWV POSITION ON GERRYMANDERING:**
Support redistricting processes and enforceable standards that promote fair and effective representation at all levels of government with maximum opportunity for public participation.

**STUDY QUESTIONS FOR UNIT DISCUSSIONS**

1. What have you learned about how and why gerrymandered maps have been drawn by both Republicans and Democrats?

2. Does the “efficiency gap” proposed by Attorney Whitford in the *Gill v. Whitford* case that is now before the United States Supreme Court provide a viable solution that will work for Wisconsin and other states as well?

3. What are your views about establishing a non-partisan citizen or legislative service agency panel to draw the redistricting maps every ten (10) years, as is done in California or Iowa, and which removes the process from the politicians?

**NOTE:** Please view these study materials online to be able to click links to sources, graphics and videos. [https://www.lwvdanecounty.org/forums/2018/2/12/fair-voting-maps]
Slaying the Gerrymander

THE WISCONSIN LEGISLATIVE REFERENCE BUREAU MAPS NONPARTISAN REDISTRICTING

By David Michael Miller, February 6, 2014

Winning the governorship plus majorities in both houses in 2010, Republicans seized the golden opportunity to dominate the decennial process of redistricting the state as never before. They had new voter boundaries drawn up behind closed doors by private law firms that would be paid by taxpayers. GOP legislators were made to sign oaths of secrecy before they could view their own redrawn districts. Rushed to beat six state Senate recall elections, the maps were quietly signed into law by Gov. Scott Walker on election day, Aug. 9, 2011.

The new maps brought immediate lawsuits, as well as pointed rebukes from judges protesting the law firms' frivolous motions and withholding of evidence. One suit decried the disenfranchisement of more than 300,000 voters who would have to wait six years to vote for their state senator instead of the usual four. Another suit charged that the plan diluted Latino voting power.

Ultimately costing the state more than $2.1 million, the battle over the redistricting process resulted in two districts being revised to comply with the Voting Rights Act. Even then, the Government Accountability Board discovered the new maps to be rife with errors. Due to a GOP mandate that reversed the longstanding practice of local officials drawing their precincts first, thousands of voters were placed in the wrong districts.

Nevertheless, the gambit paid off for the Republicans, cementing electoral advantages that will last to 2021. They claimed five of eight congressional seats in 2012 despite winning less than half of the state's votes for Congress. They also won 55% of contested state Senate seats with only 45% of the vote, and 57% of Assembly races with 48% of the vote.

So it is hardly surprising that in the wake of such historic gerrymandering, there have been repeated calls from Democrats, newspaper editors, good-government organizations and even some Republicans for a transparent, nonpartisan redistricting
process that provides for equal representation at a fraction of the cost. Two bipartisan reform bills currently before the Legislature, AB 185 and SB 163, seek to do just that by emulating the system of neighboring Iowa, the proven gold standard of drawing political boundaries fairly.

Republican leaders have refused to hold a public hearing on the bills since they were introduced last spring, so Senate authors Dale Schultz (R-Richland Center) and Tim Cullen (D-Janesville) are hosting their own public meeting Feb. 10 at the Capitol. One of the confirmed speakers is Ed Cook, legal counsel for the Iowa Legislative Services Agency, the state's nonpartisan map-drawing agency.

In place since 1981, Iowa's redistricting procedure is noted not so much for the data it considers as for the data that cannot be considered. While providing equal representation and following county and municipal boundaries are of prime importance, the rules decree that no weight can be given to a precinct's voting history or even where the incumbent resides. Demographics are also off limits, excepting racial and language factors that must be considered to comply with the Voting Rights Act.

The two redistricting reform bills follow Iowa's strictures in spirit if not to the letter. Wisconsin and Iowa differ in fundamental ways regarding population, diversity and geography, and exceptions have been made to some rules. For example, Iowa dictates that congressional districts must be composed of whole counties. However, the highly concentrated population of Milwaukee makes this impossible in Wisconsin. Iowa's terrain also presents a flat, dry table to work upon compared to Wisconsin's many hills, shores and rivers.

Ryan protection plan
To shore up U.S. Rep. Paul Ryan's district, the GOP kept a toe in Ryan's Janesville, cut loose more of Democratic Rock County and added some of Waukesha County's most conservative suburbs.

Recall insurance
Senate recall challengers Fred Clark of Baraboo and Nancy Nusbaum of Brown County were drawn out of the districts they hoped to represent. If they had won they would have had to relocate before they could be reelected to the same seat.

At the request of Cullen's office, Wisconsin's Legislative Reference Bureau has designed maps that redraw the lines in a party-blind manner. "We wanted to know, if SB 163 was the law, what would have happened in 2012," says Cullen.

Using the same 2010 census data, these maps are the first state-produced examples of a Wisconsin free from the grip of the gerrymander.
Standards and practices

Senate Bill 163 sets forth specific standards for drawing voter boundaries. Forming equally populated districts is a paramount consideration, and in this regard the Legislative Reference Bureau maps comply with the strictures of the bill. The population of each district drawn falls within the allowable deviation from the "ideal population" of equally populated districts, as do the maps in effect now.

Like Iowa's law, SB 163 also seeks to limit the wild meandering of district lines by sticking to long-established political borders. While the bill does not explicitly say that congressional district lines should run along county lines, it does say that splitting counties, cities, villages and towns should be kept to a minimum. It also says that if splitting is necessary, the most populous subdivisions should be split first.

The Legislative Reference Bureau applied this dictum rather loosely when drawing the maps. While splitting Milwaukee County is unavoidable in drawing the congressional districts, the Legislative Reference Bureau splits it twice, and also divides Rock and Outagamie counties. The standard set in SB 163 would suggest that if a second county needed to be split, it would have been Dane, the second most populous. Instead, ninth-most-populous Rock County is cleaved down the center, cutting Beloit in two. The Milwaukee suburbs of Wauwatosa and Greenfield are also broken in two.

Is there an alternative map that better fits the guidelines of SB 163? Given my own fascination with maps and puzzles, I was able to come up with a congressional district map that split only Milwaukee County without splitting any municipalities. Click here to view this map.

Federal court orders redraw

As a result of a lawsuit by Voces de la Frontera, a three-judge panel ordered the 8th and 9th Assembly districts be redrawn to address the splitting of a Hispanic voting bloc and to comply with the Voting Rights Act.

SB 163 also states that "each congressional district must contain whole Senate districts, to the extent possible." That's a challenge considering there are 33 Senate districts to try to fit cleanly into eight congressional districts. The Legislative Reference Bureau ended up splitting 12 Senate districts, although they again are not the most populous.

The most glaring example where a guideline is not followed is the 18th Senate District, which is not contiguous (in one piece). It wraps around the southern end of Lake Winnebago, with the 53rd and 54th Assembly Districts separated by the 88th in a three-way split of Oshkosh. That city would make out pretty well in this redraw,
netting three representatives in the Assembly and two in the Senate. Much larger cities such as Kenosha and Racine would have to make do with two Assembly reps and one state senator each.

How could SB 163 allow for such deviations from its own rules? It does so by providing for a bipartisan Redistricting Advisory Commission that would direct the Legislative Reference Bureau on such judgment calls, and also allow for the legislative input that GOP lawmakers have claimed such reforms would deny.

The majority and minority leaders of both houses would each choose a member for the commission, with the final member chosen by the first four -- no partisan office holders or legislative employees need apply. The Redistricting Advisory Commission would also be responsible for shepherding the process along in an open and timely fashion, conducting at least three public hearings on any plan.

**Redistricting has consequences**

If it had been enacted, the most immediate effect of this redraw would be the many incumbents arbitrarily placed in the same districts. While some pairings would have made for natural opponents, both parties would have faced intramural contests. Voters in a new 84th Assembly District might have seen a primary between Republicans Joel Kleefisch and Chris Kapenga. In Madison, Democrats Brett Hulsey and Terese Berceau might have had to face off in a new 78th. In a four-way incumbent battle royal, Republicans Steve Nass, Evan Wynn, Amy Loudenbeck and Democrat Andy Jorgensen might have had to vie for the same seat.

After the boundaries currently in effect, if voters had stuck with the same party for their legislators as for their president, today’s Assembly would contain 43 Democrats and 56 Republicans (despite Obama winning the state with 53% of the vote). If the
However, the balance of the state Senate would have likely remained the same at 16 Democrats and 17 Republicans, perhaps due to the fact that only half the new districts would have been up for election.

But what if a different metric is chosen, one that uses an election year favorable to Republicans? Using the Legislative Reference Bureau maps, if district voters’ party choices for governor in 2010 were applied to their choices for legislator, the Assembly would contain 68 Republicans and 31 Democrats. Using U.S. Sen. Ron Johnson's election as a yardstick would yield similar results: 65-34. In both scenarios the GOP would claim about two-thirds of the Assembly, while each GOP candidate's victory was only 52%. Nevertheless, in contrast to the present Legislature, the majority party would still rule.
Swing revival

If a competitive district can be defined as one whose election is decided by fewer than 10 percentage points, then today there are no competitive congressional seats in Wisconsin. Three are safely held by Democrats, five by Republicans.

The nonpartisan maps would have upset that status quo, turning the 1st and 7th seats into swing districts. If voters' 2012 party picks for Congress had remained the same for the Legislative Reference Bureau's hypothetical map, the Democrats would have flipped the 7th Congressional District from red to blue, striking a 4-4 balance in Wisconsin's House delegation that matches the actual 50% Democratic total congressional vote.

If voters' 2012 party choices for Assembly were applied to the nonpartisan map, a total of 22 districts could be projected as being competitive, an improvement over the current 15.

No matter how fairly they are drawn, these maps (or any alternatives) would still have to pass both legislative houses, and could be vetoed by the governor for any or no reason at all. At that point revised plans would again be submitted to the committee-driven legislative process. If still no agreement were reached, the maps would then be drawn by the courts (as they were in 1982, 1992 and 2002). Legal challenges could still be brought, particularly if any map was seen as violating the Voting Rights Act.

In the 30 years Iowa has been practicing nonpartisan redistricting, there has been only one instance of maps requiring a second vote. Attorneys have never been hired, and Iowa has yet to resort to maps drawn by the courts. The total cost of its system has been almost nonexistent, with funds needed primarily for printing and the gasoline to drive the printed copies to outstate hearings.

Regardless of the promise of such reform for Wisconsin, Sen. Cullen does not hold out much hope for quick action.

"This issue will only change after the fall elections," says Cullen, who, like Schultz, is not running for reelection. "There's not a question in my mind that Fitz and Vos are not going to allow hearings on these bills," he adds, referencing Senate Majority Leader Scott Fitzgerald (R-Juneau) and Assembly Speaker Robin Vos (R-Rochester).

Yet Cullen believes that educating the public might prove more valuable in the long-term than buttonholing legislators. "Most of the problems around here," he says, "are going to get fixed from the bottom up."
Redistricting Maps and Gerrymandering

JOAN SCHWARZ

Schwarz is a retired attorney, University of Wisconsin—Whitewater faculty in the Department of Languages and Literature and Gender Studies, LWV Dane County member, and legal counsel and education leader for Wisconsin United to Amend (working on the 28th Amendment to overturn Citizens United to get money out of politics)

The Constitution mandates decennial reapportionment and redistricting of congressional and state legislative districts to reflect population shifts. Legislatures consider factors like compactness, the principle of one-person-one-vote, geographic boundaries, county and city lines and communities of interest in making these decisions.

HISTORY OF PARTISAN GERRYMANDERING

Gerrymandering is as old as the republic. Even before Massachusetts governor Elbridge Gerry lent it his name to the process in 1812, politicians were playing games with maps. Patrick Henry tried to kill James Madison’s congressional career by carving him out of a House seat in the First Congress. He failed. Governor Gerry’s party was more successful. The Democratic-Republicans won 29 of 40 seats in the state legislature after redistricting. Gerry’s own district was so oddly shaped, it resembled a salamander. A cartoon published by The Boston Gazette dubbed it “The Gerry-Mander,” hence the name of gerrymandering.

Now before the United States Supreme Court are two partisan gerrymandering cases, one with a Republican gerrymandered map (Gill v. Whitford) and a Democratic gerrymandered map (Benisek v. Lamone). Chief Justice John G. Roberts, Jr. had worried aloud during arguments in Gill v. Whitford that hearing this case would cause “very serious harm” to the Supreme Court’s “status and integrity” if people perceived the court as intervening in a gerrymander case in order to favor one party over another. Now, with the Supreme Court weighing gerrymandered maps from the opposing parties, any partisan concerns and the possibility of even the appearance of partisanship may be muted.

GILL V. WHITFORD—WISCONSIN’S REPUBLICAN PARTISAN REDISTRICTING MAP

There is strong evidence that Wisconsin is a battleground with lots of healthy competition. Wisconsin swings in favor of Republicans some years and toward Democrats in other years, depending on the mood of voters. However, while the overall state is “purple” in its makeup, most legislative districts are “red.” Because Democratic voters are packed into fewer districts, the vast majority of seats are more Republican than the state as a whole.

Because of these skewed results, in the case Gill v. Whitford, a three-judge panel at the 7th Circuit Court of Appeals threw out Wisconsin’s 2011 redistricting map. While the plaintiffs are focusing on the lower house of the state legislature, the state senate district boundaries are implicitly involved in the case because they are based on the assembly districts. The Court of Appeals found the maps were not only excessively partisan, but were among the most heavily skewed to one party of any plan in the country in recent decades. At the 7th Circuit Court of
Appeals, senior judge Kenneth Ripple, appointed by Republican President Ronald Reagan, wrote “it’s clear the drafters [the Republicans] got what they intended to get. There is no question [the legislative maps] were designed to make it more difficult for Democrats, compared to Republicans, to translate their votes into seats.” The Court of Appeals concluded that one of the goals of the GOP redistricting plan “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.” The appellate court thereby ordered the state to redraw its maps by November 1, 2018. But the state appealed to the U.S. Supreme Court, which accepted the case and heard oral arguments in October 2017. So far, top GOP lawmakers have spent more than $2.1 million of Wisconsin taxpayer money on lawyers’ fees defending the maps. The *Whitford* decision is still pending.

**WISCONSIN—A COMPETITIVE STATE—HAS A MAP IN WHICH MANY SEATS SKEW REPUBLICAN**

This kind of gerrymandered map occurred when Democratic voters were highly concentrated or “packed” into fewer districts, giving the Democrats more votes than it needed in the districts it dominated, but fewer votes elsewhere. The result was a minority of seats that were lopsidedly Democratic and a majority of seats that had a smaller but decisive GOP edge. Another partisan measure called “cracking” means one party “cracks” their opponent’s supporters among many districts where their preferred candidates tend to lose by small margins.

This illustration of four methods used to create partisan a gerrymander comes from the glossary at Redistricting the Nation.

Part of the GOP advantage in Wisconsin is natural because Democrats are more concentrated geographically in urban areas, such as Milwaukee and Madison, meaning their voters are less efficiently distributed across districts statewide. This effect was even more pronounced in November 2016 because the partisan gap between urban and rural Wisconsin was larger than usual.

But the federal court in *Gill v. Whitford* found that population patterns did not explain away the sheer magnitude of the partisan tilt in the Wisconsin maps. The result of this “tilt” is that whatever share of the vote the GOP wins in statewide races for president or governor, they are likely to win a much higher share of legislative seats.

The “tilt” is measurable by looking at a formula that calculates how many “wasted” votes a party has because its voters are concentrated in fewer districts. A simple way to illustrate this “tilt” or lopsidedness is to use the presidential and gubernatorial vote as a measure of how each district compared in its partisan makeup to the state as a whole. Examples of elections illustrate this “tilt”:
In the presidential election of November 2016 between Trump and Clinton, Trump won statewide by 0.76 of a percentage point, but the GOP won 64% of the Assembly seats, meaning those districts were more Republican than the state as a whole. Thus, while the state as a whole was ultracompetitive in 2016—decided by less than a percentage point in the presidential vote—hardly any of the state’s 132 legislative districts reflected that overall partisan balance.

In the presidential election of November 2012 between Obama and Romney, Republicans got only 46% of the presidential votes, but they still won 60% of the Assembly seats. In the gubernatorial election of November 2014, Republicans got just over 52% of the vote for governor, but captured 63% of the Assembly seats.

Thus, under the present districting map, if 60 or more Assembly seats are redder than the state as a whole, and fewer than 40 are bluer than the state as a whole, then an election in which both parties get the same number of votes statewide typically results in at least a 20-seat GOP edge in that chamber. The result of the present map is that while Democrats can win many more votes statewide, they cannot win legislative control; conversely, while Republicans can have a “down” year (as they did in 2012), they can win a majority of the state’s voters and easily retain control.

In other words, in a state in which three of the past five presidential races have been decided by less than a percentage point, only a small handful of legislative seats are balanced in their partisan make-up. The rest are virtually locked in for the party that currently holds them. And in the clear majority of cases, that means the Republican Party.

The data shows that for Democrats to win just a bare 50-seat majority in the Assembly under the current districting lines, they would have to capture at least 14 seats that voted for Trump in 2016, and 9 that voted for both Trump in 2016 and Romney in 2012. In some of those seats, the built-in GOP advantage is not just a point or two, but 5 to 10 points.

THE DEMOCRATIC PLAINTIFF’S LEGAL ARGUMENT IN GILL V. WHITFORD

In an earlier gerrymandering case, Vieth v. Jubelirer, the Supreme Court voted 5-4 not to intervene. Justice Kennedy agreed with the majority that the Supreme Court should not intervene in partisan gerrymandering cases because it did not have adequate tools to do so, stating in a concurrence that “the failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make our intervention improper.” He added that “if workable standards do emerge to measure these burdens, however, courts should be prepared to order relief.”

Enter the plaintiffs in Gill v. Whitford. Based on Justice Kennedy’s reference to “workable standards,” the plaintiffs in Whitford created a new metric referred to as the “efficiency gap” that measures the difference in a state between the number of votes cast in favor of a party candidate and the number of seats won by that party. In the examples cited above, the differences between the actual votes cast statewide versus the larger percentage of the chamber’s seats awarded are referred to as “wasted votes,” with the difference being referred to as “the efficiency gap.” The Supreme Court is being asked to analyze the underlying demographic shifts as well as consider possible district cracking in Wisconsin using this metric. Under this metric, the balance of seats in each of Wisconsin’s two state-level legislative bodies and its eight seats in the U.S. House of Representatives should be roughly equivalent to the partisan balance of votes statewide—regardless of demographic processes.
Efficiency Gaps for House Plans by State, 2012
[From The New Republic, "Here's How We Can End Gerrymandering Once and for All" by Nicholas Stephanopoulos, July 2, 2014]

BENISEK V. LAMONE—MARYLAND’S DEMOCRATIC PARTISAN REDISTRICTING MAP

Also being considered by the U.S. Supreme Court is the case of another gerrymandered map, this one gerrymandered by Democrats. In this case, a special three-judge federal district court voted 2 to 1 to reject the plaintiff’s (Republicans) request for an order requiring new district lines to be in place for the 2018 midterm election. This case focuses on gerrymandering in one district—the Sixth District in Massachusetts. A week later, the plaintiffs appealed to the Supreme Court, with a motion to expedite consideration of the case so that it could be heard in November, just weeks after the argument already scheduled in Whitford. When the justices denied that request without comment on September 12, 2017, the natural assumption was that the court would simply keep the Maryland case on hold until it decided the Wisconsin case later in the term. But then the Supreme Court decided to take the Lamone case.

There are significant legal differences between Gill v. Whitford and Benisek v. Lamone. In Whitford, Democrats have brought their case under the guarantee of the Equal Protection Clause of the 14th Amendment and challenged the Assembly districting as a whole, rather than focusing on particular districts.

A little historical background about gerrymandering cases is in order. In previous election law precedents, based on earlier racially discriminatory election practices, the Supreme Court has not favored statewide challenges based on equal protection violations in particular districts. In Vieth v. Jubelirer 14 years ago, the Supreme Court rejected (5 to 4) a challenge to a Republican gerrymander of Pennsylvania’s congressional districts, stating that the federal courts lacked jurisdiction to review a political gerrymander. In Jubelirer, Justice Kennedy wrote in a separate opinion that “where it is alleged that a gerrymander had the purpose and effect of imposing burdens on a disfavored party and its voters, the First Amendment regarding political association may offer a sounder and more prudent basis for intervention than does the Equal Protection Clause.”

In keeping with this view about partisan gerrymandering cases being brought under the First Amendment, Justice Kennedy questioned the plaintiffs in Whitford about whether they had
“standing” to bring the case, since they sued under the Equal Protection Clause of the 14th Amendment. “Standing” is a threshold issue in a case which questions whether the plaintiffs have a legally cognizable interest in the matter. This issue—whether a partisan gerrymandering case is best filed under the First Amendment as in *Jubelirer* or under the Equal Protection Clause of the 14th Amendment as in *Whitford*—may be the determining factor in the Supreme Court decisions in the Wisconsin and Massachusetts cases, since Justice Kennedy is the swing or pivotal judge whose vote will probably be decisive in both cases.

Hence, the plaintiffs in the *Lamone* case are trying to avoid the possible standing issue by bringing their case under the First Amendment to attack the Democratically gerrymandered map in Massachusetts. In their petition before the Supreme Court, the Republican voters argued that the Democratically controlled legislature and Maryland governor “targeted them [the Republicans] for vote dilution because of their past support for Republican candidates for public office, violating the First Amendment retaliation doctrine.” The plaintiffs further argued that “the map-drawers reshuffled fully half of the district’s 720,000 residents—far more than necessary to correct the mere 10,000-person imbalance in the district’s population following the 2010 census.” As a result, the “registered Republicans’ share of the electorate fell from 47% to 33%.” The Supreme Court is scheduled to hear oral arguments in the Massachusetts case in March 2018.

The results in these two cases are important to the future of redistricting throughout the country. With redistricting maps that are gerrymandered by both the Republicans and Democrats, the U.S. Supreme Court has an opportunity to weigh in on the issue of partisan gerrymandering, a position that it has avoided in the past. By agreeing to deliberate and decide two opposing partisan gerrymandered maps, the Supreme Court can adopt a nonpartisan process for drawing legislative and congressional districts. Certainly in Wisconsin, it is what voters want, as demonstrated by an overwhelming vote in favor of such a process by the Wisconsin Counties Legislation Association, which represented partisans from every part of the state. The time is now more than ripe to restore fairness to our electoral process.

**SOURCES (Please visit our website study materials with live links):**

- United States Constitution
- The decision of the 7th Circuit Court of Appeals panel in *Whitford v. Gill*.
- “Counties where Trump and Walker won want to end gerrymandering, too,” a Wisconsin State Journal editorial (Oct. 8, 2017) regarding the Wisconsin Counties Association resolution to adopt a nonpartisan method for drawing legislative districts.
- The Fair Elections Project

The SCOTUS does not allow cameras in the courtroom during oral arguments so if you want to see what happens during a Supreme Court case you have to make the video yourself. IN THE SUPREME COURT OF THE UNITED STATES Beverly R. Gill, et al., Appellants v. William Whitford, et al., Appellees.