

REDISTRICTING IN WISCONSIN 2020

THE LRB GUIDEBOOK



© 2020 Wisconsin Legislative Reference Bureau
One East Main Street, Suite 200, Madison, Wisconsin 53703
<http://legis.wisconsin.gov/lrb> • 608-504-5801

This work is licensed under the Creative Commons Attribution 4.0 International License.
To view a copy of this license, visit <http://creativecommons.org/licenses/by/4.0/> or send a letter to
Creative Commons, PO Box 1866, Mountain View, CA 94042, USA.

REDISTRICTING IN WISCONSIN 2020

THE LRB GUIDEBOOK



Michael Gallagher
senior coordinating attorney

Joseph Kreye
senior coordinating attorney

Staci Duros, PhD
legislative analyst

Contents

Part I: Redistricting law, principles, and process

A. Introduction	2
B. The census and congressional reapportionment	3
C. Federal redistricting requirements	5
1. Equal population.	5
a. Calculating equal population	5
b. Constitutional standards for equal population.	7
2. Minority protection	9
a. Racial gerrymandering	10
b. The Voting Rights Act of 1965	11
D. Traditional redistricting principles	14
1. Compactness.	14
2. Contiguity	16
3. Preservation of communities of interest.	17
4. Preservation of the unity of political subdivisions	17
E. Congressional and state legislative redistricting in Wisconsin	17
1. Congressional redistricting	18
2. Legislative redistricting	19
F. Local redistricting in Wisconsin	22
1. Counties adopt tentative supervisory district plans— Phase 1	23
2. Municipalities adjust ward boundaries—Phase 2	24
a. What are wards?	24
b. General rules governing wards	25
c. Adjusting ward boundaries on the basis of the census.	27
3. Counties adopt final supervisory district plans; cities adopt aldermanic district plans—Phase 3	29
a. Final county supervisory district plans	29
b. City aldermanic districts	29

4. Court process	30
G. Redistricting timeline and potential delays due to COVID-19	30
H. Conclusion	33

Part II: History of congressional and legislative redistricting in Wisconsin

A. Introduction	36
B. The Wisconsin Constitution and early apportionments and redistricting	37
1. Early legislative redistricting	37
a. Wisconsin’s territorial days	37
b. Wisconsin’s two constitutional conventions	38
c. The <i>Cunningham</i> cases of 1892	40
d. Redistricting after the <i>Cunningham</i> cases	42
e. The Rosenberry Act	45
2. Early congressional redistricting	46
C. Redistricting in the era of one person, one vote	47
1. Redistricting 1960	47
2. Redistricting 1970	55
3. Redistricting 1980	58
4. Redistricting 1990	62
5. Redistricting 2000	64
6. Redistricting 2010	71
D. Conclusion	73

Appendix: Additional information, training, and assistance

A. Congressional and state legislative redistricting	74
B. Local redistricting	74

Part I

Redistricting law, principles, and process

A. Introduction

The American system of representative democracy is grounded in the notion of equal representation in legislative bodies. James Wilson, a delegate from Pennsylvania to the constitutional convention of 1787, worked to build that foundational American principle at the constitutional convention when he argued, “equal numbers of people ought to have an equal [number] of representatives . . .” and representatives “of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other.”¹ Elsewhere, Wilson elaborated:

All elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same.²

Of course, U.S. senators have never been chosen on the basis of equal population.³ But members of the U.S. House of Representatives and of state and local legislative bodies across the country are required to be elected from districts that are quantitatively equal in population, a rule now known as “one person, one vote.” Maintaining equal representation necessitates a mechanism by which to ensure that members of legislative bodies continue to represent approximately the same number of people as other members of the same body despite population growth or decline. Redistricting provides that mechanism.

Redistricting is the process by which states adjust the boundaries of congressional, state legislative, and local electoral districts to account for shifts in population over time.⁴ While redistricting is a relatively rare occurrence—it typically takes place only once each decade—it has gained prominence in American public life since the 1960s, when the U.S. Supreme Court developed its one-person, one-vote jurisprudence and Congress enacted the Voting Rights Act of 1965 to enforce the Fifteenth Amendment’s ban on discrimina-

1. *Wesberry v. Sanders*, 376 U.S. 1, 10–11 (1964) (quoting *The Records of the Federal Convention of 1787*, ed. Max Farrand, vol. 1 (New Haven: Yale University Press, 1911), 179–80, <https://oll.libertyfund.org>). *Wesberry* was one of the seminal cases from which emerged the concept of one person, one vote.

2. *Id.* at 17 (quoting *The Works of James Wilson*, ed. Andrews, vol. 2 (Chicago: Callaghan & Co., 1896), 15). A [different edition of vol. 2 of Wilson’s collected works](https://oll.libertyfund.org) is available at <https://oll.libertyfund.org>, in which the quoted language appears at page 837.

3. As a part of the Great Compromise, the delegates at the constitutional convention agreed that members of the Senate would be selected by the state legislatures. In short, the Great Compromise established a bicameral legislative branch in which the lower house, the House of Representatives, would be elected by the people of the individual states, with each state receiving a number of representatives based on population, but the upper house, the Senate, would retain the essential structure of the Confederation Congress in which the states were equally represented in the national government. *The Records of the Federal Convention of 1787*, *supra* note 1, at 524–25. The Seventeenth Amendment, ratified in 1913, provides for the election of senators at large by the people of each state.

4. In Wisconsin, local electoral districts that require redistricting are county supervisory districts and city aldermanic districts. *See infra* Section F, Local redistricting in Wisconsin.

tion in voting on the basis of race. Today, redistricting is of vital importance for the equal representation of all Wisconsinites in legislative bodies at the national, state, and local government levels.

While vital, redistricting is also complicated. There is no escaping that fact. And, in 2021, redistricting may prove to be more complicated than ever in the wake of a global pandemic, which has delayed census operations, coupled with a rapidly approaching 2022 election cycle. Even in normal times, redistricting involves unfamiliar terms, sophisticated technology, thorny case law, and detailed processes. As a result, and because redistricting happens only once every ten years, private citizens and government officials alike tend to lack familiarity with its intricacies.

Wisconsin is poised to once again take up the critical process of redistricting. The purpose of this publication is to explain the law, principles, and process of redistricting in anticipation of the electoral map drawing that will occur in 2021. Part I of the publication sets forth the basic principles and law that underpin the entire redistricting process. It then provides a discussion of congressional and state legislative redistricting in Wisconsin, followed by a thorough account of the state's local redistricting process, which is primarily governed by statute. Part I also provides a timeline for redistricting and notes potential changes to that timeline in light of census delays caused by the COVID-19 pandemic. Finally, Part II provides a detailed history of congressional and state legislative redistricting in Wisconsin.

B. The census and congressional reapportionment

To begin to understand redistricting in Wisconsin, we must first look beyond the state to the federal decennial census, which provides the basis for reapportionment of congressional seats and for redistricting at all levels in Wisconsin. The terms “reapportionment” and “redistricting” are sometimes used interchangeably, but they actually signify two different processes. *Reapportionment* at the congressional level refers to the division of the number of seats in the U.S. House of Representatives among the several states based on each state's portion of the national population. The terms “apportionment” and “reapportionment” are also used to refer to the process of apportioning state senate and assembly seats to various parts of the state on the basis of population.⁵ *Redistricting*, on the other hand, is the process by which congressional, state legislative, and local electoral district boundaries are redrawn periodically to account for population changes within the state.

However, the two processes, while distinct, are related: redistricting can happen only

5. See [Wis. Const. art. IV, § 3](#) (“At its first session after each enumeration made by the authority of the United States, the legislature shall *apportion* and district anew the members of the senate and assembly, according to the number of inhabitants.”) (emphasis added).

after the seats of the relevant legislative body have been reapportioned, if necessary, and both processes hinge on the results of the federal census, which the U.S. Constitution mandates be conducted every ten years. Specifically, article 1, section 2, clause 3, of the Constitution provides:

The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they [Congress] shall by Law direct.⁶

This clause, referred to as the “census clause” or “enumeration clause,” mandates an “actual Enumeration,” or a complete head count, of all people in the United States every ten years, and gives Congress the authority to direct how the count is to be conducted. Congress has delegated administration of the census to the U.S. Department of Commerce and its U.S. Census Bureau.⁷ Federal law requires that the census be taken as of April 1 of the census year, making April 1, 2020, Census Day in 2020.⁸ Because the federal decennial census has been conducted every ten years since 1790, the 2020 census marks the twenty-fourth official count of the national population in U.S. history.

In addition to the census clause, the Fourteenth Amendment to the Constitution provides that seats in the U.S. House of Representatives “shall be apportioned among the several states which may be included within this Union, according to their respective numbers.”⁹ The “respective numbers,” i.e., population, of each state are to be arrived at by “counting the whole number of persons in each State.”¹⁰

Congress has fixed the total number of seats in the U.S. House of Representatives at 435.¹¹ Every ten years, depending on population shifts as determined by the most recent census, some states gain congressional seats, some states lose seats, while others retain the same number. Since 2000, Wisconsin has been apportioned 8 of the 435 seats in the House, which is not expected to change after the 2020 census. The most seats apportioned to Wisconsin was 11 from 1900 to 1930. Since then, Wisconsin has lost three seats: one in 1930, one in 1970, and one in 2000, resulting in the state’s current tally of eight.

Once congressional seats have been reapportioned according to the results of the

6. U.S. Const. art. 1, § 2, cl. 3.

7. 13 U.S.C. §§ 1–402.

8. 13 U.S.C. § 141 (a).

9. U.S. Const. amend. XIV, § 2.

10. *Id.*; see also U.S. Const. art. I, § 2, cl. 3; 2 U.S.C. § 2a. The Fourteenth Amendment’s “whole number of persons” language supersedes the original language of U.S. Const. art. I, § 2, cl. 3, which provided that the population of each state “shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.”

11. Act of Aug. 8, 1911, ch. 5, Pub. L. No. 62–5, 37 Stat. 13; Reapportionment Act of June 18, 1929, ch. 28, Pub. L. No. 71–13, 46 Stat. 21, 26–27.

federal decennial census, it's the states' turn to respond to the census results, as each state begins the process of redrawing congressional, state legislative, and local electoral district lines.

C. Federal redistricting requirements

Federal law requires the secretary of the U.S. Department of Commerce to report census results to the states within one year after Census Day, which means that census data must be provided to the states by March 31 of the year following the year of the federal decennial census.¹² The census data provided to the states include information not only with respect to the number of people residing in various geographic regions within the state down to the census block level—the smallest unit for which population is tabulated in the census—but also with respect to certain attributes of the population, such as voting age, race, and ethnicity.

Like all states, Wisconsin's congressional, state legislative, and local electoral district maps must comply with two central federal requirements: equal population and minority protection.

1. Equal population

Equal population is the most fundamental principle in redistricting because it underpins the entire American electoral process. Adherence to the requirement of equal population ensures compliance with the one-person, one-vote rule the U.S. Supreme Court has held is mandated by the Constitution.¹³

a. Calculating equal population. The stricture of one person, one vote means that state legislatures, local governments, and courts all need a way to measure the relative degree of population equality among electoral districts in a redistricting plan. The degree of population equality among electoral districts can be determined and evaluated through the use of four statistical measures: ideal population, absolute deviation, relative deviation, and overall range. Each of these metrics is explained in turn below, the first three of which assess population equality at the level of the individual district, and the last

12. [13 U.S.C. § 141 \(c\)](#). Census data is also often referred to as “PL data” because Public Law 94-171, a 1975 law, is the federal law requiring the Census Bureau to provide census data to the states.

13. The concept of one person, one vote arose primarily from three Supreme Court cases decided in the early 1960s: [Gray v. Sanders](#), 372 U.S. 368, 381 (1963) (“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”); [Reynolds v. Sims](#), 377 U.S. 533 (1964) (holding, under the equal protection clause of the Fourteenth Amendment, that the one-person, one-vote principle applies to state legislative redistricting plans); and [Wesberry v. Sanders](#), 376 U.S. 1, 7–8 (1964) (“We hold that, construed in its historical context, the command of Art. I, § 2, that Representatives be chosen ‘by the People of the several States’ means that as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.”).

Figure 1. **Statistical terminology for redistricting**

Ideal population = total population ÷ number of districts

Example: 5,000,000 total population ÷ 50 districts = 100,000 ideal population

Absolute deviation¹ = district population – ideal population

Example: 99,000 district population – 100,000 ideal population = –1,000 absolute deviation

Relative deviation¹ = absolute deviation ÷ ideal population

Example: –1,000 absolute deviation ÷ 100,000 ideal population = –1% relative deviation

Overall range² = largest positive absolute deviation + largest negative absolute deviation

Example: +2,000 largest positive deviation + –1,000 largest negative deviation (ignoring + and – signs) = 3,000 or 3% of the ideal district size

1. Used in the calculation of deviation for individual districts

2. Used in the calculation of deviation for entire plan and is typically expressed as a percentage

of which, overall range, measures population equality of a redistricting plan as a whole. Figure 1 summarizes the statistical terminology this publication employs for purposes of measuring the equal population of redistricting plans.

We begin determining equal population by first calculating **ideal population**. Ideal population represents the target population for each district in a redistricting plan. This figure is calculated by dividing the total population of the unit being divided into districts by the number of districts being established. For example, if a state's total population is 5 million and the state has 50 legislative districts, the ideal population for each district is 100,000.¹⁴ This and the related examples below are summarized as equations in figure 1.

Once we know the ideal population, we can calculate the **absolute deviation** of each district. Absolute deviation represents the difference between the population of a given district and that district's ideal population. This difference, once calculated, is used to assess the degree by which a given district's actual population varies from the ideal population. Absolute deviation is derived by subtracting the ideal population from the real population of an individual district. The result is then used to determine the extent to which the district is larger (has a "+" deviation) or smaller (has a "-" deviation) than the ideal district size, i.e., the ideal population. Returning to our example in which the ideal population per district is 100,000, if the actual population of a given district is 99,000, that district's absolute deviation is –1,000.

14. This hypothetical example assumes the districts in question are single-member districts, which is the case for Wisconsin at all levels of redistricting. Some states have multi-member districts, for which equal population is determined by other means.

A district's absolute deviation can also be expressed as a percentage indicating the proportion by which the district's actual population exceeds or falls short of the ideal population. This measure represents a district's **relative deviation**. Relative deviation is derived by dividing the district's absolute deviation by the ideal population. In our example, the district's relative deviation is -1 percent.

Once we know the ideal population and absolute and relative deviations for each district in a redistricting plan, we are ready to calculate the plan's **overall range**, which measures the equality of population of a redistricting plan as a whole. Overall range represents the difference in population between the largest district and the smallest district in a redistricting plan and is derived by adding the largest positive deviation and largest negative deviation in a redistricting plan. Overall range is usually expressed as a percentage.

Again, assuming for purposes of our example that the ideal population for each district in a redistricting plan is 100,000, if the largest district's population is 102,000 and the smallest district's population is 99,000, the overall range is 3 percent. To reach 3 percent, we start with the ideal population, 100,000; we know that the largest district's absolute deviation is +2,000 and the smallest district's absolute deviation is -1,000; adding those figures together (disregarding the "+" and "-" values), renders an overall range of 3,000 people or 3 percent of the ideal district size (100,000).

Courts normally evaluate redistricting plans by looking to a plan's overall range. However, different courts often use different terms to refer to the concept of overall range, as well as the concepts of ideal population, absolute deviation, and relative deviation. For example, the U.S. Supreme Court recently used "maximum population deviation" to refer to what this publication calls overall range.¹⁵ The terms used in this publication are not uncommon, but they are by no means universal. When reading a court decision involving a challenge to a redistricting plan based on equal population requirements, it is crucial to understand how the court in that particular case is defining its terms.

b. Constitutional standards for equal population. There are different constitutional standards for equal population in congressional districts and equal population in state legislative and local electoral districts, but the overall principle of one person, one vote still holds. The equal population standard for congressional districts is rigid, but the rules governing state legislative and local electoral districts are more flexible.

Congressional districts must be as quantitatively equal in population as possible. Article I, section 2, of the Constitution provides that the members of the U.S. House of Representatives shall be chosen "by the People of the several States." The Supreme Court has held that language requires congressional districts to be "as nearly [equal in population]

15. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016).

as is practicable,” with the lowest possible deviation from ideal population.¹⁶ Among congressional districts, the Constitution allows for only those “limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.”¹⁷

Any population variance in a congressional redistricting plan beyond that which is unavoidable must be justified by legitimate state objectives.¹⁸ Courts consider such justifications on a case-by-case basis, and no level of population inequality among congressional districts is too small to escape judicial scrutiny.¹⁹ The case-by-case determination includes considerations such as “the size of the deviations, the importance of the State’s interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely.”²⁰

In contrast, state legislative and local electoral districts are not subject to the equal population constraints of article I, section 2, of the Constitution. Instead, the equal protection clause²¹ of the Fourteenth Amendment applies, requiring that districts be drawn with substantial, not absolute, equality of population.²² In *Evenwel v. Abbott*, decided in 2016, the Supreme Court described the difference as follows:

16. *Wesberry*, 376 U.S. at 7–8.

17. *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969). See also *Wells v. Rockefeller*, 394 U.S. 542, 545–46 (1969) (constructing districts with entire counties not sufficient justification for population disparities); and *White v. Weiser*, 412 U.S. 783, 790 (1973) (population deviations among congressional districts “were not ‘unavoidable,’ and the districts were not as mathematically equal as reasonably possible”).

18. See *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). In *Karcher*, the Supreme Court held that, under the circumstances in that case, an overall range of 0.6984 percent in a congressional redistricting plan, while relatively minor, was unconstitutional, and the Supreme Court reaffirmed previous case law to the effect that “there are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet the standard of U.S. Const. art. I, § 2, without justification. Deviations, if present, must be based on some legitimate state objective.” *Id.* Such objectives may include “making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives.” *Id.* at 740–41. See also *infra* Section D., Traditional redistricting principles. In contrast, the Supreme Court held in *Tennant v. Jefferson Cty. Comm’n*, 567 U.S. 758, 761 and 764–5 (2012), that a slightly higher overall range of 0.79 percent in a congressional redistricting plan was justified in that case because the state showed it was necessary, among other things, to respect county lines. In *Tennant*, the Supreme Court also held that technological advances do not convert what would have been minor population deviations in the past into major deviations today. *Id.* at 764 (“[T]he District Court erred in concluding that improved technology has converted a ‘minor’ variation in *Karcher* into a ‘major’ variation today. . . . Despite technological advances, a variance of 0.79% results in no more (or less) vote dilution today than in 1983, when this Court said that such a minor harm could be justified by legitimate state objectives.”).

19. See *Karcher*, 462 U.S. at 730–31 and 741.

20. *Id.* at 741. See also *Tennant*, 567 U.S. at 764–5.

21. U.S. Const. amend. XIV, § 1. The equal protection clause prohibits states from denying the equal protection of the laws to any person within their jurisdiction.

22. *Reynolds*, 377 U.S. at 579. In *Reynolds*, the Supreme Court additionally held that the boundaries of legislative districts should be redrawn at least once every ten years to avoid shifts in district populations creating substantial inequality of population among districts. *Id.* at 583–4 (“In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation. . . . [I]f reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect.”).

States must draw congressional districts with populations as close to perfect equality as possible. But, when drawing state and local legislative districts, jurisdictions are permitted to deviate somewhat from perfect population equality to accommodate traditional districting objectives, among them, preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographic compactness.²³

In practice, the substantial equality standard means that federal courts will presume a state legislative or local electoral redistricting plan is constitutional if it has an overall range of 10 percent or less.²⁴ In *Evenwel*, the Supreme Court reaffirmed that standard:

Where the maximum population deviation between the largest and smallest district [i.e., overall range] is less than 10%, the Court has held, a state or local legislative map presumptively complies with the one-person, one-vote rule. Maximum deviations above 10% are presumptively impermissible.²⁵

However, an overall range of less than 10 percent is not a safe harbor. A plaintiff may rebut the presumption of constitutionality by showing “that it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors.”²⁶ But such a challenge will be successful “only rarely, in unusual cases.”²⁷ In recent decades, Wisconsin’s state legislative redistricting plans have fallen well below that 10 percent threshold, achieving a maximum overall range of less than 2 percent going back at least to 1982. See table 1.

2. Minority protection

While the requirement of equal population is essential to redistricting because it is designed to ensure equal representation in government and that one person’s vote has no more weight than another’s, equal population must still be balanced against other com-

23. *Evenwel*, 136 S. Ct. at 1124 (internal citations omitted). See also *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973) (“It is now time to recognize, in the context of the eminently reasonable approach of *Reynolds v. Sims*, that minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.”). In *Evenwel*, the Supreme Court held that states may draw districts on the basis of total population rather than the voting-eligible or registered population, but did not hold that districting based on total population is required. In doing so, the court summarized its approach to redistricting disputes involving challenges based on equal population requirements.

24. See, e.g., *Brown v. Thomson*, 462 U.S. 835, 842–3 (1983).

25. *Evenwel*, 136 S. Ct. at 1124 (internal citations omitted). See also *White v. Regester*, 412 U.S. 755, 763 (1973) (overall range of 9.9 percent upheld); *Gaffney*, 412 U.S. 750–51 (overall range of 7.83 percent upheld); *Mahan v. Howell*, 410 U.S. 315, 329 (1973) (overall range of 16.4 percent upheld); *Harris v. Ariz. Indep. Redistricting Comm’n*, 136 S. Ct. 1301, 1303 and 1307 (2016) (overall range of 8.8 percent upheld); *Chapman v. Meier*, 420 U.S. 1, 24–25 (1975) (overall range of 20.14 percent overturned); and *Connor v. Finch*, 431 U.S. 407, 416–18, 420–21 (1977) (overall range of 16.5 percent for state senate districts and 19.3 percent for state house districts overturned).

26. *Harris*, 136 S. Ct. at 1307. Such illegitimate factors might include, for example, race. See *infra* Section C. 2. a., Racial gerrymandering.

27. *Harris*, 136 S. Ct. at 1307.

Table 1. Relative population deviation for Wisconsin

Year	Relative deviation (%)
1982	1.74 ¹
1992	0.91 ²
2002	1.59 ³
2011	0.76 ⁴

1. *AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 634 (E.D. Wis. 1982).
2. *Prosser v. Elections Bd.*, 793 F. Supp. 859, 870 (W.D. Wis. 1992).
3. *Baumgart v. Wendelberger*, No. 01-C-0121. 8 (E.D. Wis. May 30, 2002).
4. *Baldus v. Members of the Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 851 (E.D. Wis. (2012)).

internecine conflict. The equal protection clause of the Fourteenth Amendment provides: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” While the clause does not mention race, ratified, as it was, in the shadow of the Civil War, the primary purpose of the equal protection clause was to prevent “official conduct discriminating on the basis of race.”²⁹

As such, the equal protection clause prohibits state and local governments from separating citizens into different electoral districts on the basis of race without sufficient justification.³⁰ In the redistricting context, violation of the equal protection clause occurs if race is the predominant motivating factor in how a particular electoral district’s boundaries are drawn.³¹ If a district’s boundaries are impermissibly drawn with race as the predominant motivating factor by either placing a disproportionately large population of a minority group in a single district, known as “packing,” or by thinning out the minority group’s members among a number of districts, known as “cracking,” this is called a “racial gerrymander” in violation of the Constitution.³²

28. This is especially true at the state legislative and local electoral district levels. In fact, the need to balance equal population against other competing interests is the primary reason the courts require only substantial, not absolute, equality of population in state legislative and local electoral redistricting plans. *See, e.g., Reynolds*, 377 U.S. at 579; *Evenwel*, 136 S. Ct. at 1124.

29. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

30. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017); *Miller v. Johnson*, 515 U.S. 900, 911 (1995).

31. *See, e.g., Bush v. Vera*, 517 U.S. 952, 958–59 (1996).

32. *See Shaw v. Reno* (Shaw I), 509 U.S. 630, 670–71 (1993) (White, J., dissenting). While the courts will scrutinize redistricting plans for unconstitutional racial gerrymandering, the Supreme Court recently held that federal courts will not entertain claims that a redistricting plan contains impermissible partisan gerrymandering, i.e., drawing district lines for partisan political advantage. The Supreme Court held that a claim of partisan gerrymandering is not justiciable by federal courts because the courts lack a judicially manageable standard for adjudicating such a claim. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019). While the Supreme Court in *Rucho* forestalled claims of partisan gerrymandering in federal court, some state courts will entertain such a claim under state law. For example, in 2018, the Pennsylvania Supreme Court struck down the state’s congressional redistricting plan as a partisan gerrymander in violation of the Pennsylvania Constitution’s “free and equal” elections clause, which provides simply that elections in the state “shall be free and equal.” *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (“[I]t is clear, plain, and palpable that the 2011 Plan subordinates the traditional redistricting criteria in the service of partisan advantage, and thereby deprives Petitioners of their state constitutional right to free and equal elections.”); *Pa. Const. art. I, § 5*. For a complete list of states having some version of a “free and equal” elections clause in their state constitutions, see “Free and Equal Election Clauses in State Constitutions,” National Conference of State

peting interests in the redistricting process.²⁸ Chief among these is protecting the ability of racial and language minority groups to participate equally in the electoral process.

a. Racial gerrymandering. The Fourteenth Amendment was ratified in 1868 in the aftermath of the Civil War, putting a constitutional coda on that bloody inter-

The plaintiff bears the burden of proof in racial gerrymandering cases, and the plaintiff's burden is a "demanding one," in part because the legislature benefits from a "presumption of legislative good faith."³³ To prove a racial gerrymandering claim, a plaintiff must "show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."³⁴ It is not enough that race was one factor among others taken into account in drawing an electoral district's boundaries; race must have been the predominant motivating factor, when all other considerations were subordinated to race.³⁵

Nonetheless, district lines may still be drawn with race as the predominant motivating factor if doing so is necessary to further a compelling government interest and is narrowly tailored to accomplish that interest.³⁶ This standard is called "strict scrutiny." Drawing district boundaries on the basis of race in order to comply with the Voting Rights Act of 1965 (VRA) can, but does not always, satisfy strict scrutiny.³⁷

b. The Voting Rights Act of 1965. In 1870, two years after ratification of the Fourteenth Amendment, the states ratified the Fifteenth Amendment, which provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."³⁸ Congress has the power to enforce the Fifteenth Amendment by appropriate legislation,³⁹ and Congress did just that when it enacted the Voting Rights Act of 1965.

Congress passed the VRA to remedy the fact that, historically, racial minorities did

Legislatures, November 4, 2019, <https://www.ncsl.org>. The Wisconsin Constitution does not contain such a clause.

33. *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (O'Connor, J., concurring) (quoting *Miller*, 515 U.S. at 928); *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

34. *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 266–67 (2015) (quoting *Miller*, 515 U.S. at 916). See also *Shaw I*, 509 U.S. at 646–47 ("In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregate . . . voters' on the basis of race.") (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)); *Miller*, 515 U.S. at 912–13 (holding that the shape of a district does not have to be "bizarre on its face before there is a constitutional violation" and that "parties may rely on evidence other than bizarreness to establish race-based districting"); *North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018) (stating that a plaintiff may rely on circumstantial evidence of a district's shape and demographics or direct evidence going to legislative purpose in proving a racial gerrymandering claim).

35. See *Ala. Legis. Black Caucus*, 575 U.S. at 272; *Bush*, 517 U.S. at 958–59, 962; *Miller*, 515 U.S. at 916 ("[A] plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations."). Note that in the racial gerrymandering context, equal protection analysis applies on a district-by-district basis, not, as is the case in the equal population context, with respect to a redistricting plan as a whole. *Ala. Legis. Black Caucus*, 575 U.S. at 262.

36. *Bush*, 517 U.S. at 958–59.

37. *Id.* at 977. In *Bush*, the Supreme Court held compliance with the VRA was not sufficient under the circumstances to justify the racial gerrymandering at issue. *Id.* at 981 ("The districts before us exhibit a level of racial manipulation that exceeds what § 2 [of the VRA] could justify."). If a state invokes the VRA to justify race-based redistricting, it "must establish that it had 'good reasons' to think that it would transgress the Act if it did not draw race-based district lines." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017).

38. U.S. Const. amend. XV, § 1.

39. U.S. Const. amend. XV, § 2.

not have an equal opportunity to participate in elections, an injustice that persisted despite ratification of the Fourteenth and Fifteenth Amendments almost 100 years earlier.⁴⁰ In particular, Congress enacted Section 2 of the VRA “to help effectuate the Fifteenth Amendment’s guarantee that no citizen’s right to vote shall ‘be denied or abridged . . . on account of race, color, or previous condition of servitude.’”⁴¹

Section 2, as amended, prohibits state and local governments from imposing any “voting qualification or prerequisite to voting or standard, practice, or procedure . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color [or membership in a language minority group].”⁴² The Section 2 analysis centers on whether a standard, practice, or procedure has the *effect* of discriminating against a racial, color, or language minority group, regardless of intent.⁴³

Additionally, Section 2 sets forth a “totality of the circumstances” framework for evaluating potential violations of the VRA:

A violation . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [racial, color, or language minority group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.⁴⁴

In essence, Section 2 “prohibits any practice or procedure that, ‘interacting with social and historical conditions,’ impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters.”⁴⁵

In practice, a redistricting plan may be challenged under Section 2 of the VRA if it results in *vote dilution*; that is, if the plan splits up a racial, color, or language minority group that could constitute a majority in an electoral district and instead combines its members with a majority group, effectively limiting the ability of that minority group to

40. U.S. Department of Justice, *Introduction to Federal Voting Rights Laws* (updated August 6, 2015). The VRA “is generally considered the most successful piece of civil rights legislation ever adopted by the United States Congress.” *Id.*

41. *Voinovich v. Quilter*, 507 U.S. 146, 152 (1993).

42. 52 U.S.C. § 10301 (a).

43. Congress amended Section 2 of the VRA in 1982 specifically to reverse *Mobile v. Bolden*, 446 U.S. 55 (1980), in which the Supreme Court had held that a petitioner alleging violation of the Fifteenth Amendment or Section 2 of the VRA must prove there was an intent to discriminate on the basis of race.

44. 52 U.S.C. § 10301 (b) (emphasis in original).

45. *Voinovich*, 507 U.S. at 153 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)).

elect a candidate of its choice.⁴⁶ To state a claim for vote dilution, members of the affected minority group must satisfy the following threefold threshold established by the Supreme Court in 1986 in *Thornburg v. Gingles*:⁴⁷

- The minority group in question is sufficiently large and geographically compact to otherwise create a majority-minority district.⁴⁸
- The minority group is politically cohesive in terms of voting patterns, i.e., the group tends to vote as a bloc.
- The majority group votes sufficiently as a bloc to enable it, in the absence of special circumstances, to defeat the minority's preferred candidate.⁴⁹

Those three prongs of the test are generally referred to as the “*Gingles* preconditions.” If all of the *Gingles* preconditions are satisfied in a given case, the court then evaluates “the totality of the circumstances,” as provided in Section 2 of the VRA, to determine whether the minority group has been denied an equal opportunity to participate in the political process and elect a candidate of its choice.⁵⁰ Thus, satisfaction of the *Gingles* preconditions is necessary but not sufficient to succeed on a claim of vote dilution under Section 2 because after finding the *Gingles* preconditions are present, the court still must examine “the totality of the circumstances.”⁵¹ Also, the *Gingles* preconditions apply only to claims that a redistricting plan has the *effect* of discriminating against a minority group. Even in situations in which the *Gingles* preconditions are not satisfied, a claim could still be made under the Fourteenth and Fifteenth Amendments

46. *Id.* While vote dilution is typically shown when a minority group is “cracked” and dispersed among two or more districts in which it does not have an equal opportunity to elect a candidate of its choice, it is also possible, given the right circumstances, that a vote dilution claim may exist under the VRA when a minority group is “packed” into one or more districts. *Id.* In *Voinovich*, the Supreme Court explained: “How such concentration or ‘packing’ may dilute minority voting strength is not difficult to conceptualize. A minority group, for example, might have sufficient numbers to constitute a majority in three districts. So apportioned, the group inevitably will elect three candidates of its choice, assuming the group is sufficiently cohesive. But if the group is packed into two districts in which it constitutes a super-majority, it will be assured only two candidates.” *Id.*

47. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

48. A majority-minority district is a district in which minority group members constitute more than 50 percent of the voting-age population. *Bartlett v. Strickland*, 556 U.S. 1, 13 and 18 (2009). This is in contrast to a minority “influence” district, “in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected,” or a “crossover” district, in which the minority makes up less than a majority of the voting-age population, but “is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority’s preferred candidate.” *Id.* at 13. The Supreme Court has held that the VRA does not require the creation of influence districts or crossover districts. *Id.* at 13 and 19–20.

49. *Gingles*, 478 U.S. at 50–51. While *Gingles* involved multi-member districts, in *Growe v. Emison*, 507 U.S. 25 (1993), the Supreme Court held the *Gingles* preconditions apply to single-member districts as well.

50. *Bartlett*, 556 U.S. at 11–12.

51. See *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994) (“But if *Gingles* so clearly identified the three [preconditions] as generally necessary to prove a § 2 claim, it just as clearly declined to hold them sufficient in combination, either in the sense that a court’s examination of relevant circumstances was complete once the three factors were found to exist, or in the sense that the three in combination necessarily and in all circumstances demonstrated dilution.”). The “totality of the circumstances” test includes consideration of “the extent of the opportunities minority voters enjoy to participate in the political processes.” *Id.* at 1012. According to the Supreme Court, “the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.” *Id.* at 1014, n.11.

if the boundaries of an electoral district were drawn with the *intent* to discriminate on the basis of race.⁵²

All in all, whether in effect or by intent, the rights of members of racial and language minority groups to equal representation and full participation in the political process are now protected under federal law and the Constitution. Even the fundamental requirement of equal population among electoral districts must at times give way to ensure those rights are protected.

D. Traditional redistricting principles

Other than the federal requirements of equal population and minority protection, all states apply one or more other redistricting principles, often referred to simply as “traditional redistricting principles” or “traditional districting principles,” whether at the level of congressional, state legislative, or local electoral redistricting. The traditional redistricting principles most relevant for Wisconsin are compactness, contiguity, preservation of communities of interest, and preservation of the unity of political subdivisions.⁵³ While use of traditional redistricting principles is not required under the U.S. Constitution, the U.S. Supreme Court has said that evidence showing that a redistricting map was crafted with concern for satisfying these principles may serve to defeat a claim of racial gerrymandering.⁵⁴

1. Compactness

Compactness represents the principle that districts should be reasonably geographically compact, meaning that the distance between all parts of a district is minimized.⁵⁵ There is no single generally agreed upon standard for determining compactness, but the Supreme Court has used an “eyeball approach.”⁵⁶ Using the eyeball test and looking

52. *Id.* at 20, 24.

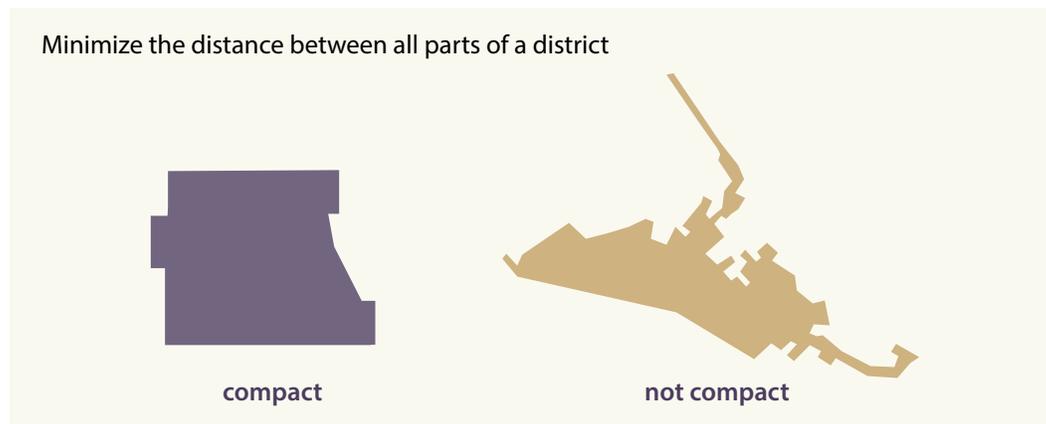
53. Other states may apply some different or additional traditional redistricting principles. Also, courts evaluating or establishing maps for Wisconsin have sometimes looked to additional principles. For example, in *Baumgart v. Wendelberger*, the United States District Court for the Eastern District of Wisconsin noted that its plan maintained a higher level of “core retention” than proposed plans submitted to the court. Cases Nos. 01-C-0121, 02-C-0366, 2002 U.S. Dist. LEXIS 29373, 13–14 and 22 (E.D. Wis. 2002). Core retention is the principle that the core of prior districts should, to the extent possible, be preserved in new plans. *See also* Part II, Section C. 5., Redistricting 2000.

54. *Shaw v. Reno* (Shaw I), 509 U.S. 630, 647 (1993) (stating with respect to “traditional districting principles, such as compactness, contiguity, and respect for political subdivisions”: “We emphasize that these criteria are important not because they are constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.”) (internal citation omitted). *See also supra* Section C. 2. a., Racial gerrymandering.

55. Compactness in this context is different from the compactness element in the first *Gingles* precondition for evaluating whether the votes of a minority group have been diluted in violation of Section 2 of the Voting Rights Act of 1965. In that context, compactness refers to the geographic compactness of the minority group whose vote has been diluted, not the geographic compactness of the district itself. *See supra* Section C. 2. b., The Voting Rights Act of 1965.

56. *Bush v. Vera*, 517 U.S. 952, 960 (1996).

Figure 2. **Compactness**



at figure 2, one can easily distinguish the compact district from the district that is not geographically compact.

While there is no universal requirement that all districts be as compact as possible, courts will look to compactness when scrutinizing the legality of a redistricting plan because districts with “dramatically irregular shapes may have sufficient probative force to call for an explanation.”⁵⁷ For example, in *Shaw v. Reno* in 1993, the Supreme Court was confronted with two majority-minority congressional districts in North Carolina that were highly irregular in shape. The court’s description of the districts is illustrative:

The first of the two majority-black districts contained in the revised plan, District 1, is somewhat hook shaped. Centered in the northeast portion of the State, it moves southward until it tapers to a narrow band; then, with finger-like extensions, it reaches far into the southernmost part of the State near the South Carolina border. District 1 has been compared to a “Rorschach ink-blot test,” and a “bug splattered on a windshield.”

The second majority-black district, District 12, is even more unusually shaped. It is approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas until it gobbles in enough enclaves of black neighborhoods. . . . One state legislator has remarked that “if you drove down the interstate with both car doors open, you’d kill most of the people in the district.”⁵⁸

While the Supreme Court did not decide the merits of that case in 1993, in related litigation in 1996, the court held that North Carolina’s Congressional District 12, the winding, snakelike district described above, was an unconstitutional racial gerrymander.⁵⁹ The district’s shape was “highly irregular and geographically non-compact by any

57. *Shaw I*, 509 U.S. at 647 (1993) (Stevens, J., concurring) (quoting *Karcher v. Daggett*, 462 U.S. 725, 755 (1983)).

58. *Id.* at 635–6 (internal citations and some internal quotations omitted).

59. *Shaw v. Hunt* (Shaw II), 517 U.S. 899, 918 (1996).

objective standard that can be conceived.”⁶⁰ The state attempted to justify the district’s boundaries as necessary to comply with the Voting Rights Act of 1965, but the Supreme Court held that the district’s shape was not narrowly tailored to achieve compliance with the VRA, as required under strict scrutiny, because the district violated the first *Gingles* precondition, geographic compactness of the minority group included within the district.⁶¹

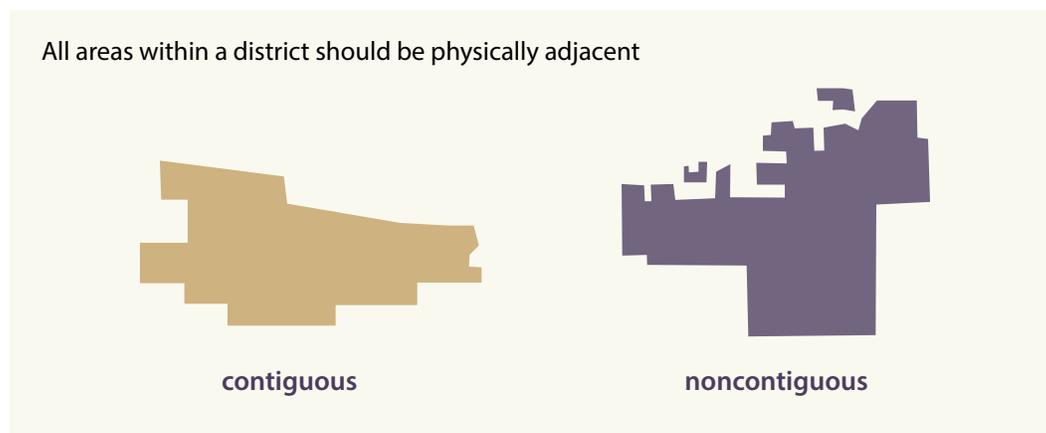
The Wisconsin Constitution requires that assembly districts “be in as compact form as practicable.”⁶² The Wisconsin Statutes also explicitly require that wards and aldermanic districts be compact.⁶³

2. Contiguity

Contiguity is the general principle, almost universally applied in the redistricting context, that each area within a district should be physically adjacent to another area within the district. A district’s contiguity may be tested by whether it is possible to travel to all parts of a district without crossing district lines. Figure 3 shows a district that is contiguous side by side with a district that includes noncontiguous territory.

In Wisconsin, senate and assembly districts, wards, and county supervisory and city aldermanic districts are all required to consist of contiguous territory, with the exception of island territory.⁶⁴

Figure 3. **Contiguity**



60. *Id.* at 905–6 (internal quotation marks omitted).

61. *Id.* at 916. See also *supra* Section C. 2. a. and b., Racial gerrymandering and The Voting Rights Act of 1965.

62. [Wis. Const. art. IV, § 4](#). See also *infra* Section E. 2., Legislative redistricting.

63. See *infra* Section F., Local redistricting in Wisconsin.

64. See *infra* Section E. 2., Legislative redistricting, and Section F., Local redistricting in Wisconsin.

3. Preservation of communities of interest

Respecting communities of interest in a redistricting plan means attempting to group like-minded or similar people so that they may elect a representative of their choice who reflects their common values in a manner relevant to legislative representation. This principle is distinct from federal requirements relating to the protection of racial and language minority groups in a redistricting plan. However, when communities of interest align with a specific population's racial or ethnic characteristics, care must be taken to ensure that legitimate political considerations, and not race, predominate in drawing a district's boundaries, unless necessary to comply with the VRA. Otherwise, a court might find that the district constitutes an unconstitutional racial gerrymander.⁶⁵

In Wisconsin, municipalities are required by statute to take into account communities of interest in drawing ward boundaries.⁶⁶

4. Preservation of the unity of political subdivisions

Respecting the unity of political subdivisions means drawing district boundaries in such a way as to avoid crossing existing political boundaries. This principle both simplifies the administration of elections and helps to clearly identify for voters the specific district in which they live. In many ways this principle goes hand in hand with the effort to preserve communities of interest. However, strictly adhering to the boundaries of political subdivisions in a redistricting plan often makes it more difficult to satisfy equal population requirements. Consequently, this principle, while by no means obsolete, was followed much more meticulously in Wisconsin, and elsewhere, before the advent of one person, one vote.⁶⁷

In Wisconsin, assembly districts must “be bounded by county, precinct, town or ward lines.”⁶⁸ Additionally, county supervisory districts must generally consist of whole wards or municipalities, city aldermanic districts must consist of whole wards, and wards may not cross municipal or county lines.⁶⁹

E. Congressional and state legislative redistricting in Wisconsin

In Wisconsin, the state legislature has the power to redraw both congressional and state

65. See, e.g., *Bush*, 517 U.S. at 972–76 (finding scant evidence that district boundaries were drawn based on political considerations but ample evidence that race was the predominant motivating factor). See also *supra* Section C. 2. a., Racial gerrymandering.

66. See *infra* Section F, Local redistricting in Wisconsin.

67. See Part II, Section B., The Wisconsin Constitution and early apportionments and redistricting.

68. Wis. Const. art. IV, § 4. See also *infra* Section E. 2., Legislative redistricting.

69. See *infra* Section F, Local redistricting in Wisconsin.

legislative district boundaries.⁷⁰ Redistricting laws in Wisconsin are enacted in the same manner as other laws, meaning that a redistricting plan must pass both the senate and assembly and be approved by the governor, unless, if vetoed, the legislature overrides the governor's veto by a two-thirds majority vote in both houses.⁷¹ The last time the legislature successfully overrode a governor's veto was in 1985, and that was a partial veto.⁷² Given these hurdles, as discussed further below, recent decades have seen state legislative redistricting plans put in place by courts. Congressional redistricting plans, however, which tend to be much less controversial than legislative plans, have typically been enacted relatively quickly by the legislature with the governor's approval.⁷³

1. Congressional redistricting

The congressional redistricting process begins at the federal level with the reapportionment of seats in the U.S. House of Representatives based on the federal decennial census.⁷⁴ After reapportionment, Wisconsin's lawmakers may then go to work drafting new maps for the state's congressional districts. But there are no statutory or state constitutional guidelines for congressional redistricting in Wisconsin. Instead, rules established under the U.S. Constitution and the Voting Rights Act of 1965 govern the process. Specifically, as described earlier, congressional districts must be as mathematically equal in population as possible, may not constitute a racial gerrymander, and must not dilute the equal opportunity of racial, color, and language minority groups to choose candidates of their choice.⁷⁵

Prior to the emergence of the one-person, one-vote rule in the 1960s, county lines were seen as being more or less inviolate in congressional redistricting in Wisconsin—as the counties went, so went the districts—and no county other than highly populated Milwaukee County was ever split in drawing congressional district lines. But the state's county lines no longer serve as the default template for congressional redistricting. Now, the requirement that congressional districts be as nearly equal in population as possible often necessitates the splitting of political subdivisions, whether at the county or municipal level, in drawing congressional district maps.

Before the 1960s, it was also typical for congressional district boundaries to be altered, not every decade based on the federal decennial census, but only when the number

70. U.S. Const. art. 1, § 2, cl. 3; [Wis. Const. art. IV, §§ 1 and 3](#).

71. See [State ex. rel. Reynolds v. Zimmerman](#), 22 Wis.2d 544, 558 (1964). See also Part II, Section C. 1., Redistricting 1960.

72. Richard A. Champagne and Madeline Kasper, "[The Veto Override Process in Wisconsin](#)," *Reading the Constitution* 4, no. 2 (Madison, WI: Legislative Reference Bureau, 2019), 1.

73. See Part II, Section C., Redistricting in the era of one person, one vote.

74. See *supra* Section B., The census and congressional reapportionment.

75. See *supra* Section C., Federal redistricting requirements.

of representatives in Wisconsin's congressional delegation changed.⁷⁶ Since 1963, however, the legislature has never failed to timely pass new congressional district maps after each federal decennial census.⁷⁷ New Wisconsin congressional maps are typically enacted each decade well in advance of the deadline for filing nomination papers for the partisan primary. The partisan primary for the 2022 general election is to occur on August 9, 2022, and the deadline for filing nomination papers for the partisan primary will be June 1, 2022.⁷⁸

2. Legislative redistricting

While the Wisconsin Constitution does not provide any guidance for congressional redistricting, state legislative redistricting is another matter. In addition to the federal requirements of equal population and minority protection, article IV of the Wisconsin Constitution governs the basic requirements for legislative redistricting in Wisconsin.⁷⁹ Article IV, section 2, directs the legislature to establish from 54 to 100 assembly districts and to draw senate districts that do not cross assembly boundaries and that number not more than one-third nor less than one-quarter of the number of assembly districts. Article IV, section 4, requires assembly districts “to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable.” Article IV, section 5, requires that senate districts consist of “convenient contiguous territory.” Beyond those requirements, the legislative redistricting process in Wisconsin is guided by court precedents and the weight of custom and practice. There are no statutory requirements governing legislative redistricting in Wisconsin.

In terms of timing, article IV, section 3, requires the legislature to “apportion and district anew the members of the senate and assembly, according to the number of inhabitants,” at its first session following each federal decennial census.⁸⁰ Because Census Day is April 1, 2020, the next round of redistricting is slated to take place during the 2021–23 legislative session, which ends on January 3, 2023.⁸¹

While the Wisconsin Constitution empowers the legislature to redistrict the senate and the assembly, recent decades have seen legislative redistricting plans put in place by

76. See Part II, Section B. 2., Early congressional redistricting.

77. See Part II, Section C., Redistricting in the era of one person, one vote.

78. See *infra* figure 4. See also *infra* Section G., Redistricting timeline and potential delays due to COVID-19.

79. Wis. Const. art. IV, §§ 2–5.

80. Since 1973, the apportioned number of representatives to the assembly has been fixed at 99. The apportioned number of senators has been fixed at 33 since 1862.

81. The Wisconsin Legislature meets on a biennial basis, beginning on the first Monday in January of each odd-numbered year, unless that first Monday falls on January 1 or 2, in which case the new legislature convenes on January 3. Wis. Stat. § [13.02\(1\)](#). By longstanding practice, the legislature does not adjourn *sine die*, which constitutes final adjournment, until the day on which the new legislature convenes.

courts.⁸² Prior to the 1960s, redistricting disputes in Wisconsin were typically filed with the state supreme court under that court's original jurisdiction.⁸³ Before 1962, federal courts generally refused to hear redistricting disputes because the U.S. Supreme Court had taken the position that such disputes involved a political question beyond the jurisdiction of the federal courts.⁸⁴

Unlike the federal courts, in pre-1960s redistricting cycles, the Wisconsin Supreme Court would entertain challenges to existing redistricting laws, and occasionally invalidated redistricting plans it found unconstitutional.⁸⁵ At the same time, however, if the legislature and the governor failed to enact a legislative redistricting plan after a federal decennial census, the state supreme court determined it lacked the authority to promulgate a legislative redistricting plan itself or to compel the legislature to do so, even when the passage of time rendered the existing plan disproportionate with respect to population.⁸⁶ In the absence of a new redistricting plan, elections continued to be held under the old maps.

All of that changed with the arrival on the scene in the 1960s of the principle of one person, one vote. The U.S. Supreme Court's decision in *Baker v. Carr*⁸⁷ in 1962 set the stage for the court's adoption of the rule of one person, one vote. In *Carr*, the court held for the first time that federal courts have jurisdiction to hear cases challenging the constitutionality of redistricting plans.⁸⁸ *Carr* involved a situation in which Tennessee's seats in the U.S. Senate and U.S. House of Representatives had not been redistricted for more than 60 years, since 1901, yet the state's population had grown and shifted significantly in that time.⁸⁹ The federal district court dismissed the case, relying on existing Supreme Court precedent to find that the case presented a political question beyond the court's jurisdiction.⁹⁰ The Supreme Court reversed, holding that the district court had jurisdiction to

82. As noted earlier, legislative redistricting plans in Wisconsin must pass both houses of the legislature and be approved by the governor, unless, if vetoed, the legislature overrides the governor's veto by a two-thirds majority vote in both houses. *State ex. rel. Reynolds*, 22 Wis.2d at 558.

83. See Part II, Section B., The Wisconsin Constitution and early apportionments and redistricting.

84. *Colegrove v. Green*, 328 U.S. 549, 556 (1946) ("The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. . . . The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.").

85. See, e.g., *State ex rel. Attorney Gen. v. Cunningham* 81 Wis. 440 (1892) (*Cunningham I*); *State ex rel. Lamb v. Cunningham* 83 Wis. 90 (1892) (*Cunningham II*).

86. *State ex. rel. Martin v. Zimmerman*, 249 Wis. 101, 104 (1946) ("The legislature being a co-ordinate branch of the government may not be compelled by the courts to perform a legislative duty even though the performance of that duty be required by the constitution. The court cannot initiate by judicial action legislation which has been placed in the hands of the legislature."). See also *State ex rel. Broughton v. Zimmerman*, 261 Wis. 398, 406 (1952) ("Our state constitution places the power to reapportion the legislative districts exclusively in the legislature, and if the legislature fails to perform the duty enjoined upon it by sec. 3, art. IV, Const., to reapportion the state at the first session of the legislature ensuing after each federal census, the courts are without power to compel the legislature to perform its constitutional duty in such respect").

87. *Baker v. Carr*, 369 U.S. 186 (1962).

88. *Id.* at 237.

89. *Id.* at 191.

90. *Id.* at 208–9.

decide whether inequality of representation owing to 60 years of changes in Tennessee's population with no new congressional map violated the equal protection clause of the Fourteenth Amendment.⁹¹ Not long after deciding *Carr*, the Supreme Court developed its one-person, one-vote jurisprudence, requiring the maintenance over time of equality of population among congressional, state legislative, and local electoral districts, and empowering federal courts to establish redistricting plans after the federal decennial census if state legislatures failed to do so.⁹²

Also not long after the Supreme Court issued its groundbreaking opinion in *Carr*, the Wisconsin Supreme Court overruled its own precedent that had held the state supreme court lacked authority to establish a legislative redistricting plan if the legislature and the governor failed to enact one. When the 1960 redistricting cycle rolled around, the state had not enacted a legislative redistricting plan since 1951 and Wisconsin's congressional maps had not been updated since 1931, and even then only to account for the state's loss, as a result of the 1930 census, of one seat previously apportioned to the state's congressional delegation.⁹³ The legislature and the governor finally enacted a new congressional redistricting plan in 1963, which was two years later than usual.⁹⁴ However, a duly enacted state legislative redistricting plan was not as forthcoming.

The 1961 and 1963 legislatures passed a number of plans, but each was vetoed, first by Governor Gaylord Nelson, who was elected U.S. senator in 1962, and then by Governor John Reynolds, Wisconsin's former attorney general who was elected governor upon Nelson's departure to join the upper house of Congress.⁹⁵ With little hope in sight for a duly enacted legislative redistricting plan, the Wisconsin Supreme Court decided to hear a lawsuit petitioning the court to establish a plan contrary to the court's prior decisions. In *State ex. rel. Reynolds v. Zimmerman*, the state supreme court followed the U.S. Supreme Court's lead by overruling its own relevant precedent and holding that it had authority to provide affirmative relief and craft a legislative redistricting plan if the legislature and the governor could not do so:

The citizens of this state can now obtain affirmative judicial relief from federal courts upon a showing that the voting power discriminations resulting from malapportionment deny them equal protection. Since a denial of voting rights deemed to be a denial of the general standards of equal protection of the law under the Fourteenth amendment would

91. *Id.* at 237.

92. See *Gray v. Sanders*, 372 U.S. 368, 381 (1963); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964). See also *supra* Section C. 1., Equal population.

93. See Part II, Section C. 1., Redistricting 1960.

94. *Id.*

95. *Id.*

also be a denial of the specific standard of representation in direct ratio to population in art. IV [of the Wisconsin Constitution], there is no reason for Wisconsin citizens to have to rely upon the federal courts for the indirect protection of their state constitutional rights. To the extent that *Broughton* and *Martin* have held that the unavailability of affirmative judicial relief forecloses a determination on the merits of whether a reapportionment scheme, valid when passed, is presently unconstitutional due to intervening population shifts, they are overruled.⁹⁶

Following the court's decision in *State ex. rel. Reynolds*, the Wisconsin Legislature ultimately passed a joint resolution directing the nonpartisan Legislative Reference Bureau to assist the Wisconsin Supreme Court in drafting a legislative redistricting plan.⁹⁷ With the LRB's help, the court established state legislative maps in time for the 1964 general election, the first such instance in the state's history, but it would not be the last. Courts established state legislative redistricting plans for Wisconsin in the 1980, 1990, and 2000 redistricting cycles, although in the 1980 cycle, the legislature ended up enacting a plan that superseded but substantially replicated the court's plan.⁹⁸ By 2010, court-adopted redistricting plans had virtually become the norm, at least for state legislative districts. So, when in 2011, the legislature and the governor succeeded in enacting a legislative redistricting plan, it turned out to be somewhat the exception despite the fact that the state constitution contemplates that process as the rule.⁹⁹

F. Local redistricting in Wisconsin

Just as with congressional and state legislative redistricting plans, the federal requirements of equal population and minority protection apply in the local redistricting context as well. With respect to equal population, the one-person, one-vote requirement embedded in the equal protection clause of the Fourteenth Amendment means that local electoral districts must be substantially equal in population.¹⁰⁰ What that means in practice for equal protection purposes in Wisconsin is that county supervisory and city aldermanic redistricting plans should achieve an overall range¹⁰¹ of 10 percent or less.¹⁰²

96. *State ex. rel. Reynolds*, 22 Wis. 2d. at 564.

97. See Part II, Section C. 1., Redistricting 1960.

98. See Part II, Section C. 3.-5., Redistricting 1980, 1990, and 2000. Both state and federal courts have jurisdiction over redistricting litigation. Which court ends up drawing maps depends largely on whether the dispute is first filed in state or federal court. For example, in *Jensen v. Wisconsin Elections Board*, 249 Wis.2d 706, 708-9 (2002), the Wisconsin Supreme Court refused to take original jurisdiction over a redistricting dispute in part because an action was already underway in federal court. See Part II, Section C. 6., Redistricting 2010.

99. See Part II, Section C. 6., Redistricting 2010.

100. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016).

101. See *supra* Section C. 1. a., Calculating equal population.

102. *Evenwel*, 136 S. Ct. at 1124 (2016) (“[W]hen drawing state and local legislative districts, jurisdictions are permitted to

Similarly, the ban on racial gerrymandering under the equal protection clause and the prohibition on diluting the votes of racial, color, and language minority groups under the Voting Rights Act of 1965 apply equally to local redistricting plans.¹⁰³ In short, the same general principles that apply to congressional and state legislative districts under the U.S. Constitution and federal law also apply in the context of local redistricting. Unlike congressional and state legislative redistricting, however, in Wisconsin, local redistricting is governed by a detailed statutory regime.

With respect to the process itself, local redistricting in Wisconsin occurs in three phases and requires cooperation and coordination among counties and their respective municipalities. The process starts at the county level in Phase 1, with counties adopting tentative county supervisory district plans; moves to the municipal level in Phase 2, in which municipalities adjust ward boundaries as needed; and concludes in Phase 3, with counties adopting final supervisory district plans and cities adopting aldermanic districts if applicable. Each of the three phases consists of a 60-day work period, and each phase must be completed before the next phase may begin. The official publication of the census data and block-level census maps for Wisconsin starts the clock ticking on the whole process.¹⁰⁴

1. Counties adopt tentative supervisory district plans—Phase 1

Within 60 days after the official publication of the census data for Wisconsin, “but no later than July 1 following the year of each decennial census,”¹⁰⁵ the statutes require each county board to adopt a tentative county supervisory district plan.¹⁰⁶ The county board’s proposed plan sets forth the number of supervisory districts and tentative district boundaries or a description of boundary requirements.

In preparing a tentative county supervisory district plan, the county board must do the following:

deviate somewhat from perfect population equality. . . . Where the maximum population deviation between the largest and smallest district is less than 10%, the Court has held, a state or local legislative map presumptively complies with the one-person, one-vote rule. Maximum deviations above 10% are presumptively impermissible.” (internal citations omitted). The Supreme Court has also said that circumstances may justify “slightly greater percentage deviations” for local electoral districts as opposed to state legislative districts because, among other things, local electoral districts often involve smaller populations, fewer representatives, and rural areas. *Abate v. Mundt*, 403 U.S. 182, 185 (1971). However, anything beyond the 10-percent threshold in overall range loses the benefit of the presumption of constitutionality; rather, it is presumptively impermissible. *Evenwel*, 236 S. Ct. at 1124. See *supra* Section C. 1. b., Constitutional standards for equal population.

103. See *supra* Section C. 2. a. and b., Racial gerrymandering and The Voting Rights Act of 1965.

104. See *infra* figure 5 for the default local redistricting timeline for 2021.

105. Through no fault of their own, counties may not be able to satisfy the July 1, 2021, deadline in the 2020 redistricting cycle if the U.S. Census Bureau is not able to provide final census data to the states on time due to census delays caused by the COVID-19 pandemic. See *infra* Section G., Redistricting timeline and potential delays due to COVID-19. Regardless, the required 60-day time frame for each phase of the local redistricting process continues to apply.

106. *Wis. Stat. § 59.10 (3) (b) 1.* All of the requirements for establishing a tentative county supervisory district plan described above are provided in *Wis. Stat. § 59.10 (3) (b) 1.* That provision applies to counties other than Milwaukee County. However, Milwaukee County is subject to similar requirements under *Wis. Stat. § 59.10 (2) (a).*

- Solicit suggestions from municipalities concerning the development of an appropriate plan.
- Hold a public hearing on the proposed plan, after which the plan can be amended to incorporate suggestions from municipalities and the general public in the county.
- Submit a copy of the proposed plan to each municipal governing body in the county.

In the event that a municipality needs to be divided between two or more supervisory districts that cannot be accommodated within the existing ward plan, the county board must submit a written statement to the municipality indicating the approximate location and population of proposed wards.

With respect to the tentative plan itself, each plan must satisfy the following statutory requirements:

- The number of districts must equal the number of supervisors. The number of supervisors a county may have depends on population. See table 2.
- The districts must be substantially equal in population.¹⁰⁷
- Each district generally must consist of whole wards or municipalities. The county board may propose splitting municipalities in order to establish the creation of county supervisory districts of substantially equal population. Under the statutes, whenever possible, whole contiguous municipalities or contiguous parts of the same municipality must be placed within the same supervisory district.
- Territory within each district must be contiguous, except for island territory, i.e., territory that is surrounded by water or by the territory of another municipality.¹⁰⁸

2. Municipalities adjust ward boundaries—Phase 2

In Phase 2, municipalities have 60 days after receiving the tentative county supervisory district plan to adjust ward boundaries.¹⁰⁹ But before moving on to discuss the details of Phase 2, it is worth taking a moment to examine the nature and role of wards in the broader redistricting context.

a. **What are wards?** Wards play a central role in redistricting in Wisconsin because they are the building blocks from which congressional, state senate and assembly, county supervisory, and city aldermanic districts are all constructed. Ward boundaries are intended to be as permanent as possible,¹¹⁰ with changes made only to accommodate changes in population, alterations in municipal boundaries, and the mathematical requirements of creating electoral districts of equal population for purposes of one person, one vote.

107. See *supra* Section C. 1. b., Constitutional standards for equal population.

108. See Wis. Stat. § [5.15 \(2\) \(f\) 3.](#)

109. Wis. Stat. § [5.15 \(1\) \(b\).](#)

110. Wis. Stat. § [5.15 \(1\) \(a\) 1.](#)

Table 2. Number of supervisors allowed per county

County population (other qualifiers)	Requirements
750,000+	Wis. Stat. § 59.10 (2) (a) and (d)
Less than 750,000 (more than one town)	Wis. Stat. § 59.10 (3) (a) to (c)
100,000 to 750,000	no more than 47 supervisors
50,000 to 100,000	no more than 39 supervisors
25,000 to 50,000	no more than 31 supervisors
Less than 25,000	no more than 21 supervisors
Less than 750,000 (only one town)	Wis. Stat. § 59.10 (5)

Note: “If the population of any county is within 2 percent of the minimum population for the next most populous grouping under this paragraph, the board thereof, in establishing supervisory districts, may employ the maximum number for such districts set for such next most populous grouping.” [Wis. Stat. § 59.10 \(3\) \(a\) 5.](#)

In many states, what Wisconsin calls “wards” are referred to as “precincts.” The U.S. Census Bureau calls them “voting districts,” but it should be noted that wards are not electoral districts from which officials are elected. Instead, wards serve as administrative subunits that are aggregated into electoral districts. As such, wards are not subject to the one-person, one-vote requirement governing the formation of electoral districts. Rather, the population ranges of wards are set by statute.

The statutes require all cities, villages, and towns in Wisconsin with a population of 1,000 or more to establish wards. Municipalities under 1,000 do not have to establish wards, but may do so to facilitate the administration of elections.¹¹¹ The governing body of a municipality—the city common council or village or town board—is responsible for establishing ward boundaries.¹¹² An ordinance or resolution describing the ward boundaries must be adopted by a majority of the members of the governing body.¹¹³

b. General rules governing wards. In establishing wards, municipalities are required to follow the standards set forth in Wis. Stat. § 5.15. Specifically, wards must:

Be composed of whole census blocks.¹¹⁴ Wards are constructed by aggregating whole census blocks so that the population of the ward falls within the prescribed statutory range. The census block is the smallest unit for which population is tabulated and is usually bounded by streets or other prominent physical features. Municipal and county

111. Wis. Stat. § [5.15 \(2\) \(a\)](#). Even for municipalities not required to divide into wards, the county board may request that the municipality divide into wards if the county board proposes to place the municipality in two or more county supervisory districts.

112. Wis. Stat. § 5.15 (1) (b).

113. *Id.*

114. *Id.*

lines may also serve as block boundaries. Blocks may be as small as a typical city block or as large as several square miles in rural areas. Census blocks normally contain fewer than 100 people.

However, there are exceptions to the whole-block requirement because idiosyncrasies in local demographics and geography sometimes make it untenable to maintain whole census blocks in redistricting. Under the statutes, a municipality may split a census block if the block's population is too large to permit the establishment of aldermanic districts of substantially equal population.¹¹⁵ A census block may also be split if annexed or detached territory divides a block, or if a block is only partly contained in a municipality.¹¹⁶ In that case, the municipality may incorporate only the portion of the block contained within its boundaries.¹¹⁷ Any division of blocks must be based on the best evidence available of where the block's residents actually live.¹¹⁸

Suit the convenience of voters.¹¹⁹ To suit the convenience of the voters, wards must, “as far as practicable, be kept compact and observe the community of interest of existing neighborhoods and other settlements.”

Be composed of contiguous territory, except for island territory.¹²⁰

Comply with the population ranges established by law.¹²¹ Again, wards are not electoral districts and are therefore not subject to equal population requirements. Instead, wards must satisfy the population ranges provided by law, which are tied to the relative population of a municipality. See table 3. Wards may be established below the prescribed population ranges under a number of circumstances specified by law. These include territory that is located in a county or school district other than the county or school district in which the major part of the municipality is located; island territory containing a resident population; territory that becomes part of a municipality after April 1 of the census year; territory consisting of a portion of a ward the remainder of which has been detached from a municipality; and wards established because of deviation between census geography and actual municipal boundaries.¹²²

The statutes further direct that the population of a ward be established at a “convenient point” within the prescribed population range with “due consideration for the

115. Wis. Stat. § 5.15 (2) (c).

116. Wis. Stat. § 5.15 (2) (bm) and (g).

117. *Id.*

118. Wis. Stat. § 5.15 (2) (cm). “Best evidence” includes information such as housing units, utility connections, and vehicle registrations. *Id.*

119. Wis. Stat. § 5.15 (1) (b).

120. *Id.*

121. Wis. Stat. § 5.15 (2) (b).

122. Wis. Stat. § 5.15 (2) (f).

known trends of population increase or decrease.”¹²³ Accordingly, the population of each ward should be set at a level that satisfies the applicable population range and, because wards are intended to be as permanent as possible, that can accommodate fluctuations in population over a relatively long period.

Lie entirely within one municipality and one county.¹²⁴ Wards may not cross municipal or county lines.

Be designated by consecutive, unique whole numbers beginning with the number one.¹²⁵

c. Adjusting ward boundaries on the basis of the census. While ward boundaries are intended to be as permanent as possible, after the federal decennial census, ward boundaries may have to be adjusted to do the following:

Reflect changes in population.¹²⁶ Municipalities may have to adjust the boundaries of those wards which, according to the 2020 census, have either gained or lost population and as a result no longer fit the applicable population range. A ward that exceeds the maximum of the relevant population range is to be divided into two or more wards. A ward that falls below the minimum of the applicable population range is to be combined with an adjacent ward or combined with an adjacent ward, which is itself then subdivided into two or more wards.

Reflect changes in minority population.¹²⁷ Under the statutes, ward boundaries may have to be adjusted “to enhance the participation of members of a racial or language minority group in the political process and their ability to elect representatives of their choice.”¹²⁸ This requirement under state law reflects the mandates of the Voting

Table 3. Ward population ranges, [Wis. Stat. § 5.15 \(2\) \(b\)](#)

Municipality population	Ward population
City of over 150,000	1,000 to 4,000
City of 39,000 to 149,999	800 to 3,200
City, village, or town of 10,000 to 38,999	600 to 2,100
City, village, or town of 1,000 to 9,999	300 to 1,000
Fewer than 1,000	No division required

123. Wis. Stat. § 5.15 (1) (a) 1.

124. Wis. Stat. § [5.15 \(1\) \(d\)](#).

125. Wis. Stat. § [5.15 \(4\) \(a\)](#).

126. Wis. Stat. § [5.15 \(1\) \(a\) 3](#).

127. Wis. Stat. § [5.15 \(1\) \(a\) 2](#).

128. *Id.*

Rights Act of 1965.¹²⁹ Although wards do not directly constitute electoral districts, they are used to form electoral districts, and minority populations must be distributed within a combination of wards in such a manner as to make it possible to combine those wards to construct electoral districts in which a racial or language minority group has an equal opportunity to elect a representative of its choice.

Reflect changes in municipal boundaries.¹³⁰ Ward boundaries must be adjusted to accommodate annexations, detachments, or other changes in municipal boundaries that have occurred since the previous ward plan was adopted. Wards must reflect the municipal boundaries in place on Census Day.¹³¹ Thus, for purposes of redistricting in 2021, ward plans must show municipal boundaries as of April 1, 2020.

Accommodate the establishment of county supervisory districts.¹³² Wards may also need adjustment to permit the establishment of county supervisory districts of substantially equal population. Under the statutes, a municipality must make a “good faith effort” to accommodate the county’s proposed supervisory district plan and must divide itself into wards in a manner permitting the creation of county supervisory districts of substantially equal population.

Facilitate the creation of aldermanic districts.¹³³ A municipality may find it necessary to adjust existing ward boundaries if they no longer allow for the creation of aldermanic districts that are substantially equal in population.

Accommodate a legislative redistricting plan.¹³⁴ Congressional and legislative redistricting typically occur each decade only after municipalities have adjusted ward boundaries. However, if that situation should be reversed in any redistricting cycle, as it was in the 2010 cycle, municipalities are required to adjust ward boundaries to the extent necessary to accommodate a previously enacted congressional or legislative redistricting plan. The amended ordinance or resolution adjusting ward boundaries must be passed by the governing body of the municipality no later than April 10 of the second year following the year of the federal decennial census.

Once a municipality adjusts its wards, it has five days to provide all of the following to the county clerk of each county in which the municipality is located:¹³⁵

- A copy of the resolution or ordinance.

129. See *supra* Section C. 2. b., The Voting Rights Act of 1965.

130. Wis. Stat. § 5.15 (1) (b).

131. *Id.*

132. Wis. Stat. § [5.15 \(2\) \(d\)](#).

133. Wis. Stat. § 5.15 (2) (bm).

134. Wis. Stat. § 5.15 (4) (a).

135. Wis. Stat. § [5.15 \(4\) \(b\)](#).

- A list of the census block numbers contained in each ward and an identification of any split blocks.
- A map of the municipality illustrating the revised ward boundaries.
- A report confirming the boundaries of the municipality and the boundaries of all wards in the municipality.

3. Counties adopt final supervisory district plans; cities adopt aldermanic district plans—Phase 3

Following the adoption of ward plans by municipalities, Phase 3, the final phase of the local redistricting process in Wisconsin, takes place at both the county and city levels: counties adopt final supervisory district plans, and cities not electing their common council at large establish aldermanic district plans.

a. **Final county supervisory district plans.** The county supervisory district plan is finalized only after a process that involves public input. Within 60 days after every municipality in a county has adjusted its wards, the county board is required to adopt a final supervisory district plan and number each district.¹³⁶ Before doing so, however, the county board must first hold another public hearing. Once adopted, the chairperson of the county board is required to file a certified copy of the final plan with the secretary of state.¹³⁷

b. **City aldermanic districts.** At the city level, the common council of a city not electing its common council at large is required to redistrict the city’s aldermanic districts within 60 days after adjusting its ward boundaries.¹³⁸ Aldermanic districts must be “as compact in area as possible” and contain “whole contiguous wards.”¹³⁹

With respect to equal population, the statutes require that aldermanic districts, “as nearly as practicable,” contain “an equal number of inhabitants according to the most recent decennial federal census of population.”¹⁴⁰ While that requirement looks more like an absolute equality of population standard, such as applies to congressional districts under the U.S. Constitution, there are other indications that, like county supervisory districts, the more flexible substantial equality of population standard applies to city aldermanic districts as well. Specifically, state statutes governing wards require wards to permit the creation of aldermanic districts that are “substantially equal in population.”¹⁴¹ That language mirrors the U.S. Supreme Court’s jurisprudence concerning the population

136. Wis. Stat. § [59.10 \(3\) \(b\) 2.](#)

137. *Id.*

138. Wis. Stat. § [62.08 \(1\).](#) Town boards and village boards are elected at large and require no districting.

139. *Id.*

140. *Id.*

141. *See* Wis. Stat. § 5.15 (1) (a) 2. and (2) (bm) and (c).

equality standard under the equal protection clause of the Fourteenth Amendment as applied to both state legislative and local electoral redistricting plans.¹⁴² Under that more deferential rule, a local redistricting plan is presumed to be constitutional if it has an overall range of 10 percent or less.¹⁴³ Moreover, the Supreme Court has said that the circumstances surrounding local redistricting may even justify “slightly greater percentage deviations” for local electoral districts as opposed to state legislative districts.¹⁴⁴

4. Court process

While each phase of the local redistricting process requires that work be completed within a 60-day time frame, the statutes also provide a court process should the required plan at any phase not be adopted by the applicable deadline. For example, if in Phase 1 the county board fails to adopt a tentative supervisory district plan within 60 days after official publication of the census data for Wisconsin, any municipality or elector of the county may petition the circuit court for the county, within 14 days after expiration of the 60-day period, to establish a temporary plan until the plan is superseded by one adopted by the county board.¹⁴⁵ A substantially similar process is provided for the completion of ward plans within 60 days in Phase 2 and the adoption of final county supervisory district plans and city aldermanic district plans in Phase 3.¹⁴⁶

G. Redistricting timeline and potential delays due to COVID-19

The novel form of the coronavirus known as COVID-19 has put America in a virtually unprecedented situation, bringing crises of a magnitude not seen for generations. Coming, as it has, in a census year, the COVID-19 pandemic could affect the timing of redistricting in 2021 due to delays in census operations.

The World Health Organization (WHO) designated a COVID-19 pandemic on March 11, 2020. That designation came at a critical time for the census because early data collection and field operations had already begun or were imminent.¹⁴⁷ The U.S. Census Bureau then suspended field operations after President Donald Trump declared a COVID-19 national health emergency on March 13, 2020.¹⁴⁸ Field operations restarted

142. See *supra* Section C. 1. b., Constitutional standards for equal population.

143. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016). See also *supra* Section C. 1. a., Calculating equal population.

144. *Abate v. Mundt*, 403 U.S. 182, 185 (1971).

145. Wis. Stat. § 59.10 (6).

146. Wis. Stat. §§ 5.18 and 62.08 (5).

147. Congressional Research Service, [2020 Census Fieldwork Delayed by COVID-19](https://crsreports.congress.gov), updated August 17, 2020, <https://crsreports.congress.gov>.

148. *Id.*

in May 2020, but under a staggered approach.¹⁴⁹ All told, the Census Bureau anticipates at least a two-month delay in the completion of census field operations, which could cause delays in the delivery of census data to the states for purposes of redistricting.¹⁵⁰

In a typical reapportionment cycle, the Census Bureau delivers apportionment counts to the president no later than December 31 of the year of the census. As a result of census delays due to COVID-19, the Census Bureau asked Congress to pass a law moving that deadline back to April 30, 2021. However, as of the date of this publication, Congress has not taken any action to delay that statutory deadline. The Census Bureau is taking steps to adjust its operations so that it can get apportionment counts to the president on time.¹⁵¹ The president will provide those counts to the U.S. House of Representatives, along with the number of representatives to which each state is entitled based on population.

In a typical redistricting cycle, the Census Bureau delivers official census data to the states no later than March 31 of the year following the year of the federal decennial census, as required by federal law.¹⁵² As a result of census delays due to COVID-19, the Census Bureau asked Congress to pass a law moving that deadline back to July 31, 2021, for the 2020 redistricting cycle. Again, however, as of the date of this publication, Congress has taken no action to do so. While the Census Bureau has indicated that it is streamlining its operations to try to satisfy both the December 31, 2020, deadline for delivering apportionment counts to the president and the March 31, 2021, deadline for delivering census data to the states, on September 25, 2020, a federal court in California stayed the December 31 deadline for the delivery of apportionment counts to the president.¹⁵³ Additionally, the order prohibits the Census Bureau from imposing a September 30, 2020, deadline on census data collection under the bureau's streamlined processes, which, if the order stands, could affect the timeline for delivery of census data to the states. Notwithstanding that or any other potential litigation that may contribute to delayed delivery of official census data to the states for purposes of redistricting, it is still possible that Congress could take action to satisfy the Census Bureau's request to delay the March 31 statutory deadline.

149. *Id.*

150. Prior to COVID-19, the Census Bureau planned to end data collection on July 31. In June 2020, the end date for data collection was moved to October 31. However, in a statement dated August 3, 2020, the Census Bureau moved that date to September 30, 2020. U.S. Census Bureau, [Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count](https://2020census.org), release no. CB20-RTQ.23, August 3, 2020, <https://2020census.org>. Obviously, this situation is in flux. For up-to-date information on census delays due to COVID-19, visit U.S. Census Bureau, [2020 Census Operational Adjustments Due to COVID-19](https://2020census.org), <https://2020census.org>.

151. U.S. Census Bureau, [Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count](https://2020census.org), release no. CB20-RTQ.23, August 3, 2020, <https://2020census.org>.

152. 13 U.S.C. § 141 (c).

153. National Urban League, et al., v. Wilbur L. Ross, et al., Case No. 20-CV-05799-LHK (N.D. Cal. Sept. 24, 2020) ([Order Granting Plaintiffs' Motion for Stay and Preliminary Injunction](#)).

There is no specific deadline for congressional and state legislative redistricting in Wisconsin, except that the state constitution provides that the legislature take up state legislative redistricting during the first legislative session following the federal decennial census.¹⁵⁴ However, if the partisan primary and general election in 2022 are to be held based on new maps, congressional and state legislative redistricting must be completed in time for nomination papers to be circulated in April 2022 and filed no later than June 1, 2022. Otherwise, the partisan primary and general election will be held under the existing maps. Figure 4 shows the election schedule for 2022.

Unlike congressional and state legislative redistricting, local redistricting occurs according to a specific timeline established by statute.¹⁵⁵ Phase 1 of the local redistricting process, the adoption by counties of tentative supervisory district plans, is required to occur within 60 days after the official publication of the census data for Wisconsin “but no later than July 1 following the year of each decennial census.”¹⁵⁶ Obviously, if census data are not reported to the state until after March 31, 2021, counties’ completion of Phase 1 could be pushed back as well, depending on the length of the delay. Because each phase of the local redistricting process may not begin until the prior phase ends, any delay in Phase 1 could likewise cause delays to Phase 2, the adoption of ward plans by municipalities, and Phase 3, the adoption of final county supervisory district plans and city aldermanic district plans. Figure 5 provides the default local redistricting timeline, which assumes the state receives census data no later than March 31, 2021. The timeline

Figure 4. **Election timeline, 2022**

December 1, 2021	Nomination papers circulated for spring primary
January 4, 2022	Deadline for filing nomination papers for spring primary
February 15, 2022	Spring primary
April 5, 2022	Spring election
April 15, 2022	Nomination papers circulated for partisan primary
June 1, 2022	Deadline for filing nomination papers for partisan primary
August 9, 2022	Partisan primary
November 8, 2022	General election

154. See *supra* Section E. 2., Legislative redistricting.

155. See *supra* Section F., Local redistricting in Wisconsin.

156. [Wis. Stat. § 59.10 \(3\) \(b\) 1](#). See also *supra* Section F. 1., Counties adopt tentative supervisory district plans—Phase 1.

Figure 5. **Local redistricting timeline**

March or April 2021	Pub. L. No. 94-171 file received and published
June 2021	Counties adopt tentative supervisory plans
August 2021	Municipalities adjust ward boundaries
October 2021	Counties establish supervisory districts
October 2021	Cities establish aldermanic districts

would have to be adjusted accordingly if the Census Bureau is ultimately unable to deliver census data to the states by that date.

Delays in the local redistricting process could mean that elections of local government officials may have to be conducted under existing electoral maps in 2022. Specifically, city alders and county board supervisors are elected at the spring election. Nomination papers for the spring primary are scheduled to be circulated in December 2021 and must be filed no later than January 4, 2022. The spring primary will be held on February 15, 2022, and the spring election will be held on April 5, 2022. See figure 4. If local redistricting is delayed due to late receipt of census data, the spring primary and election may have to be held under the existing maps.

H. Conclusion

Redistricting is an infrequent and complex process. It happens only once every ten years, and it did not even occur with that kind of regularity until the U.S. Supreme Court established the one-person, one-vote rule in the 1960s. Since that time, the boundaries of congressional, state legislative, and local electoral districts have had to be updated at least once every ten years to account for shifts in population over time. Maintaining equal population among electoral districts is the fundamental aim of the redistricting process as a whole. Doing so helps ensure that representation in legislative bodies is proportional and elections are demographically equal, principles that James Wilson articulated 175 years before the Supreme Court first laid out the rule of one person, one vote.

The redistricting process must also take into account race and ethnicity. The Fourteenth and Fifteenth Amendments effectively prohibit discrimination in redistricting on the basis of race. And the Voting Rights Act of 1965 requires officials engaged in redistricting to take positive steps to safeguard the equal participation of racial or language minority groups in the political process and their ability to elect representatives of their choice.

Equal population and minority protection: these are the two core principles that inform the entire redistricting process. Other traditional redistricting principles are also at play, including that districts be reasonably compact and respect the boundaries of political subdivisions. But even those much older redistricting principles must often give way to the mandates of equal population and minority protection.

In 2021, the redistricting process in Wisconsin could suffer delays due to late reporting of the 2020 census data as a result of the COVID-19 pandemic. Whether that will happen and the extent of potential delays remain to be seen, but should it happen, those delays could pose special challenges in a process that is already fraught with complexity and often controversy. However, the American system of government has proven to be exceedingly resilient over the 232 years since the Constitution was ratified. To be sure, that is true in no small part because the Framers, as Justice Anthony Kennedy once remarked, “split the atom of sovereignty” when they took the innovative approach of dividing political power between the national government and the states.¹⁵⁷ Under that federalist system, the power to redraw the boundaries of congressional districts rests with the states, in addition to state legislative and local electoral districts. As Part II of this publication shows, Wisconsin has weathered many rocky redistricting cycles in her 172 years of statehood. While the 2020 redistricting cycle may pose unique challenges in the wake of a global pandemic, Wisconsin is well positioned to meet those challenges. ■

157. [United States Term Limits v. Thornton](#), 514 U.S. 779, 838 (1995) (Kennedy, J. concurring) (“Federalism was our Nation’s own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.”).

Part II

History of Congressional and Legislative Redistricting in Wisconsin

A. Introduction

Redistricting is the process by which states adjust the boundaries of congressional, state legislative, and local electoral districts to account for shifts in population over time. Part I of this publication sets forth the laws, principles, and processes that apply to redistricting at all levels in Wisconsin. Part II traces the history of legislative and congressional redistricting in Wisconsin and shows how the law and process governing redistricting in the state have evolved through at least three distinct eras over more than 200 years.

The first era, Wisconsin's territorial days, began with the creation of a territorial legislature by the Northwest Ordinance of 1787 and continued through the subsequent establishment of the Wisconsin Territory in 1836 by an act of Congress, which uniquely empowered the governor, rather than the legislature, to apportion the seats of the territorial legislature. Upon statehood, the second era commenced in 1848 when the people of Wisconsin ratified a constitution that required the legislature, not the governor, to apportion and redistrict legislative seats every five years "according to the number of inhabitants."

By 1910, legislative redistricting was required only every ten years, and the legislature and the governor often succeeded in redrawing congressional and legislative district boundaries with relatively little controversy. At the same time, however, rules imposed by the Wisconsin Supreme Court, especially the rule that assembly districts not cross county lines, made redrawing legislative district boundaries on the basis of population more and more difficult. Also, while the boundaries of legislative districts were redrawn on a regular basis, the legislature, as was true in other states, typically undertook congressional redistricting only when Wisconsin's apportionment of seats in the U.S. House of Representatives changed. As a result, Wisconsin's congressional districts sometimes included significant population disparities that had developed over time, especially during the first half of the twentieth century.

Finally, the 1960s ushered in the era of one person, one vote when the U.S. Supreme Court held that legislative and congressional districts must satisfy certain equal population standards under the U.S. Constitution. As a result, congressional districts, as well as legislative districts, had to be adjusted at least once every ten years to account for shifts in population as shown by the federal decennial census. Additionally, if, after any census, the legislature and the governor failed to enact new legislative or congressional maps, the courts themselves would do so. This was nothing less than a sea change. Prior to the 1960s, federal courts would not even entertain redistricting disputes in the first place because the U.S. Supreme Court considered redistricting to involve political questions beyond the jurisdiction of the courts. While the Wisconsin Supreme Court did

hear redistricting disputes, it had also ruled that it lacked the authority to compel the legislature to redistrict or to itself undertake redistricting if the legislature and the governor failed to do so. However, after the establishment of the principle of one person, one vote, courts established state legislative district maps for Wisconsin in the 1960, 1980, 1990, and 2000 redistricting cycles, although in the 1980 cycle, the legislature ended up enacting a plan that superseded but did not deviate substantially from the court's plan. So, when in 2011, the legislature and the governor succeeded in adopting a legislative redistricting plan, it turned out to be somewhat the exception despite the fact that the state constitution contemplates that process as the rule.

From Wisconsin's territorial days to 2011 Wisconsin Act 43, when it comes to redistricting, Wisconsin has quite a story to tell, as Part II of this publication shows.

B. The Wisconsin Constitution and early apportionments and redistricting

1. Early legislative redistricting

a. **Wisconsin's territorial days.** The story of legislative redistricting in Wisconsin begins in 1787, when an area that today contains the State of Wisconsin was first organized under the Northwest Ordinance. Representatives in the territorial legislature were elected from counties or townships, and the ordinance provided that inhabitants of the territory were entitled to "a proportionate representation in the Legislature."¹

The Twenty-Fourth United States Congress created the Wisconsin Territory in 1836, when it passed legislation establishing the Territorial Government of Wisconsin.² That act created a legislative assembly, which was divided into a council, consisting of 13 members, and a house of representatives, consisting of 26 members, but gave the governor, not the legislature, the power of legislative apportionment.³ Seats in both houses of the territorial legislature were apportioned on the basis of population to electoral districts, each of which consisted of one or more whole counties.⁴ All members were elected at large, and there were no single-member districts except for those apportioned only one seat.⁵

1. Northwest Ordinance, art. II, [An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio](https://www.ourdocuments.gov) (1787), <https://www.ourdocuments.gov>.

2. [U.S. Stat. Ch. LIV \(1836\)](#).

3. *Id.* § 4.

4. *Id.* See also H. Rupert Theobald, "[Legislative and Congressional Reapportionment in Wisconsin: A Summary of the Law, Together with a Chronology of Wisconsin Reapportionment since 1836](#)," *Research Bulletin* 70-2 (Madison, WI: Legislative Reference Bureau, 1970), 3-5; H. Rupert Theobald, "[Equal Representation: A Study of Legislative and Congressional Apportionment in Wisconsin](#)," *Wisconsin Blue Book* (Madison, WI: Legislative Reference Bureau, 1970), 77-78, 80, and n.2.

5. Theobald, "Equal Representation," *supra* note 4, at 198.

b. Wisconsin's two constitutional conventions. Wisconsin's first constitutional convention convened in October 1846.⁶ The proposed constitution that emerged from that convention substantially retained the territorial legislative apportionment scheme, except that the legislature rather than the governor would have the power to reapportion legislative districts. The legislature was to consist of a senate and a house of representatives, and senate and house districts were to consist of whole counties.⁷ All members would be elected at large from their districts, and there would be no single-member districts other than those districts apportioned only one seat on the basis of population.⁸

The members of the first constitutional convention considered, but rejected, a legislative apportionment scheme based on single-member districts.⁹ Proponents of a single-member district apportionment scheme saw it as being more “purely democratic” because representatives would be better known and more accountable to the people of the district.¹⁰ Proponents of single-member districts also argued that in multi-member districts, members of the legislature would invariably be elected from population centers within a district, giving inhabitants of less populous areas “no chance of direct representation.”¹¹ Proponents of multi-member districts, however, believed that the creation of single-member districts was not practically possible and that members at the constitutional convention had been duped into thinking the single-member district proposal was a “democratic measure,” when, they alleged, it was in fact “a political scheme.”¹² Debate on this issue at the first constitutional convention “had been a very political, and rather emotional, floor fight.”¹³

The voters ultimately rejected the proposed constitution in April 1847 (14,199 for; 30,231 against).¹⁴ According to former chief of the Wisconsin Legislative Reference Bureau, H. Rupert Theobald, “[i]t appears that the absence of a single-member districting system was one of the reasons which led to the defeat of the proposed Constitution.”¹⁵

At the territory's second constitutional convention, which convened in Madison on December 15, 1847, the framers, only a few of whom had been elected to the first

6. See Frederick L. Holmes, “[First Constitutional Convention in Wisconsin, 1846](#),” in *Proceedings of the State Historical Society of Wisconsin, 1905* (Madison, WI: State Historical Society of Wisconsin, 1906), 233.

7. [Constitution of the State of Wisconsin \(rejected\)](#), art. V, §§1 and 4 (1846).

8. See *id.* § 4; Theobald, “Equal Representation,” *supra* note 4, at 80.

9. Theobald, “Equal Representation,” *supra* note 4, at 80.

10. See *id.* at 81 (comments of Mr. Drake at the first constitutional convention) and 86 (comments of Orasmus Cole at the second constitutional convention) (“If any principle was purely democratic, the single district system was so.”).

11. *Id.* at 87 (comments of Warren Chase at the second constitutional convention). See also *id.* at 83 (comments of Mr. Drake at the first constitutional convention, appearing in *Wisconsin Argus*).

12. *Id.* at 83 (comments of G. Hyer appearing in the *Madison Express* newspaper dated December 8, 1846).

13. *Id.* at 82.

14. Theobald, “Equal Representation,” *supra* note 4, at 86.

15. *Id.* at 80.

constitutional convention, again took up the contentious question of apportionment of legislative districts.¹⁶ And again, the issue was hotly contested.¹⁷ However, the framers ultimately settled on a proposed constitution in which members of the legislature, consisting of a senate and an assembly, would be elected from single-member districts, adjusted periodically to account for shifts in population over time. The original version of article IV, section 3, of the Wisconsin Constitution required that state legislative districts be adjusted every five years, and required the state to conduct its own mid-decade census in addition to the federal decennial census.¹⁸ Sessions of the new state legislature were annual rather than biennial as they are now. Members of the assembly served for only one year and senators served for two.¹⁹ Today, assembly representatives serve for two years and state senators serve four-year terms.²⁰

With respect to reapportionment and redistricting, the new constitution required the legislature, every five years, to “apportion and district anew the members of the senate and assembly, according to the number of inhabitants.”²¹ Article IV, section 4, required that assembly districts “be bounded by county, precinct, town or ward lines, to consist of contiguous territory, and be as compact in form as practicable.” Article IV, section 5, provided that senators be elected from “single districts of convenient contiguous territory” and that “no assembly district shall be divided in the formation of a senate district.” These requirements remain largely intact in the Wisconsin Constitution today, but in some respects their application has changed over time.

The new constitution also made the initial apportionment and established districts for the fledgling state legislature.²² While article IV, section 3, required that districts be created “according to the number of inhabitants,” the initial districting itself would not have satisfied contemporary equal-population standards. For example, the largest assembly district had 6,487 residents, more than twice the ideal of 3,290, and the largest senate district had 15,866 residents, well over the ideal of 11,081.²³ These population disparities resulted in large part from the framers’ choice to strictly adhere to county lines in the creation of senate and assembly districts.²⁴

Article IV, section 2, of the new state constitution, a section that has never been

16. *Id.* at 83. Of the 124 members elected to the first constitutional convention, only six were reelected to serve at the second constitutional convention. *Id.*

17. *See id.* at 83–87.

18. [Constitution of the State of Wisconsin \(1848\)](https://babel.hathitrust.org), <https://babel.hathitrust.org>.

19. Wis. Const., art. IV, §§ 4 and 5 (1848).

20. Wis. Const., art. IV, §§ 4 and 5.

21. Wis. Const., art. IV, § 3 (1848).

22. Wis. Const., art. XIV, § 12 (1848).

23. Theobald, “Equal Representation,” *supra* note 4, at 93.

24. *Id.* at 94.

amended, required that the assembly have at least 54 but no more than 100 members and that the senate have at least one-fourth but no more than one-third the number of members of the assembly. The first legislative apportionment created a senate with 19 members and an assembly with 66.²⁵ The legislature increased the number of senators and assembly representatives in 1852 and 1856, and by 1861, the legislature reached the maximum number of members allowed under the constitution: 33 senators and 100 assembly representatives.²⁶ Increasing the size of the legislature allowed the creation of new seats in parts of the state whose populations were rapidly growing, without having to reduce the number of seats already apportioned to other parts of the state.

Early legislative reapportionment and redistricting plans were relatively uncontroversial and for the most part established assembly districts without crossing county lines.²⁷ However, the 1887 redistricting plan included four assembly districts that crossed county lines—the most extensive cross-county lines redistricting that had occurred up to that point.²⁸ Five years later, in 1892, the Wisconsin Supreme Court would limit the extent to which assembly districts may cross county lines and would establish an equal population standard for purposes of redistricting “according to the number of inhabitants” under the state constitution.

c. **The *Cunningham* cases of 1892.** In 1890, after a decade of Republican dominance in state government, the people of the state elected a Democrat, George W. Peck, as governor, and Democrats won large majorities in both houses of the state legislature.²⁹ The legislature and the governor soon enacted a redistricting plan that “contained more Assembly districts across county lines than any of its predecessors, yet failed to achieve substantial population equality among districts.”³⁰ The Republicans sued, and the Wisconsin Supreme Court heard the dispute under its original jurisdiction.

In the decisions that followed, *State ex rel. Attorney General v. Cunningham*³¹ and *State ex rel. Lamb v. Cunningham*,³² both of which were decided in 1892, the Wisconsin Supreme Court made several key determinations that would shape redistricting cycles in Wisconsin for some years to come. First, a full 70 years before the U.S. Supreme

25. Theobald, “Legislative and Congressional Reapportionment in Wisconsin,” *supra* note 4, at 6.

26. *Id.* at 8; Theobald, “Equal Representation,” *supra* note 4, at 98.

27. Theobald, “Legislative and Congressional Reapportionment in Wisconsin,” *supra* note 4, at 7–12.

28. *Id.* at 12. See also Theobald, “Equal Representation,” *supra* note 4, at 244.

29. Theobald, “Legislative and Congressional Reapportionment in Wisconsin,” *supra* note 4, at 12; Theobald, “Equal Representation,” *supra* note 4, at 98.

30. Theobald, “Legislative and Congressional Reapportionment in Wisconsin,” *supra* note 4, at 13. See also Theobald, “Equal Representation,” *supra* note 4, at 246.

31. *State ex rel. Attorney Gen. v. Cunningham* 81 Wis. 440 (1892) (Cunningham I).

32. *State ex rel. Lamb v. Cunningham* 83 Wis. 90 (1892) (Cunningham II).

Court held in *Baker v. Carr*³³ that federal courts could adjudicate the constitutionality of redistricting plans, the Wisconsin Supreme court held for the first time that it had “the judicial power to declare [an] apportionment act unconstitutional, and to set it aside as absolutely void.”³⁴

Second, decades before the U.S. Supreme Court established the one-person, one-vote rule under the federal Constitution,³⁵ the Wisconsin Supreme Court held that state legislative districts in a redistricting plan must be as close to exactly equal in population as possible if the plan is to satisfy the state constitution’s mandate that the legislature redistrict senate and assembly districts “according to the number of inhabitants.” Invalidating the redistricting plan before it, the court in *Cunningham I* reasoned that the people of Wisconsin are entitled to equal representation in the legislature:

But, again, this apportionment act violates and destroys one of the highest and most sacred rights and privileges of the people of this state, guaranteed to them by the Ordinance of 1787 and the constitution, and that is “equal representation in the legislature.” . . . It is proper to say that *perfect exactness* in the apportionment according to the number of inhabitants is neither required nor possible. But there should be as close an approximation to *exactness* as possible, and this is the utmost limit for the exercise of legislative discretion.³⁶

The court held that the redistricting plan at issue represented a “wide and bold departure from this constitutional rule.”³⁷ However, the supreme court made two important caveats. First, the requirement of equal population had to be balanced against the state constitution’s other redistricting requirements, including the requirement that assembly districts “be bounded by county, precinct, town or ward lines.”³⁸ As the supreme court acknowledged in the second of the *Cunningham* cases, “it is impossible to secure exact and equal representation, by reason of the constitutional hindrances mentioned; and it is because of such hindrances, and only because of such hindrances, that the legislature, under the constitution, are at liberty to depart from the equality of representation.”³⁹

33. *Baker v. Carr*, 369 U.S. 186 (1962).

34. *Cunningham I*, 81 Wis. at 486. Before the U.S. Supreme Court’s 1962 decision in *Baker v. Carr*, federal courts generally refused to hear redistricting disputes because the U.S. Supreme Court had taken the position that such disputes involved a political question beyond the jurisdiction of the federal courts. See *Colegrove v. Green*, 328 U.S. 549, 556 (1946). See also *infra* Section C. 1., Redistricting 1960.

35. See *infra* Section C. 1., Redistricting 1960. See also Part I, Section C. 1., Equal Population.

36. *Cunningham I*, 81 Wis. at 483–4 (emphasis in original).

37. *Id.* at 484 (“If, as in this case, there is such a wide and bold departure from this constitutional rule that it cannot possibly be justified by the exercise of any judgment or discretion and that evidences an intention on the part of the legislature to utterly annul and disregard the rule of the constitution in order to promote some other object than a constitutional apportionment, then the conclusion is inevitable that the legislature did not use any judgment or discretion whatever.”).

38. *Id.* at 486.

39. *Cunningham II*, 83 Wis. at 150.

Second, assembly districts could not split counties. An assembly district may contain one or more whole counties, or a county may contain one or more whole assembly districts, but no county may be split and partially joined to another county in the formation of an assembly district.⁴⁰

The Wisconsin Supreme Court was well ahead of the times in the *Cunningham* cases, which anticipated similar rulings of the U.S. Supreme Court by 70 years, at least with respect to equal population requirements and justiciability. However, the *Cunningham* cases' prohibition against splitting counties to form assembly districts made redistricting more and more challenging as the state's population changed over time. Even when decided, the *Cunningham* cases were perceived as putting new and burdensome restraints on the redistricting process in Wisconsin. Governor Peck said at the time, “[B]y the same rules and principles which have now been announced by the court no apportionment ever made in the state since the adoption of the constitution has been constitutional or valid.”⁴¹ Nevertheless, the legislature ultimately passed a redistricting plan in 1892 that Governor Peck signed. In 1970, former chief of the Wisconsin Legislative Reference Bureau, H. Rupert Theobald, remarked that the 1892 plan was “astounding in its strict adherence to equal population numbers,” at least as compared to all previous plans.⁴²

d. Redistricting after the *Cunningham* cases. Following the 1892 redistricting cycle, the state enacted new plans in 1896, following the obligatory 1895 state census, and in 1901, following the federal decennial census.⁴³ The state conducted another mid-decade census in 1905, but no redistricting plan followed.⁴⁴ The people of the state then ratified a constitutional amendment in 1910 that eliminated the mid-decade state census and instead required redistricting only every ten years based on the federal decennial census.⁴⁵ New state legislative redistricting plans were enacted in 1911 and 1921.⁴⁶

In 1931, the legislature passed a plan that altered assembly district boundaries within

40. *Id.* at 148. That second caveat anticipates another holding, made almost in passing, buried deep in the lengthy opinion in *Cunningham II*. The court held that if a county contains two or more whole assembly districts, a “new unit of representation” is established, meaning that the equal population of those districts is to be measured only with respect to the assembly districts contained within that county, not with respect to the statewide assembly redistricting plan as a whole. *Id.* at 150. That holding may have been intended to alleviate at least some of the tension between the equal population requirement and the requirement that counties not be split in the formation of assembly districts. In any case, it appears not to have been followed in later redistricting decisions of the Wisconsin Supreme Court, which evaluate the equal population of all assembly districts statewide, not on a county-by-county basis. *See, e.g.,* State ex rel. Bowman v. Dammann, 209 Wis. 21, 24–27 (1932) (evaluating an assembly reapportionment plan based on the state’s total population).

41. Theobald, “Equal Representation,” *supra* note 4, at 104. The rule against dividing counties in the formation of assembly districts would ultimately be discarded in the 1970s as untenable in the face of the federal constitutional requirement of one person, one vote. *See infra* Section C. 2., Redistricting 1970.

42. Theobald, “Equal Representation,” *supra* note 4, at 104.

43. *See* Theobald, “Legislative and Congressional Reapportionment in Wisconsin,” *supra* note 4, at 14–15.

44. *Id.* at 15–16.

45. *Id.* at 16.

46. *Id.* at 16–17.

counties without reapportioning seats.⁴⁷ As a result, some more populous counties were underrepresented in the plan, while less populous counties were overrepresented.⁴⁸ For example, on the basis of population, Milwaukee County, with 725,263 residents, or approximately 24.68 percent of the state's population, should have been apportioned 24 or 25 assembly districts, but remained at 20.⁴⁹ Based on the 1930 census, Wisconsin's population was 2,939,006.⁵⁰ With 100 assembly districts, the ideal district size would therefore be 1 percent of the total population, or 29,390 people. In contrast to Milwaukee County, Door County and Kewaunee County were overrepresented in the plan. While contiguous, the two counties were apportioned one assembly district each, whereas if they had been combined to form a single district, the combined district would have had a population of approximately only 1.17 percent of the state's population, a smaller deviation from the ideal district size than was evident in many other districts in the plan.⁵¹ The plan also included clear inequalities in population among assembly districts and was challenged in the state supreme court in *State ex rel. Bowman v. Dammann*.

The supreme court refused to overturn the plan. To begin with, the court said that when reviewing a reapportionment and redistricting plan, "several things must be kept in mind at once."⁵² First, while "the legislature [is] bound by constitutional mandate to avoid unnecessary inequalities in representation," the state constitution, as the *Cunningham* cases had also recognized, "contains other provisions which militate against absolute equality and which of necessity give to the legislature some freedom of action in adjusting the districts."⁵³ The *Bowman* court added, "All of these other constitutional requirements are plainly obstructions to precise equality."⁵⁴

Second, the court approaches reapportionment and redistricting acts in the same way as other acts, which benefit from a presumption of constitutionality:

A reapportionment act should be approached by this court in the same manner and spirit as any other act the constitutionality of which is brought into question. Every presumption in favor of the validity of the act and the good faith and fairness of the legislature should be indulged in, and the act should be sustained unless there is such a wide and bold departure from this constitutional rule that it cannot possibly be justified by the exercise of any judgment or discretion and that evidences an intention on the part of the

47. *Id.* at 18.

48. *State ex rel. Bowman*, 209 Wis. at 24–27.

49. *Id.* at 24–25.

50. See Theobald, "Legislative and Congressional Reapportionment in Wisconsin," *supra* note 4, at 18.

51. *Id.* at 25–26.

52. *Id.* at 27.

53. *Id.*

54. *Id.*

legislature to utterly annul and disregard the rule of the constitution in order to promote some other object than a constitutional apportionment.⁵⁵

With those principles in mind, the court upheld the redistricting plan. The court distinguished the maps in *Bowman* from the maps at issue in the *Cunningham* cases, which, the court said, had contained “clear and obvious gerrymanders.”⁵⁶ Instead, viewing the maps in *Bowman* as a whole, the plan, while imperfect, generally satisfied constitutional requirements.⁵⁷ The court also acknowledged the political reality that “the enactment of such a law presents practical difficulties, arising from the necessity that it secure the approval of both houses of the legislature.”⁵⁸ The court punctuated that point, quoting at length from a decision of the Court of Appeals of New York, a quote that is worth setting out in full here:

“It can be stated at the outset that although the fairest that has been passed upon the subject, the act is not an ideal one. There are some inequalities which any one individual intrusted with the power might at once remedy, but which might be very hard to alter when brought under the review of one hundred and twenty-eight assemblymen and thirty-two senators. Local pride, commercial jealousies and rivalries, diverse interests among the people, together with a difference of views as to the true interests of the localities to be affected, all these things and many others might have weight among the representatives upon the question of apportionment, so that in order to accomplish any result at all, compromise and conciliation would have to be exercised. Looking at the act as a result of such circumstances, and it seems clear that it cannot be said to be so far a violation of legislative discretion as to cause its complete overthrow by the courts.”⁵⁹

Indeed, after the state supreme court upheld the 1931 state legislative redistricting plan, political realities began to overshadow the process in ways not seen before. No redistricting occurred following the 1940 census, although minor revisions to the existing plan based on the 1930 census were enacted in 1943 and 1945 to account for local annexations and ward changes.⁶⁰ In the face of that legislative inaction, a petition was filed with the state supreme court seeking to compel the legislature to undertake legislative redistricting, but the supreme court denied the petition.⁶¹ The court held that it lacked the power to compel the legislature to pass a redistricting plan.⁶² The court further held that

55. *Id.* at 28 (internal quotation marks omitted).

56. *Id.* at 31.

57. *Id.*

58. *Id.*

59. *Id.* at 31–32 (quoting *People ex rel. Carter v. Rice*, 135 N.Y. 473, 31 N.E. 921, 929 (NY Ct. App. 1892)).

60. See Theobald, “Legislative and Congressional Reapportionment in Wisconsin,” *supra* note 4, at 19.

61. *State ex rel. Martin v. Zimmerman*, 249 Wis. 101, 111 (1946).

62. *Id.* at 104.

it lacked authority to itself put a redistricting plan in place, a holding the state supreme court would ultimately reverse in 1964.⁶³

e. **The Rosenberry Act.** Unlike the 1940 redistricting cycle, after the 1950 census, the legislature took action to redraw the boundaries of legislative districts by creating a study committee to work on redistricting.⁶⁴ The committee consisted of two senators, three members of the assembly, and three members of the public, one of whom was Marvin Rosenberry, a former chief justice of the Wisconsin Supreme Court, who chaired the committee.⁶⁵ The study committee drafted a plan, which became [Chapter 728, Laws of 1951](#), known as the Rosenberry Act.⁶⁶ The Rosenberry Act was likely the most proportionate redistricting plan based on equal population that had been passed since the 1892 plan following the *Cunningham* cases.⁶⁷

However, under Section 3 of the Rosenberry Act, the redistricting plan itself could take effect only if the voters rejected an advisory referendum at the November 1952 general election. A group of rural legislators had called for a constitutional amendment that would allow state senate districts to be constructed in part on the basis of land area in addition to population. The advisory referendum posed that question to the voters, which the voters rejected.⁶⁸ Despite the advisory referendum's failure, the Rosenberry Act had no effect before a series of events led to its being superseded in significant part by a subsequent act of the legislature.⁶⁹

When the voters rejected the advisory referendum in 1952, a constitutional amendment authorizing the formation of senate districts in part based on land area had already been making its way through the legislature.⁷⁰ The 1951 legislature had passed the constitutional amendment on first consideration, and, notwithstanding the voters' rejection of the advisory referendum at the general election in 1952, the 1953 legislature passed the amendment on second consideration and referred the amendment to referendum at the spring election that year.⁷¹ The voters ratified the amendment on April 7, 1953.⁷²

63. *Id.*; [State ex. rel. Reynolds v. Zimmerman](#), 22 Wis.2d 544, 564 (1964). See also *infra* Section C. 1., Redistricting 1960.

64. See Theobald, "Legislative and Congressional Reapportionment in Wisconsin," *supra* note 4, at 20.

65. *Id.*

66. *Id.*

67. *Id.* See also Theobald, "Equal Representation," *supra* note 4, at 252.

68. Theobald, "Legislative and Congressional Reapportionment in Wisconsin," *supra* note 4, at 21–22. The referendum failed by a vote of 753,092 to 689,615. *Id.* at 21.

69. *Id.* at 22. Section 3 of the Rosenberry Act provided it would take effect on January 1, 1954, if the voters rejected the advisory referendum.

70. *Id.* For the Wisconsin Constitution to be amended, two successive legislatures must pass the constitutional amendment, after which the amendment must be ratified by the people of the state at a referendum. Wis. Const., art. XII, § 1.

71. Theobald, "Legislative and Congressional Reapportionment in Wisconsin," *supra* note 4, at 22.

72. *Id.* Voter turnout at the spring election was considerably lower than that of the preceding general election at which the advisory referendum had been rejected. The voters at the spring election ratified the constitutional amendment by a vote of 433,033 in favor to 406,133 against. *Id.*

After ratification, the legislature implemented the constitutional amendment by passing a redistricting plan that established senate districts based in part on land area in addition to population.⁷³ The plan, known as the Rogan Act, was enacted in June 1953 as [Chapter 242, Laws of 1953](#). However, the Rogan Act was challenged in court on the basis that the various changes that had been included in the constitutional amendment—not only area apportionment but also elimination of the requirement that senate districts consist of whole assembly districts and permission to use village boundaries in creating legislative districts—constituted separate questions that should have been submitted to the people individually. The supreme court agreed, invalidating the constitutional amendment and ruling that the Rosenberry Act should be the basis for the next election cycle and the Rogan Act nullified.⁷⁴ The redistricting plan under the Rosenberry Act was in place when the 1960 redistricting cycle rolled around.⁷⁵

2. Early congressional redistricting

After statehood, congressional districts in Wisconsin were historically redrawn only when the number of congressional seats apportioned to the state changed, which typically occurred each decade until 1910. On May 29, 1848, Wisconsin entered the union as the thirtieth state, with two congressional representatives, which was reflected in its original 1848 constitution.⁷⁶ The two members of Congress took their seats in the U.S. House of Representatives at the beginning of June to finish out the thirtieth term of Congress.

According to Section 7 of its statehood act, Wisconsin would be entitled to a third congressional representative “from and after” March 4, 1849—the start of the next congressional term.⁷⁷ Thus, Chapter 11, Laws of 1848, divided the state into three congressional districts for the upcoming general election, and three representatives from Wisconsin joined the thirty-first Congress.⁷⁸ Following the 1850 census, Wisconsin was apportioned the same number of congressional seats it had held since 1849.⁷⁹ Because of this, Wisconsin retained for the rest of the 1850s the same three-member division congressional district plan that had been enacted in 1848.

Following its admission to the union, Wisconsin experienced steady growth in

73. *Id.*

74. [State ex rel. Thompson v. Zimmerman](#), 264 Wis. 644 (1953).

75. *See infra* Section C. 1., Redistricting 1960.

76. [Wis. Const., art. XIV, § 10 \(1848\)](#).

77. [Wisconsin Statehood Act, Ch. 50, Sess. I., 30th Cong. \(1848\)](#).

78. Ch. 11, Laws of 1848, published in the [Laws of the State of Wisconsin](#) (Madison: Rhenodyne A. Bird, State Printer, 1848), 15–16.

79. [“Apportionment Legislation 1840–1880: Census Act of 1850,”](#) U.S. Census, accessed July 28, 2020, <https://www.census.gov>.

population for more than a half century. Over the next six redistricting cycles, beginning in 1860, the state was gradually apportioned more congressional representatives and the legislature and the governor enacted congressional redistricting plans without controversy. On the basis of the results of the 1860 census, Wisconsin doubled its congressional delegation, having been apportioned six seats in the U.S. House of Representatives.⁸⁰ From the 1860s to 1900s, Wisconsin continued to gain congressional seats, redrawing congressional districts every decade: eight seats in the 1870s;⁸¹ nine seats in the 1880s;⁸² ten seats in the 1890s;⁸³ and eleven seats in the 1900s.⁸⁴ On the basis of the results of the 1910 census, Wisconsin retained 11 seats.⁸⁵ Eleven congressional seats is the largest apportionment that Wisconsin has received to date.

Following the 1920 census, the U.S. House of Representatives failed to reapportion itself for the first and only time in history. Without a reapportionment, the state legislature took no action to redistrict congressional seats, retaining for the rest of the 1920s the same congressional district plan that had been enacted in 1911.

On the basis of the results of the 1930 census, Wisconsin lost a seat, and the legislature convened in special session to pass a redistricting plan, which the governor signed.⁸⁶ However, from 1931 to 1963, the legislature did not undertake congressional redistricting because the number of congressional seats apportioned to the state remained at 10.

C. Redistricting in the era of one person, one vote

1. Redistricting 1960

In 1961, Republicans controlled the legislature and a Democrat, Gaylord Nelson, was governor, a situation not conducive to the expeditious drawing of legislative and congressional districts. By November of that year, the Democratic state attorney general, John Reynolds, advised the legislature that he would file suit in the state supreme court to compel the legislature to take action on redistricting if the legislature could not devise new plans. Ultimately, the legislature could not pass a plan and Reynolds filed suit. The court declined to take up Reynolds's complaint, but, instead, indicated that he could renew his complaint if the next legislature failed to draw new maps.

On March 26, 1962, shortly after the state supreme court advised Reynolds to wait,

80. [Ch. 238, Laws of 1861](#), was enacted to redistrict Wisconsin's six congressional seats.

81. [Ch. 48, Laws of 1872](#), was enacted to redistrict Wisconsin's eight congressional seats.

82. [Ch. 244, Laws of 1882](#), was enacted to redistrict Wisconsin's nine congressional seats.

83. [Ch. 483, Laws of 1891](#), was enacted to redistrict Wisconsin's 10 congressional seats.

84. [Ch. 398, Laws of 1901](#), was enacted to redistrict Wisconsin's 11 congressional seats.

85. [Ch. 661, Laws of 1911](#), was enacted to redistrict Wisconsin's 11 congressional seats.

86. [Ch. 28, Laws of 1931](#), was enacted to redistrict Wisconsin's 10 congressional seats.

the U.S. Supreme Court issued its decision in *Baker v. Carr*, holding that federal courts could adjudicate challenges to malapportioned districts under the equal protection clause of the Fourteenth Amendment.⁸⁷ That decision overturned the Supreme Court's 1946 decision in *Colegrove v. Green* in which the court held that malapportionment cases presented political questions and were, therefore, nonjusticiable.⁸⁸

In April 1962, prompted by the holding in *Baker v. Carr*, Reynolds filed suit in the United States District Court for the Western District of Wisconsin seeking an injunction to prevent the secretary of state, Robert Zimmerman, from conducting the 1962 general election under the current legislative plan, the Rosenberry Act of 1951,⁸⁹ and the current congressional plan, a plan that had remained unchanged since 1931.⁹⁰ Reynolds also proposed that the upcoming election of legislators and members of Congress be held at large throughout the state or, alternatively, that the court appoint a special master to recommend an equitable apportionment plan.⁹¹

On May 23, 1962, the court indicated that it would have to dismiss the complaint because the plaintiff, the State of Wisconsin, was not a "person" entitled to protection under the Fourteenth Amendment and corresponding federal law and, therefore, did not have standing to sue.⁹² However, the court gave Reynolds five days from the date of its opinion to amend the complaint to name at least two individual electors as plaintiffs.⁹³ If Reynolds amended the complaint, the case would continue and Zimmerman would have five days thereafter to respond.⁹⁴ Finally, the court noted that the legislature had a duty to perform and it would be best if the legislature fulfilled its responsibility to "apportion and district anew" rather than have the federal court intervene.

A much happier result would obtain, the court said, if the legislature promptly convened on its own volition, or came into session at the call of the governor, and enacted a fair and constitutional redistricting law.⁹⁵ Reynolds subsequently amended his complaint to name five individuals as plaintiffs, all residents of Waukesha County.⁹⁶

87. [Baker v. Carr](#), 369 U.S. 186 (1962).

88. [Colegrove v. Green](#), 328 U.S. 549 (1946).

89. See *supra* Section B. 1. e., The Rosenberry Act.

90. [State of Wisconsin v. Zimmerman](#), 205 F.Supp. 673, 674 (W.D. Wis. 1962).

91. *Id.* at 674.

92. *Id.* at 674-5. The [Fourteenth Amendment](#) provides, in part, that no state may "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The relevant federal law, [28 U.S.C. § 1343](#), reads, in part: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person."

93. [Zimmerman](#), 205 F.Supp. at 676.

94. *Id.*

95. *Id.*

96. [State of Wisconsin v. Zimmerman](#), 209 F.Supp. 183 (W.D. Wis. 1962). The individual plaintiffs were Mrs. Elfrieda Wilson, Dan Smith, Robert E. Smith, Lyle Link, and Thomas Miglautsch.

Governor Nelson called the legislature into special session on Monday, June 18, 1962, at 11 a.m. to redraw legislative and congressional district lines.⁹⁷ Both houses also reconvened that day in regular session.⁹⁸ The governor delivered his call for a special session in person before a joint convention of both houses in the assembly chamber, warning the body that any further delay in establishing new districts would result in the legislature abdicating to the courts its responsibility to redistrict.⁹⁹ The governor also noted in his message the severe population disparities under the current legislative plan. The population of the smallest assembly district was 19,650, whereas the population of the largest assembly district was 87,286.¹⁰⁰ The population in the senate districts ranged from 74,293 to 208,343.¹⁰¹ These deviations from ideal population resulted from the requirement under the *Cunningham* cases that county boundaries remain intact when redistricting.¹⁰² The governor acknowledged that a perfect redistricting plan could not be accomplished under that requirement, but held out hope that the legislature could make “substantial improvements.”¹⁰³ Specifically, Governor Nelson urged the legislature to adopt the recommendations of a bipartisan Legislative Council committee that had been convened at the end of the 1959 legislative session to address redistricting.¹⁰⁴

Two days after the governor delivered his message, the senate introduced both a congressional and a legislative redistricting plan, 1961 Senate Bills 814 and 815 respectively.¹⁰⁵ Senate Bill 814 passed in the senate on June 27, 1962, and in the assembly on June 28, 1962.¹⁰⁶ Senate Bill 815 passed in the senate on June 28 and in the assembly on June 29.¹⁰⁷ Governor Nelson vetoed both bills on July 2.¹⁰⁸ The governor objected to the legislature’s refusal to adopt the bill proposed by the Legislative Council committee, a product of 15 months of research and study, and its promulgation of a plan that the governor characterized as being drawn in haste, without input from the Democrats.¹⁰⁹ In addition, the governor objected to the huge population disparities between districts, disparities

97. Wis. Senate Journal, vol. 3 (June 18, 1962, to Jan. 9, 1963) 1–5.

98. *Id.* at 12, 14–15 and Wis. Assembly Journal, vol. 3 (June 18, 1962, to Jan. 9, 1963) 6.

99. Wis. Senate Journal, vol. 3 (June 18, 1962, to Jan. 9, 1963) 2–3.

100. *Id.* at 3.

101. *Id.*

102. See *supra* Section B. 1. c., The *Cunningham* cases of 1892.

103. *Id.*

104. *Id.* at 4–5. The committee had 15 members; five Republican legislators, five Democratic legislators, and five members of the public.

105. Wis. Senate Journal, vol. 3 (June 18, 1962, to Jan. 9, 1963) 18–19.

106. *Id.* at 42; Wis. Assembly Journal, vol. 3 (June 18, 1962, to Jan. 9, 1963) 56–57.

107. Wis. Senate Journal at 49; Wis. Assembly Journal at 67–68.

108. Wis. Senate Journal at 62–63, 65–69.

109. *Id.*

which would be significantly less under the Legislative Council committee proposal.¹¹⁰ The senate voted to override the vetoes on the same day that the governor returned the bills without his approval, but the assembly was unable to reach the two-thirds majority vote necessary for a veto override.¹¹¹

On July 3, 1962, the federal court appointed a special master to hold hearings and make findings and recommendations related to the challenge brought by Attorney General Reynolds.¹¹² The special master held hearings on July 10, 13, 19, and 20.¹¹³ In the meantime, the legislature attempted to bypass the governor's anticipated objections to a redistricting plan by adopting a plan via joint resolution. On July 19, 1962, the senate introduced and passed Senate Joint Resolution 125, relating to senate and assembly districting. Before passing the measure, Senator Gerald Lorge, a Republican from Bear Creek, rose to a point of order to question the validity of using a joint resolution to adopt a redistricting plan. The presiding officer, President Pro Tempore Senator Frank Panzer, also a Republican, ruled that the joint resolution was properly before the body and that "it was not within the power of the chair to make a judicial ruling."¹¹⁴

The assembly did not concur in SJR 125, but, instead, on July 31, passed Assembly Joint Resolution 164 relating to the "further study of reapportionment and the adjournment of the legislature."¹¹⁵ The senate concurred and the legislature adjourned until January 9, 1963, at 11 a.m., the effective end of the 1961 legislature and one hour before the organization of the 1963 legislature.¹¹⁶

On August 3, 1962, the special master filed a memorandum of opinion with the federal court, concluding that the plaintiffs had not made a case for equitable relief.¹¹⁷ Eleven days later the court issued its opinion, agreeing with the special master and, in essence, holding that it was now too late to redistrict in time for the November elections:

This Court is sitting as a court of equity. It must balance the equities. As a practical matter, it is impossible at this late date to enter orders which would change the election dates of the primary and general elections, and also change all the statutory preliminary requirements. The balance of equities is against the plaintiffs, due largely to the time element involved.¹¹⁸

110. *Id.*

111. *Id.* at 65, 70. Wis. Assembly Journal at 77–78.

112. [Zimmerman](#), 209 F.Supp. at 184.

113. *Id.*

114. *Id.* at 112.

115. Wis. Assembly Journal, vol. 3 (June 18, 1962, to Jan. 9, 1963) 132–4.

116. *Id.* See also [Zimmerman](#), 209 F.Supp. at 186.

117. [Zimmerman](#), 209 F.Supp at 184 and 187.

118. *Id.* at 188.

The September primary was less than a month away, and the last day to file nomination papers for candidates to fill legislative and congressional offices had passed a month earlier. The court dismissed the suit, but without prejudice, thereby allowing the plaintiffs or others to seek relief if the legislature failed to redistrict before August 1, 1963.¹¹⁹ Consequently, the 1962 elections were held under the old plans.

The 1962 elections resulted in the same political configuration that led to a stalemate in passing redistricting proposals in the previous session. Republicans retained the majority in both houses and a Democrat remained in the governor's office, but this time the occupant was former Attorney General John Reynolds.

The assembly introduced a congressional redistricting plan, 1963 Assembly Bill 222, on February 14, 1963, and passed that plan on March 27.¹²⁰ However, the bill took a little longer to make its way through the senate. If the plan became law, it would be the first time since 1911 that the legislature had adjusted the congressional district lines to account for changes in population, apart from reducing the state's congressional delegation from 11 seats to 10 in 1931.¹²¹ Such an adjustment was, therefore, a novel approach that not all senators were ready to embrace.

The senate finally took up the bill as a special order of business on May 8, 1963.¹²² But before the senate began its deliberations, Senator Gordon Roseleip introduced a resolution to request an opinion from the attorney general regarding the following questions related to congressional redistricting:

- Is there a legal requirement that the state legislature reapportion the congressional districts in Wisconsin following the 1960 census?
- Is there a legal requirement that the state legislature reapportion the congressional districts in Wisconsin at any time?
- If there is a legal requirement that the state legislature reapportion the congressional districts in Wisconsin, must it be on a population basis?¹²³

The senate approved a motion to refer the resolution to the calendar, but then proceeded to take up AB 222.¹²⁴ The senate rejected both substitute amendments offered by Senator Roseleip and a few simple amendments also offered by the senator.¹²⁵ Senator Davis Donnelly, a Democrat from Eau Claire, moved that the bill be non-concurred in,

119. *Id.* at 189.

120. [Wis. Assembly Journal](#) (1963) 161, 396–400.

121. *See supra* Section B. 2., Early Congressional Redistricting.

122. [Wis. Senate Journal](#), vol. 2 (1963) 843.

123. *Id.* *See also* 1963 Wis. SR 26.

124. [Wis. Senate Journal](#), vol. 2 (1963) 843.

125. *Id.* at 844–5.

but the senate rejected that motion.¹²⁶ The senate then read the bill a third time and concurred in its passage.¹²⁷ The senate did not take up Roseleip's resolution and, two days later, he asked that it be withdrawn.¹²⁸ Governor Reynolds approved AB 222 on May 20, 1963, and it became Chapter 63, Laws of 1963.¹²⁹

Around that same time, the senate introduced a legislative redistricting plan, 1963 Senate Bill 575.¹³⁰ The bill passed the senate on June 6 with all Democrats and one Republican voting against the bill.¹³¹ The assembly then concurred in passage of the bill.¹³² All but three Republicans voted for the bill and all but one Democrat voted against it.¹³³

Governor Reynolds vetoed SB 575 on July 9. The governor stated in his veto message that the bill clearly violated the state constitution and did not comply with the Fourteenth Amendment to the U.S. Constitution.¹³⁴ The governor noted that SB 575 had similar flaws to 1961 Senate Bill 815, which Governor Nelson vetoed. The plan ignored the recommendations from the Legislative Council's 1961 study committee to provide two additional assembly seats to Milwaukee County. Instead, the plan created two additional assembly districts in Waukesha County. In addition, although the study committee had recommended creating an additional senate district in western Milwaukee County and another in eastern Waukesha County due to the population growth in both, the bill created an additional district for Waukesha County, but not for Milwaukee County. In summary, the governor stated that 1963 Senate Bill 575 "repeats the constitutional deprivation to the 1,036,041 residents of Milwaukee County" that was evident in 1961 Senate Bill 815.¹³⁵

In 1961, the legislature's response to the governor's veto of a legislative redistricting plan was an attempt to redistrict by way of passing a joint resolution. After the veto of 1963 Senate Bill 575, the legislature again attempted to bypass the governor's objections by adopting a joint resolution. On July 10, 1963, a day after the governor's veto of SB 575 and while the senate was in session, the senate committee on legislative procedure introduced 1963 Senate Joint Resolution 74, relating to the apportionment of senate and assembly seats.¹³⁶

The senate took up SJR 74 on July 30. The resolution passed that afternoon, but not

126. *Id.* at 847. Five Republicans and two Democrats voted for non-concurrence.

127. *Id.*

128. *Id.* at 902.

129. Wis. Assembly Journal (1963) 1083.

130. Wis. Senate Journal, vol. 2 (1963) 915.

131. *Id.* at 1263.

132. [Wis. Assembly Journal](#) (1963) 1492.

133. *Id.*

134. [Wis. Senate Journal](#), vol. 2 (1963) 1468.

135. *Id.* at 1470–71.

136. *Id.* at 1490.

before Senator Fred Risser rose to the point of order that consideration of SJR 74 was out of order because it would repeal statutes, an action that could not be accomplished by resolution.¹³⁷ The senate president, Lieutenant Governor Jack Olson, a Republican, ruled that the joint resolution was properly before the body and that it was not within the presiding officer's power to make a judicial ruling.¹³⁸

The assembly concurred in SJR 74.¹³⁹ Being unable to veto a joint resolution, Governor Reynolds went to the Wisconsin Supreme Court, arguing, among other things, that the legislature could not redraw legislative district boundaries without his approval.¹⁴⁰

On February 28, 1964, the court ruled in Reynold's favor. The court held that a redistricting plan could not become law without the governor's concurrence or a legislative override of the governor's veto and noted that "both the legislative and executive branches of our state government have long regarded legislative reapportionment as a matter of joint action between the legislature and the governor."¹⁴¹ The court also noted that, although article IV, section 3, of the Wisconsin Constitution does not expressly provide that the apportionment shall be "by law," the inconsistent use of the phrase "by law" in the constitution creates an ambiguity that the court will resolve by construing article IV, section 3, "in the most-reasonable manner in relation to the fundamental purpose of the constitution as a whole, to wit: To create and define the institutions whereby a representative democratic form of government may effectively function."¹⁴² Furthermore, the court stated:

Since the constitution itself places such heavy emphasis on the requirement that the legislative districts be apportioned 'according to the number of inhabitants' it would be unreasonable to hold that the framers of the constitution intended to exclude from the reapportionment process the one institution guaranteed to represent the majority of the voting inhabitants of the state, the governor.¹⁴³

The court also clarified that, regardless of past precedent, it could provide relief to state voters adversely affected by a malapportioned redistricting plan:

The citizens of this state can now obtain affirmative judicial relief from federal courts upon a showing that the voting power discriminations resulting from malapportionment

137. *Id.* at 1706–07.

138. *Id.*

139. [Wis. Assembly Journal](#) (1963) 1995–98.

140. [State ex. rel. Reynolds v. Zimmerman, 22 Wis.2d 544 \(1964\)](#). Reynolds also asked whether the governor had standing to allege that a redistricting plan violates the rights of Wisconsin citizens guaranteed by both the federal and state constitutions. The court ruled that the executive did indeed have standing to make such allegations. *Id.* at 552–3.

141. *Id.* at 558.

142. *Id.* at 556.

143. *Id.*

deny them equal protection. Since a denial of voting rights deemed to be a denial of the general standards of equal protection of the law under the Fourteenth amendment would also be a denial of the specific standard of representation in direct ratio to population in art. IV, there is no reason for Wisconsin citizens to have to rely upon the federal courts for the indirect protection of their state constitutional rights.¹⁴⁴

In addition, the court held that the existing redistricting plan, the Rosenberry Act enacted in 1951, violated article IV, section 3, of the state constitution because, more than 10 years after its enactment, it no longer conformed to a reasonable measure of population equality.¹⁴⁵ Finally, the court stated that if the legislature and the governor could not enact a redistricting plan by May 1, 1964, the court itself would put a plan in place by May 15.¹⁴⁶

On April 14, 1964, the Senate Committee on Legislative Procedure introduced a redistricting plan that also established ward lines in the city of Milwaukee, 1963 Senate Bill 679.¹⁴⁷ The bill was made a special order of business for 9 a.m. on April 15.¹⁴⁸ After two recesses and the consideration of a number of amendments and substitute amendments, the bill passed the senate after the 6 p.m. recess.¹⁴⁹ The assembly amended the bill on April 17 and the senate concurred in those amendments the same day.¹⁵⁰

Governor Reynolds returned the bill without his approval on April 22, 1964, making objections similar to those he made when rejecting 1963 Senate Bill 575 and similar to those made by Governor Nelson when rejecting 1961 Senate Bill 815.¹⁵¹ That same day the senate attempted and failed to override the governor's veto.¹⁵² Two days later, the senate majority leader and the senate minority leader introduced 1963 Senate Joint Resolution 109, which directed the Legislative Reference Bureau to provide to the Wisconsin Supreme Court "technical assistance for the purpose of compiling statistics, drawing maps, etc." and to "give precedence to this task over all other tasks, for the period from May 1 to May 15, 1964."¹⁵³ The resolution passed both houses on the day the senators introduced it.¹⁵⁴

144. *Id.* at 564. "To the extent that *Broughton* and *Martin* have held that the unavailability of affirmative judicial relief forecloses a determination on the merits of whether a reapportionment scheme, valid when passed, is presently unconstitutional due to intervening population shifts, they are overruled." *Id.* See also, *State ex. rel. Broughton v. Zimmerman*, 261 Wis. 398 (1952) and *State ex. rel. Martin v. Zimmerman*, 249 Wis. 101 (1946).

145. *State ex. rel. Reynolds*, 22 Wis.2d at 569.

146. *Id.* at 571.

147. *Wis. Senate Journal*, vol. 2 (1963) 2163-64.

148. *Id.*

149. *Id.* at 2204-11.

150. *Id.* at 2247-54 and *Wis. Assembly Journal* (1963) 2610-21.

151. *Wis. Senate Journal*, vol. 2 (1963) 2264-71.

152. *Id.* at 2272-73.

153. *Id.* at 2340 and 1963 Wis. SJR 109.

154. *Wis. Senate Journal*, vol. 2 (1963) 2340 and *Wis. Assembly Journal* (1963) 2749.

As a result, for the first time in Wisconsin, a court put a legislative redistricting plan in place instead of a plan drafted by the legislature. With the LRB's assistance, the court released its legislative redistricting plan on May 14, 1964, effective for the 1964 elections.¹⁵⁵ Under the court's plan no assembly district population exceeded the statewide average population of assembly districts by more than one-third and no senate district population exceeded the statewide average population of senate districts by more than one-sixth.¹⁵⁶ The court's plan would be the last state legislative plan to require that counties not be split in the formation of assembly districts:

Thirty-nine counties of low population are combined into 17 multicounty assembly districts, each with a population near the state-wide average for assembly districts. Sixteen counties of population near the state-wide average for assembly districts, or for geographic reasons prevented from being combined into multicounty assembly districts, are established as single-county assembly districts. The remaining 67 assembly seats are distributed among the remaining 17 counties in accordance with population.¹⁵⁷

Consequently, the 1964 general election was held under new congressional and legislative redistricting plans and both plans reflected adjustments to comply with population shifts evidenced by the 1960 census.

2. Redistricting 1970

The 1970s brought the first round of legislative and congressional redistricting following establishment of the one-person, one-vote rule under *Reynolds v. Sims*. It was also the first round to jettison the rule of the *Cunningham* cases established by the state supreme court in 1892 that mandated strict adherence to county boundaries in the formation of assembly districts.¹⁵⁸ In 1969, upon the assembly's request, the state attorney general, Robert Warren, issued an opinion indicating that the legislature could no longer follow the *Cunningham* decisions in light of *Reynolds v. Sims* and subsequent federal court decisions.¹⁵⁹ The assembly noted in its request that the variance in the population of assembly districts at that time ranged from 32.5 percent above the average to 43.7 percent below the average.¹⁶⁰

In 1971, Republicans controlled the senate and Democrats controlled the assembly.¹⁶¹

155. *State ex. rel. Reynolds v. Zimmerman*, 23 Wis.2d 606 (1964).

156. *Id.* at 607.

157. *Id.* at 606–7.

158. See *supra* Section B. 1. c., The *Cunningham* cases of 1892.

159. 58 Wis. Op Att'y. Gen. 88, 88–91 (1969), <https://www.doj.state.wi.us>.

160. *Id.*

161. *2019–2020 Wisconsin Blue Book* (Madison, WI: Legislative Reference Bureau, 2018), 492.

Patrick Lucey, a Democrat, began his first term as governor. It would seem that this combination of partisans would not likely succeed in producing redistricting plans without judicial intervention. But succeed they did, even though a number of factors made the task even more challenging. For one, the legislature had to reduce the number of congressional districts from 10 to 9 on the basis of population shifts during the preceding decade. In addition, the attorney general had suggested that the legislature reduce the size of the assembly from 100 to 99 in order to facilitate population equality and that each of the 33 senate districts contain three whole assembly districts.¹⁶² Finally, the U.S. Census Bureau was slow in providing the necessary census block population data, delaying the introduction of the first legislative redistricting plan until September 1971.

The senate introduced the first congressional plan, 1971 Senate Bill 360, on April 14, 1971, but that bill failed to gain traction and died in the senate in June.¹⁶³ In the interim, the senate had introduced an alternative congressional plan, 1971 Senate Bill 558, in May.¹⁶⁴ The senate took up that bill in September 1971 and, after considering and rejecting numerous amendments, passed the bill on October 5.¹⁶⁵ The assembly first took up the bill on October 22.¹⁶⁶ That body rejected a number of amendments before finally concurring in SB 558, but a motion to suspend the rules and immediately message the bill to the senate failed.¹⁶⁷ The assembly placed the bill on the calendar for November 3, 1971, but subsequently passed a motion to have the bill made a special order of business for October 27.¹⁶⁸ On October 27, a motion to reconsider concurrence failed thereby completing assembly action on SB 558.¹⁶⁹ The bill became law upon Governor Lucey's signature on November 17, 1971, as [Chapter 133, Laws of 1971](#).

In September 1971, while the senate was considering its congressional redistricting plan, Representative Kessler introduced a legislative redistricting plan, 1971 Assembly Bill 1356.¹⁷⁰ The Committee on Elections approved the bill in October 1971, but it lingered on a delayed calendar.¹⁷¹ On January 7, 1972, Senator Keppler introduced a legislative

162. [60 Wis. Op Att'y. Gen. 101, 109–11 \(1971\)](#), <https://www.doj.state.wi.us>.

163. [Wis. Senate Journal](#), vol. 1 (1971) 646.

164. *Id.* at 1023.

165. [Wis. Assembly Journal \(1971\) 2650](#).

166. *Id.* at 2962–70.

167. *Id.* Representative Anderson, a Democrat from Dane County, was forced to move to suspend the rules after he asked unanimous consent to do so and Representative Berger, a Democrat from Milwaukee, objected. After that motion failed, Representative Kessler, another Milwaukee Democrat, moved reconsideration and asked for unanimous consent to expunge the record of the assembly's concurrence. Representative Sensenbrenner, a Milwaukee Republican, objected to expungement and Kessler's subsequent motion to expunge the record failed 60 to 38 with two not voting.

168. *Id.* at 2975–76.

169. *Id.* at 3054–55.

170. [Wis. Assembly Journal \(1971\) 2456](#).

171. *Id.* at 3049–50, 3436. On October 27, 1971, Representative Kessler moved that 1971 Wis. AB 1356 be withdrawn from the delayed calendar of October 14 and made a special order of business for October 28. Representative Froehlich, a Repub-

redistricting plan, 1971 Senate Bill 864.¹⁷² Keppler’s proposal, as introduced, would have nested three assembly districts within each senate district and three senate districts within each of the nine congressional districts, thereby creating 27 senate districts and 81 assembly districts. However, a substitute amendment changed the alignment of assembly and senate districts, creating the configuration that currently exists: 33 senate districts and 99 assembly districts. The senate passed SB 864, as amended, on February 17 and sent it to the assembly.¹⁷³ Although the assembly passed the bill on March 2, 1972, the assembly majority had its own ideas about redistricting, which it implemented by passing 1971 Assembly Substitute Amendment 1 and several amendments to that substitute amendment.¹⁷⁴ The senate took up the bill, as amended, on March 3, but would not concur in the assembly substitute amendment and, instead, requested that the houses convene a committee of conference.¹⁷⁵

The conference committee submitted its report to the legislature on March 10, 1972.¹⁷⁶ The report indicated that Representative Kessler, one of the three assembly members of the committee, had moved that the committee adopt the legislative redistricting plan offered by the chief of the Legislative Reference Bureau, Dr. H. Rupert Theobald.¹⁷⁷ That motion failed, prompting committee member Senator Steinhilber to renew his motion from two days previous to alert the legislature “that the committee was unable to reach a compromise agreement.”¹⁷⁸ That motion passed. Shortly after receiving the report, the senate tabled the report and adjourned as scheduled, pursuant to 1971 Senate Joint Resolution 21.¹⁷⁹

On April 19, 1972, Governor Lucy called for a special session of the legislature to work on legislative redistricting, presenting his concerns and objectives in person before a joint convention of the houses.¹⁸⁰ In particular, the governor stressed the importance of

lican from Outagamie County, asked for unanimous consent to have the bill made a special order of business for January 15, 1972. Kessler objected. Froehlich then asked for unanimous consent to have the bill made a special order of business for February 15, 1972. Again, Kessler objected. The body then turned its attention to Kessler’s motion, which failed 48 to 47 with five absent or not voting. On February 2, 1972, Representative Guiles, a Republican from Winnebago County introduced a second assembly redistricting plan, 1971 Wis. AB 1530. The bill died in the Committee on Elections, chaired by Representative Kessler.

172. *Wis. Senate Journal*, vol. 3 (1971) 2216.

173. *Id.* at 2612–14.

174. *Id.* at 2788.

175. *Id.* “In all cases of disagreement between the senate and assembly on amendments, adopted by either house to a bill or joint resolution passed by the other house, a committee of conference consisting of 3 members from each house may be requested by either house, and the other house shall appoint a similar committee. At least one member from each house shall be a member of the minority party.” See [2019 Joint Rule 3 \(1\)](#).

176. *Wis. Senate Journal*, vol. 3 (1971) at 2972–73.

177. *Id.*

178. *Id.*

179. *Id.* at 2973 and 2988–96.

180. *Wis. Senate Journal*, April 1972 Special Session (1972) 1 and 3.

adopting a plan that would strive to achieve population equality.¹⁸¹ The governor also acknowledged the efforts that the legislature had already made to accomplish redistricting in a timely and thoughtful fashion:

Extensive discussions among the leaders of both political parties in both houses have laid the necessary groundwork for your efforts. The ability to concentrate your energies on this matter until its resolution and the desire to exercise your own responsibility rather than yield it to the courts will, I believe, assure a swift, efficient and successful session.¹⁸²

Once summoned into special session, the legislature did not take long to accomplish the goals set forth by the governor. The senate introduced a legislative redistricting plan, Special Session Senate Bill 1, less than one hour before the governor's address to the joint convention. The senate passed the bill on April 20, 1972, and the assembly passed the bill the next day.¹⁸³ The bill became Chapter 304, Laws of 1971, on May 8. Because the legislature no longer needed to treat county boundaries as inviolate, it was able to create a plan in which the population of each new district did not deviate from ideal population by more than 1 percent. In addition, the plan required that cities elect their common council members from aldermanic districts of equal population and created the *ward* as the geographic unit that would serve as the building block for drafting subsequent plans and achieving population equality.¹⁸⁴

3. Redistricting 1980

The 1980 census revealed that the state's population had increased by 6.5 percent since 1970.¹⁸⁵ In addition, growth and shifts during the intervening years resulted in population increases in northern Wisconsin and population decreases in the city of Milwaukee and in southeastern Wisconsin overall.¹⁸⁶ During the 1981–82 biennium, the Democrats controlled both houses of the legislature, but the governor's office was held by a Republican, Lee Dreyfus. Legislators introduced several redistricting bills in the senate, but none of those bills had been enacted by the end of January 1982.

The plaintiffs in *Wisconsin AFL-CIO v. Elections Board* filed suit in the U.S. District

181. *Id.* at 5–11. “In a score of states reapportionment has been successfully accomplished by legislatures. States as various in geography and composition as Arizona, Connecticut, Nebraska, and Ohio have achieved a deviation of one percent or less in their plans. Let Wisconsin stand with the states whose legislatures have successfully reapportioned themselves in conformance with the one-man, one-vote standard, rather than with those who failed.” *Id.* at 7–8.

182. *Id.* at 8.

183. *Id.* at 78–82.

184. *Id.* “Each ward shall consist of whole census enumeration districts or, where block statistics are available for urban blocks, of whole urban blocks. To suit the convenience of the voters residing therein, each ward shall be kept as compact as practicable.”

185. *Wisconsin State AFL-CIO v. Elections Board*, 543 F.Supp. 630, 632 (1982).

186. *Id.*

Court for the Eastern District of Wisconsin on February 2, 1982, asking the court to declare the current redistricting plan unconstitutional and to draw a new plan.¹⁸⁷ The court convened a three-judge panel to hear the case, and on February 22, 1982, the panel declared the existing plan unconstitutional because it no longer satisfied equal population requirements.¹⁸⁸ The panel noted that, based on the 1980 census data, the ideal population for a senate district would be 142,591 and for an assembly district, 47,531.¹⁸⁹ The panel then noted that the population of the existing districts varied significantly from the ideal. One senate district, for example, had a population that was 27.3 percent more than the ideal and another had a population that was 22.5 percent less than the ideal.¹⁹⁰ The assembly districts ranged from a district where the population was 29 percent higher than the ideal to a district that had a population 33.4 percent lower than the ideal.¹⁹¹

The court's order declaring the current plan unconstitutional and enjoining the Elections Board from administering elections under that plan also established deadlines for submitting motions and proposed plans. The court granted seven motions to intervene and received plans from the original plaintiffs and the intervenors, as well as others who were not party to the suit.¹⁹² Governor Dreyfus also moved to intervene and asked the court to abstain from conducting any further proceedings because he had petitioned the Wisconsin Supreme Court to take original jurisdiction to consider redistricting.¹⁹³ The state supreme court granted the petition, but the case was subsequently removed to the U.S. District Court for the Western District of Wisconsin, which transferred the case back to the three-judge panel on April 1, 1982.¹⁹⁴ In the meantime, the legislature, with the governor's approval, had enacted a congressional redistricting plan.

The panel heard oral arguments in the legislative redistricting case on April 21, 1982.¹⁹⁵ Two days later, the panel entered an order indicating that they would postpone establishing their own plan until the state had made "all reasonable efforts" to create "a constitutionally acceptable plan."¹⁹⁶ On May 20 both houses of the legislature passed a redistricting plan, but the governor vetoed the bill on May 23.

In June, having given the legislature time to act on its own, the panel created its own

187. *Id.* at 632.

188. *Id.* The panel was convened pursuant to [28 U.S.C. § 2284](#).

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 633.

195. *Id.*

196. *Id.*

plan. The court began by considering the vetoed plan and comparing it to others submitted to the court, but it was not impressed:

The vetoed plan has been submitted to us for our consideration and, after reviewing it, we conclude that it is one of the worst efforts before us and for that reason we decline to adopt it. The plan has, in our opinion, no redeeming value and we will not discuss it further in this opinion.¹⁹⁷

The court found significant flaws with the other submitted plans as well. For example, the court noted that rather than creating compact districts, some plans created districts that “wiggle and meander without any discernible reason save, perhaps, for the desire to stretch a district to fit some political end.”¹⁹⁸ The parties also asked the court, for the purpose of maximizing population equality, to relax any state or federal constitutional requirements to limit the crossing of county, municipal, and ward boundaries to create legislative districts.¹⁹⁹ However, one of the parties also argued that a 10 percent population variation should be acceptable if necessary to maintain municipal lines.²⁰⁰ The court acknowledged that it could not, in many cases, keep counties and municipalities intact if its plan was to achieve acceptable levels of population deviations, but would attempt to keep county and municipal splits and population deviations to a minimum.²⁰¹

The court then elaborated on the virtues of its plan as compared to the submitted plans. The best plan submitted to the court with regard to population equality had an overall range of 2.83 percent, whereas the overall range in the court’s plan was 1.74 percent, “the lowest population deviation in the history of Wisconsin.”²⁰² In addition, no district had a population that varied more than 0.87 percent from the ideal.²⁰³ In order to avoid diluting the voting strength of minority populations, the plan created three majority-minority districts where black residents made up more than 65 percent of each district.²⁰⁴ The court also created a Hispanic influence district by grouping the wards with the state’s largest population of Hispanic citizens into one district.²⁰⁵ Finally, the court noted that it did not consider the residence of incumbents when drafting the plan.²⁰⁶

197. *Id.* at 632. The court had more to say in a footnote: “For example, the hastily conceived plan . . . has an assembly deviation range of 6.02%, a rate that may very well be constitutionally unacceptable, as the deviations do not appear to be the result of efforts to adhere to a state policy directed toward maintaining the integrity of political subdivisions.”

198. *Id.* at 634.

199. *Id.* at 635–6.

200. *Id.*

201. *Id.*

202. *Id.* at 637.

203. *Id.*

204. *Id.* at 636–7.

205. *Id.*

206. *Id.* at 638.

However, because elections in even-numbered senate districts would not occur until 1984, the court attempted to draw even-numbered senate districts using the boundaries that roughly corresponded to such boundaries under the 1972 plan.²⁰⁷

The court conceded that its plan was not perfect. The court did not use a computer to create the plan, and the data provided to the court were not always accurate.²⁰⁸ The census occasionally changed the certifications of its population data, including a recertification of the statewide population on May 24, 1982, and thus the court was unable to incorporate what it referred to as “minor” changes.²⁰⁹ The court requested that the chief of the Legislative Reference Bureau, Dr. H. Rupert Theobald, review the plan and alert the court to any necessary corrections.²¹⁰

The 1982 election was held under the court’s plan. The election resulted in the Democrats maintaining their majority in both houses and in a Democrat, Anthony Earl, becoming governor. The legislature tried, unsuccessfully, to codify the court-ordered plan early in 1983. The legislature then attempted to pass a redistricting plan by including it in the biennial budget bill. However, the governor, who wished to give the redistricting plan a hearing independent of the budget, used the partial veto to eliminate the plan from the bill.²¹¹ On July 11, 1983, five days after issuing his veto message to the senate, the governor called a special session to adopt the redistricting plan.²¹² That plan, Special Session Assembly Bill 1, was passed by both houses and signed by the governor, becoming [1983 Wisconsin Act 29](#).²¹³ The act did not deviate substantially from the court plan, but the legislature made sure to note that it had “approved upon it” by creating the lowest

207. *Id.*

208. *Id.* at 638–9.

209. *Id.* at 639. “For example, on May 26, 1982, we were advised by the Legislative Reference Bureau that the City of St. Francis was incorrectly listed in previously submitted data as having 10,666 people when it actually had 24 people less. The 24 people lost to St. Francis were actually residents of the city of Milwaukee, thus raising its state population from 636,210 to 636,234. We were not told the ward(s) of Milwaukee that contained the newly found 24.”

210. *Id.* The court noted the involvement of the LRB in a footnote: “In a letter dated May 13, 1982, Judge Evans asked counsel for the Republican and Democratic parties to authorize Dr. Theobald to provide the court with technical assistance if it so desired. On May 17, 1982, Judge Evans received a letter signed by Assembly Speaker Ed Jackamonis, Senate President Fred Risser and minority party leaders State Representative Tommy Thompson and Senator Walter Chilsen granting the request. The letter from the party leaders, however, stated that Dr. Theobald and his staff, who are dependent on the legislature for such things as pay and budget, recognized that no plan could please every member of the legislature, and that they wished that steps be taken to avoid the appearance that they in any way influenced the court’s decision. To avoid any appearance of influence, the party leaders suggested that a written record be made of any contacts between the court and the Bureau. Because we believed that working with this condition would not be in the courts’ interest, we declined to call upon Dr. Theobald or his staff for any technical assistance although the court did call the Bureau approximately eight times to obtain additional maps and census data or to verify conflicting statistical data.”

211. [Wis. Senate Journal](#) (1983) 288. “I am vetoing the reapportionment plan. While I find the substance of the redistricting effort to be acceptable, objections to the process of including the plan in the budget make it impossible for it to be judged on its merits. I will call a special session of the Legislature to assure a full public hearing for the proposed plan.”

212. [Wis. Assembly Journal](#), July 1983 Special Session (1983) 292.

213. Beginning in 1983 laws became designated as acts. Prior to 1983, session laws were designated as chapters in the Laws of Wisconsin.

population deviation in the history of Wisconsin redistricting²¹⁴ The overall range was 1.72 percent for assembly districts and 1.05 percent for senate districts.²¹⁵ The Elections Board administered the next three general elections under Act 29.

4. Redistricting 1990

The political composition of the state in 1991 was similar to that in 1981: the Democrats controlled both houses of the legislature and a Republican, Tommy G. Thompson, was governor. As is typical, the state's population did not remain static following the 1980 census. The state received the 1990 census data in March 1991, but by early 1992 no redistricting plan had been introduced in either house. Several Republican legislators filed suit in the U.S. District Court for the Western District of Wisconsin on January 30, 1992, to have the court declare the current legislative redistricting plan malapportioned and, therefore, unconstitutional and in violation of the Voting Rights Act.²¹⁶ The district court convened a three-judge panel to hear the case and the panel allowed a number of groups to intervene, including the legislature's Democratic leaders, several other black and Hispanic legislators, and the Wisconsin Educational Association Council.²¹⁷ All parties agreed that the existing plan was no longer constitutional based on shifts in the state's population.²¹⁸ The panel agreed to expedite the case in order to have new districts in place in time for the 1992 partisan primary and general election and, accordingly, scheduled an evidentiary hearing for the week of April 27.²¹⁹

In March 1992, following the filing of the action in federal court, the legislature introduced a number of bills proposing new redistricting plans. 1991 Assembly Bill 1017 and 1991 Senate Bill 549 proposed both congressional and legislative redistricting plans but passed only in their house of origin. 1991 Senate Bill 578, proposing only a legislative plan, passed both houses on April 14, 1992, but was vetoed by Governor Thompson. The governor's objections were based, in part, on excessive population deviations, partisan gerrymandering, and failure to prevent the dilution of the voting strength of racial minorities.²²⁰ However, the legislature had also introduced and passed in both houses a congressional redistricting plan on April 14, 1992, which the governor signed on April 28. The bill became [1991 Wisconsin Act 256](#), the first Wisconsin congressional plan to achieve absolute equality of population among congressional districts.

214. [1983 Wis. Act 29](#), 634.

215. *Id.*

216. [Prosser v. Elections Bd.](#), 793 F.Supp. 859, 862 (W.D. Wis. 1992).

217. *Id.* at 862.

218. *Id.* at 865.

219. *Id.* at 862.

220. [Wis. Senate Journal](#) (1992) 886–7.

The three-judge panel held its evidentiary hearing to consider legislative plans on April 27 and 28, 1992.²²¹ The court had received 10 proposed legislative redistricting plans, but the hearing focused primarily on only four of those plans; two offered by the Republicans, the legislative plan offered by the Democrats, and a plan offered by Representative Annette Williams, a black Democrat from Milwaukee.²²² Expert witnesses supporting the plans presented written evidence to the court and were subject to cross-examination by counsel for the litigants.²²³ Counsel also presented opening and closing arguments.²²⁴

The court had initially anticipated choosing the best plan of those submitted rather than drawing its own. However, the court found that the two best plans, one submitted by the Republicans (Prosser IIIA) and the legislative plan, bore “the marks of their partisan origins.”²²⁵ The court then decided to make its own plan, combining the best features of Prosser IIIA and the legislative plan.²²⁶ The court found that both of these plans adhered well to the traditional redistricting principles of compactness and contiguity and closely followed the boundaries of political subdivisions, only occasionally splitting counties and municipalities.²²⁷ Prosser IIIA renumbered a Milwaukee senate district from an odd-numbered district to an even-numbered district so that, as the plaintiffs explained, minority residents in Milwaukee would have “an earlier shot at another senate seat.” Unfortunately for other voters, Prosser IIIA renumbered a district elsewhere in the state from an even-numbered district to an odd-numbered district, which would have resulted in disenfranchising a larger number of voters from voting in the 1992 election.²²⁸

Both plans created five black majority-minority assembly districts in Milwaukee with black voting-age populations ranging from 58 to 61 percent, but the legislative plan paired more incumbents in the process, which the court found could not be justified on the basis of compliance with the Voting Rights Act.²²⁹ Both plans created a black influence assembly district and a Hispanic influence assembly district in Milwaukee. Ultimately, the court plan did not vary greatly from the best attributes of both plans:

221. Prosser v. Elections Bd. at 862.

222. *Id.* at 862 and 865.

223. *Id.* at 862.

224. *Id.*

225. *Id.* at 865. “Judges should not select a plan that seeks partisan advantage—that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by persons having no political agenda—even if they would not be entitled to invalidate an enacted plan that did so.” *Id.* at 867.

226. *Id.*

227. *Id.* at 866. The court also considered a third plan, the Republican plan labelled Prosser IA, but rejected that plan because it “gratuitously” split wards.

228. *Id.* at 866. The court noted that a map drawer could not “offset” diluting the voting strength of one group by enhancing that of another.

229. *Id.* at 869–70.

The court plan creates a black senatorial district in Milwaukee; the black voting-age population of the district is 59.8 percent, which is essentially the same as Prosser IIIA and the legislative plan. The black “influence” senatorial district has a black voting-age population of 45 percent in our plan, which is the same as Prosser IIIA and slightly lower than the legislative plan. It creates five black-majority assembly districts, and one black-influence district, having black voting-age populations essentially identical to those in Prosser IIIA. In number of splits the court plan falls in between the legislative plan and Prosser IIIA; it splits 115 political subdivisions smaller than counties, compared to 108 for the legislative plan and 130 for Prosser IIIA. It temporarily “disenfranchises” 257,000 voters compared to 200,000 for the legislative plan and 392,000 for Prosser IIIA. The court plan splits no Indian reservations.

Finally, the court plan, far as we are able to judge, creates the least perturbation in the political balance of the state.²³⁰

The court’s plan took effect on June 2, 1992, and the Elections Board administered the 1992 primary and general election under that plan.

5. Redistricting 2000

The U.S. Census Bureau certified the state’s 2000 census population data on December 28, 2000.²³¹ Although Wisconsin’s population increased slightly more than 9 percent from its 1990 population, the increase in Wisconsin was less than that of some other states.²³² Consequently, the state would no longer have nine congressional districts, but eight.²³³

In 2001, Democrats controlled the state senate and Republicans controlled the state assembly and the governor’s office.²³⁴ On February 1, 2001, a group of voters from Congressional Districts 1, 2, 6, 8, and 9 filed suit in the U.S. District Court for the Eastern District of Wisconsin seeking “a declaratory judgment that the current [congressional] apportionment plan is unconstitutional, an injunction barring administration of elections under that plan and, in the absence of subsequent action by state legislators, the institution of a judicially-crafted redistricting plan.”²³⁵ Four days later, the senate Democratic caucus (the Baumgart intervenors) moved to intervene and to expand the suit to challenge the constitutionality of the state’s legislative districts.²³⁶ On February 8, the

230. *Id.* at 871. The court noted that Prosser IIIA had split Indian reservations, whereas the legislative plan had not. *Id.* at 870.

231. [Arrington v. Elections Bd.](#), 173 F.Supp.2d 856, 858 (E.D. Wis. 2001).

232. *Id.* n.2.

233. *Id.* n.3.

234. Governor Tommy G. Thompson (R) resigned, effective February 1, 2001, to become secretary of the U.S. Department of Health and Family Services. Lt. Governor Scott McCallum (R) assumed the office of governor upon Thompson’s resignation.

235. *Id.* at 858. The plaintiffs filed suit shortly after the announcement concerning the apportionment of representatives. *Id.* at 868–9.

236. *Id.* The senate Democratic caucus would later be referred to as the Baumgart intervenors, after Senator James Baumgart. See [Baumgart v. Wendelberger](#), Amended Memorandum Opinion and Order, Cases Nos. 01-C-0121, 02-C-0366,

chief judge of the Seventh Circuit Court of Appeals appointed a three-judge panel to hear the case. On February 21, 2001, the Speaker of the assembly, Scott Jensen, and the senate minority leader, Mary Panzer, both republicans, (the Jensen intervenors) moved to intervene in the matter of congressional reapportionment. They did not initially seek to challenge the legality of the legislative districts but subsequently amended their motion to challenge that as well.²³⁷

One of the first questions the court needed to consider was whether the plaintiff's complaint presented a justiciable case or controversy, as required under Article III of the U.S. Constitution. Did the plaintiffs claim a clearly identifiable injury that could be remedied by the court or were they seeking an advisory opinion based on a problem which may not arise?²³⁸ The plaintiffs, of course, argued that their allegations satisfied the case or controversy requirement of Article III. The intervenors agreed and the defendant, the Elections Board, took no position.

The plaintiffs alleged that, because of state population increases and shifts, the congressional districts were no longer in compliance with the constitutional requirement that U.S. representatives be apportioned among the states according to their respective number of inhabitants²³⁹ and that the districts were no longer equal in population, as mandated by the U.S. Supreme Court to avoid diluting the strength of any one elector's vote.²⁴⁰ The plaintiffs further alleged that the impending loss of one congressional representative would result in them being underrepresented and unable to fully participate in the political process leading up to the 2002 election due to the uncertainty surrounding who would represent them.²⁴¹

On November 28, 2001, the three-judge panel determined, with one judge dissenting, that the plaintiffs' complaint presented a justiciable case. The court found that the plaintiffs had a realistic concern regarding injuries to their voting rights and that the

[2002 WL 34127417 \(E.D. Wis. 2002\)](#).

237. *Arrington* at 859.

238. Citing prior U.S. Supreme Court decisions, the court recognized that it was limited under Article III to redressing "real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of the facts." *Arrington* at 859, quoting *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402 (1971).

239. U.S. Const. art. I, §2. "Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers."

240. "We hold that, construed in its historical context, the command of Art. I, § 2 that Representatives be chosen 'by the People of the several States' means that, as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964). "While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us." *Id.* at 18.

241. For example, the plaintiffs alleged that the "malapportionment of the state's congressional districts harms the plaintiffs (and others). Until valid redistricting occurs, they cannot know in which congressional district they will reside and vote, nor do they have the ability to hold their congressional representative accountable for his or her conduct in office." *Arrington* at 863, n.13.

prospect of such injuries occurring was not so speculative as to avoid immediate review. The court acknowledged that the state legislature has the primary responsibility to create congressional and legislative districts and that “a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.”²⁴² However, although the legislative intervenors asserted that they would redraw the congressional districts, they conceded that it was just as likely that they would come to an impasse on redistricting.²⁴³ In addition, in the absence of redistricting, the Elections Board would be duty bound to administer the 2002 general election using a malapportioned plan, one that could not realistically be administered because it included one more congressional district than allowed under federal law.

The lone dissenter, Judge Easterbrook, would have dismissed the complaint for failure to present an Article III case or controversy. Judge Easterbrook noted the fact that the complaint was filed shortly after the state learned it would be losing one congressional seat and long before the legislature had an opportunity to undertake redistricting:

The best face one can put on this complaint is that plaintiffs predict that Wisconsin will fail to enact eight equal-size districts. Yet a prediction that something will go wrong in the future does not give standing today. One might as well commence a suit as soon as some legislator introduces a bill that would be unconstitutional if enacted. Until the bill is enacted there is nothing to litigate about.²⁴⁴

Judge Easterbrook also took issue with the majority’s citation to a law review commentary for the proposition that congressional redistricting plans are “instantly unconstitutional” upon the release of the decennial census data, in effect, creating an immediate judicial case or controversy.²⁴⁵ He believed that declaring Wisconsin’s congressional districts malapportioned if used again to conduct the 2002 election, an impossibility based on having the wrong number of districts, would be advisory only and, therefore, improper.²⁴⁶ Consequently, Judge Easterbrook refused to take part in any further adjudication of the case.

Having determined that the plaintiffs could proceed with their suit, the court granted the unopposed motions to intervene and stayed the proceedings until February 1, 2002, so that the legislature could at least attempt to redistrict. The court also dismissed the Elections Board because it was a state agency and, therefore, not a proper defendant

242. *Grove v. Emison*, 507 U.S. 25, 34, 113 S.Ct. 1075 (1993).

243. *Arrington* at 864.

244. *Id.* at 869.

245. *Id.* at 860, citing Pamela S. Karlan, *The Right to Vote: Some Pessimism about Formalism*, 71 Tex. L.Rev. 1705, 1726 (1993).

246. *Id.* at 870.

under federal law, a defect noted by the dissent.²⁴⁷ The court ordered the plaintiffs, in consultation with the other parties, to prepare a schedule and administrative plan by December 19, 2001, for the “efficient judicial processing” of the case. The court also scheduled a status conference for January 7, 2002.²⁴⁸ The state received the final 2000 census data from the U.S. Census Bureau on March 8, 2001.²⁴⁹

On January 7, 2002, with the federal case still pending, Speaker Jensen and Senate Minority Leader Panzer petitioned the Wisconsin Supreme Court to take original jurisdiction on the issue of legislative redistricting, declare the existing legislative districts unconstitutional due to population shifts since the 1990 census, enjoin the Elections Board from conducting the 2002 elections using the existing districts, and redraw the assembly and senate maps in time for the 2002 elections.²⁵⁰ The petitioners sued the Elections Board and each of its members in his or her official capacity. The court allowed Senate Majority Leader Charles Chvala and Assembly Minority Leader Spencer Black, representing the senate and assembly Democrats, and the Wisconsin Education Association Council to intervene.²⁵¹ The intervenors argued against the court assuming original jurisdiction because the process for adjudicating the state and federal issues was well underway in federal court and, therefore, that court was in a better position than the state court to resolve those issues.²⁵² The members of the Elections Board, by a one-vote majority, supported the petition.²⁵³

On January 9, 2002, two days after Speaker Jensen and Senate Minority Leader Panzer filed their petition, Representative Bonnie L. Ladwig and others introduced a bipartisan congressional redistricting bill, 2001 Assembly Bill 711. The assembly passed the bill, as amended, on January 29, 2002, by a vote of 78 to 21. The senate did not immediately take up the bill.²⁵⁴

On February 12, 2002, the Wisconsin Supreme Court denied the petition to take original jurisdiction of legislative redistricting.²⁵⁵ The court decided that taking up the

247. *Id.* at 867, citing 42 U.S.C. § 1983 and *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 64, 109 S.Ct. 2304 (1989). In short, 42 U.S.C. § 1983 allows an action against a person, but a state agency is not considered a person under the statute. The dissent indicated that the plaintiffs could amend their complaint to name the individual members of the Elections Board as defendants, either as “natural” persons or as state officials acting in their official capacities.

248. *Id.* at 867–8.

249. *Baumgart v. Wendelberger*, Amended Memorandum Opinion and Order, Cases Nos. 01-C-0121, 02-C-0366, 2002 WL 34127417 (E.D. Wis. 2002).

250. *Jensen v. Wisconsin Elections Board*, 249 Wis.2d 706, 708–09 (2002).

251. *Id.* at 708.

252. *Id.* at 709.

253. *Id.* The four Republican appointees voted to support the petition. The two Democratic appointees and the court-appointed member voted against supporting the petition.

254. 2001 Wis. AB 711.

255. *Jensen*, 249 Wis.2d at 708–9.

case would put it on a “collision course” with the federal court proceedings and, rather than providing clarity and finality, create more confusion and, possibly, more litigation.²⁵⁶ The court noted that the federal panel had already established a schedule for discovery, pretrial motions, and separate trials on congressional reapportionment and legislative redistricting.²⁵⁷ The court also noted that because neither the state assembly nor the state senate had offered a redistricting plan, and were unlikely to do so, the Wisconsin Supreme Court would be duplicating the work of the federal court to the extent that both courts, absent a compromise, would be asked to render maps.²⁵⁸ In addition, maps created by the state court would still be subject to a potential challenge in federal court on the basis of alleged violations of federal law.²⁵⁹ Therefore, with the deadline for filing nomination papers approaching and an election less than nine months away, it was more efficient to have the federal court resolve all state and federal issues at once.²⁶⁰ The court indicated that had the petitioners come to the state court sooner, it would have been “highly appropriate” for the court to take up the matter.²⁶¹ In fact, it would have been the court’s duty and responsibility to take original jurisdiction of the case given that the state’s role in redistricting is primary.²⁶²

Finally, the court acknowledged that it did not have the necessary procedures in place to act as a trial court in a redistricting matter.²⁶³ In 1972, the state enacted a redistricting plan without involving the courts. However, the federal courts established plans following each subsequent census. The Wisconsin Supreme Court had not been involved in redistricting since 1964.²⁶⁴ The court, having reiterated its long unused primacy in the area of legislative redistricting, decided it would undertake rulemaking procedures “to assure the availability of a forum in this court for future redistricting disputes.”²⁶⁵ The court would solicit public and expert comment and then hold a hearing on the matter on Monday, October 14, 2002.²⁶⁶ Bringing an original action on

256. *Id.* at 716–18.

257. *Id.* at 715.

258. *Id.* at 714.

259. *Id.* at 716.

260. *Id.* at 717–18.

261. *Id.* at 709–10, 717.

262. *Id.* at 710, 717.

263. *Id.* at 718–20.

264. *Id.* at 711. See, [State ex rel. Reynolds v. Zimmerman](#), 22 Wis.2d 544 (1964) (Zimmerman I) and [State ex rel. Reynolds v. Zimmerman](#), 23 Wis.2d 606 (1964) (Zimmerman II).

265. *Jensen*, 249 Wis.2d at 720–21.

266. *Id.* “Components of a new procedure could include: provisions governing factfinding (by a commission or panel of special masters or otherwise); opportunity for public hearing and comment on proposed redistricting plans; established time-tables for the factfinder, the public and the court to act; and if possible, measures by which to avoid the sort of federal-state court ‘forum shopping’ conflict presented here.” As of the date of this publication, the Wisconsin Supreme Court has not established any procedures for trying redistricting cases.

redistricting before the Wisconsin Supreme Court would have to wait for another day and another case.

On March 12, 2002, the senate concurred in the passage of 2001 Assembly Bill 711. Governor McCallum signed the bill on March 29, 2002, and it became law as [2001 Wisconsin Act 46](#) on April 10. The enactment of Act 46 rendered moot the congressional redistricting issue before the federal court.

The federal court held a trial on the remaining issue of legislative redistricting on April 11 and 12, 2002.²⁶⁷ On April 12, in order to cure the jurisdictional defect in the earlier complaint, the Jensen intervenors filed a separate complaint against the members of the Elections Board acting in their official capacities.²⁶⁸ The court consolidated the earlier complaint challenging the legislative districts with the new complaint and the case proceeded as *Baumgart v. Wendelberger*.²⁶⁹ Prior to trial, other parties had moved to intervene. The court allowed Senators Gwendolynne Moore and Gary George to intervene but denied the motions of the African-American Coalition for Empowerment, Citizens for Competitive Elections, and Wisconsin Manufacturers and Commerce Association. However, the court allowed those three organizations to file briefs as *amicus curiae*.²⁷⁰ Judges Clevert, Easterbrook, and Stadtmueller presided over the proceedings.

On May 30, 2002, the court held that the existing assembly and senate districts violated the one-person, one-vote principle, an unsurprising result considering that the parties had agreed that the districts were unconstitutional on the basis of the deviations from ideal population.²⁷¹ The only thing left then for the court to do was adopt a new plan.

The parties submitted a total of 16 plans to the court for review: nine from the Jensen intervenors, three from the Baumgart intervenors, and one each from Senator George, the African-American Coalition for Empowerment, the Citizens for Competitive Elections, and the Wisconsin Manufacturers and Commerce Association.²⁷² With regard to the Jensen and Baumgart plans, the court considered only two from each group.

The court found that although the Jensen plans performed better than the other plans with regard to population deviation and compliance with traditional redistricting principles, the “partisan origins of the Jensen plans are evident.”²⁷³ The plans pitted a

267. [Baumgart v. Wendelberger, Amended Memorandum Opinion and Order, Cases Nos. 01-C-0121, 02-C-0366, 2002 WL 34127417 \(E.D. Wis. 2002\)](#).

268. *Id.*

269. *Id.* *Baumgart* refers to the Baumgart Intervenors from the original action and *Wendelberger* refers the chairperson of the Elections Board in 2002, Jeralyn Wendelberger.

270. *Id.*

271. *Id.* “For example, Senate District 6 deviates more than 22 percent from the perfect senate district numeric population, [162,536] and Assembly District 18 deviates more than 26 percent from the perfect assembly district numeric population.”

272. *Id.*

273. *Id.*

substantial number of Democratic incumbents against each other and moved a number of assembly Democratic incumbents into solid Republican districts.²⁷⁴ With regard to senate districts, the plans split county lines in districts with Democratic incumbents in a move that the court assumed would result in Republicans having a senate majority.²⁷⁵

The Baumgart plans fared no better, as the court found those plans to be “riddled with their own partisan marks.”²⁷⁶ Both Baumgart plans considered by the court cut the city of Madison into six assembly districts radiating from the isthmus like pieces of a pie.²⁷⁷ In addition, the Baumgart plans had higher levels of population deviations and disenfranchisement and lower levels of compactness, due in part to renumbering senate districts in Milwaukee County, which the court presumed was done for partisan reasons.²⁷⁸ Senator George submitted a plan substantially similar to one of the Baumgart plans, except that it had a higher population deviation and, as a result of renumbering Milwaukee County senate districts, disenfranchised more voters.²⁷⁹

Finding that all the plans submitted to the court had “unredeemable flaws,” the court decided to create a plan using the state’s court-drawn 1992 redistricting plan as a guide.²⁸⁰ The court began the process by adjusting the current districts for population changes in Milwaukee County and the surrounding region. Since the 1990 census, Milwaukee County’s population had decreased substantially and the population in the region west of Milwaukee County had increased substantially. In addition, the parties spent a considerable amount of time at trial discussing the impact that a new plan would have on Milwaukee County, specifically the impact on minority populations. Therefore, the court believed it was prudent to begin with redrawing the lines for the southeastern part of the state.²⁸¹

The court ultimately crafted a plan that created “five African-American majority assembly districts, one Latino majority assembly district, and one African-American ‘influence’ district.”²⁸² The court’s plan had a maximum population deviation that was less than the best of the Baumgart plans and only slightly higher than that of the Jensen plans.²⁸³ Compared to the Baumgart and Jensen plans, the court plan had a higher level of core retention and a lower level of disenfranchisement in senate districts and split fewer

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

municipalities.²⁸⁴ The court also indicated that, by considering the affidavits of the parties regarding more “subjective” considerations, its plan better respected and maintained the communities of interest in the City of Milwaukee.²⁸⁵

Less than a month after drawing new maps, on June 21, 2002, the court acknowledged that its plan had relied on data errors that resulted in some wards being noncontiguous, misidentified, or omitted entirely from the plan.²⁸⁶ The court ordered the parties to confer with the Wisconsin Legislative Technology Services Bureau “regarding the data underlying the . . . plan that may require further consideration by the court and the further amendment of the . . . plan.”²⁸⁷ On July 10, 2002, the court amended the plan to correct the population data errors identified by the LTSB.²⁸⁸ The new plan was subsequently used for the first time to conduct the 2002 general election.

The order establishing a new plan should have marked the conclusion of *Baumgart v. Wendelberger*. However, the case has an unusual epilogue. Nine years after the court’s order adopting the final amended plan, Senator Judy Robson, one of the original plaintiff intervenors, filed a motion to reopen the case, arguing that the recently conducted 2010 census had rendered the legislative redistricting plan unconstitutional.²⁸⁹ On July 27, 2011, the court denied the motion, stating that the mere occurrence of the decennial census was not an “exceptional circumstance” under the federal rules of civil procedure requiring the court to reopen its prior judgment.²⁹⁰

6. Redistricting 2010

In 2011, following the 2010 general election, Republican Scott Walker held the governor’s office and Republicans held majorities in both the senate and assembly. Wisconsin received the U.S. Census Bureau data necessary for redistricting on March 10, 2011, and legislative leadership immediately set to work on congressional and legislative redistricting plans while municipalities were still drawing ward boundaries.

The senate introduced a congressional redistricting plan, [2011 Senate Bill 149](#), on July 11, 2011. That bill passed the senate on July 19, 2011, and passed the assembly the following day. Governor Walker signed the bill as [2011 Wisconsin Act 44](#) on August 9, 2011.

284. *Id.*

285. *Id.*

286. *Baumgart v. Wendelberger*, 2002 U.S. Dist. LEXIS 29370.

287. *Id.*

288. *Baumgart v. Wendelberger*, U.S. Dist. E.D. Wisconsin, Case No. 01-C-0121, Case No. 02-C-0366 (July 10, 2002).

289. *Baumgart v. Wendelberger*, U.S. Dist. E.D. Wisconsin, Case No. 01-C-0121 (July 27, 2011).

290. *Id.*

Also on July 11, 2011, the senate introduced a legislative redistricting plan, [2011 Senate Bill 148](#), along with another bill, [2011 Senate Bill 150](#), which required counties and municipalities to conform ward and district lines to any enacted congressional or state legislative redistricting plan. The senate passed both bills on July 19, and the assembly concurred in both the following day. The governor signed SB 150 on July 25 and it became [2011 Wisconsin Act 39](#). Governor Walker signed the legislative redistricting plan, SB 148, on August 9, and it became [2011 Wisconsin Act 43](#). Act 43 had the lowest population deviations of any legislative redistricting plan in Wisconsin history: the population of all districts was within 0.4 percent of the ideal district size. Act 43 was also the earliest a legislative redistricting plan had been enacted since 1921.

Act 43 was challenged before the U.S. District Court for the Eastern District of Wisconsin. On March 23, 2012, a three-judge panel held that the boundaries of Assembly Districts 8 and 9, both in Milwaukee County, had to be altered in order to ensure that Hispanics could elect the candidate of their choice, consistent with U.S. Supreme Court precedent and the Voting Rights Act of 1965.²⁹¹ The panel otherwise upheld the plan. The court issued an order creating a new boundary between Assembly Districts 8 and 9 on April 11, 2012.²⁹² Elections then proceeded under Act 43, as modified by the court.

However, in July 2015, a group of plaintiffs filed a complaint with the U.S. District Court for the Western District of Wisconsin alleging unconstitutional partisan gerrymandering because the plan lacked “partisan symmetry.” Put simply, the plaintiffs alleged that the legislative districts under Act 43 intentionally favored the Republican majority in the legislature to such an extent as to violate the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. Furthermore, the plaintiffs proposed a test, the “efficiency gap” test, to measure the plan’s partisan symmetry.²⁹³

On November 21, 2016, a majority of the three-judge panel assigned to hear the case ruled in favor of the plaintiffs, finding that Act 43 provided an unfair advantage to one political party in violation of the equal protection clause and the rights of association under the First Amendment.²⁹⁴ The panel found, among other things, that Wisconsin’s “political geography,” while moderately favoring Republicans, “cannot explain the magnitude of Act 43’s partisan effect.”²⁹⁵ In November 2017, the defendants filed an appeal with the U.S. Supreme Court. In June 2018, the Supreme Court announced it would hear

291. [Baldus v. Members of the Wis. Gov’t Accountability Bd.](#), 849 F. Supp. 2d 840, 849–51, 852–3 (E.D. Wis. 2012). *See also* Part I, Section C. 2., Minority protection.

292. [Baldus v. Members of the Wis. Gov’t Accountability Bd.](#), 862 F. Supp. 2d 860 (E.D. Wis. 2012).

293. For a detailed description of the efficiency gap test, and for more information on the case generally, see Staci Duros, *Gill v. Whitford: Wisconsin’s Partisan Gerrymandering Case* (Madison, WI: Legislative Reference Bureau, 2017).

294. [Whitford v. Gill](#), 218 F. Supp. 3d 837, 910, 926–27 (W.D. Wis. 2016).

295. *Id.* at 924.

the case and subsequently granted a stay of the lower court's order invalidating the Act 43 maps.

However, with a decision in the Wisconsin case pending, the Supreme Court's decision in another partisan gerrymandering case rendered the Wisconsin litigation moot. In *Rucho v. Common Cause*,²⁹⁶ a consolidated case, voters and other plaintiffs in North Carolina and Maryland had filed suits challenging their states' congressional redistricting plans as unconstitutional partisan gerrymanders.²⁹⁷ The North Carolina plaintiffs claimed their state's redistricting plan discriminated against Democrats, while the Maryland plaintiffs claimed their state's plan discriminated against Republicans.²⁹⁸ The court dismissed, holding that "partisan gerrymandering claims present political questions beyond the reach of the federal courts."²⁹⁹ That decision effectively ended the Wisconsin litigation challenging the constitutionality of 2011 Act 43 as a partisan gerrymander. The Act 43 maps will remain in place until superseded by a new legislative redistricting plan following the 2020 census.

D. Conclusion

The 2020 redistricting cycle has yet to go on the books. When it does, it probably will not resemble the redistricting cycle in 2010 when, for the first time in 30 years, the legislature and the governor, rather than a court, put new legislative district maps in place in near record time. Not only is the political complexion of state government likely to look different for the 2020 cycle, but also redistricting will take place in the wake of the COVID-19 pandemic, a circumstance that could delay the delivery of census data to the states for purposes of redistricting.³⁰⁰ Any delay in the delivery of that data could likewise delay the redistricting process itself with the 2022 election cycle right around the corner. So, when the account of the 2020 redistricting cycle is ultimately written, it will likely have its own unique narrative to contribute to the broader history of redistricting in Wisconsin. ■

296. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-07 (2019).

297. *Id.* at 2487.

298. *Id.*

299. *Id.* at 2506-07.

300. See Part I, Section G., Redistricting timeline and potential delays due to COVID-19.

Appendix: Additional information, training, and assistance

Congressional and state legislative redistricting

The nonpartisan Legislative Reference Bureau (LRB) provides legal and information services to legislators concerning congressional and legislative redistricting and provides information services about redistricting to the general public. At the request of any legislator, LRB drafting attorneys draft proposed congressional and state legislative redistricting plans as bills for consideration by the legislature. Before drafting a proposed plan as a bill, the LRB assists legislators in putting together congressional and state legislative redistricting maps, using software developed, updated, and maintained by the nonpartisan Legislative Technology Services Bureau (LTSB). For more information concerning GIS maps used for redistricting and the data on which those maps are based, visit LTSB's GIS homepage at <http://legis.wisconsin.gov/ltsb/gis/>. For more information on elections generally, including redistricting, see the LRB's Elections Project publications, online at <http://legis.wisconsin.gov/lrb/pubs/wisconsin-elections-project/wisconsin-elections-project/>.

Local redistricting

The LTSB, the LRB, and the Applied Population Lab (APL) at the University of Wisconsin–Madison are involved in a coordinated effort to offer educational opportunities and hands-on training on the local redistricting process in Wisconsin in order to prepare local officials for the upcoming round of local redistricting in 2021. The LTSB conducts hands-on training and troubleshooting with the local redistricting software known as “WISE-LR,” which the LTSB developed. The LRB provides training on local redistricting law and process in Wisconsin. And the APL offers expertise on the census, population data and trends, and issues related to applied demography. For more information about local redistricting educational and training opportunities and for additional resources related to local redistricting in Wisconsin, visit <http://legis.wisconsin.gov/ltsb/local-redistricting/>.