





# BETWEEN THE LINES

Much is at stake in redrawing the boundaries of Wisconsin's political districts.

By Larry Sandler

In one sense, redistricting is just one huge math problem—a whole lot of number-crunching to divide everybody in the state into substantially equal groups, with the result being lines on maps to mark the geographic areas where those equal populations live.

Put that way, it seems so mundane a task that it could be assigned to an agency of bureaucrats plugging data into computers. Indeed, that's exactly what neighboring Iowa actually does.

But Wisconsin doesn't, and neither does any other state, because that huge math problem is also a huge political issue. Redistricting has the potential to decide control of both houses of the state legislature for the next decade.

That's five biennial budgets, totaling close to half a trillion dollars of spending, taxes, fees and borrowing; countless major policy decisions on education, health, public safety, transportation, natural resources, and human services; dozens of laws shaping criminal justice, civil litigation, and elections; and confirmation of gubernatorial appointees during three terms. All of these things and more ride on where those lines are drawn.

The redistricting done every 10 years, after the U.S. census is completed, also sets boundaries for many other elected officials, from the U.S. House of Representatives to local city councils and school boards. On every level, district lines can, and often do, affect decision making.

The impact of the COVID-19 pandemic has slowed the release of 2020 census figures, and thus slowed the redistricting process. But the stakes are high, and maneuvering by people across the political spectrum has been underway for months. That can be seen in the legal and political firepower amassed on both sides of a case involving what might look initially like an arcane rules matter. Awaiting a decision by the Wisconsin Supreme Court as of deadline for this article, the outcome of the case involving Supreme Court Rules Petition 20-03 will affect the handling of legislative-redistricting decisions that might not be finalized until 2022. Who will make the call on the new political boundaries—politicians themselves, state judges, federal judges, or others—remained unsettled well into 2021.

Drawing district lines is at the heart of democratic representative government, a primary mechanism for enforcing the constitutional mandate that every citizen's vote counts equally.

But with so much depending on the outcome, redistricting is also the focus of rampant political gamesmanship, hard-fought litigation, and persistent calls for reform. It is a system rooted in more than two centuries of law and history, but very much steered by the politics of the moment.

During the 2020–2022 cycle, Marquette Law School's Lubar Center for Public Policy Research and Civic Education is placing particular emphasis on reporting and programs concerning redistricting. This set of articles for the *Marquette Lawyer* by Larry Sandler, including the "sidebars" on pp. 44–51, is part of that initiative. Sandler is a freelance journalist with more than 35 years of experience covering government and business in southeastern Wisconsin for the *Milwaukee Journal Sentinel* and other publications.



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## Mapping Out the Law

Redistricting is derived from the United States Constitution, although it is never directly mentioned there. Article I of the nation's founding document says that the number of U.S. House members from each state will be determined by population, based on a nationwide census every 10 years, but it leaves the details up to Congress and the states. It doesn't say anything about redistricting state legislatures.

Yet the concept of electing state legislators from districts had already taken hold by the time the Constitution was ratified. Wisconsin's territorial legislature was elected by districts, starting in 1836, says a 2016 report on redistricting by the state's Legislative Reference Bureau (LRB). After statehood, the 1848 constitution specified that those districts should be determined "according to the number of inhabitants."

Despite that language, lawmakers decided that ensuring that each district had an equal "number of inhabitants" was secondary to respecting political geography, and, for more than 100 years, Wisconsin legislative districts were based largely on county lines, the LRB report says. The state supreme court upheld this principle in 1892, ruling that populous counties could be split into multiple districts and sparsely populated counties could be joined to make a single district, but that districts could not be constructed from pieces of different counties.

At the same time, the Fourteenth Amendment to the U.S. Constitution guarantees everyone "the equal protection of the laws," and the 1960s brought new legal force to those words.

In its landmark 1962 *Baker v. Carr* decision, the U.S. Supreme Court established the "one person, one vote" standard and ruled that federal courts could hear constitutional challenges to state legislative districting (and redistricting). Congressional legislation has provided that, unlike most cases, such challenges are heard by three-judge panels, consisting of both district and appellate judges, and any appeals go directly to the nation's high court.

*Baker v. Carr* was followed in 1964 by *Reynolds v. Sims*, which required both houses of a state legislature to be redistricted according to population, and *Wesberry v. Sanders*, which held that districts must be equal in population. In 1973, the high court clarified that state legislative districts—unlike congressional districts—need only be "as nearly uniform as practicable," rather than exactly equal.

Meanwhile, Congress approved the Voting Rights Act of 1965, outlawing discrimination against racial and linguistic minorities in election procedures, including the way that districts are drawn. The 1986 *Thornburg v. Gingles* decision established that the act prohibits even unintentional discrimination in redistricting.

Legal challenges alleging only a Voting Rights Act violation, but not a constitutional violation, proceed through federal court in the ordinary way, rather than with an original three-judge panel.

## A New Era of Redistricting

With the legal landscape transformed, "[t]he 1960s ushered in a completely new world in redistricting nationally and in Wisconsin," the Wisconsin LRB report says.

In addition to new laws, new court decisions, and new ideas about equality and justice, advances in technology have allowed the Census Bureau to release detailed demographic information more quickly, the report explains. Those developments also heightened awareness of the political impact of redistricting.

That's not to say that politics weren't already deeply embedded in the process from the beginning.

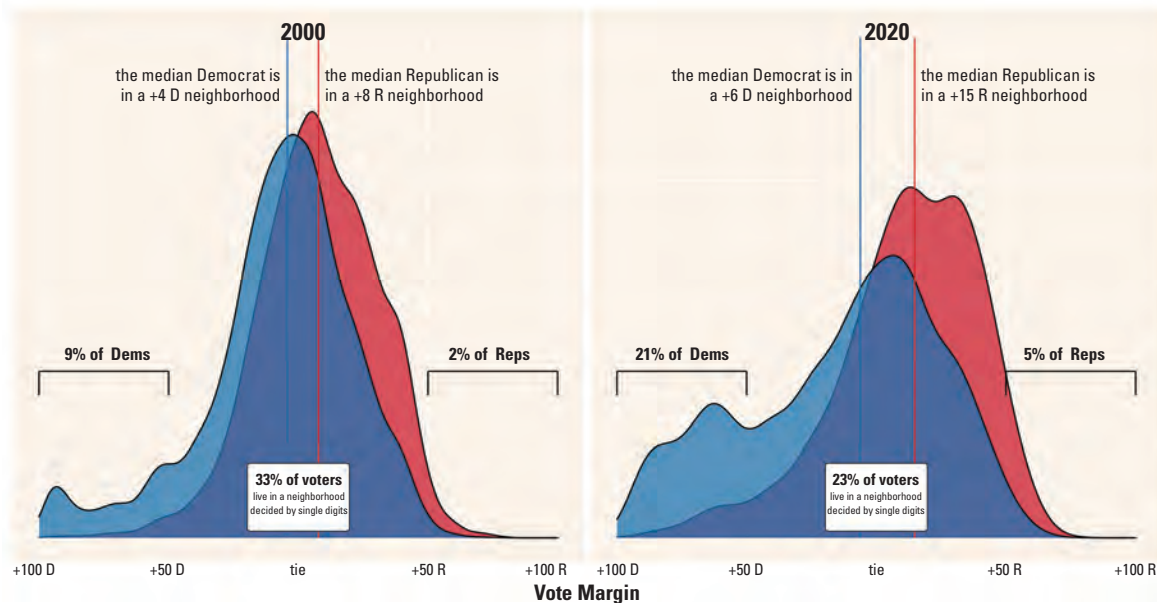
In the most famous example, from 1812, the Massachusetts legislature drew a bizarrely shaped state senate district, which benefited Governor Elbridge Gerry's Democratic-Republican Party. After Gerry, a signer of the Declaration of Independence and delegate to the 1787 Constitutional Convention, signed the map into law, a political cartoon compared the narrow, curving district to a monstrous salamander, and dubbed it a "Gerry-mander." Ever since, the practice of drawing districts for political advantage has been known as gerrymandering.

But in Wisconsin in recent times, political divisions thwarted gerrymandering attempts for four decades. In most of those decades, the same divisions also failed to produce compromises, and redistricting wound up in court, where judges drew the maps.

The history of drawing state legislative maps has been more tumultuous than for congressional maps. (See the sidebar article on page 49 about the state's congressional redistricting.) Those political and legal machinations are summarized in the LRB report and in the 2007 report of a task force appointed by the Wisconsin Supreme Court to study redistricting rules for the justices.

## In a narrowly divided state, shifting political geography

The partisan lean of neighborhoods where Wisconsin's Democratic and Republican voters live, 2000 and 2020



Wisconsin is becoming more politically polarized, a trend that has significant implications for redistricting. In the 2000 presidential election, a third of voters lived in neighborhoods where the percentage of support for the parties differed by single-digit margins. By the 2020 election, fewer than a quarter of voters lived in neighborhoods that were so closely divided. In addition, in 2020, 21 percent of Democratic voters and 5 percent of Republican voters lived in neighborhoods that overwhelmingly favored their party, more than twice the percentages of those living in lopsided neighborhoods in 2000 (then 9 percent of Democrats and 2 percent of Republicans).

**1960s:** After the 1960 census, Republicans controlled both Wisconsin's Assembly and Senate, but could not agree on a redistricting plan until after the U.S. Supreme Court handed down its ruling in *Baker v. Carr* in March 1962. The Democratic governor, Gaylord Nelson, vetoed the plan, and the legislature failed in override attempts or to bypass him by including its plan in a joint resolution instead of a law.

A federal court allowed the state to use its old maps for the 1962 elections, in which the GOP held on to its legislative majorities and Democrat John Reynolds succeeded Nelson as governor. After Reynolds vetoed a Republican-sponsored plan, the legislature sustained his veto but adopted a joint resolution to enact its map without his signature.

Reynolds then appealed to the state high court, which ruled the joint resolution approach unconstitutional in *Reynolds v. Zimmerman*. In that February 1964 decision, the Wisconsin Supreme Court also issued an ultimatum: If a redistricting plan wasn't law by May 1, the justices would draw the maps themselves. The court did just that, after Reynolds vetoed yet another GOP-backed plan and the legislature failed to override his veto.

**1970s:** Following the 1970 census, the Democratic-controlled Assembly and Republican-led state Senate were unable to agree on a redistricting plan, drawing another state supreme court

ultimatum. Governor Patrick Lucey, a Democrat, called the legislature into special session, opening with a joint session in which he personally beseeched lawmakers to adopt equitable maps.

They heeded Lucey's call, and he signed the resulting plan. For the first time, every district was within 1 percent of the statewide average population. Also as part of this act, the legislature created the system of wards, or voting units, that would become building blocks for future state, federal, and local redistricting plans. (See the sidebar article on page 46 about local redistricting in Wisconsin.)

**1980s:** With Democrats in control of both chambers after the 1980 census, the legislature agreed on a redistricting plan, only to face a veto from the Republican governor, Lee Dreyfus. The state's largest labor organization, the Wisconsin AFL-CIO, filed suit, leading a panel of three federal judges to draw the maps.

But the court's maps were only used once. Democrats scored a trifecta in the 1982 elections, keeping their hold on both houses while Governor Anthony Earl replaced Dreyfus. The legislature then adopted its own maps, which Earl signed into law.

**1990s:** As they had a decade before, Democrats controlled both chambers of the state legislature after the 1990 census. And in a repeat of the early-1980s pattern, they approved a redistricting plan that was vetoed by the GOP governor, Tommy

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**After five decades of shifting political tides, the “red wave” election of 2010 was perfectly timed for Republicans.**

Thompson. This time, the Republicans filed suit, led by Assembly GOP leader David Prosser, resulting in another map drawn by a three-judge federal panel.

**2000s:** Following the 2000 Census, Democrats held the Senate, while Republicans controlled the Assembly. They couldn't agree on a redistricting plan to send to Governor Scott McCallum, a Republican. That triggered 2002 litigation in both federal court and state court. As a three-judge federal panel was considering the case, the Republican speaker of the Assembly, Scott Jensen, asked the state supreme court to intervene. Unlike their predecessors of the 1960s and 1970s, the justices declined, deferring to the federal court, which drew the maps.

### Power Play

After five decades of shifting political tides, the “red wave” election of 2010 was perfectly timed for Republicans. In the first midterm balloting under President Barack Obama, a Democrat, the GOP swept to big gains both nationally and statewide, taking over Wisconsin's lower house, Senate, and governor's office—the first time in 72 years that all three changed hands simultaneously.

That handed Republicans complete control of redistricting for the first time since the 1950s. But Democrats soon mounted recalls against six GOP senators in an effort to capitalize on opposition to 2011 Act 10, which had stripped most public-employee unions of nearly all collective-bargaining rights. Republicans retaliated by launching recalls against three Democratic senators.

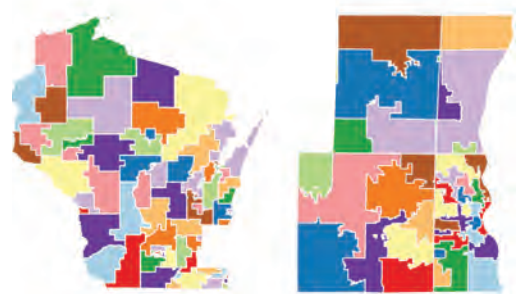
With the Senate divided 19–14, Democrats needed a net gain of three seats in the nine recall elections to retake the upper chamber. If redistricting proceeded on the usual timetable, Democrats would have a shot at influencing—or blocking—the legislature's maps.

Republicans swiftly upended the timetable. Instead of waiting for local governments to redraw wards based on tentative county supervisory districts, the GOP used census blocks to start drawing legislative districts as soon as detailed census data became available, then retroactively legalized that process (2011 Act 39).

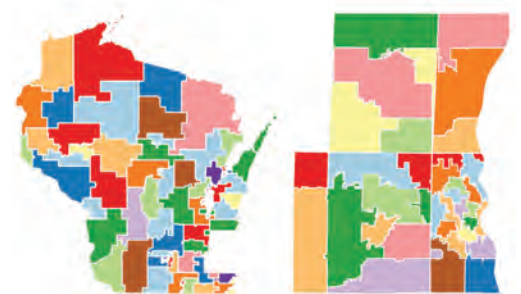
Aided by powerful new computer technology, Republicans created their maps in remarkable secrecy. They drafted the maps in the Madison law offices of Michael Best & Friedrich and required GOP lawmakers to sign nondisclosure agreements (NDAs) just to get a look at their own districts, without being allowed to see the entire draft maps.

## ASSEMBLY DISTRICTS BY DECADE

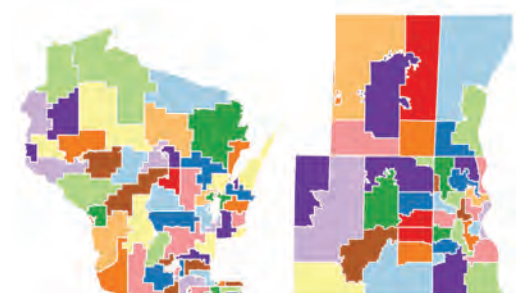
### 1990s



### 2000s



### 2010s



These maps show the boundaries of state Assembly districts during the past three decades (the insets on the right show the Milwaukee metro area, which is whited out to the left).

The court-drawn map of districts for the 2000s changed relatively little from the previous court-drawn map for the 1990s, but the map drawn by Republican legislative leaders for the 2010s differed significantly. In the 2010s, 35 percent of the state (by area) wound up in a different district, more than twice the 17 percent shift of a decade earlier. Similarly, the total perimeter of all Assembly districts, a measure of their boundaries' complexity, grew by 5.3 percent in the 2010s, more than three times the 1.7 percent increase the prior decade. The varying colors in the map are simply to make the district boundaries more visible.



Madison attorney Jim Troupis, who was involved in this process, maintains that the secrecy was nothing new. Like other legislation, district maps are commonly drafted behind closed doors rather than in open committee meetings, says Troupis, a former judge who also represented Republicans in the previous two rounds of redistricting.

But this time was different, because the GOP's unified control of state government meant that its maps would become law, argued Doug Poland, the Madison attorney who represented the Democratic side. By drawing maps in law offices and using NDAs, Republicans tried to cloak their work behind a veil of attorney-client privilege and legislative privilege that a three-judge federal panel partly rejected, but that Democrats could not fully remove until they later (and briefly) retook the Senate, says Poland, now litigation director for progressive legal organization Law Forward, in Madison.

The legislature approved the maps in July 2011, and Governor Scott Walker signed them into law the next month. This was the earliest that a state redistricting plan had been enacted since 1921, the LRB noted. Walker's signature came on the same day as most of the recall elections, where the Republicans maintained control of the Senate, but by a narrower (17–16) margin.

Democrats promptly filed suit to challenge the maps. In 2012, a three-judge federal court upheld most of the maps but ordered the boundary between Assembly Districts 8 and 9 to be redrawn to give Milwaukee's Hispanic community a supermajority in District 8. When the legislature didn't do so, the court approved a revised map for those districts, drawn by Kenneth Mayer, a University of Wisconsin-Madison political science professor who served as an expert witness for the Democratic side, Poland said.

In contrast to previous cycles, however, litigation did not end there.

Democrats saw the impact of the GOP maps in the 2012 election. Obama carried the state by seven percentage points on his way to reelection, and Democrat Tammy Baldwin defeated Tommy Thompson by six points to win a U.S. Senate seat. But Republicans boosted their majority in the Assembly from 58 to 60 seats (out of 99) and took back the state Senate from Democrats, who had briefly held the upper chamber after a 2012 recall election.

Republican Dale Schultz, a former Senate majority leader, calls the 2012 election "an epiphany" that led him to join forces with former

Senate Democratic leader Tim Cullen to work for changes in redistricting. "I realized we had invented a process that was thwarting the will of the voters," Schultz said at an October 2020 "On the Issues with Mike Gousha" online program from Marquette University Law School.

"The 2011 round [of redistricting] was an intentional and extreme gerrymander, probably one of the most extreme in American history," said Mayer, who also had been an expert witness for the Democrats in 2002.

However, as Republicans argued at the time, partisan gerrymandering wasn't illegal. Unlike gerrymandering based on racial discrimination, the courts had repeatedly refused to step in. The only glimmer of hope for gerrymandering opponents was that U.S. Supreme Court Justice Anthony Kennedy, a frequent swing vote, had suggested in 2004, in a case called *Vieth v. Jubelirer*, that the practice might be unconstitutional if someone could "define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights."

With Kennedy's words in mind, then-University of Chicago law professor Nicholas Stephanopoulos and policy analyst Eric McGhee devised the "efficiency gap," which measures "wasted votes"—votes in excess of the majority needed to win a seat—to demonstrate the impact of "packing" party loyalists into the fewest possible supermajority districts or "cracking" them between districts (the latter to prevent them from gaining a majority in any one district).

For example, if Democrats win one district with 70 percent of the votes, they have "wasted" 20 percent. If Republicans win two adjacent districts with 55 percent each, they have "wasted" only 10 percent of the combined vote. For all three districts together in this example, the efficiency gap favors the Republicans—and drawing the lines differently might have allowed the Democrats to win all three with approximately 53 percent each.

Based on the efficiency gap, Poland and Stephanopoulos convinced a three-judge panel in 2016 to strike down Wisconsin's Republican-drawn maps, the first time a federal court had ruled against a partisan gerrymander. In 2018, in *Gill v. Whitford*, the Supreme Court set aside the decision for failure of the plaintiffs to have shown adequate legal standing to proceed in federal court, but it sent the case back to the federal district court for further proceedings on the matter.

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While *Gill* was returning to the lower court, Kennedy retired. In 2019, his successor, Justice Brett Kavanaugh, joined in a 5–4 decision, written by Chief Justice John Roberts: *Rucho v. Common Cause* ruled that “partisan gerrymandering claims present political questions beyond the reach of the federal courts.”

Within a week, the three-judge federal district court in Wisconsin dismissed the *Gill* case.

### Redrawing the Rules

Given the history, no one expects a bipartisan agreement to emerge from the current round of redistricting. Republicans still have a firm grip on both houses of the legislature, but a Democratic governor, Tony Evers, holds the veto pen.

“The probability of an actual compromise between the legislature and the governor is approximately nil,” Mayer said.

“Adopting a new map for redistricting after the 2020 census will likely be difficult and any dispute will end up in the courts (as it did the last time Wisconsin had divided government in 2001),” the conservative Wisconsin Institute for Law and Liberty (WILL) wrote in support of a petition for a new state supreme court rule on redistricting cases.

WILL filed the petition on behalf of Jensen, the former GOP speaker of the Assembly who tried to shift the 2000s redistricting litigation from federal to state court. When the justices demurred back then, they said they did not have procedures in place to handle such a case. WILL and Jensen, now a school-choice lobbyist, said it was time to create such procedures.

The court previously had attempted to do so. In 2003, the justices named a committee of legal and political science professors—including Mayer and Peter Rofes, a Marquette University law professor—to propose a rule. The committee came back with its recommendations in 2007, and, in response to justices’ concerns, followed up with a revised version in 2008.

The committee’s proposed rule called for a panel of five randomly selected state appellate judges to hear redistricting challenges—and if necessary, draw new maps. Their decision could be appealed to the Wisconsin Supreme Court. That structure recognized that such cases require substantial fact-finding, and that the supreme court and its counterparts “do their best work when others have taken their shots before” and “cleared away the underbrush,” Rofes said. But in 2009, the justices rejected that proposal, 4–3, with conservatives in the majority.

“I do not think the court, this court, which consists of elected officials, really ought to be jumping into this political thicket,” said Prosser, the former Republican speaker of the Assembly who by then was a justice. He also called the rule “almost like an invitation [to the legislature] to fail” at redistricting, since the court would be ready to step in if lawmakers were deadlocked.

Jensen’s proposed rule, by contrast, would provide for the supreme court to exercise original jurisdiction over redistricting cases, although the justices could appoint a circuit judge or special master if they determined facts to be in dispute. His petition is supported by Republican legislative leaders and the state’s five GOP congressmen.

WILL President Rick Esenberg called redistricting “a quintessential original action case,” because of its statewide importance and the “considerable urgency” to resolve all redistricting issues before June 1 of the election year, when candidates can start circulating nominating petitions for fall elections.

That urgency could be even greater in this cycle, because of a major delay in releasing census data. Ordinarily, the Census Bureau would have sent detailed data to all states by March 31 of this year. But coronavirus complications repeatedly pushed back that timeline, and in February, the bureau said its new deadline would be September 30, sharply compressing the time available for legislative and court action.

Law Forward, which has led the charge against the proposed rule, is backed by Evers and others who filed hundreds of comments in opposition, including lawyers, academics, and progressive groups. If the high court wants a rule, it should be studied in detail, “not just based on the musings of Rick Esenberg and Scott Jensen,” Poland said.

Esenberg said redistricting is a state question that belongs in state court. Poland said three-judge federal panels have demonstrated experience and expertise in redistricting issues. He and Esenberg agree, however, that state and federal courts have concurrent jurisdiction and plaintiffs can try to get relief in either venue.

Underlying the legal debate is the political question whether either side has an advantage in either court. WILL has a recent history of filing original-jurisdiction actions with the state supreme court, and Poland called its proposed rule “forum-shopping in the extreme.” Esenberg denied this, saying that the independent streak shown by Justice Brian Hagedorn shows the court isn’t that predictable.

In fact, Hagedorn lamented the trend toward original actions in rejecting an unrelated WILL-filed lawsuit in December, writing, “This court is designed to be the court of last resort, not the court of first resort.”

And at a January 2021 public hearing on the proposed rule, Chief Justice Patience Roggensack, as she had in 2009, expressed deep skepticism at the idea of the court’s drawing the maps. As of late April, the court had not announced a decision on the rule.

Another previously rejected idea that could resurface is redistricting by joint legislative resolution to bypass Evers. Although the state supreme court found that tactic unconstitutional in the 1964 *Reynolds* case, the progressive *Wisconsin Examiner* reported in 2019 that Republicans were considering it again. GOP leaders denied discussing that option but didn’t completely rule it out.

## Commissioning a Map

With that history in mind—and similar experiences in other states—it may not be a surprise that some people want to find a less contentious and less politicized way to handle redistricting. Many cite Iowa as a model. Since 1981, that state’s maps have been drawn by its nonpartisan Legislative Services Agency, under the guidance of a bipartisan commission, subject to approval by lawmakers. However, no other state has adopted a similar system. In Wisconsin, Cullen and Schultz cosponsored a bill in 2013 to assign redistricting to the LRB, but that bill died in committee without a hearing.

A more common method is the use of a bipartisan commission, often including independents or third-party representatives, to draw the lines. In 14 states, those commissions have primary responsibility for legislative (and often congressional) redistricting, without lawmakers’ approval. Politicians are prohibited from serving on the most independent of these commissions (in Alaska, Arizona, California, Colorado, Hawaii, Idaho, Michigan, Montana, and Washington), an approach upheld by the Supreme Court in a case from Arizona. By contrast, five other states (Arkansas, Missouri, New Jersey, Ohio, and Pennsylvania) not only have politicians on their commissions but also sometimes include their governor and other high-ranking officials on them.

Another five states (Connecticut, Illinois, Mississippi, Oklahoma, and Texas) have backup

commissions, typically consisting of top state officials, that swing into action if lawmakers cannot agree on maps by a set deadline. Five more states (Maine, New York, Rhode Island, Utah, and Vermont) have constitutionally or legislatively authorized advisory commissions whose work is subject to lawmakers’ approval.

In Wisconsin, creation of some sort of “nonpartisan procedure” for redistricting has been endorsed in advisory referendum questions approved by voters in 28 counties and 19 municipalities and in resolutions adopted by 54 of the state’s 72 county boards. That idea also was backed by 72 percent of respondents in a 2019 Marquette Law School Poll.

Wisconsin’s legislature, however, hasn’t agreed to give up any of its redistricting authority. And as Mayer noted, voters here don’t have the power to bypass lawmakers and initiate a referendum on a constitutional amendment by petition, the way Arizona, California, Colorado, and Michigan established their commissions in recent years. Instead, Evers followed Virginia’s lead in creating an advisory commission by executive order. His nine-member People’s Maps Commission has been holding hearings to take comments from experts and residents about how the lines should be drawn.

Evers empowered three retired judges to pick commission members and banned politicians and lobbyists from serving on the panel, but Republican legislative leaders slammed the commission as partisan and vowed to ignore its maps. Cullen, the Democrat speaking at the October 2020 Marquette forum, said that the panel erred by inviting Obama’s former attorney general, Eric Holder, a national leader of Democrats’ redistricting and fundraising efforts, to address its first meeting. Evers’s office did not respond to requests for an interview with the commission chairman, Milwaukee physician Christopher Ford.

Still, the commission’s maps could play a role in any litigation over the issue. Schultz said they should show “what a fair map looks like.”

Troupis, the longtime Republican lawyer, said it would be preferable for elected officials to negotiate a compromise on redistricting without judicial intervention, as the state constitution intends. “The courts are a poor substitute for the political process,” Troupis said. “We do the best we can as lawyers and judges.” ■

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