



THE BOUNDARIES OF LAW AND POLITICS

Disputes over Wisconsin's maps for political districts have a long history, but the last few years have brought especially intense court battles.

BY JOHN D. JOHNSON

Wisconsin's 2020 redistricting cycle was long, bitterly contested, and subject to dramatic reversals of fortune. Yet perhaps the most unusual feature of the whole process was how it ended in 2024: with a legislative redistricting plan passed by Republican legislators and signed by a Democratic governor. Redistricting of the state legislature by divided political branches had occurred only three times prior in state history—in 1852, 1856, and 1971.

Redistricting may once have seemed a matter primarily of interest to political insiders. But the boundaries of legislative districts have great impact on politics and power, as the events of the last 15 years in Wisconsin have shown.

This article describes the twists and turns of Wisconsin's redistricting history, particularly following the 2020 census. The disputes illustrate longstanding, unresolved debates about the process and principles by which new maps are drawn.

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A VERY BRIEF HISTORY OF WISCONSIN REDISTRICTING

The modern era of redistricting began in the 1960s, after a series of federal court decisions, beginning with the U.S. Supreme Court's 1962 decision in *Baker v. Carr*. Broadly speaking, the result of the Court's interventions was to impose a one-person-one-vote principle to require balanced populations among state legislative districts.

In 1964, in *State ex rel. Reynolds v. Zimmerman*, the Wisconsin Supreme Court drew new state legislative maps. At the time, the court still operated under the constraint—a 19th-century interpretation of the state constitution—that county borders had to remain inviolable in the drawing of Assembly districts. The justices emphasized just two principles in selecting their map: relative equality of population and compactness.

In the 1970s, a divided state legislature managed to pass compromise maps during a special session called by the governor for that purpose. After the election of 1980, no compromise emerged, and in 1982 a three-judge federal court decreed new maps.

The 1982 decision, *Wisconsin State AFL-CIO v. Elections Board*, includes many of the now-familiar elements for assessing maps. Foremost, it considered population equality, aiming for a total deviation (between any districts) ideally below 2 percent. Beyond that, the court sought compact, contiguous districts that minimized municipal splits. Wisconsin had previously discarded the intact-counties rule, and the federal court in 1982 held that the integrity of county lines was “desirable” but of “secondary importance.” The judges also sought to keep communities of interest, in particular racial minorities, intact. Finally, and significantly, the federal judges explicitly rejected the consideration of incumbent or partisan interests in the creation of their map, writing, “At no time in the drafting of this plan did we consider where any incumbent legislator resides or whether our plan would inure to the benefit of any one person or party.”

In 1992, another three-judge federal court, in *Prosser v. Elections Board*, drew the maps for Wisconsin's Assembly and Senate. This court emphasized the importance of population equality only up to a point, writing in an oft-quoted phrase, “Below 1 percent, there are no legally or politically relevant degrees of perfection.” Notably, the *Prosser* court rejected the argument that Wisconsin's constitution requires “literal contiguity.”

Unlike the court a decade earlier, the 1992 panel took deliberate care to avoid pairing incumbents together. However, it also explicitly endorsed a nonpartisan approach to drawing maps. The court exhorted, “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.”

In 2002, the next federal court, again in the form of a three-judge panel, took a different approach, introducing the idea of “core retention” to Wisconsin redistricting. The majority in *Baumgart v. Wendelberger* wrote, “The Court undertook its redistricting endeavor in the most neutral way it could conceive—by taking the 1992 reapportionment plan as a template and adjusting it for population deviations.” This was the first use of a “least change” approach in Wisconsin's judicial redistricting. Despite establishing its primary interest in core retention, the court also considered the performance of its selected plan on a whole host of traditional redistricting criteria.

Democrats took control of the Wisconsin legislature via the 2008 election, on the coattails of Barack Obama's overwhelming presidential victory in the state (by almost 14 percentage points). Holding also the governor's mansion, Democrats declined to use their trifecta to pass a law requiring redistricting by an “independent commission,” hoping that they would themselves control the process in 2011. However, the Tea Party movement in 2010 installed Republican Scott Walker as governor, bringing in, along with him, GOP majorities in both houses of the legislature.

SETTING THE STAGE

Republicans seized upon their new trifecta, which came at the right time—that of decennial redistricting. The map drawn and passed along party lines in 2011 was a remarkably effective partisan gerrymander. It gave Republicans a vise grip on both houses of the state legislature by accentuating the natural “packing” of Democratic support into urban seats while “cracking” it elsewhere. Scarcely any seats remained competitive. Of the 396 general elections held for an Assembly seat from 2014 to 2020, only 7 resulted in the flipping of a seat between the parties.

In statewide elections, Wisconsin remained a closely contested state throughout the 2010s, but the practical effect of the gerrymander was that

statewide swings within the normal range had no real consequence on legislative elections. For instance, Scott Walker won reelection in 2014 by 5.74 percentage points (as a share of the two-party vote) and lost it by 1.12 points in 2018. That is a net change of nearly 7 points statewide. Yet the number of Assembly districts in which Walker won a majority declined by only 1 (among a total of 99), from 64 in 2014 to 63 in 2018.*

Feeling stymied by the legislative maps, Democrats in Wisconsin eagerly anticipated the 2021 redistricting process. Politicians have always taken a great personal interest in where the lines are drawn, but public interest in the process also reached unusually intense levels in the leadup to the 2020 census release. Campaign-style yard signs reading “THIS TIME Wisconsin Deserves FAIR MAPS” cropped up around the state, distributed by a coalition of groups.

Neither the strength nor the durability of the Republicans’ majority in the state legislature during the 2010s is entirely due to the skill of the party’s 2011 gerrymander. Voters themselves are far more predictable than in past eras, splitting their tickets less often and relatively rarely switching party support from one election to the next. The growing urban-rural divide increasingly caused a natural packing of Democrats in maps that follow traditional redistricting criteria such as compactness and keeping municipalities intact. This geographic disadvantage to Democrats led to a split among reformers regarding what makes a redistricting plan “fair.”

In one view, *fairness* is the result of a *neutral, nonpartisan* process. The mapmakers should only consider purely nonpartisan goals such as maximizing compactness, minimizing divisions of municipalities into different districts, and keeping communities of interest intact. Any residual partisan advantage in such a plan is just an inevitable outcome of where people live.

In another view, a *fair* map is one that *minimizes bias*. Tastes differ on how this should be measured. Some advocates call for maps that allocate seats proportionally to the share of votes cast, yet proportional outcomes in a regime of single-member districts cannot be consistently or reliably achieved throughout a decade-long range of

election outcomes. Recognizing this, others simply argue that fair maps are those that reliably deliver a majority of legislative seats to the party winning a majority of the vote.

Still others reject the necessity of reform altogether. Maps, in this view, are appropriately drawn by the parties fighting to maximize their interests, constrained only by the modest requirements of the state and federal constitutions. This is usually the dominant perspective among whichever political party finds itself in control of a state’s government, including, in Wisconsin, both Republicans (in the 2020s) and Democrats as recently as 2009.

THE 2020 REDISTRICTING CYCLE, TAKE 1

The starting gun for any redistricting process is the release of the PL 94-171 data files by the U.S. Census Bureau, containing block-level population counts (the name/number refers to a 1975 law enacted by Congress). The COVID-19 pandemic delayed release of these data from March 31 until August 12, 2021.

Litigation in Wisconsin began forthwith, in expectation of a deadlock between the legislature and the governor. Democratic operatives filed a federal lawsuit on August 13, and conservative activists filed a state suit on August 23. The federal suit was assigned to a panel of three judges, two of whom had been appointed to their seats (with Senate confirmation) by President Barack Obama and one by President Donald Trump. The state suit was taken up directly by the Wisconsin Supreme Court, composed at the time of four “conservatives” and three “liberals” (the terms, whatever their demerits, are the commonly used ones).

This set up the first big question: Which court should hear the case? After all, the existing malapportionment between districts (the natural result of population changes in the previous decade) allegedly violated both the federal and state constitutions, but as a practical matter there could be only one set of new maps. In 2001, a similar dual-litigation scenario had been resolved when the Wisconsin Supreme Court deferred to the federal court.

* To be sure, the actual results of state legislative elections are not identical to the votes cast for president or governor within each district—generally, local incumbents win a bit more of the vote than does their party’s statewide standard-bearer. Nonetheless, top-of-the-ticket and down-ballot races have become so closely correlated in recent decades that this article uses the votes cast in prominent statewide races as a proxy for the political lean of individual districts. So references to follow in this article—e.g., “Trump districts” or “Biden districts”—denote the districts in which that statewide candidate received a majority of votes cast, regardless of which local candidate won the district race.

The reverse was true in 2021. The three-judge panel quickly stayed the federal case, in deference to the state court. The state court, in turn, waited for the legislature to reach an impasse with the governor, as was universally predicted.

Prior even to the release of redistricting data, Governor Tony Evers established by executive order a process for a “nonpartisan redistricting commission,” called “The People’s Maps Commission.” This body had no statutory standing but held public meetings, promulgated a set of mapmaking criteria, and released proposed maps on November 5, 2021.

These commission-drawn maps attempted to hedge the two different definitions of fairness. In describing its methods, the commission outlined a set of criteria for *drawing* maps, all of which were said to be scrupulously nonpartisan. It stated that any maps satisfying all such criteria would lastly be *evaluated* for “partisan fairness.” The final maps chosen by the commission reflected this ordering of concerns.

The maps would have limited the existing Republican margin in the legislature. Statewide, Joe Biden won 50.3 percent of the two-party presidential vote in 2020. Under the Assembly map as used from 2012 through 2020, this translated into a Biden majority in just 37 districts, versus 62 for Trump. Under the commission’s proposed map, the victory would have yielded 45 Biden districts to 54 Trump districts.

The commission’s maps were also drawn with explicit disregard for the addresses of incumbent legislators or the current district boundaries. This likely contributed to the chilly reception of the maps from legislators of *both* parties. Knowing this, GOP leadership forced an Assembly vote: it saw all Republicans and almost half of the Democrats (17 of 38) vote against the commission’s maps.

On the same day, November 11, 2021, the state’s GOP legislators also passed their own preferred new legislative and congressional maps on a party-

line vote. These maps closely matched the districts used for the previous decade. The changes aimed to update the original gerrymander to account for political shifts over the previous decade. They also sought to shore up Republican support in the western Milwaukee suburbs, where two Assembly seats had flipped to Democrats since Trump’s election in 2016. In northwestern Wisconsin, the legislature’s map modified two historically Democratic seats to take advantage of Republican gains in rural areas. All told (see the summary in Table 1), using the 2020 vote, 64 of the new seats in this map were Trump districts, compared with 62 under the previous maps.

Or they would have been: In fact, as expected, Governor Evers vetoed the legislature’s maps on November 18, 2021, teeing up intervention from the Wisconsin Supreme Court in its existing case, *Johnson v. Wisconsin Elections Commission*. On November 30, the court issued a ruling explaining how it would choose new maps. This decision on how to proceed fractured the court.

A bare majority of four justices—all the conservatives—agreed to seek new maps that rebalanced district populations while making the “least change” from previous maps. Three of these justices held that this was the *only* valid approach. A fourth justice, Brian Hagedorn, concurred with the “least change” standard in this situation but argued that additional criteria could still be legitimately considered. The three liberal justices dissented entirely.

In this way, the court found a narrow majority in support of its next course of action, though without a majority for the precise legal rationale for the decision. The court set a deadline of December 15 for the parties to submit proposed maps to be evaluated by the “least change” standard.

Six parties to the lawsuit submitted proposed state legislative maps, while four submitted congressional maps. Despite the court’s new specification of a “least change” standard, the Republican legislators simply submitted their map as vetoed by Evers. The governor, by contrast, abandoned the map created by his People’s Maps Commission and submitted his own least-change proposal instead.

Doubtlessly taking advantage of the opportunity for comparison, Evers’s new submission was carefully drawn to move notably fewer people (and acres) from one Assembly or congressional district to another than the legislature’s plan. Despite the adherence to this criterion, the Evers state map was

Table 1. Number of State Legislative Districts Won by 2020 Presidential Candidates in Selected Maps

Mapmaker	State Assembly		State Senate	
	Biden	Trump	Biden	Trump
Actual districts, 2012-2020	37	62	11	22
People’s Maps Commission	45	54	12	21
Evers’s least-change	43	56	12	21
Legislative Republicans	35	64	11	22

nonetheless significantly better for the Democratic party than was the legislature's plan. There were 43 Biden districts in the Evers submission.

On March 3, 2022, the court chose Evers's maps, following a simple logic. The governor's proposal showed the least change from the maps used in 2012–2020 because it moved the fewest voters into a new district. However, the majority choosing the Evers maps shared just one justice, Hagedorn, with the majority that originally had chosen the “least change” approach.

The other three conservative justices rejected the idea that a “least change” approach should be based on “core retention,” or the number of voters not moved between districts. Instead, they made various arguments that “least change” should instead involve more emphasis on population deviations or the number of municipal splits—considerations that would lead to the selection of the Republican legislators' map.

The seven justices' various opinions—a majority, concurrence, and dissents—also included lengthy discussion of the racial implications of the various submitted maps. The Evers map deliberately added an additional majority-Black Assembly district, which the majority interpreted as consistent with the Voting Rights Act.

The legislature and parties represented by the Wisconsin Institute for Law and Liberty (WILL) sought review of this decision by the U.S. Supreme Court, which quickly overturned the selection of Evers's legislative map, ruling that its reliance on race violated the U.S. Constitution's Equal Protection Clause.

The United States Supreme Court issued its ruling on March 23, 2022. On April 15, with time running out for individuals considering whether to run as candidates in primary elections, the Wisconsin Supreme Court selected the legislature's original submission. Justice Hagedorn again provided the deciding vote, now rejoining the court's three other conservatives and explaining his view that the procedural posture of the case left the court no choice but to select one of the existing proposed maps and that, among those, only the legislature's proposal complied with the U.S. Supreme Court's instructions.

In the November 2022 general election, Wisconsin was once again narrowly divided at the top of the ticket, simultaneously reelecting Evers by 3 percentage points and Republican U.S. Senator Ron Johnson by 1 point. This even balance was not reflected in the state legislative elections. Republicans flipped three seats in the

Assembly and one in the Senate, achieving a supermajority of two-thirds in the upper chamber and leaving them two votes short of that in the lower.

As it turned out, this was merely the first chapter of Wisconsin's 2020 redistricting cycle.

THE 2020 REDISTRICTING CYCLE, TAKE 2

The next chapter began with the Wisconsin Supreme Court election to replace retiring Chief Justice Patience Roggensack. Roggensack was a conservative, so the winner of this election in April 2023 would decide majority control of the court for certain purposes. Judicial races in Wisconsin are officially nonpartisan, but this notion became increasingly difficult to credit in the 2023 race. One candidate, Milwaukee County Circuit Court Judge Janet Protasiewicz, was endorsed by the Democratic Party. The other, former Wisconsin Supreme Court Justice Daniel Kelly, was endorsed by the Republican Party. The election quickly became a *de facto* referendum on abortion access and redistricting, with Protasiewicz describing the current maps as “rigged” and “unfair.”

Many Republicans criticized Protasiewicz's campaign rhetoric as inappropriate for a nonpartisan judicial candidate. The majority of voters seemed untroubled. Protasiewicz defeated Kelly by 11 percentage points and was sworn into office on August 1, 2023. On August 2, the firm Law Forward filed a lawsuit arguing that the state legislative maps used in 2022 were unconstitutional for a variety of reasons. On October 6, the court's new majority agreed to consider the challenges to the maps.

In *Clarke v. Wisconsin Elections Commission*, on December 22, 2023, by another one-vote margin (4–3), the court ruled the existing maps unconstitutional on a relative technicality. The Wisconsin Constitution requires that state legislative districts be composed of “contiguous territory.” In Wisconsin, cities and villages routinely annex portions of towns, and these annexations often result in municipalities themselves containing disconnected fragments. In *Prosser v. Elections Board* in 1992, the federal court had determined that these municipal “islands” could be considered politically contiguous with the rest of the municipality. The 2022 maps were replete with this kind of small disconnection: 52 Assembly districts and 21 Senate districts. In the 2023 decision, the four liberal justices rejected this practice, ruling that

the state constitution requires districts to be literally, physically contiguous.

Having banned the use of the new maps in the upcoming 2024 election, the court invited the legislature and governor to enact new maps by state statute. Anticipating that such a process would fail, the court also invited the parties in the case to submit their own preferred maps. Significantly, the court's new liberal majority rejected the 2021 "least change" standard for judicial redistricting, writing that "[b]ecause no majority of the Court agreed on what least change actually meant, the concept amounted to little more than an unclear assortment of possible redistricting metrics." Instead, the court announced that it would evaluate submitted maps according to the following criteria: population equality, (literal) contiguity, compactness, (minimized) divisions of counties and municipalities, civil rights requirements, and "partisan impact."

The final criterion, partisan impact, is particularly controversial. The majority wrote, "As a politically neutral and independent institution, we will take care to avoid selecting remedial maps designed to advantage one political party over another. Importantly, however, it is not possible to remain neutral and independent by failing to consider partisan impact entirely."

As previously discussed, Wisconsin's current political geography means that a map drawn to be compact and contiguous, without considering partisan interests, will inevitably work to the benefit of Republicans. So the commitment to considering the partisan impact of proposed maps was widely understood as intended to offset at least partly the GOP-lean baked into Wisconsin's geography.

The court considered proposed maps, submitted in January 2023, from six parties: two conservative and four liberal. The plan submitted by the Republican legislature simply resolved the contiguity issues in the existing map and left the partisan balance unchanged at 64 Trump districts among the 99 Assembly seats in the 2020 election. Conservative parties represented by the Wisconsin Institute for Law and Liberty submitted a plan with 58 Trump districts. The Senate Democrats offered a plan with 51 Trump districts, Evers drew a map with 50 Trump districts, the map submitted by the liberal parties represented by Law Forward contained 48 Trump districts, and the plan from a liberal group known as the Wright Petitioners held 47. The Senate maps offered by the parties had a similar skew in terms of the number of Trump districts.

Just a couple of weeks later, resigned to the prospect that the court's new majority would never

select either of its preferred plans, Republican legislative leaders made an abrupt about-face: They announced support for Evers's own submission. Subtle differences between the Democratic-aligned maps explain why.

Wisconsin state senators hold four-year terms, with the even-numbered districts featuring races during presidential elections and the odd-numbered districts during midterms—but map-drawers may number districts however they please. One plan before the court, that of the Wright Petitioners, placed twice as many Democratic-leaning seats into the even-numbered class as the odd-numbered class. This map would have given Democrats a genuine possibility of flipping both legislative chambers in 2024. The other Democratic-aligned plans more evenly divided Democratic-leaning seats between the even and odd cohorts, which would have put a Democratic Senate majority entirely out of reach in 2024.

The plans also varied in the number of instances in which they placed more than one incumbent in a single new district. Across both chambers, Evers's submission combined fewer Republicans than in all but the Senate Democrats' plan. Finally, to consider the results from certain past races, the Evers maps were arguably slightly more favorable to Republicans than were the other Democratic-aligned proposals.

Out of fear that the Wisconsin Supreme Court would choose a plan they regarded as even more damaging, the Republicans passed a slightly modified version of Evers's maps, removing some incumbent pairs. Evers vetoed the modified maps on January 30, 2024. The legislature responded by passing his maps in their original form on February 13. In an odd scene, the Evers maps were opposed by all but one Democratic legislator from each chamber, and various Democratic politicians, from the governor's own party, lobbied against the passage of the maps, warning about an unspecified Republican trap. Evers signed them into law on February 19, and the court found it unnecessary to take further substantive redistricting action.

The new maps had an immediate and dramatic impact. In the November 2024 election, more Assembly districts were contested by both parties than in any year since at least 2010, and an unusually high number also featured contested primaries. In November, Democrats won 45 of the 99 Assembly seats—still a minority but considerably up from 35 in 2022. In the Senate, Democrats flipped 4 districts, increasing their total to 15 (among the 33 districts) and ending the Republican supermajority in that chamber.

In districts across the state, Republican legislative candidates were generally more popular than Donald Trump or Eric Hovde, the Republican U.S. Senate candidate. Trump won Wisconsin by 0.86 percentage points (the closest margin either way of any state in the country), and he also won the vote in 50 of 99 Assembly seats. Democratic U.S. Senator Tammy Baldwin simultaneously won reelection by 0.85 points, and she likewise carried the vote in 50 Assembly districts. By contrast, under the 2022 maps, Trump would have won 64 Assembly seats and Baldwin 36.

Looking to the state Senate results: Trump actually won a minority of districts, 15 of 33, while Baldwin won a majority: 18. Under the 2022 maps, by contrast, Trump would have won 22 districts and Baldwin only 11. In other words, if they had remained in effect, the 2022 maps would have converted Trump's 0.86 percentage point victory into a two-thirds supermajority of Senate seats, while the new maps actually converted Trump's narrow majority into a theoretical state legislative minority. (See the summary in Table 2.)

LOOKING AHEAD TO 2031

While Republicans retained control of both state houses in 2024, the results bode fairly well for Democrats looking ahead to 2026. Both presidential candidate Kamala Harris and Baldwin won all four of the battleground Senate districts holding elections in 2026; if Democratic candidates win three of them, they will control the chamber. The Assembly will likely be similarly close, as Democratic candidates in 2024 lost five seats (enough for a majority) by fewer than 3.5 points.

To look further ahead, the serpentine 2020 redistricting process provides little clarity for the next redistricting cycle, after the 2030 U.S. census. Whoever draws those maps will have to make hard choices, as Wisconsin will likely lose a congressional seat in the 2030 reapportionment. Realistically, either party could control either chamber of the legislature or the governor's mansion, making the chances good that these bodies will be politically divided. The ideological composition of the state Supreme Court will likewise be decided by elections yet this decade.

Whether liberal or conservative, the Wisconsin Supreme Court, recent precedent suggests, will take an active approach to redistricting. Gone, it seems, are the days of the state court's quickly deferring to a panel of federal judges, and in fact precedent of the U.S. Supreme Court supports deference in the opposite direction, *by* the federal courts. But such deference scarcely will oust the federal district court

Table 2. Number of State Legislative Districts Won by 2024 Presidential Candidates in Selected Maps					
Mapmaker		State Assembly		State Senate	
		Harris	Trump	Harris	Trump
2024 Proposals	Legislative Republicans	35	64	11	22
	WILL (Johnson Intervenor)	41	58	11	22
	Governor Evers (adopted and used)	49	50	18	15
	Wright Petitioners	49	50	18	15
	Law Forward (Clarke Petitioners)	51	48	17	16
2022 Proposals	Districts used in 2022	35	64	11	22
	Evers's least-change	41	58	12	21
	People's Maps Commission	44	55	12	21

altogether from the field, at least if a redistricting plan then adopted by the state supreme court can itself be claimed to violate federal law. And the U.S. Supreme Court can *directly* review federal challenges to maps drawn by the Wisconsin Supreme Court (even acting summarily, as we saw in March 2022).

And as for the law to be applied? Wisconsin's redistricting precepts were only further complicated by the narrow and conflicting majority opinions of the early 2020s. The decision of the Wisconsin Supreme Court's conservative majority in 2022, in *Johnson v. Wisconsin Elections Commission*, to select the map drawn by Republican legislators was a departure from previous court rulings, which avoided selecting a map drawn by explicitly partisan actors.

The subsequent decision by the court's new liberal majority in 2023, in *Clarke v. Wisconsin Elections Commission*, was also a deviation from past practice, because it specifically listed the partisan impact of a plan as a criterion that the justices would use in selecting a winner. The federal courts in 1982 and 1992 had reasoned that the better approach was to disregard partisan considerations entirely, not to attempt to achieve a given partisan outcome, even one considered to be "fair."

How all of this will play out, time and perhaps judicial election results will tell. ■