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

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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

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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

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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 range[101] of 10 percent or less.[102]

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96. *State ex. re. 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