

2 F.3d 508
United States Court of Appeals,
Third Circuit.

Guy A. DONATELLI; Michelle M. Harman; Scott Richert; Keith Gross; George Miller; Raymond Pierson; Harry P. Ross; Harvey Eck, Appellants,

v.

Brenda K. MITCHELL; William Boehm; Frank A. Pecora; John M. Perzel; Robert J. Cindrich; Allen G. Kukovich; F. Joseph Loeper; Robert J. Mellow; J. William Lincoln; Robert C. Jubelirer, Appellees.

No. 93-1293. Argued July 2,
1993. Decided Aug. 13, 1993.

Voters brought § 1983 action against Secretary of Commonwealth and others challenging senatorial reapportionment plan. The United States District Court for the Eastern District of Pennsylvania, Robert S. Gawthrop, III, J., 826 F.Supp. 131, granted summary judgment in favor of Secretary. Voters appealed. The Court of Appeals, Edward R. Becker, Circuit Judge, held that: (1) reapportionment plan which resulted in assignment of senator to represent new district on other side of state for remaining two years of term was subject to rational-basis test, and (2) under such test, plan did not violate equal protection.

Affirmed.

West Headnotes (14)

- 1 **Constitutional Law** ⇌ Levels of Scrutiny
First step in evaluating claim that law or government action violates equal protection clause is to determine appropriate standard of review. U.S.C.A. Const.Amend. 14.

3 Cases that cite this headnote
- 2 **Constitutional Law** ⇌ Rational Basis Standard; Reasonableness
"Rational-basis review" is highly deferential standard of review that is generally applied to state action challenged under Equal Protection Clause if it neither proceeds along suspect lines

nor infringes fundamental constitutional rights. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

- 3 **Constitutional Law** ⇌ Rational Basis Standard; Reasonableness
Under rational-basis review, challenged classification must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. U.S.C.A. Const.Amend. 14.

5 Cases that cite this headnote

- 4 **Constitutional Law** ⇌ Strict Scrutiny and Compelling Interest in General
Under "strict scrutiny test," challenged state action will be upheld only if it advances compelling state interest and is narrowly tailored to meet that interest. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

- 5 **Constitutional Law** ⇌ Alien Status
Constitutional Law ⇌ Race, National Origin, or Ethnicity
Because classifications that are based on race or infringe on fundamental constitutional rights are presumptively invalid and will not often be justified by legitimate state interest, strict scrutiny is applied in cases where challenged action or legislation involves "suspect classification," that is, one based on race, alienage, or national origin, and where challenged action infringes on fundamental constitutional right, such as right to travel and rights protected by First Amendment. U.S.C.A. Const.Amend. 1, 14.

5 Cases that cite this headnote

- 6 **Constitutional Law** ⇌ Redistricting and Reapportionment in General
State reapportionment plan which resulted in assignment of senator to represent new district for remaining two years of his term, in

which district no voters had voted for senator, was subject to rational-basis review; two-year "disenfranchisement" of voters in new district did not infringe on any fundamental constitutionally protected right in that it was not targeted at discrete group of voters based on some personal characteristic and did not preclude voters from voting any regularly scheduled senate election. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

7 **Constitutional Law** ⇌ Voting and Political Rights

That a law or state action imposes some burden on the right to vote does not make it subject to strict scrutiny. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

8 **Elections** ⇌ Power to Confer and Regulate States ⇌ Power and Duty to Apportion

States retain broad discretion to regulate their own elections and to determine apportionment of their own legislative districts.

9 **Constitutional Law** ⇌ Equity
Constitutional Law ⇌ Wisdom

Constitutional Law ⇌ Statutes and Other Written Regulations and Rules

Rational-basis review under equal protection clause is not license for courts to judge wisdom, fairness, or logic of legislative choices. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

10 **Constitutional Law** ⇌ Statutes and Other Written Regulations and Rules

Legislative classification that does not affect suspect category or infringe on fundamental constitutional right must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could

provide rational basis for classification. U.S.C.A. Const.Amend. 14.

14 Cases that cite this headnote

11 **Constitutional Law** ⇌ Rational Basis Standard; Reasonableness

State decision makers need not actually articulate purpose or rationale supporting classification in order for classification to be upheld under rational-basis test; nor does state have any obligation to produce evidence to sustain rationality of its decision. U.S.C.A. Const.Amend. 14.

3 Cases that cite this headnote

12 **Constitutional Law** ⇌ Equal Protection

Classification subject to rational-basis review is accorded strong presumption of validity. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

13 **Constitutional Law** ⇌ Redistricting and Reapportionment in General

States ⇌ Method of Apportionment in General Pennsylvania reapportionment plan which resulted in assignment of senator to represent new district on opposite side of state for remaining two years of term did not violate equal protection under rational-basis test; right of voters in new district to vote for senator was not infringed since right to vote on equal basis with other citizens of state was individual right and such voters were in same situation as any other voter temporarily disenfranchised as result of reapportionment, senator had incentives to represent new constituency similar to those of other incumbent senators, and appointment of senator did not violate Pennsylvania law or any constitutional right. U.S.C.A. Const.Amend. 14; Pa. Const. Art. 2, § 2.

4 Cases that cite this headnote

14 **Constitutional Law** ⇌ Perfect, Exact, or Complete Equality or Uniformity

Classification does not fail rational-basis review simply because it is not made with mathematical nicety or because in practice it results in some inequality.

1 Cases that cite this headnote

Attorneys and Law Firms

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Before: BECKER, ALITO and ROTH, Circuit Judges.

Opinion

OPINION OF THE COURT

EDWARD R. BECKER, Circuit Judge.

Eight voters who reside in the newly created 44th state senatorial district in eastern Pennsylvania brought this suit under 42 U.S.C. § 1983, alleging a violation of the Equal Protection Clause. They claim that the 1991 Pennsylvania Reapportionment Plan, and the consequent "assignment" of Senator Frank Pecora (who was elected to the Senate in 1990

from the old 44th district located in western Pennsylvania) to represent the new 44th district for the remaining two years of his term, unconstitutionally saddled them with a representative whom neither they nor any other voter in their district elected. The district court, finding no merit to the claim, granted summary judgment in favor of defendants, various Pennsylvania election officials and the members of the Pennsylvania Legislative Reapportionment Commission. 826 F.Supp. 131.

We conclude, as did the district court, that the state actions at issue here are subject only to rational-basis review because they do not involve a suspect classification (i.e. a classification based on race, alienage, or national origin) or burden a fundamental constitutional right. Applying this deferential standard of review, we conclude that the reapportionment plan and the consequent assignment of Senator Pecora to represent the new 44th district are rationally related to legitimate state interests. We therefore will affirm.

I.

In 1991, as required by law, the Pennsylvania Legislative Reapportionment Commission (the "Commission") reapportioned Pennsylvania's state senatorial districts to account for population changes shown by the 1990 decennial census. See Pa. Constitution Art. II, § 17; ¹ see also *Reynolds v. Sims*, 377 U.S. 533, 586, 84 S.Ct. 1362, 1385, 12 L.Ed.2d 506 (1964) ("the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis"). The Final 1991 Reapportionment Plan adopted by the Commission in November of 1991 and approved by the Pennsylvania Supreme Court in February of 1992, see *In re 1991 Pennsylvania Legislative Reapportionment Comm'n*, 530 Pa. 335, 609 A.2d 132, cert. denied, 506 U.S. 819, 113 S.Ct. 66, 121 L.Ed.2d 33 (1992),² redrew 49 of the 50 senatorial districts. *511 To accommodate a drastic shift in population from the western to the eastern part of the state, the Reapportionment Plan eliminated completely the old 44th District, located in Allegheny County (dividing the territory in that district among surrounding districts in the western part of the state) and created an entirely new district in the eastern part of the state which was designated as the new 44th district.³ The 1991 Reapportionment Plan substantially changed many districts, but, with the exception of the new

44th district, all of the redrawn districts included at least some portion of their numerical predecessors.

Pennsylvania state senators are elected to four year terms, with half of the senators being elected in even numbered years. Under this staggered election system, which has been mandated by the Pennsylvania Constitution for over 200 years, *see* Pa. Const. Art. II, § 2, only senate seats in odd-numbered districts were scheduled for reelection in the fall of 1992, just after the 1991 Reapportionment Plan went into effect. The first opportunity to elect a senator in the reapportioned even-numbered districts, including the new 44th district, would not be until the fall of 1994. Consequently, a total of approximately 1.3 million Pennsylvania voters who were shifted by the reapportionment plan into new even-numbered districts would be represented for over two years by a state senator in whose election they had not participated.⁴

However, the situation of the approximately 239,000 citizens residing in the new 44th district was different from that of citizens who were shifted into other even-numbered districts in that the new 44th district had no connection to the old 44th district in western Pennsylvania, other than being assigned the number 44. Thus, from all appearances, the new 44th district had no incumbent senator to represent it until the next regularly scheduled general election in 1994. At the time the Reapportionment Plan was adopted in the fall of 1991, some members of the Commission apparently assumed that a special election would be held in 1992 to fill the vacancy in the new 44th district until the 1994 general election. Some members of the Commission apparently also believed that, as a result of the Plan, Senator Pecora, who had been elected in 1990 to represent the old 44th district, would lose his senate seat for the remaining two years of his term because of his district's dissolution, but would have the opportunity to run in 1992 for the open seat in the new 43d district, where his residence was then located as a result of the reapportionment.

Events transpired somewhat differently than the Commission foresaw. In the spring of 1992, the Supreme Court of Pennsylvania approved the 1991 Reapportionment Plan against a number of challenges, including one brought by Senator Pecora (who was challenging the alleged dissolution of his senate district). The court announced that Senator Pecora, if approved by the Senate, would be the proper representative of the new 44th District for the remaining two years of his term. *See In re 1991 Pennsylvania Legislative Reapportionment Comm'n*, 609 A.2d at 140 (Senator Pecora

is "not automatically expelled from [his] Senate seat [representing the 44th district] by the Commission's actions. Only the Senate has the authority to judge the qualifications of its members."). The court explained that the final determination of Senator Pecora's eligibility to represent the new 44th district (at least as a matter of state law) was up to the Senate, which, under the Pennsylvania Constitution, has total and unreviewable authority to "judge the election and qualifications of its *512 members." Pa. Const. Art. II, § 9. The Supreme Court thus mooted Senator Pecora's claim that the Plan unfairly ousted him from his Senate seat by dissolving his old district.

In November of 1992, after losing his bid for a seat representing the 18th Congressional District in the United States House of Representatives, Senator Pecora moved his residence across the state to the new 44th district, and, on November 23, 1992, the Senate, by a one-vote majority,⁵ voted that Senator Pecora was qualified to represent that district until the end of his term in January 1995, having been elected to represent the old 44th district in November 1990.⁶ At the start of the new Senate term on January 5, 1993, the Senate again voted (although a second vote was not required), by a one-vote margin, that Senator Pecora was qualified to remain seated and to represent the new 44th district. Thus, by virtue of the Pennsylvania Supreme Court's approval of the 1991 Reapportionment Plan and its interpretation of state law, Senator Pecora became (with the Senate's vote in favor of his qualification) the senator for the new 44th district for the remainder of his term, even though none of the residents of that district had participated in his election in 1990.

Plaintiffs, eight voters residing in the new 44th district, brought this suit on December 29, 1992, in the District Court for the Eastern District of Pennsylvania, naming as defendants Secretary of the Commonwealth Brenda Mitchell, Commissioner of Elections William Boehm, Senator Pecora, and the individual members of the Legislative Reapportionment Commission.⁷ Plaintiffs claim that the 1991 Reapportionment Plan, as construed by the Pennsylvania Supreme Court and applied by the Pennsylvania Senate to allow the assignment of Senator Pecora to their district, unconstitutionally burdened their right to vote for a state senator and/or to be represented by a state senator who was elected by at least a "core constituency" within their district. As relief, plaintiffs sought: a declaration that the defendants violated the plaintiffs' rights to equal protection of the law; an order requiring Secretary Mitchell

and Commissioner Boehm to conduct an election "as soon as possible" for the office of Senator for the 44th Senatorial District; damages, including punitive damages, and attorneys' fees.

The defendants filed motions to dismiss or for summary judgment. The plaintiffs also moved for partial summary judgment. State Senators Joseph Loeper and Robert Jubelirer, although named as defendants as members of the Commission, filed a motion for summary judgment in favor of the plaintiffs. Throughout the case, these two "nominal" defendants have agreed with the position of the plaintiffs, arguing that the right of the voters in the new 44th district to equal protection has been violated and that the court *513 should order a special election to fill the senate seat for the district.⁸

In its opinion addressing the parties' various motions, the district court was less than charitable towards the challenged actions of the defendants, summarizing the unusual chain of events as follows:

[I]n an apparently unique feat of legislative levitation and legerdemain, the 44th district was whisked 250 miles across the Commonwealth, replete with its own pre-elected senator, and plopped down upon the not entirely unsuspecting, but certainly unelecting, brand new batch of voters in eastern Pennsylvania, as some sort of senatorial manna from the Monongahela.

See *Casey v. Donatelli*, 826 F.Supp. 131, 132-33 (E.D.Pa.1993). Nevertheless, the district court rejected the plaintiffs' and nominal-defendants' arguments and granted summary judgment in favor of the defendants. Plaintiffs filed a timely notice of appeal, and the case was expedited by a motions panel of this court.

II.

A.

1 2 3 Our first step in evaluating a claim that a law or government action violates the Equal Protection Clause is to determine the appropriate standard of review. See *Dunn v. Blumstein*, 405 U.S. 330, 335, 92 S.Ct. 995, 999, 31 L.Ed.2d 274 (1972). The district court applied rational-

basis review, the highly deferential standard of review that is generally applied to state action challenged under the Equal Protection Clause if it "neither proceeds along suspect lines nor infringes fundamental constitutional rights." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, ----, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993). Under rational-basis review, the challenged classification must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.*; see also *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970).

4 5 Plaintiffs contend that the district court erred by declining to apply the more rigorous "strict scrutiny" test, under which a challenged state action will be upheld only if it advances a compelling state interest and is narrowly tailored to meet that interest. Strict scrutiny has generally been applied to two types of equal protection claims: (1) where the challenged action or legislation involves a "suspect" classification, i.e. a classification based on race, alienage, or national origin, see, e.g., *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971); *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944); and (2) where the challenged action infringes on fundamental constitutional rights, such as the right to travel or rights protected by the First Amendment, see, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 101, 92 S.Ct. 2286, 2293, 33 L.Ed.2d 212 (1972). Strict scrutiny is applied in such cases because classifications that are based on race or that infringe on fundamental constitutional rights, are presumptively invalid and will not often be justified by a legitimate state interest.

6 7 8 The plaintiffs concede that their case does not involve race, alienage or national origin, but they contend that strict scrutiny is required because the state has infringed upon their fundamental right to vote. We disagree. That a law or state action imposes some burden on the right to vote does not make it subject to strict scrutiny. *Burdick v. Takushi*, 504 U.S. 428, ----, 112 S.Ct. 2059, 2063, 119 L.Ed.2d 245 (1992); see also *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9, 102 S.Ct. 2194, 2199, 72 L.Ed.2d 628 (1982) ("[T]he right to vote, *per se*, is not a constitutionally protected right." (citations omitted)).⁹ Accordingly, *514 the Supreme Court has held that the appropriate level of scrutiny into the propriety of a state law or action regulating elections "depends upon the extent to which the challenged

regulation burdens First and Fourteenth Amendment rights.” *Burdick*, 504 U.S. at ---, 112 S.Ct. at 2063. Plaintiffs have not articulated what fundamental constitutionally protected right has been infringed that would merit application of strict scrutiny. Nor, as we will explain, can we discern how the absence of a “core constituency” of citizens who elected Senator Pecora in their district infringes plaintiffs’ fundamental constitutional rights.

Strict scrutiny has been applied to legislation that restricted access to the ballot based on lack of wealth or lack of property. See *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (poll tax subject to strict scrutiny and struck down under Equal Protection Clause); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969) (state statute limiting franchise in certain school districts to owners or lessees of taxable realty subject to strict scrutiny and struck down under Equal Protection Clause). The Court applied strict scrutiny in these cases because the legislation permanently denied access to vote to a discrete group of voters based on a personal characteristic—the lack of wealth or property—which, “like race, creed, or color, is not germane to one’s ability to participate in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored.” *Harper*, 383 U.S. at 668, 86 S.Ct. at 1082 (citation omitted); see also *Kramer*, 395 U.S. at 626-27, 89 S.Ct. at 1889 (“Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in governmental affairs” and require close scrutiny.).

In contrast to the statutes reviewed in *Harper* and *Kramer*, the two-year “disenfranchisement” suffered by the plaintiffs here as a result of the 1991 reapportionment and Senator Pecora’s representation of their district was not targeted at a discrete group of voters based on some personal characteristic, such as wealth or property ownership. Nor has it precluded plaintiffs from voting in any regularly scheduled senate election, for they will have equal access to the ballot in the next regularly scheduled state senate election in 1994.

Courts that have addressed equal protection claims brought by voters who were temporarily disenfranchised after a reapportionment have consistently applied rational-basis review. See, e.g., *Republican Party of Oregon v. Keisling*, 959 F.2d 144 (9th Cir.1992); *Mader v. Crowell*, 498 F.Supp. 226, 230-31 (M.D.Tenn.1980); *Pate v. El Paso County*, 337 F.Supp. 95 (W.D.Tex.) (three-judge court), *aff’d without*

opinion, 400 U.S. 806, 91 S.Ct. 55, 27 L.Ed.2d 38 (1970). Similarly, equal protection challenges to statutes prescribing the manner in which legislative vacancies are filled have been evaluated under the rational-basis test. See *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 12, 102 S.Ct. 2194, 2201, 72 L.Ed.2d 628 (1982) (applying rational-basis review to state’s choice of manner in which to fill legislative vacancies); *Trinsey v. Pennsylvania*, 941 F.2d 224, 234-36 (3d Cir.) (same), *cert. denied*, 502 U.S. 1014, 112 S.Ct. 658, 116 L.Ed.2d 750 (1991).

Plaintiffs argue, however, that the Supreme Court’s decision in *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), where the Court subjected a durational residency requirement for the right to vote to strict scrutiny and found it violated the Equal Protection Clause, supports the application of strict scrutiny in this case. We disagree. Unlike the state action at issue here, and much like the challenged statutes in *Harper* and *Kramer*, the statute in *Dunn* carved out a discrete class of otherwise qualified voters and restricted their right to vote in regularly scheduled elections simply because they had not resided within the state for a particular length of time. Here, as we have stated, plaintiffs have not been denied *515 their right to vote in any regularly scheduled state senate election. They were able to vote in the regularly scheduled pre-reapportionment senate elections in their old districts, and they will be able to vote in the next regularly scheduled general election for their new district in the fall of 1994. Moreover, the Court in *Dunn* applied strict scrutiny not only because the statute denied access to the ballot to a discrete group of otherwise qualified voters, but also because it directly burdened citizens’ fundamental constitutional right to travel from state to state. See *Dunn*, 405 U.S. at 338-42, 92 S.Ct. at 1001-03. No such burden on the right to travel is involved here.

In sum, we agree with the district court that the 1991 Reapportionment Plan and the consequent “assignment” of Senator Pecora to represent the new 44th district for the remainder of his term—state actions that plaintiffs claim have discriminatorily affected their right to vote and/or to be represented in the state senate—are subject only to rational-basis review.¹⁰

B.

9 10 11 12 As the Supreme Court recently emphasized, rational-basis review under the Equal Protection Clause “is

not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, ----, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993); see also *Heller v. Doe*, 509 U.S. 312, ----, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257 (1993) (citing *Beach*). A legislative classification that does not affect a suspect category or infringe on a fundamental constitutional right "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach*, 508 U.S. at ----, 113 S.Ct. at 2101 (citations omitted). The state decision-makers need not actually articulate the purpose or rationale supporting the classification; nor does the state have any obligation to produce evidence to sustain the rationality of its decision. See *Heller*, 509 U.S. at ----, 113 S.Ct. at 2643. In short, a classification subject to rational-basis review "is accorded a strong presumption of validity." *Id.* at ----, 113 S.Ct. at 2642.

Keeping in mind the high degree of deference we must afford the state decisions under review, we proceed to determine whether they lack a rational basis.

C.

13 Numerous courts have concluded that temporary disenfranchisement resulting from the combined effect of reapportionment and a staggered election system meets the rational-basis test and therefore does not violate the Equal Protection Clause. See, e.g., *Republican Party of Oregon v. Keisling*, 959 F.2d 144 (9th Cir.1992) (combination of reapportionment plan and staggered election system for state senators that caused some citizens to wait six years to vote for senator did not violate equal protection clause); *Mader v. Crowell*, 498 F.Supp. 226 (M.D.Tenn.1980) (that some Tennessee voters for state senate had been moved from even-numbered district to odd-numbered district so that, under a staggered election plan, they would not vote for senator for another two years, did not render the plan unconstitutional); *Ferrell v. Oklahoma*, 339 F.Supp. 73, 82 (W.D.Okla.1972) (three-judge court) ("It is impossible, where Senate district boundaries are changed, to avoid having *516 some voters represented by a Senator for whom they had no opportunity to support or oppose."), *aff'd sub nom.*, *Ferrell v. Hall*, 406 U.S. 939, 92 S.Ct. 2045, 32 L.Ed.2d 328 (1972); *Carr v. Brazoria County*, 341 F.Supp. 155 (S.D.Tex.1972) (postponement of franchise resulting from redistricting and staggered elections for precinct offices did not violate Equal Protection or Due

Process Clauses); *Pate v. El Paso County*, 337 F.Supp. 95 (W.D.Tx.) (three-judge court) (redistricting combined with provision in Texas Constitution establishing staggered terms for county commissioners did not unconstitutionally restrict right to vote), *aff'd without opinion*, 400 U.S. 806, 91 S.Ct. 55, 27 L.Ed.2d 38 (1970).

Plaintiffs do not dispute the outcome of these cases, and they concede that over one million citizens in Pennsylvania who reside outside of the new 44th district have been shifted into new even-numbered districts so that they too will be represented for nearly two years by a senator in whose election they did not participate. Plaintiffs recognize that such temporary disenfranchisement is inevitable, at least to some degree, whenever a reapportionment is combined with a staggered system of elections.

Plaintiffs contend, however, that their situation is significantly different than that of the other shifted voters because there are no voters in the new 44th district who had the opportunity to vote for Senator Pecora (except, of course, for Senator Pecora himself, and any other voters who, like him, may have moved across the state from within the area comprising the old 44th district to the area comprising the new 44th district). They argue that, although citizens may be reassigned to districts represented by senators in whose election they did not participate, an entire district cannot constitutionally be "assigned" a senator in a state, such as Pennsylvania, which does not allow for appointment of senators, but instead requires special elections to fill senate vacancies. See Pa. Const. Art. II, § 2 ("Whenever a vacancy shall occur in either House, the presiding officer thereof shall issue a writ of election to fill such vacancy for the remainder of the term."). In short, plaintiffs assert that temporary or marginal disenfranchisement is constitutionally permissible only where a "core constituency" of voters who elected the senator representing a newly reapportioned district remains.

While the plaintiffs' argument may have some appeal, it has no constitutional basis. Plaintiffs claim that their right to vote for a state senator under Pennsylvania law has been infringed because they have been "assigned" a senator who was not elected by their district, or any significant portion of it. But the right they seek to protect—their right to vote on an equal basis with other Pennsylvania citizens—is an individual right. See *Reynolds v. Sims*, 377 U.S. at 561, 84 S.Ct. at 1381 (The right to vote is "individual and personal in nature."); *United States v. Bathgate*, 246 U.S. 220, 227, 38 S.Ct. 269, 271, 62 L.Ed. 676 (1917) (same). To the extent

that a voter in the new 44th district has been temporarily disenfranchised after the reapportionment, he or she is in the same situation as any other temporarily disenfranchised voter in the state, regardless of whether *all* or only *some* of his or her neighbors within the same senatorial district are similarly disenfranchised. In short, we do not see how the plaintiffs have been significantly discriminated against as a result of the absence of a "core constituency" of neighbors who participated in Senator Pecora's election.

Implicit in the plaintiffs' argument is their contention that they have significantly unequal representation in the state senate because Senator Pecora does not represent their interests in the same way as senators in districts where some "core constituency" of voters remains. We question the validity of this proposition. Although Senator Pecora may not be the best person to represent the new 44th District, he nonetheless has incentives to represent his current constituency similar to those of many other incumbent senators in even-numbered senatorial districts. Although reapportionment has altered all of these senators' constituencies, their interest in re-election and in doing their jobs well, i.e. representing their districts, remains. At all events, we fail to see how the presence of a "core constituency" of voters who elected Senator Pecora will necessarily *517 improve Senator Pecora's representation of these plaintiffs. There is no reason to believe that the interests of a "core constituency" would coincide with the interests of voters who were shifted into a district as a result of reapportionment.¹¹

Plaintiffs' attempt to distinguish their situation from that of the other Pennsylvania voters who have been shifted into other even-numbered districts is based largely on their contention that, unlike in all other districts, their senator has been appointed, rather than elected, as required by Pennsylvania law. There are two problems with this argument. First, the Pennsylvania Supreme Court, which is the final arbiter of Pennsylvania law, held that, with the approval of the Pennsylvania Senate, Senator Pecora would be the proper representative of the new 44th district for the remaining two years of his term. *See 1991 Pennsylvania Legislative Reapportionment Comm'n*, 609 A.2d at 140-41. Thus, the plaintiffs' suggestion that the "assignment" of Senator Pecora to represent their district does not comport with Pennsylvania law is wrong.

Second, the United States Supreme Court has held that appointment of a state senator to fill a vacancy during

the remainder of a vacant senate term does not violate the Equal Protection Clause or any other constitutional right. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 102 S.Ct. 2194, 72 L.Ed.2d 628 (1982). The plaintiffs in *Rodriguez* challenged a Puerto Rico law that vested in a political party the power to fill an interim vacancy in the Puerto Rico Legislature. They argued that qualified voters have a constitutional right to elect their representatives and that vacancies must therefore be filled by special election. Rejecting the claim, the Court explained that the Constitution does not confer an unconditional right to vote, although, when a state provides that its representatives be elected, citizens have a constitutionally protected right under the Equal Protection Clause to participate in elections on an equal basis with other citizens. *Rodriguez*, 457 U.S. at 10, 102 S.Ct. at 2200.

The Court in *Rodriguez* found no equal protection violation, reasoning that the Puerto Rico statute at issue did not

restrict access to the electoral process or afford unequal treatment to different classes of voters or political parties. All qualified voters have an equal opportunity to select a district representative in the general election; and the interim appointment provision applies uniformly to all legislative vacancies, whenever they arise.

Id.; *see also Lynch v. Illinois State Bd. of Elections*, 682 F.2d 93 (7th Cir.1982) (holding that Illinois municipal code provision allowing the filling of vacancies to elected municipal offices by appointment for period up to 28 months before next scheduled election was not unconstitutional because states have legitimate interest in insuring that governmental processes are not disrupted by vacancies and wide latitude in devising methods to fill such vacancies); *cf. Valenti v. Rockefeller*, 393 U.S. 405, 89 S.Ct. 689, 21 L.Ed.2d 635 (1969) (upholding authority of Governor of New York to appoint person to fill vacancy in United States Senate until next regularly scheduled congressional election against challenge brought under the Seventeenth Amendment); *Trinsey v. Pennsylvania*, 941 F.2d 224 (3d Cir.) (upholding Pennsylvania statute allowing appointment to fill vacant U.S. Senate seat against challenge under Seventeenth Amendment and Equal Protection Clause), *cert. denied*, 502 U.S. 1014, 112 S.Ct. 658, 116 L.Ed.2d 750 (1991).

Whether by statute or by the unique combination of the decisions of the Pennsylvania *518 Supreme Court and the qualification vote of the Pennsylvania Senate, the state law in both *Rodriguez* and this case permit the designation of a representative unelected by the specific district to represent the district until the next regularly scheduled general election. As in *Rodriguez*, the assignment of Senator Pecora to the new 44th district did not restrict plaintiffs' access to the electoral process, for, like all other Pennsylvania citizens, the voters in the new 44th district will be able to vote in the next regularly scheduled general election for senators in 1994.

Against this background, we cannot say that the combination of the 1991 Reapportionment Plan, the seating of Senator Pecora as representative of the new 44th district, and the staggered election system for Pennsylvania senators, lacks a rational basis. As we have noted, there was a drastic shift in population from the western to the eastern part of Pennsylvania, which the state was constitutionally required to accommodate through reapportionment, *see Reynolds v. Sims*, 377 U.S. at 568, 84 S.Ct. at 1385. Of course, there were numerous ways in which the districts could have been redrawn and renumbered. As plaintiffs contend, the Commission need not have drawn up an entirely new district in the eastern part of the state, but could have shifted the districts incrementally from west to east to account for the increased population in the east. Or, the Commission could have assigned the single newly created district an odd number (so that there would have been a general election for state senator in the fall of 1992 rather than 1994) and one of the odd-numbered districts an even number. But no matter how the reapportionment was done, there would have been a significant number of voters shifted into even-numbered districts who, like plaintiffs, would be represented by a senator for over two years whom they did not elect.

As a result of the Commission's decision to assign number 44 to the newly created eastern Pennsylvania district, the approximately 239,000 residents of that district are represented for two years by a senator in whose election they had not participated. Moreover, approximately 114,600 residents of that district (or 47.9%) have to wait six years to participate in a senatorial election since they were shifted from odd-numbered districts into an even-numbered district. *See supra* n. 4. Had the Commission decided instead to assign the number 44 to the district in western Pennsylvania that is now designated number 43, approximately 172,400 residents in that district would have been represented for two

years by a senator (Senator Pecora) in whose election they did not participate, and approximately 172,400 residents (or 72% of the district) would not have had the opportunity to participate in a senatorial election for six years since they would have been shifted from an odd-numbered to an even-numbered district. Thus, this alternative would have required a significantly larger number of persons to wait six years, instead of the normal four, for an opportunity to participate in a senate election.

14 At all events, it is not our place to determine whether the Commission's decisions were the best decisions or even whether they were good ones. A classification does not fail rational-basis review simply because it "is not made with mathematical nicety or because in practice it results in some inequality." *Dandridge*, 397 U.S. at 485, 90 S.Ct. at 1161 (citing *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911)); *see also Heller*, 509 U.S. at ----, 113 S.Ct. at 2643. Heeding the Supreme Court's repeated caveat that "reapportionment is primarily the duty and responsibility of the State ... rather than of a federal court," *Voinovich*, 507 U.S. at ----, 113 S.Ct. at 1157, we cannot say that the Commission's decisions to draw an entirely new district in the eastern part of the state, to dissolve a district in the western part of the state, and to assign the new district the number 44, in order to accommodate a drastic population shift, was not rational.

As for the Pennsylvania Supreme Court's decision that Senator Pecora could be lawfully seated to represent new District 44 for the remainder of his term, and the Senate's subsequent *519 vote so to seat him, rather than to hold a special election, we cannot say that these state actions lack a rational basis either. The state has a legitimate interest in not ousting a senator in the middle of the four-year term which he was elected to serve. Moreover, as the Supreme Court recognized in *Rodriguez*, the state has a legitimate interest in avoiding the expense and inconvenience of a special election. *See Rodriguez*, 457 U.S. at 12, 102 S.Ct. at 2201.

We are not unmindful of the strong intimation in the plaintiffs' papers that political partisanship was a driving force behind the unusual chain of events at issue here.¹² But if that is so, it only vindicates the rationale behind the deferential standard of review here, i.e., that federal courts generally should refrain from interfering in political disputes arising out of state reapportionment.¹³ While we may not find that any or all of the state decisions that culminated in the seating of

Senator Pecora to represent the new 44th district were the best or fairest decisions, we nonetheless find that they are

supported by a rational basis. The judgment of the district court will therefore be affirmed.¹⁴

Footnotes

1 Reapportionment is governed by Article II, § 17 of the Pennsylvania Constitution, which provides in part:

(a) In each year following that in which the Federal decennial census is officially reported as required by Federal law, a Legislative Reapportionment Commission shall be constituted for the purpose of reapportioning the Commonwealth. The commission shall act by a majority of its entire membership.

2 Article II, § 17 of the Pennsylvania Constitution provides, in part:

(d) Any aggrieved person may file an appeal from the final plan directly to the Supreme Court within thirty days after the filing thereof. If the appellant establishes that the final plan is contrary to law, the Supreme Court shall issue an order remanding the plan to the commission and directing the commission to reapportion the Commonwealth in a manner not inconsistent with such order.

(e) When the Supreme Court has finally decided an appeal or when the last day for filing an appeal has passed with no appeal taken, the reapportionment plan shall have the force of law....

3 The new 44th district is composed of parts of Berks, Chester, Lehigh, and Montgomery Counties.

4 Additionally, any voter who was reassigned from an odd-numbered district to an even-numbered district would lose the opportunity he or she otherwise would have had to participate in a senate election in 1992 and would have to wait an extra two years to vote for a state senator.

5 Senator Pecora, who was formerly a Republican but switched parties as these events unfolded, participated in the vote to seat himself. The initial vote resulted in a tie, reflecting the equal number of Democrats and Republicans in the Senate, which was then broken by the vote of the Lieutenant Governor, a Democrat, in favor of seating Senator Pecora. Thus, with Senator Pecora seated, the balance between Democrats and Republicans remained, and the Democrats, by virtue of the tie-breaking vote of the Lieutenant Governor, were in control of the Senate.

6 Under the Pennsylvania Constitution, Art. II, § 5, senators must have been inhabitants of their respective districts for at least one year prior to their election. As the Pennsylvania Supreme Court noted in *In re 1991 Pennsylvania Legislative Reapportionment Comm'n*, 609 A.2d at 139 n. 7, the one-year residency requirement would likely have to be waived after the reapportionment since, with the redrawing of 49 out of 50 districts, no representative would have lived within a newly drawn district for one year. But the court held that under Pa. Const., Art. II, § 9, these issues of qualification were ultimately for the Senate to decide. *Id.* (citing *In re Jones*, 505 Pa. 50, 476 A.2d 1287 (1984)).

7 The members of the Commission included: Chairman Robert Cindrich, State Representatives John Perzel and Allen Kukovich, State Senators Joseph Loeper and Robert Mellow, and recently substituted ex officio members of the Commission, who were, as of the date of the filing of the complaint, State Senators Robert Jubelirer and William Lincoln.

Governor Casey was also named as a defendant in the complaint. However, pursuant to Fed.R.Civ.P. 41, the parties voluntarily dismissed the Governor. The parties also dropped all claims against Mitchell and Boehm in their personal capacities.

8 Throughout the Commission's deliberations over the 1991 Reapportionment Plan, Senator Loeper opposed the version of the plan that was finally adopted by a majority of the Commission. Senator Jubelirer was not a member of the Commission at that time.

9 States retain broad discretion to regulate their own elections, *Burdick*, 504 U.S. at ---, 112 S.Ct. at 2063, and to determine the apportionment of their own legislative districts, *see Grove v. Emison*, 507 U.S. 25, ---, 113 S.Ct. 1075, 1081, 122 L.Ed.2d 388 (1993) ("[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court."); *see also Voinovich v. Quilter*, 507 U.S. 146, --- - ---, 113 S.Ct. 1149, 1156-57, 122 L.Ed.2d 500 (1993) (same).

10 Plaintiffs also argue that if we decide not to apply strict scrutiny, we should apply an intermediate level of scrutiny of the type applied in ballot access cases such as *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (reviewing statutory prohibition on write-in voting); *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) (reviewing statutory requirement that independent candidates for President of the United States file nominating petitions over six months prior to general elections), and *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) (reviewing statutory requirement that candidates for local office pay filing fees as high as \$8,000). Each of these cases, however, involved laws that restricted voters' range of choices at the ballot box, restrictions which the Court found burdened voters' First Amendment Rights. No such restriction on plaintiffs' First Amendment rights is involved here. *See Keisling*, 959 F.2d at 145 (distinguishing the rights at issue in *Anderson* from plaintiffs' claim against temporary disenfranchisement after reapportionment, which the court found did not infringe First Amendment rights).

11 When asked at oral argument what minimum percentage of voters would constitute a "core constituency" sufficient to pass constitutional muster under their theory, plaintiffs were unable to offer a definition. Rather, they argued that wherever a court were

to draw the line, the 0% "core constituency" that exists in the new 44th district would clearly fall below it. Because we find no merit to plaintiffs' proposed "core constituency" doctrine, we need not engage in any arbitrary line-drawing. We note, however, that plaintiffs' conceded inability to define their concept of "core constituency" supports our conclusion that there is no significant difference between the position of the plaintiffs and that of the over one million other voters shifted into other even-numbered districts that contain some percentage of voters who participated in the incumbent senator's election in 1990.

12 Plaintiffs were free to challenge the reapportionment plan by bringing a claim of political gerrymandering under the Equal Protection Clause, *see Davis v. Bandemer*, 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986), but did not do so.

13 Indeed, application of a more exacting standard would interject the federal courts directly into the sinews of redistricting decisions.

14 Because we have found that the plaintiffs' constitutional claims are without merit, we need not address the additional arguments raised by defendants, including the defendants' contention that plaintiffs failed to join the Lieutenant Governor as an indispensable party under Fed.R.Civ.Pro. 19(a)(2)(i); that the plaintiffs' claims are barred by laches; that the members of the Commission are entitled to absolute immunity from suit under the Pennsylvania Constitution's Speech or Debate Clause, Art. II, § 15; and that the members of the Commission are entitled to qualified immunity from the damages claim under *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

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641 N.W.2d 100
Supreme Court of North Dakota.

Jerome KELSH, Petitioner,

v.

Alvin A. JAEGER, in his capacity as Secretary
of State, State of North Dakota, Respondent.

No. 20020060. March 28, 2002.

State senator filed petition, seeking to have the Supreme Court exercise its original jurisdiction to issue a writ of prohibition enjoining the Secretary of State from administering an election for the office of state senator following redistricting. The Supreme Court held that: (1) Supreme Court would exercise original jurisdiction; (2) constitution allowed legislature to truncate senator's four-year term when necessary to further constitutional mandates for redistricting; (3) statute giving senior incumbent senator the authority to stop election was void as an impermissible delegation of legislative power; and (4) redrawing of state senate district boundaries with a resulting 46.6% change of the district's constituency justified having election.

Petition denied.

Attorneys and Law Firms

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Wayne K. Stenehjelm, Attorney General, Attorney General's Office, Douglas Alan Bahr (appeared), Solicitor General, Attorney General's Office, Bismarck, for respondent and Office of Attorney General.

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Thomas D. Kelsch, Kelsch, Kelsch, Ruff & Kranda, Mandan, for North Dakota Republican Party.

Opinion

PER CURIAM.

[¶ 1] Jerome Kelsh petitions this Court to exercise its original jurisdiction to issue a writ of prohibition enjoining the Secretary of State from administering an election for the office of state senator in District 26 for the 2002 primary and general elections. Kelsh asserts N.D.C.C. § 54-03-01.8 truncates his four-year senate term and thereby violates N.D.

Const. art. IV, § 4, requiring a senator's term must be for four years. We hold the language in N.D.C.C. § 54-03-01.8 that allows an incumbent state senator to decide whether to stop an election for state senator in District 26 in 2002 is an impermissible delegation of legislative power, and we strike it. By allowing an election for state senator in District 26 in 2002, N.D.C.C. § 54-03-01.8 provides the electors in this newly redrawn district their constitutional right to elect a state senator from the district. We hold the remainder of the statute, in truncating Kelsh's term, does not violate N.D. Const. art. IV, § 4, and we deny the writ.

I

1 2 3 [¶ 2] A writ of prohibition is an extraordinary remedy to prevent an inferior body or tribunal from acting without or in excess of jurisdiction when there is not a plain, speedy, and adequate remedy in the course of law. N.D.C.C. § 32-35-01; *Old Broadway Corp. v. Backes*, 450 N.W.2d 734, 736 (N.D.1990). Under N.D. Const. art. VI, § 2, this Court has authority to exercise original jurisdiction and to issue remedial writs necessary to properly exercise its jurisdiction. The power vested in this Court to issue original writs is discretionary and may not be invoked as a matter of right. *State ex rel. Kusler v. Sinner*, 491 N.W.2d 382, 384 (N.D.1992). It is well-settled that our power to exercise original jurisdiction extends only to those cases in which the questions presented are *publici juris* and affect the sovereignty of the state, the franchises or prerogatives of the state, or the liberties of its people. *Id.* To warrant the exercise of this Court's original jurisdiction, the interest of the state must be primary, not incidental, and the public-the community at large-must have an interest or right that may be affected. *State ex rel. Wefald v. Meier*, 347 N.W.2d 562, 564 (N.D.1984).

4 [¶ 3] The issues in this case involve the people's right to elect representatives to the state Legislature and the *103 Legislature's right to truncate the terms of elected representatives by legislative redistricting. The case involves the people's right of franchise and the Legislature's authority to effectively disenfranchise some of the electorate. Few matters encompass more public interest than issues involving the power of the people to govern themselves through the voting process. *See Meier*, 347 N.W.2d at 564. We conclude, therefore, this matter is of public interest and warrants our exercise of original jurisdiction.

II

5 [¶ 4] Kelsh asserts N.D.C.C. § 54-03-01.8, as amended in 2001 by the 57th Legislative Assembly, violates N.D. Const. art. IV, § 4, because the statute effectively reduces his term as an elected senator in District 26 from four years to two years. The 57th Legislative Assembly adopted a redistricting plan after the 2000 federal census. The plan reduced the number of senatorial districts from 49 to 47, fixed the number of senators and representatives, and divided the state into senatorial districts.

[¶ 5] Relevant to this case is N.D. Const. art. IV, § 2, which states, in part:

The legislative assembly shall fix the number of senators and representatives and divide the state into as many senatorial districts of compact and contiguous territory as there are senators. The districts thus ascertained and determined after the 1990 federal decennial census shall continue until the adjournment of the first regular session after each federal decennial census, or until changed by law.

The legislative assembly shall guarantee, as nearly as is practicable, that every elector is equal to every other elector in the state in the power to cast ballots for legislative candidates. A senator and at least two representatives must be apportioned to each senatorial district and be elected at large or from subdistricts from those districts.

Also relevant is N.D. Const. art. IV, § 3, which states:

The legislative assembly shall establish by law a procedure whereby one-half of the members of the senate and one-half of the members of the house of representatives, as nearly as is practicable, are elected biennially.

The 57th Legislative Assembly in 2001 amended N.D.C.C. § 54-03-01.8 to provide:

A senator from an odd-numbered district must be elected in 2002 for a term of four years and a senator from an even-numbered district must be elected in 2004 for a term of four years. Except as otherwise provided in this section, a senator from an even-numbered district in which there is another incumbent senator as a result of legislative redistricting

must be elected in 2002 for a term of two years. However, if as a result of legislative redistricting a senator elected in 1998 is placed in an even-numbered district there must be an election in 2002 for a term of two years unless the senator elected in 1998 files by February 15, 2002, a written statement with the secretary of state stating that the senator elected in 1998 agrees that there need not be an election for a senator in 2002 and that the senator elected in 2000 may continue that senator's term; based on this requirement, districts twenty and twenty-six may be required to elect senators in 2002. A senator from an odd-numbered district in which there is another incumbent senator must be elected in 2002 for a term of four years; based on this requirement, district thirty-one must elect a senator in 2002. The term of a senator from an even-numbered *104 district who is placed in an odd-numbered district as a result of legislative redistricting expires as of December 1, 2002; based on this requirement, the term of the senator elected in district twelve in 2000 expires as of December 1, 2002, and district twenty-three must elect a senator in 2002.

[¶ 6] Joel Heitkamp was elected in 1998 to a four-year term as state senator in former District 27. Jerome Kelsh was elected in 2000 to a four-year term as state senator in District 26. As part of the Legislature's 2001 redistricting plan, a substantial portion of former District 27, including Heitkamp's township of residence, was placed in District 26. Section 54-03-01.8, N.D.C.C., requires District 26 to elect a state senator in 2002 for a two-year term unless Heitkamp, the senator who was elected in 1998 and was placed in District 26 by the redistricting plan, filed a written statement by February 15, 2002 agreeing that there need not be an election in District 26 for state senator in 2002. Heitkamp did not file such a statement by February 15, 2002. Consequently, N.D.C.C. § 54-03-01.8 requires District 26 to elect a state senator in 2002 and truncates the term of Kelsh, the incumbent senator in District 26 elected to a four-year term in 2000. Kelsh asserts the statute, by reducing his four-year term to a two-year term, violates N.D. Const. art. IV, § 4, which provides: "Senators and representatives must be elected for terms of four years." Kelsh asks this Court to declare the statute unconstitutional

and to issue a writ of prohibition enjoining the Secretary of State from administering a primary and a general election to elect a state senator in District 26 in 2002. The resolution of this issue requires us to construe our state constitution and to determine whether the Legislature, in amending N.D.C.C. § 54-03-01.8, contravened any part of it.

6 7 8 9 10 11 [¶ 7] When interpreting the state constitution, our overriding objective is to give effect to the intent and purpose of the people adopting the constitutional statement. *City of Bismarck v. Fettig*, 1999 ND 193, ¶ 8, 601 N.W.2d 247. The intent and purpose of a constitutional provision is to be determined, if possible, from the language itself. *State v. Hagerty*, 1998 ND 122, ¶ 13, 580 N.W.2d 139. We give words in a constitutional provision their plain, ordinary, and commonly understood meaning. *Tormaschy v. Hjelle*, 210 N.W.2d 100, 102 (N.D.1973). When interpreting constitutional provisions, we apply general principles of statutory construction. *Hagerty*, at ¶ 13. We must give effect and meaning to every provision and reconcile, if possible, apparently inconsistent provisions. *State ex rel. Sanstead v. Freed*, 251 N.W.2d 898, 908 (N.D.1977). We presume the people do not intend absurd or ludicrous results in adopting constitutional provisions, and we therefore construe such provisions to avoid those results. *North Dakota Comm'n on Med. Competency v. Racek*, 527 N.W.2d 262, 266 (N.D.1995).

[¶ 8] This Court addressed predecessor constitutional provisions involving staggered senate terms and the four-year term requirement in *State ex rel. Williams v. Meyer*, 20 N.D. 628, 127 N.W. 834 (1910). In *Meyer*, a senator elected to a four-year term in 1908 was required by the Legislature's reapportionment of senate districts to run for reelection in 1910, after having served only two years of his term. In support of his argument that he was entitled to serve out his four-year term, the senator relied on Section 27 of the constitution, the predecessor to N.D. Const. art. IV, § 4, which provided "Senators shall be elected for the term of four years, except as hereinafter provided." The relator, a *105 candidate for nomination in the 1910 primary election in the senator's district, relied on Section 30 of the constitution, the predecessor to N.D. Const. art. IV, § 3, which provided:

The senatorial districts shall be numbered consecutively from one upwards according to the number of districts prescribed, and the number of senators shall be divided into two classes. Those elected in the districts

designated by even numbers shall constitute one class, and those elected in the districts designated by odd numbers shall constitute the other class. The senators of one class elected in the year 1890 shall hold their office for two years. Those of the other class shall hold their office for four years and the determination of the two classes shall be by lot, so that one half of the senators, as nearly as practicable, may be elected biennially.

[¶ 9] The *Meyer* Court held the senator's term could be truncated under the circumstances, reasoning:

On the one hand, it is contended that the provisions of section 27, supra, that senators shall be elected for the term of four years, controls, while the relator urges that the exception to that section, namely, "except as hereinafter provided," applies in this instance; that the provision of section 30 that the senators shall be divided into two classes, those in the even-numbered districts constituting one class and those in the odd-numbered districts the other class so that one-half of the senators, as nearly as practicable, may be elected biennially, is controlling. We are of the opinion that the contention of the relator must be sustained. It was the clear intent of the constitutional convention to provide a Senate which should at all times, as nearly as practicable, be composed of members one-half of whom were experienced in the duties of their offices.... [The Senate] is a continuous body. It never goes out of existence, and the purpose of the constitutional provisions on this subject which we have quoted was to maintain a Senate which should at all times have one-half its members, as nearly as practicable, experienced men.... The phrase, "except as hereinafter provided," referred to, relates not only to the senators of the even class elected in 1890, but it is applicable to those elected after any reapportionment at which new districts are created, so far as necessary to bring them into harmony with the plan of the Constitution regarding the membership of

the Senate and the terms of office of the senators.... To place a literal interpretation on the four-year provision as to the term of senators would classify some odd-numbered districts with some even-numbered districts, and interminable confusion and disorder would result. An illustration is convincing. By the reapportionment made in 1901 nine new senatorial districts were created, and the election of nine new senators provided for. If these nine new senators were all elected for four years and their districts thereby added to one of the two classes as fixed in 1891, the fundamental principle that the two classes remain as nearly as practicable equal in numbers would be clearly violated, and one would thereafter have contained 15 members and the other 25, and, had a second reapportionment followed in a corresponding year, new districts created by the second reapportionment would still further have increased the disproportion in the numbers of the districts in the two classes.

Meyer, 20 N.D. at 631-33, 127 N.W. at 836. The *Meyer* court held the four-year term requirement of Section 27 was subservient to the Section 30 requirement of staggered senatorial terms when necessary to ensure *106 that the senate maintain, "as nearly as practicable," one-half of its number as experienced members.

[¶ 10] There are conflicting Attorney General opinions addressing this issue. In a March 4, 1992, letter opinion, Attorney General Nicholas J. Spaeth concluded, without discussing the *Meyer* decision, that N.D. Const. art. IV, § 4, precluded the Legislature from constitutionally limiting the term of a senator elected in the general election in 1990 to a term of two years by requiring those senators to run again in 1992. In a July 13, 2001, letter opinion, Attorney General Wayne Stenehjem overruled the 1992 letter opinion. Attorney General Stenehjem relied in part on the *Meyer* decision and concluded "the Legislative Assembly has, as part of its constitutional authority to maintain the staggering of terms for senators and representatives, the authority to reduce the terms of one or more senators or representatives from four years to two years if necessary to effectuate an otherwise valid redistricting plan."

[¶ 11] The phrase in Section 27, "except as hereinafter provided," relied upon by the *Meyer* court to support its decision, was deleted from the N.D. Const. art. IV, § 4, mandate of four-year senate terms when Section 4 was approved by the electorate on June 12, 1984, as a part of a rewrite of the legislative article, and became effective December 1, 1986. *See* 1983 N.D. Sess. Laws ch. 728, § 4. The provision was again amended and approved by the voters, effective July 1, 1997, in its current form, but the previously deleted language was not restored. 1997 N.D. Sess. Laws ch. 570, § 2. The Secretary of State argues the *Meyer* reasoning nevertheless controls and supports the truncation of Kelsh's senate term.

[¶ 12] There are two feasible conclusions about the people's intent in deleting the language at issue. The deletion of the language could be construed as an expression of the people's intent to preclude the Legislature from truncating the term of a state senator to less than four years under any circumstances. However, the deletion of the language could also be construed as a recognition that the deleted language was unnecessary surplusage, because the constitutional provisions can be and must be harmonized, without any need to rely on the deleted language. *See Little v. Traynor*, 1997 ND 128, ¶ 29, 565 N.W.2d 766 (stating the most plausible explanation for the Legislature deleting the statutory language is that the language was found to be surplusage).

[¶ 13] In construing and interpreting the constitution, we must give effect and meaning to every provision and reconcile, if possible, apparently inconsistent provisions. *Freed*, 251 N.W.2d at 908. If we were to construe N.D. Const. art. IV, § 4, in a literal sense as absolutely prohibiting the Legislature, under any circumstances, from truncating the term of a senator to less than four years, the Legislature would be severely hampered in accomplishing its constitutional mandates to establish a redistricting plan giving every elector an equal vote and to elect one-half of the members of the senate biennially. Such a narrow interpretation of N.D. Const. art. IV, § 4, would preclude the Legislature from redrawing any boundary that would truncate an incumbent senator's four-year term before its expiration. This could severely hamper the redistricting process.

12 [¶ 14] When the intentions of the people cannot be determined solely from the language of a constitutional provision itself, we may look to the historical context of an amendment and construe it in the light of contemporaneous

history. *Hagerty*, 1998 ND 122, ¶ 17, 580 N.W.2d 139. This Court, in *Meyer*, found an overriding *107 objective of the people and purpose under the constitution for allowing the Legislature to truncate terms in a redistricting plan:

[T]he purpose of the constitutional provisions on this subject which we have quoted was to maintain a Senate which should at all times have one-half its members, as nearly as practicable, experienced men.... To place a literal interpretation on the four-year provision as to the term of senators would classify some odd-numbered districts with some even-numbered districts, and interminable confusion and disorder would result.

Meyer, 20 N.D. at 632-33, 127 N.W. at 836.

[¶ 15] We do not believe the people intended to subvert this overriding objective by deleting the “except as hereinafter provided” language from N.D. Const. art. IV, § 4. The Legislature retains its constitutional mandates under N.D. Const. art. IV, §§ 2 and 3, to provide senatorial districts with equal votes for the electorate and to elect one-half of the senate members each biennium. Implicit in those mandates is the need for flexibility to truncate terms as necessary to the redistricting process.

[¶ 16] Faced with an identical issue under similar circumstances, the Washington Supreme Court in *State ex rel. Christensen v. Hinkle*, 169 Wash. 1, 13 P.2d 42, 44 (1932), cited and followed this Court’s decision in *Meyer*, even though the Washington state constitution required senators “shall be elected for four years,” but did not contain language similar to the “except as hereinafter provided” clause. The Washington Supreme Court concluded such language was unnecessary for it to follow the *Meyer* rationale in construing the Washington constitution. The Washington Supreme Court concluded its state constitution permitted the Legislature to truncate the terms of state senators as part of a constitutionally mandated redistricting plan:

We see no material difference in the language and legal effect of the two Constitutions. It follows, therefore, that in our view no constitutional right of the relator was invaded by Initiative Measure No. 57 when the term of office to which he had been previously elected was reduced from four to two years.

Hinkle, 13 P.2d at 44.

[¶ 17] We recognize N.D. Const. art. IV, § 4, establishes that senators must be elected for terms of four years. The mandates under N.D. Const. art. IV, §§ 2 and 3, however, require the Legislature to redraw districts after each decennial census to maintain elector vote equality, and to establish a procedure wherein one-half of the members of the senate are elected biennially, and they must be interpreted and harmonized with the provision for four-year senate terms under Section 4. In so doing, we construe the constitution as allowing the Legislature to truncate a senator’s four-year term when necessary to further the constitutional mandates for redistricting.

[¶ 18] It is a well-settled rule that we will not construe a statute or constitutional provision to reach an absurd result. *See Bouchard v. Johnson*, 555 N.W.2d 81, 83 (N.D.1996). When the Legislature establishes a redistricting plan to guarantee, as nearly as practicable, that every elector’s vote is equal, it will often have to redraw district boundaries to accommodate the changes and movement in population. If we construe N.D. Const. art. IV, § 4, to prohibit the Legislature from truncating any senator’s four-year term in its redistricting plan, it could not place the residences of two incumbent senators into one district; otherwise the redrawn district would have two senators until one of the senate terms expired. To avoid this, the *108 Legislature would have to take into account the location of each incumbent senator’s residence and refrain from drawing lines that would place two incumbent senators in a single district. This interpretation would, in our view, lead to an absurd result. It would require the Legislature to draft district lines to accommodate incumbent senators’ housing locations to avoid having a district with double representation. We reject such an inflexible interpretation of N.D. Const. art. IV, § 4, as it relates to the Legislature’s authority in accomplishing its redistricting mandates under N.D. Const. art. IV, §§ 2 and 3.

13 [¶ 19] Construing all provisions of our state constitution together, we conclude that under N.D. Const. art. IV, § 4, a senator generally must be elected for a term of four years. However, the Legislature can truncate senate terms when reasonably necessary to accomplish another constitutional mandate.

III

14 [¶ 20] Section 54-03-01.8, N.D.C.C., provides there will be an election in 2002 in District 26, but gives one person the power to stop it.

However, if as a result of legislative redistricting a senator elected in 1998 is placed in an even-numbered district there must be an election in 2002 for a term of two years unless the senator elected in 1998 files by February 15, 2002, a written statement with the secretary of state stating that the senator elected in 1998 agrees that there need not be an election for a senator in 2002 and that the senator elected in 2000 may continue that senator's term; based on this requirement, districts twenty and twenty-six may be required to elect senators in 2002.

(Emphasis added.) Giving an incumbent senator an opportunity to run immediately in an election in his new district simply advances the incumbent senator's private interest, rather than a public interest. See *Hinkle*, 13 P.2d at 43. It provides no justification to override the constitutional mandate of four-year senate terms under N.D. Const. art. IV, § 4. The problem here is compounded in that the Legislature has placed in the hands of one person the authority to stop an election. For the reasons which follow, we conclude the above underscored language of N.D.C.C. § 54-03-01.8 is void as an impermissible delegation of legislative power.

15 16 17 [¶ 21] The Legislature has the power to administer the election process. N.D. Const. art. II, § 1; *Dist. One Republican Comm. v. Dist. One Democrat Comm.*, 466 N.W.2d 820, 832 (N.D.1991); *Miller v. Schallern*, 8 N.D. 395, 400, 79 N.W. 865, 866 (1899). Except as otherwise provided in the constitution, the Legislature may not delegate legislative powers to others, *MCI Telecomms. Corp. v. Heitkamp*, 523 N.W.2d 548, 554 (N.D.1994), including a subset of its members, *Eklund v. Eklund*, 538 N.W.2d 182, 189 (N.D.1995) (Sandstrom, J., concurring), or private citizens. *Enderson v. Hildenbrand*, 52 N.D. 533, 541, 204 N.W. 356, 359 (1925). In *County of Stutsman v. State Historical Soc'y*, 371 N.W.2d 321, 327 (N.D.1985), this Court explained:

Unless expressly authorized by the State Constitution, the Legislature may not delegate its purely legislative powers to any other

body.... However, the Legislature may delegate powers which are not exclusively legislative and which the Legislature cannot conveniently do because of the detailed nature. Simply because the Legislature may have exercised a power does not mean that it must exercise that power. In *Ralston Purina Company [v. Hagemester]*, 188 N.W.2d 405 (N.D.1971)], we pointed out *109 that the true distinction between a delegable and non-delegable power was whether the power granted gives the authority to make a law or whether that power pertains only to the execution of a law which was enacted by the Legislature. The power to ascertain certain facts which will bring the provisions of a law into operation by its own terms is not an unconstitutional delegation of legislative powers. *Ferch v. Housing Authority of Cass County*, 79 N.D. 764, 59 N.W.2d 849 (1953). However, the law must set forth reasonably clear guidelines to enable the appropriate body to ascertain the facts.

This Court has upheld legislative delegations of power when the law contains reasonable guidelines by which the person or body to whom a power is delegated may operate. See, e.g., *MCI Telecomms. Corp.*, 523 N.W.2d at 555; *North Dakota Council of Sch. Adm'rs v. Simer*, 458 N.W.2d 280, 285-86 (N.D.1990); *Southern Valley Grain Dealers Ass'n v. Bd. of County Comm'rs*, 257 N.W.2d 425, 435 (N.D.1977). When reasonable guidelines are given, the delegated power to ascertain facts for operation of a law is not unconstitutional, because that power pertains to execution of the law. *Syverson, Rath and Mehrer, P.C. v. Peterson*, 495 N.W.2d 79, 82 (N.D.1993). Under our constitutional system, the Legislature may not delegate to itself, or to a subset of its members, executive or judicial functions. *Eklund*, 538 N.W.2d at 189 (Sandstrom, J., concurring).

[¶ 22] In *Montana-Dakota Util. Co. v. Johanneson*, 153 N.W.2d 414 (N.D.1967), the Legislature gave rural electric cooperatives the unfettered discretion to refuse consent for a public utility to extend its power lines into a rural area with rural electric cooperative lines or facilities. This Court concluded the legislation was an unconstitutional delegation of legislative power:

[F]or all practical purposes, the co-operative, and not the Public Service Commission, is the body that determines whether a certificate of public convenience and necessity shall be granted to a public utility in the area outside the limits of the municipality.

Under Section 3, the co-operative has this power regardless of whether it or the utility is best qualified to serve the area and regardless of the fact that the public utility applying to serve such area might more economically render such service. No guidelines are set out in the law to be followed by the co-operative in making such determination, and no safeguards are provided against arbitrary action by the co-operative.... The Legislature must declare the policy of the law and must definitely fix the legal principles which are to control the action taken.

....

If the Legislature had determined that the public utilities should serve only in urban areas, that would have been a legislative determination. But Section 3 of Chapter 319 presents a different situation. The Legislature itself does not determine who is to furnish electrical service in rural areas. It leaves that determination to the electric co-operative, and this clearly is an unlawful delegation of legislative authority.

Johanneson, 153 N.W.2d at 421.

[¶ 23] Here, too, we conclude the Legislature has unlawfully delegated its authority. As amended, N.D.C.C. § 54-03-01.8 gives unfettered discretion to a single person to stop an election for state senator in District 26 in 2002. We therefore hold the above underscored language of N.D.C.C. § 54-03-01.8 confers an unconstitutional delegation of legislative power and cannot stand. We strike this statutory *110 language, and as a consequence, N.D.C.C. § 54-03-01.8 requires an election for state senator in District 26 in 2002.

IV

18 [¶ 24] The Legislature can truncate four-year state senator terms provided under N.D. Const. art. IV, § 4, when necessary to accomplish another constitutional mandate. However, the Legislature does not have unfettered authority to truncate terms during the redistricting process. This Court in *Meyer* held the constitutional provision requiring four-year

terms could be overridden by the Legislature to further its constitutional mandate to stagger senate terms in establishing a redistricting plan to ensure that the senate maintains one-half of its number as experienced members. To withstand the constitutional attack here, N.D.C.C. § 54-03-01.8 must further some constitutional mandate or directive to justify its requirement that an election for state senator be held in 2002 in District 26, which results in truncating Kelsh's senate term.

[¶ 25] District 26, as redrawn under the Legislature's redistricting plan, is a substantially different district than former District 26. Currently, the population in District 26 is 14,327. The redistricting plan moved 4,509 individuals from former District 26 into new Districts 28 and 29. It also moved 6,676 individuals into current District 26 from former Districts 25 and 27. Consequently, the redistricting plan has resulted in a 46.6 percent change of the population from former District 26 compared to current District 26.

[¶ 26] Our state constitution requires: "A senator and at least two representatives *must* be apportioned to each senatorial district and *be elected* at large or from subdistricts *from those districts.*" N.D. Const. art. IV, § 2 (emphasis added). When a district undergoes a boundary change that results in a 46.6 percent change of the actual persons residing in the district, the question is whether the state senator elected by the district prior to the change can be considered to have been elected from the changed district.

[¶ 27] Addressing a similar question, the Alaska Supreme Court in *Egan v. Hammond*, 502 P.2d 856, 873-74 (Alaska 1972), held that the governor had the power to terminate senate terms as incidental to his general reapportionment powers and explained:

A need to truncate the terms of incumbents may arise when reapportionment results in a permanent change in district lines which either excludes substantial numbers of constituents previously represented by the incumbent or includes numerous other voters who did not have a voice in the selection of that incumbent.

[¶ 28] *See also Kentopp v. Anchorage*, 652 P.2d 453, 462 (Alaska 1982) (stating formulation of a reapportionment plan is a decidedly political process and the Legislature has discretion whether to truncate terms); *In re Apportionment Law*, 414 So.2d 1040, 1047 (Fla.1982) (holding election of state senators after redistricting resulting in truncation

of terms was justified to accomplish state constitutional requirement that senators be elected from their districts).

19 20 [¶ 29] When reapportionment results in a substantial constituency change, the constitutional requirement that a senator be elected from a district may justify truncating an incumbent senator's term to give the electorate in the newly drawn district an opportunity to select a senator from that district. The petition before us questions the constitutional validity of N.D.C.C. § 54-03-01.8 in requiring an election in District 26 and, ***** thereby, truncating Kelsh's four-year term. We do not address any aspect of the statute as it relates to other districts in the state for which no challenge is before us. An appellate court need not answer questions, the answers to which are unnecessary to resolve the case before it. See *Moszer v. Witt*, 2001 ND 30, ¶ 20, 622 N.W.2d 223.

[¶ 30] To resolve this case, we need not decide how significant the change in a district's constituency must be to justify the legislative decision to have an election that would truncate the term of an incumbent senator. We need only decide whether the redrawing of the District 26 boundaries with a resulting 46.6 percent change of the district's constituency justifies having an election in 2002, even though it truncates Kelsh's term.

[¶ 31] Although not every change in a district will justify having an election, we conclude a constituency change of 46.6 percent does. Nearly one-half of the electors of District 26, as formulated under the 2001 redistricting plan, have never had an opportunity to elect a state senator from the district. The newly drawn district contains within its boundaries two incumbent state senators, and that situation further exacerbates the disenfranchisement caused by the

redrawn boundaries. We hold that N.D.C.C. § 54-03-01.8, by allowing an election in District 26 in 2002, accomplishes the Legislature's N.D. Const. art. IV, § 2, directive of establishing a redistricting plan under which a district's state senator is elected from the district. Consequently, we hold the statute justifiably truncates Kelsh's term and is not unconstitutional in violation of N.D. Const. art. IV, § 4.

V

[¶ 32] In accordance with this opinion, we hold the Legislature may truncate four-year senate terms as provided under N.D. Const. art. IV, § 4, when necessary to further a constitutional mandate or directive. We hold the language of N.D.C.C. § 54-03-01.8, placing in one person the decision whether District 26 elects a state senator in 2002, is void as an impermissible delegation of legislative power. We further hold N.D.C.C. § 54-03-01.8, by requiring an election in District 26, furthers the N.D. Const. art. IV, § 2, constitutional mandate that a state senator be elected from the district and does not violate N.D. Const. art. IV, § 4. We therefore deny the petitioner's request for a writ of prohibition to enjoin the Secretary of State from holding a primary and general election in District 26 in 2002 for election of a state senator.

[¶ 33] GERALD W. VANDE WALLE, C.J., DALE V. SANDSTROM, WILLIAM A. NEUMANN, MARY MUEHLEN MARING, and CAROL RONNING KAPSNER, JJ., concur.

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793 F.Supp. 859
United States District Court,
W.D. Wisconsin.

David T. PROSSER, Jr., Randall J. Radtke, Robert T. Welch, each individually and as members of the Wisconsin State Assembly; Michael G. Ellis, Donald K. Stitt, Brian D. Rude and Margaret A. Farrow, each individually and as members of the Wisconsin State Senate; Derek Kenner, Jacqueline D. Schellinger, Hafeezah Ahmad, Kent Vernon and Perfecto Rivera, each individually, Plaintiffs, Richard Collins, individually and in his official capacity as President of the Wisconsin Education Association Council; George Williams, individually; Wisconsin Education Association Council, African-American Coalition for Empowerment and Barbara White; and District Councils 24, 40 and 48, AFSCME, AFL-CIO, Intervening Plaintiffs,

v.

ELECTIONS BOARD, an independent agency of the State of Wisconsin; Gordon Baldwin, Barbara Kranig, J. Curtis McKay, John Niebler, Brandon Scholz, Brent Smith, Kit Sorenson and Mark E. Sostarich, in their official capacities as members of the Elections Board of the State of Wisconsin; Board of State Canvassers, an independent agency of the State of Wisconsin; Gordon Baldwin, James E. Doyle, Cathy S. Zeuske, Marilyn L. Graves, in their official capacities as members or potential members of the Board of State Canvassers, Defendants,

and

Walter J. Kunicki, individually and as Speaker of the Wisconsin Assembly, and Fred A. Risser, individually and as President of the Wisconsin Senate; Gary R. George, individually and as a member of the Wisconsin State Senate; Annette (Polly) Williams, individually and as a member of the Wisconsin State Assembly; Miguel Berry, Abel Ortiz, and Rosa M. Dominguez; G. Spencer Coggs; Marcia P. Coggs, Intervening Defendants.

No. 92-C-0078-C. June 2, 1992.

Republican legislators filed suit challenging apportionment of Wisconsin legislature as unconstitutional and violative of Voting Rights Act. The three-judge District Court adopted its own reapportionment plan, which: combined best features of two best plans submitted, and which provided for total deviation from exact population equality of .52% and mean deviation of .10%; which created black senatorial district in Milwaukee, black "influence" senatorial district, five black-majority assembly districts and one black-influence assembly district; and which paired only 16 incumbents in both houses of the legislature and only six of the same party.

Order accordingly.

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Marcia P. Coggs, pro se.

Before POSNER, Circuit Judge, CRABB, Chief Judge, and CURRAN, District Judge.

Opinion

OPINION AND ORDER

PER CURIAM.

In the spring of 1991, the Census Bureau furnished the State of Wisconsin with a detailed breakdown of the results of the 1990 decennial census. The breakdown showed that as a result of population shifts since the 1980 decennial census, the Wisconsin legislature was malapportioned—the shifts had produced large discrepancies in population between districts. The shifts had probably caused a violation of the Voting Rights Act, 42 U.S.C. § 1973, as well, because they had resulted in blacks' being “packed” into districts in Milwaukee, thus “wasting” black votes and therefore, arguably, denying blacks the reasonable opportunity *862 to select legislators of their choice that the Act guarantees them. Both houses of the Wisconsin legislature have a Democratic majority, but not a large enough one to override vetoes by the state's Republican governor. For that or other reasons, no bill to reapportion the legislature had been enacted into law when, on January 30 of this year, several Republican legislators filed this suit challenging the current apportionment of the legislature as unconstitutional and violative of the Voting Rights Act. *Davis v. Bandemer*, 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986). This three-judge district court was convened pursuant to 28 U.S.C. § 2284. The Democratic leaders of the Wisconsin legislature were permitted to intervene, as were a number of groups, including the Wisconsin Education Association Council, and individuals, including Annette Williams, a black representative from Milwaukee, and several other black and Hispanic legislators. The case was expedited to enable the state primary and general elections to proceed on schedule in the new districts. Shortly before the evidentiary hearing that we had scheduled for the week of April 27, the legislature passed a reapportionment bill, which the governor vetoed. The hearing, held in Madison on April 27 and 28, focused on four out of the ten plans that had been submitted. (The reason for the selection of those plans is discussed later.) Expert evidence in support of the various plans was introduced in written form, so that the hearing could be devoted to cross-examination of the experts and to opening and closing arguments of counsel.

We have now arrived at a decision and this opinion sets forth its legal and factual basis. Fed.R.Civ.P. 52(a). We discuss

the malapportionment issues first and the Voting Rights Act second, but preface our discussion with a brief description of the political and demographic character of Wisconsin.

The state is large but thinly populated, with a shade under 5 million people, of whom about a fifth live in Milwaukee County in the southeastern corner of the state. The state is largely white, the 5 percent that is black being concentrated in the city of Milwaukee. There are also small Hispanic, Asian, and American Indian minorities. The state has a tradition of political independence, and although the balance in recent years has tipped slightly in favor of the Democrats, popular Republicans such as Reagan and Thompson (the present governor) have carried the state—in Thompson's case, by a lopsided margin. State law fosters (or perhaps reflects) political independence by allowing any eligible voter, regardless of political affiliation, to vote in either primary. A high voter turnout in general elections is facilitated by allowing voters to register at the same time that they vote.

The Census Bureau, for its purposes, divides the state into thousands of census blocks, the population of which varies from 0 to 3,000 people. The political subdivisions of the states include the usual—counties, towns, etc.—as well as legislative districts. The smallest subdivision is the ward. Although state law requires a ward to have at least 300 residents, there are exceptions, and some wards, we were told, have as few as 6 people in them. The entire state is divided into wards, and all wards are nested within the larger subdivisions; that is, no ward is in two counties, two towns, two assembly districts, etc. However, a number of wards “split” census blocks; that is, the block may be part in one ward and part in another. The state has 99 assembly districts, with an average of some 49,000 people per district. There are 33 senatorial districts, each composed of three assembly districts. In part to achieve population equality some districts split other political subdivisions (other than wards)—some for example cross county or town lines.

All elections in Wisconsin for state governmental offices are held in even years, the members of the assembly being elected every two years while the senators have staggered four-year terms. The senatorial districts are numbered (1 through 33) and the even-numbered districts elect their senators in the year of the Presidential election (such as this year); the odd-numbered *863 districts elect their senators in the off-years. The Democrats dominate both houses, with 58

representatives in the assembly and 19 senators. There are 5 black representatives and 1 black senator.

Legislative districting has generated political controversy at least since England's "rotten boroughs." The reason is that any disparity in the number of voters in different districts dilutes the influence of some voters on the composition of the legislature. If for example one district has ten times as many electors as another, the electoral influence of each voter in the first district will be one-tenth that of each voter in the second district. Inequality in voting power as a consequence of disparities in population among legislative districts has been the particular target of the Supreme Court's reapportionment decisions, which have decreed the norm of "one person, one vote." *Reynolds v. Sims*, 377 U.S. 533, 577, 84 S.Ct. 1362, 1389, 12 L.Ed.2d 506 (1963). The norm, however, is unattainable for two reasons: measurement error, and the presence of competing norms that cannot be ignored. The decennial census involves both undercounting and overcounting, and the errors are not completely random and therefore do not cancel out. *Tucker v. U.S. Department of Commerce*, 958 F.2d 1411, 1412-13 (7th Cir.1992). Moreover, population shifts occur in the interval (here two years) between the census and the reapportionment based on it. As for competing norms: there is a nearly infinite set of district configurations that would generate approximate population equality across districts, and no one supposes that a court should be indifferent among all members of the set. It would be possible to create a district of 49,000 Wisconsinites by assembling census blocks from all over the state, by joining a Milwaukee neighborhood with a rural area in the northwestern corner of the state, hundreds of miles away, by cutting a corridor 200 hundred miles long and a quarter of a mile wide that would snake through the state, and in a million other ways. It would be possible to create a senatorial district by combining three widely separated assembly districts. With the right computer program a complete reapportionment map for the state can be created in days and modified in hours and we have no doubt that the parties examined hundreds of possible plans before submitting the handful that we have been asked to consider.

1 The objections to bizarre-looking reapportionment maps are not aesthetic (except for those who prefer Mondrian to Pollock). They are based on a recognition that representative democracy cannot be achieved merely by assuring population equality across districts. To be an effective representative, a legislator must represent a district that has a reasonable

homogeneity of needs and interests; otherwise the policies he supports will not represent the preferences of most of his constituents. There is some although of course not a complete correlation between geographical propinquity and community of interests, and therefore compactness and contiguity are desirable features in a redistricting plan. Compactness and contiguity also reduce travel time and costs, and therefore make it easier for candidates for the legislature to campaign for office and once elected to maintain close and continuing contact with the people they represent. Viewing legislators as agents and the electorate as their principal, we can see that compactness and contiguity reduce the "agency costs" of representative democracy. But only up to a point, for the achievement of perfect contiguity and compactness would imply ruthless disregard for other elements of homogeneity; would require breaking up counties, towns, villages, wards, even neighborhoods. If compactness and contiguity are proxies for homogeneity of political interests, so is making district boundaries follow (so far as possible) rather than cross the boundaries of the other political subdivisions in the state.

Compactness and contiguity greatly reduce, although they do not eliminate, the possibilities of gerrymandering. Daniel D. Polsby & Robert D. Popper, "The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering," 9 *Yale L. & Policy Rev.* 301 *864 (1991). To understand this phenomenon one must understand the difference between popular and legislative majorities that is inherent in a districted legislature as opposed to one in which legislators are elected at large. Suppose the Democratic Party in Wisconsin had the support of 51 percent of the voters *and* this support was distributed evenly across districts in both houses. Then the Democrats' bare majority of voter support would be translated into a 100 percent majority in the legislature and Republican voters would be, in effect, disenfranchised, though no more so than the losing candidate's voters in any winner-take-all election. (It is possibilities such as these that power the movement for proportional representation-which has its own serious problems, however.) Through skillful districting a party having a bare majority of voting strength throughout the state might be able to bring about the same result even if the districts were constrained to have equal population and even if the party's support was geographically uneven. The method would be to draw district lines in such a way as to enclose areas in which the party had the support of 51 percent of the voters. The result would be geometrically irregular districts

that might violate a norm of contiguity and compactness—hence the value of such a norm.

Speaking of disenfranchisement and gerrymandering (in its broadest sense of partisan districting), redistricting a legislative body whose members have staggered terms unavoidably creates the former, though only temporarily, and with it possibilities for the latter. When a senatorial district line is redrawn, some persons who formerly resided in an even-numbered district, and hence last voted for senator in 1988 and would, but for redistricting, have voted for senator again this year, now find themselves in an odd-numbered district and so must wait until 1994 to vote for senator again. In effect they are “disenfranchised” from one election. (An equal number, however, get to vote in one more election—they are allowed to vote twice for senator in four years, 1990 and 1992. But taking away one person's vote is not remedied by giving someone else two votes.) The effect is not limited to voters. Suppose that you are a senator representing an even-numbered district. Therefore your term expires at the end of this year. Suppose that as a result of redistricting you find yourself a resident of an odd-numbered district. You cannot run in that district this year, because odd-numbered districts do not vote for senator again until 1994. You would have to move to an even-numbered district and run against the incumbent, assuming he was seeking reelection.

The broader problem is that if as a result of redistricting two incumbents find themselves residents of the same district, and neither decides to retire or to move to another district, they must run for “reelection” without any of the usual advantages of incumbency, because their opponent is also an incumbent. In recent years (though public opinion polls suggest that this year may be different), incumbents have had a marked advantage in electoral contests with newcomers, so a partisan redistricting plan will seek to “pair” (place in the same district) as many legislators of the opposite party, and as few of their own party, as possible; more precisely, pair as many opposing (and as few of one's own) legislators who plan not to retire, or to move their legal residence to another district, as possible.

With exact population equality unattainable and in any event not the only goal of redistricting, it is apparent that the design of a reapportionment plan that will be “best” in terms of the goals of representative democracy is a daunting task, especially for judges. Although two of the judges of this court are long-term residents of Wisconsin, none of us is familiar with every part of the state or with the intricacies of local

government, and the parties have not supplied us with enough information to enable us to become expert reapportioners. They could not have done this if they had wanted to, because the speed with which this litigation has had to be conducted in order to enable the fall primary and general elections to proceed in orderly *865 fashion has necessarily limited the scope of inquiry.

Our task would be easier if we were reviewing an enacted districting plan rather than being asked to promulgate one ourselves. If for example the bill containing the legislative plan had been signed by Governor Thompson, and was being challenged as unconstitutional, our task would be to decide not whether the plan was the best possible but whether it struck a reasonable balance among the considerations enumerated above, starting with approximate numerical equality among districts. The legislative plan never became law, however. The only plan that became law, and therefore the only plan that is challenged, is the existing apportionment of the Wisconsin legislature, which all parties concede is unconstitutional. The issue for us is therefore remedy: not, Is some enacted plan constitutional? But, What plan shall we as a court of equity promulgate in order to rectify the admitted constitutional violation? What is the best plan?

Mindful of our limitations, we asked the parties at the outset whether they had any objection to our treating their plans in the manner of “final offer arbitration,” that is, to our selecting the best *of the submitted plans* rather than trying to create our own plan, whether from the ground up or out of bits and pieces of the plans submitted by the parties. Only the Wisconsin Education Association Council objected, and it did so weakly. We permitted the parties to submit multiple plans and to amend their plans. Although a total of ten plans were submitted, the focus of our deliberations has been on four plans—Prosser IA and IIIA, which are the Republican plans; the legislative plan, which is the Democratic plan; and Representative Williams's plan. The other plans that like Williams's plan would create four rather than five black majority districts in Milwaukee (the George, Ortiz, and Berry plans) suffer from the same infirmities as her plan and need not be discussed separately. Nor the Coggs and WEAC plans, neither of which differs substantially from the legislative plan.

After considering the plans, we have decided to retract our threat to choose the “best” no matter how bad it was. The best plans were Prosser IIIA and the legislative plan, and both bear the marks of their partisan origins. We have decided to

formulate our own plan, which combines the best features of the two best plans.

Prosser IA is defended on the ground that it achieves perfect numerical equality. It does this by building districts out of census blocks, without regard for wards (remember that many wards split census blocks). Prosser IIIA also achieves close to perfect numerical equality, but it adheres to ward boundaries and therefore splits some blocks. The plaintiffs argue that IA is better, because splitting blocks makes true numerical equality unattainable. The argument rests on the fallacy of delusive exactness. The decennial census is not accurate, and the 1990 decennial census is already out of date. When blocks are split in the forming of wards, the population of the ward is estimated by estimating the proportion of residents of each split block in the ward to which they are assigned. The estimation procedure is not arbitrary, but is based on counting dwellings and asking building managers how many people are in their building. Doubtless there are errors but so far as anyone has suggested to us they are random-which cannot be said of all the errors in the census count itself. As far as the trivial differences in population equality between Prosser IA and IIIA are concerned, they are entitled to no consideration. We ought to be realistic. If one assembly district has 49,000 residents, and another has 49,500, there is no basis for assuming *any* dilution of voting power in the second district, for not all residents of a district vote-not all are eligible to vote (children, for example, are not eligible). Even if it were assumed falsely that the ratio of voters to total population were the same in the two districts, the dilution in any voter's electoral power resulting from a 1 percent difference in number of voters would be too trivial to register in the most sensitive analysis of political power.

2 *866 All three of the plans that we are considering at the moment deviate from perfect equality (perfect 1990 census equality, that is) by less than 1 percent. Deviation is measured in two ways. One is by taking the difference in population between the least and the most populous district and dividing by the average population of all districts. By this measure, Prosser IA involves a deviation of 0 percent, Prosser IIIA .15 percent, and the legislative plan .34 percent. The average by which the districts in the three plans deviate from the average population of the plan's districts is 0 percent, .03 percent, and .07 percent. By both measures, the differences among the three plans are trivial. All deviations are well below 1 percent. Below 1 percent, there are no legally or politically relevant degrees of perfection.

3 We can therefore narrow our focus still more by rejecting Prosser IA because it gratuitously breaks up wards. Wards are not sacred, but they are the basic unit of Wisconsin state government for voting purposes. You vote by ward. Under Prosser IA, people in the same ward would be voting in different races. This would not be a major inconvenience, but it would be some and there is, as we have pointed out, no offsetting gain in population equality; the apparent gain is a statistical illusion.

4 Between Prosser IIIA and the legislative plan, the differences are few. Both districting plans create districts having a high degree of compactness and contiguity, with one exception. Towns in Wisconsin are permitted to annex noncontiguous areas, and this is sometimes done. The legislative plan treats these "islands," as the noncontiguous annexed areas are called, as if they were contiguous, but the Prosser plans require literal contiguity and therefore always place the area between an island and the town that owns it in the same district with the town and the island. Since the distance between town and island is slight, we do not think the failure of the legislative plan to achieve literal contiguity a serious demerit; and we note that it has been the practice of the Wisconsin legislature to treat islands as contiguous with the cities or villages to which they belong. Wis.Stat. §§ 4.001(3), 5.15(1)(b). We are not persuaded by the plaintiffs' argument that the Wisconsin constitution requires literal contiguity.

5 Both Prosser IIIA and the legislative plan follow the boundaries of the other political subdivisions more or less, though they occasionally split counties, cities, and towns (but never wards). Neither party supplied enough information to enable us to determine whether the splits of the one are more serious than those of the other in terms of breaking up populations that are homogeneous in their need of or demand for governmental services, and other relevant criteria of community of interest. Prosser IIIA temporarily "disenfranchises" a considerably greater number of voters, largely because of its authors' decision to change an odd-numbered district in Milwaukee to an even-numbered district and to restore the balance by changing an even-numbered district elsewhere in the state to an odd-numbered district, thereby disenfranchising (in the 1992 election) the residents of the latter district. The purpose of the decision was to give minority residents of Milwaukee an earlier shot at another senate seat. Although "a temporary dilution of voting power that does not burden a particular group does not violate the equal protection clause," *Republican Party v. Keisling*, 959

F.2d 144, 145-46 (9th Cir.1992) (per curiam), and is an inevitable concomitant of redistricting, it is not something to be encouraged. At the hearing the plaintiffs announced their readiness to abandon this feature of their plan, but they never submitted an amended plan.

6 With the plans similar in most respects, much of the hearing focused on the question of political fairness, or gerrymandering (broadly defined). The plaintiffs told us that political fairness is irrelevant—that their plan or plans should be preferred, regardless of political fairness, because their plans produce the more perfect numerical equality and that's all that counts. (Yet inconsistently they argue that their plans should also be preferred because they achieve greater contiguity.) *867 But we have seen that there is no realistic basis for supposing that their plans produce greater equality, and if they do, the margin is too slight to matter. What is true is that if we were reviewing an enacted plan we would pay little heed to cries of gerrymandering, because every reapportionment plan has some political effect, and so could be denounced as “gerrymandering” committed by the party that had pressed for its enactment. *Gaffney v. Cummings*, 412 U.S. 735, 752-53, 93 S.Ct. 2321, 2331, 37 L.Ed.2d 298 (1973); see also *Davis v. Bandemer*, *supra*; Peter H. Schuck, “The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics,” 87 *Colum.L.Rev.* 1325 (1987). But we are not reviewing an enacted plan. An enacted plan would have the virtue of political legitimacy. We are comparing submitted plans with a view to picking the one (or devising our own) most consistent with judicial neutrality. 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.

Prosser IIIA, particularly on the senatorial side, is the more partisan, as it appears designed to decapitate the Democratic leadership in the senate. It does this by placing 4 of the senate's Democratic leaders (including both the majority leader and the assistant majority leader), all of whom represent even-numbered districts, in odd-numbered districts, thus preventing them from running for the senate this fall unless they move their legal residence to an even-numbered district, where they would have to run against an incumbent unless the incumbent decided to move or retire. (In a post-hearing submission, the plaintiffs offered to renumber the leaders' districts. The offer, unaccompanied

as it is by any explanation of the effect of changing the numbers of other districts to permit the renumbering of the leaders' districts, comes too late.) On the assembly side, Prosser IIIA would pair 12 Democrats and 4 Republicans. Since there are more Democrats than Republicans in the assembly, a nonpartisan plan would presumably pair more Democrats than Republicans—but not this many more, because the percentage of Democrats in the assembly is 58 percent, not 75 percent. Of course the political impact of pairing depends on the plans of the incumbents. The plaintiffs argue that although the legislative plan appears to be less one-sided in favor of Democrats than Prosser IIIA appears to be one-sided in favor of Republicans, in fact the Democrats have been careful to pair only Democrat incumbents one of whom is planning to retire or move anyway. However, insufficient evidence concerning incumbents' plans, when those plans were made, and how firm they are was presented to enable us to go beyond the bare statistics of pairing.

In defense of the political fairness of Prosser IIIA the plaintiffs asked us to compare the results that it would produce with the results of two “base races.” To explain, a politically fair apportionment plan is one that will produce a legislative composition that reflects the respective voting strengths of the parties in the state—but how is that strength to be gauged? Especially in Wisconsin, a state of ticket-splitters and independents, elections are influenced by a lot more than the candidates' party labels. Political scientists tell us, what is anyway common sense, that party labels are more likely to matter the more obscure the office to be filled by an election is, that is, the fewer other factors besides party identification are likely to be in play in the electoral contest. Such an election is a “base race” that can be used to infer the respective strength of the parties in the various parts of the state. The plaintiffs' experts selected as the base races for this case the last two elections (1986 and 1990) for state treasurer. They averaged together the votes for the respective parties in the two races and then determined how each party would have fared if the legislature were elected under the Prosser IIIA districting plan and the vote for each party's candidates were identical to the vote in *868 each district for state treasurer in 1986 and 1990.

There was an intermediate step, however. Remember that in a districted legislature, as distinct from one in which legislators are chosen by proportional representation, small differences in voting strength can translate into large differences in representation (making it a little unclear what is meant by

saying that a nonpartisan reapportionment will produce a legislature that "reflects" the respective voting strengths of the parties in the state). In the two "base races" selected by the plaintiffs the Republicans got only 48 percent of the vote. Were this their average vote in a legislative election they might get far fewer than 48 percent of the seats. So the experts added 2 percent to each district's Republican vote (in the 1986 and 1990 state treasurer's races), on the theory that if the Republicans in an election for state legislators held today had the same distribution of voting strength across districts that they had in the base races, except that they got an extra 2 percent in each district so that their average voting strength was 50 percent, then if this average strength translated into 50 percent or fewer Republican seats in the legislature the plan could not be pronounced politically unfair. And in fact Prosser IIIA would give the Republicans only 44 percent of the seats on these assumptions.

Unhappily for the plaintiffs, the ground for using the 1986 and 1990 state treasurer's races as base races was destroyed in cross-examination. The distinguished political scientist who conducted the base race analysis for the plaintiffs is not a Wisconsinite or familiar with Wisconsin politics, and he relied totally on the selection of base races by another expert, who while a reputable political scientist at the University of Wisconsin is also a high-level Republican activist. Cross-examination brought out that the state treasurer's race in Wisconsin, far from being a quiet arena for old-fashioned party politics, is riven by special factors. Oddest of all is the fact that, from time immemorial until 1990, the occupant of this office had always been named Smith. The latest Smith (a Democrat) had won reelection by a large margin in 1986. Four years later he stood for reelection once again, and this time, after charges of improprieties were leveled against him and widely publicized, was defeated by his Republican opponent. The victor was a woman and this may have played a role too: Whether party loyalty played any role in the election is doubtful and certainly unproven.

7 The alternative to finding a base race somehow purged of nonpartisan considerations—a snipe hunt, in all likelihood—is to average the results of a number of elections, on the theory that nonpartisan factors will tend to be randomly distributed and therefore will cancel out, leaving party loyalty as the only factor differentiating the vote totals of the two parties. (A possible adjustment would be to discount each election result by 1 minus the percentage turnout, on the theory that nonpartisan factors tend to increase the turnout. That was

not done here.) The Democrats tendered the results of 11 state-wide races, going back to 1982, the composite results of which establish the fairness of the legislative plan in just the same way as the plaintiffs' analysis establishes the fairness of their plan. The plaintiffs argue that 1982 is too long ago, and they have a point, and that 11 is a small sample (though larger than their own sample of 2), and this is also a point. The Democratic sample mysteriously omits several races, and since the district totals of those races are not in the computer that the parties to this litigation have been sharing and cannot be placed in the computer within the time constraints of this litigation, we cannot construct a more comprehensive sample. We conclude that whatever merits base race analysis may have when the data are adequate to conduct such an analysis, they are not adequate here.

8 Our evaluation of the competing plans must remain tentative until we consider the Voting Rights issue, and let us turn to it now. The Voting Rights Act authorizes and in some instances compels racial gerrymandering in favor of blacks *869 and other minorities. Because the Act implements the Fifteenth Amendment, it is constitutional despite its discriminatory character. *United Jewish Organization v. Carey*, 430 U.S. 144, 159, 97 S.Ct. 996, 1006, 51 L.Ed.2d 229 (1976). The wisdom and seemliness of the Act have been questioned, even by radical blacks. Lani Guinier, "The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success," 89 *Mich.L.Rev.* 1077 (1991). Because blacks vote heavily Democratic, majority or supermajority black districts produce lopsided Democratic majorities, resulting in a wastage of Democratic votes and a weakening of the Democratic party—the party of most blacks. But none of that is our business.

9 From our earlier discussion it might seem that the Act's objectives would be best achieved by creating districts in which blacks were 51 percent of the population, since additional black voters would be wasted and would be better off being shifted to districts in which their votes might affect the outcome. But because a disproportionate number of blacks are below voting age, and because turnout among blacks is generally much lower than among whites, a 1 percent margin in population would not translate into a 1 percent margin in voting strength. A rule of thumb has emerged in the cases that to give blacks a reasonable assurance of obtaining a majority of votes in a district the population of the district must be at least 65 percent black (50 percent plus 5 percent to reflect the lower average age

of blacks and hence lower voting population, 5 percent to reflect a lower fraction of registered voters, and 5 percent to reflect a lower turnout) and the voting population at least 60 percent black. *Ketchum v. Byrne*, 740 F.2d 1398, 1415-16 (7th Cir.1984). We do not understand the separate criteria for overall population and voting-age population. Population is relevant in a districting case only as a proxy for voting population, *McNeil v. Springfield Park District*, 851 F.2d 937, 944-45 (7th Cir.1988), so if one has the latter figure, as we do, one does not need the former. *Ketchum v. Byrne, supra*, 740 F.2d at 1413. We shall therefore confine ourselves to the 60 percent voting population (i.e., voting-age population) criterion.

We said at least 60 percent but we could equally well have said at most. For votes above the level needed to elect a representative of one's choice are wasted and had best, as we have said, be reallocated to another district, where they might make a difference. Suppose the choice were between the following pairs of districts: one pair consisting of one district that was 60 percent black and one that was 40 percent black, and the other pair consisting of one district that was 100 percent black and one that was zero percent black. Under the first choice, blacks could elect one representative of their choice and influence the election of one other representative. Under the second choice, they could elect one black representative and have no influence on the election of another representative. So the first would be superior in terms of the goals of the Voting Rights Act. Indeed, it is because, as a result of population shifts, the present 3 predominantly black assembly districts (and 1 black senatorial district) in Milwaukee have black voting populations far in excess of 60 percent that the present districting violates the Act.

Both Prosser IIIA and the legislative plan propose to create 5 black majority assembly districts in Milwaukee. In Prosser IIIA, 4 of these districts would have voting populations 60-61 percent black and the other 58.34 percent. The legislative plan would yield 3 districts with a black voting population of 60-61 percent, and the other 2 would have 59.78 and 59.87 percent respectively. These of course are small differences. The only substantial differences between the plans are two: the legislative plan would pair more incumbents, and at the same time would include more blacks in the 5 majority districts plus 1 more district, an "influence" district, that is, a district in which blacks comprise a sufficiently large fraction of the voting population to constitute an effective interest group, though not one with majority control. Both plans contain a

black "influence" assembly district but the legislative *870 one creates a larger black bloc in that district—24 percent versus 18 percent. The pairing of incumbents has no relation that we can see to the purposes of the Voting Rights Act. The creation of a stronger "influence" district, however, is a modest plus from the Act's standpoint; the skepticism expressed in *McNeil v. Springfield Park District, supra*, 851 F.2d at 947, on this score concerned the distinct issue whether failure to create such a district could be an actual violation of the Voting Rights Act. Both plans—indeed all plans, including our own—create a Hispanic "influence" assembly district in Milwaukee. The Prosser plans split Indian reservations; the legislative plan does not.

The real challenge on the Voting Rights Act front comes from Representative Williams. She (along with Representative Coggs and Senator George) wants 4 black majority districts instead of 5 because she fears that 60 percent really is not enough to guarantee black voting control of a district. She has a point. Even if all blacks vote for black candidates, if two blacks and one white run in the Democratic primary in a district in which blacks cast 60 percent of the votes, the black candidates may split the black vote and the white candidate win. (That happened, with the colors reversed, in a recent mayoral election in Chicago.) Then too the 60 percent rule of thumb may not give adequate weight to the very low turnout of black voters in Milwaukee. Williams presented evidence that the last time she ran, even though the population of her district is 74 percent black, the number of votes cast by whites was only 100 fewer than the number cast by blacks. But she ran unopposed, and her expert witness conceded that, if she had had a white (or perhaps any) opponent, black voters would have turned out in greater number.

10 From the standpoint of a black incumbent concerned only with his or her reelection prospects in a potential contest with a white, the more blacks in the district the better. Williams's expert witness testified that to be safe for blacks a district must have a population that is 80 percent black. But an incumbent's standpoint is too limited a one. The goal of the Voting Rights Act is to enhance the electoral power of minority voters, rather than to maximize the electoral prospects of minority incumbents. This goal implies a tradeoff between the size of the minority supermajority in a minority district and the number of such districts. Under Williams's plan, black incumbents' prospects would be maximized but at the expense of the number of minority districts. The case against the 60 percent rule of thumb has not been made. The 60

percent rule provides a particularly comfortable margin here because of Wisconsin's "same day" registration rule. A person can register to vote at the polls on election day simply by producing an envelope with his name and address on it as proof of residence in the ward in which he is voting. As a result of this system, a very high percentage of registered voters actually vote, and the percentage of registered black voters who vote appears to be the same as that of white voters.

11 Hints have been dropped in newspaper articles that the legislative plan is designed to "get" Williams for breaking with the Democratic leadership on key issues. While no effort was made to prove this, and its relation to the purposes of the Voting Rights Act is in any event obscure, we are puzzled by the fact that the legislative plan pairs *all* the black incumbents in Milwaukee.

Our plan, what we call "the court plan," avoids this and other problems with the parties' plans. The court plan, set forth in the judgment order that accompanies this opinion, is based on the two best submitted plans—Prosser IIIA and the legislative plan. It preserves their strengths, primarily population equality and contiguity and compactness, and avoids their weaknesses. No useful purpose would be served by describing the boundaries of the 99 assembly and 33 senatorial districts created by the plan, but we shall compare its salient characteristics with those of the plans on which we drew. The court plan's total deviation from exact population equality is .52 percent, compared to .15 for Prosser IIIA and .52 for the legislative plan, and its mean *871 deviation is .10 percent, compared to .03 for Prosser IIIA and .11 for the legislative plan; all these figures are well within the 1 percent margin of error. 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 in 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 assembly 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.

12 Finally, the court plan, far as we are able to judge, creates the least perturbation in the political balance of the state. We have explained why the parties' submissions do not permit meaningful base-race comparisons, but such as they are, these comparisons suggest that the court plan is the least partisan. More important, the court plan pairs only 16 incumbents in both houses of the legislature, and only 6 of the same party (4 Democrats and 2 Republicans). Prosser IIIA, in contrast, pairs 35 incumbents, including 22 of the same party: 18 Democrats and 4 Republicans. The legislative plan pairs 31 incumbents, 22 of the same party: 12 Democrats and 10 Republicans. It is possible to object that in protecting incumbents, our plan perpetuates and entrenches political imbalances created by the existing, and unconstitutional, apportionment. But while the existing apportionment is conceded to be unconstitutional as a consequence of population shifts, the plaintiffs have not shown that it was politically biased from the start or that their own plan corrects such political bias as there may have been—without overcorrection.

ORDER

IT IS ORDERED that effective June 2, 1992, the 99 assembly districts described in part II of this order are organized into 33 senate districts as follows:

I. SENATE DISTRICTS

First senate district

The combination of the 1st, 2nd and 3rd assembly districts.

Second senate district

The combination of the 4th, 5th, and 6th assembly districts.

Third senate district

The combination of the 7th, 8th, and 9th assembly districts.

Fourth senate district

The combination of the 10th, 11th, and 12th assembly districts.

Fifth senate district

The combination of the 13th, 14th, and 15th assembly districts.

Sixth senate district

The combination of the 16th, 17th, and 18th assembly districts.

Seventh senate district

The combination of the 19th, 20th, and 21st assembly districts.

Eighth senate district

The combination of the 22nd, 23rd, and 24th assembly districts.

Ninth senate district

The combination of the 25th, 26th, and 27th assembly districts.

Tenth senate district

The combination of the 28th, 29th, and 30th assembly districts.

Eleventh senate district

The combination of the 31st, 32nd, and 33rd assembly districts.

Twelfth senate district

The combination of the 34th, 35th, and 36th assembly districts.

**872 Thirteenth senate district*

The combination of the 37th, 38th, and 39th assembly districts.

Fourteenth senate district

The combination of the 40th, 41st, and 42nd assembly districts.

Fifteenth senate district

The combination of the 43rd, 44th, and 45th assembly districts.

Sixteenth senate district

The combination of the 46th, 47th, and 48th assembly districts.

Seventeenth senate district

The combination of the 49th, 50th, and 51st assembly districts.

Eighteenth senate district

The combination of the 52nd, 53rd, and 54th assembly districts.

Nineteenth senate district

The combination of the 55th, 56th, and 57th assembly districts.

Twentieth senate district

The combination of the 58th, 59th, and 60th assembly districts.

Twenty-First senate district

The combination of the 61st, 62nd, and 63rd assembly districts.

Twenty-Second senate district

The combination of the 64th, 65th, and 66th assembly districts.

Twenty-Third senate district

The combination of the 67th, 68th, and 69th assembly districts.

Twenty-Fourth senate district

The combination of the 70th, 71st, and 72nd assembly districts.

Twenty-Fifth senate district

The combination of the 73rd, 74th, and 75th assembly districts.

Twenty-Sixth senate district

The combination of the 76th, 77th, and 78th assembly districts.

Twenty-Seventh senate district

The combination of the 79th, 80th, and 81st assembly districts.

Twenty-Eighth senate district

The combination of the 82nd, 83rd, and 84th assembly districts.

Twenty-Ninth senate district

The combination of the 85th, 86th, and 87th assembly districts.

Thirtieth senate district

The combination of the 88th, 89th, and 90th assembly districts.

Thirty-First senate district

The combination of the 91st, 92nd, and 93rd assembly districts.

Thirty-Second senate district

The combination of the 94th, 95th, and 96th assembly districts.

Thirty-Third senate district

The combination of the 97th, 98th, and 99th assembly districts.

II. ASSEMBLY DISTRICTS

First assembly district

The following territory shall constitute the 1st assembly district:

- (1) Whole counties. The counties of Door and Kewaunee.
- (2) Brown county. That part of the county of Brown consisting of the towns of Green Bay, Humboldt and Scott.

Second assembly district

The following territory shall constitute the 2nd assembly district:

(1) Brown county. That part of the county of Brown consisting of:

- a) the towns of Bellevue, De Pere, Eaton, Morrison and New Denmark;
- b) that part of the town of Glenmore comprising ward 2;
- c) the village of Denmark; and
- d) that part of the city of De Pere comprising wards 3 and 6.

(2) Manitowoc county. That part of the county of Manitowoc consisting of:

a) the towns of Cato, Cooperstown, Eaton, Franklin, Gibson, Kossuth, Maple Grove, Mishicot, Rockland, Two Creeks and Two Rivers;

*873 b) the villages of Francis Creek, Kellnersville, Maribel, Mishicot, Reedsville and Whitelaw; and

c) the city of Two Rivers.

Third assembly district

The following territory shall constitute the 3rd assembly district:

(1) Brown county. That part of the county of Brown consisting of:

- a) the towns of Holland, Rockland and Wrightstown;
- b) that part of the town of Glenmore comprising ward 1; and
- c) that part of the city of De Pere comprising wards 4 and 5.

(2) Calumet county. That part of the county of Calumet consisting of:

- a) the towns of Brillion, Brothertown, Charlestown, Chilton, Harrison, Rantoul, Stockbridge and Woodville;
- b) that part of the town of New Holstein comprising ward 1;
- c) the villages of Hilbert, Potter, Sherwood and Stockbridge;
- d) the cities of Brillion and Chilton;

e) that part of the city of Appleton located in the county; and

f) that part of the city of Menasha located in the county.

(3) Fond du Lac county. That part of the county of Fond du Lac consisting of:

a) the towns of Calumet and Marshfield;

b) that part of the town of Taycheedah comprising wards 1 and 2; and

c) the villages of Mount Calvary and St. Cloud.

(4) Outagamie county. That part of the county of Outagamie consisting of that part of the city of Appleton comprising wards 5, 8, 9 and 12.

(5) Winnebago county. That part of the county of Winnebago consisting of that part of the city of Appleton located in the county.

Fourth assembly district

The following territory in the county of Brown shall constitute the 4th assembly district:

a) the village of Allouez;

b) that part of the village of Ashwaubenon comprising wards 1, 2, 5, 6, 7, 8, 9, 10, 11 and 12;

c) that part of the city of De Pere comprising wards 1, 2, 7, 8, 9, 10, 11 and 12; and

d) that part of the city of Green Bay comprising wards 41, 45, 46, 47 and 48.

Fifth assembly district

The following territory shall constitute the 5th assembly district:

(1) Brown county. That part of the county of Brown consisting of:

a) the towns of Hobart and Lawrence; and

b) the village of Wrightstown.

(2) Outagamie county. That part of the county of Outagamie consisting of:

a) the towns of Buchanan, Freedom, Kaukauna, Oneida, Osborn and Vandebroek;

b) the villages of Combined Locks, Kimberly and Little Chute; and

c) the city of Kaukauna.

Sixth assembly district

The following territory shall constitute the 6th assembly district:

(1) Oconto county. That part of the county of Oconto consisting of:

a) the towns of Abrams, Brazeau, Gillett, How, Maple Valley, Morgan, Oconto Falls, Spruce, Stiles and Underhill;

b) the village of Suring; and

c) the cities of Gillett and Oconto Falls.

(2) Outagamie county. That part of the county of Outagamie consisting of:

a) the towns of Bovina, Cicero, Liberty, Maine and Seymour;

b) that part of the town of Black Creek comprising ward 1;

c) the villages of Nichols and Shiocton; and

d) the city of Seymour.

(3) Shawano county. That part of the county of Shawano consisting of:

*874 a) the towns of Angelica, Belle Plaine, Grant, Green Valley, Hartland, Herman, Lessor, Maple Grove, Navarino, Pella, Richmond, Washington, Waukechon and Wescott;

b) the villages of Bonduel and Cecil; and

c) the city of Shawano.

Seventh assembly district

The following territory in the county of Milwaukee shall constitute the 7th assembly district:

a) the village of West Milwaukee; and

b) that part of the city of Milwaukee comprising wards 132, 133, 137, 140, 142, 144, 148, 290, 291, 292, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 311, 312 and 323.

Eighth assembly district

The following territory in the county of Milwaukee shall constitute the 8th assembly district:

a) that part of the city of Milwaukee comprising wards 138, 139, 145, 149, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 309 and 310.

Ninth assembly district

The following territory in the county of Milwaukee shall constitute the 9th assembly district:

a) that part of the city of Milwaukee comprising wards 141, 143, 146, 147, 150, 151, 152, 153, 154, 194, 197, 229, 230, 231, 232, 233, 234, 236, 237, 241, 252, 253, 254, 255, 256, 257, 266, 267 and 271.

Tenth assembly district

The following territory in the county of Milwaukee shall constitute the 10th assembly district:

a) that part of the village of Shorewood comprising ward 12;

b) that part of the city of Glendale comprising wards 1, 2 and 7; and

c) that part of the city of Milwaukee comprising wards 1, 19, 59, 60, 102, 103, 104, 105, 106, 107, 108, 109, 110, 113, 115, 119, 173, 174, 181, 182 and 183.

Eleventh assembly district

The following territory in the county of Milwaukee shall constitute the 11th assembly district:

a) that part of the city of Milwaukee comprising wards 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 17, 18, 22, 159, 165, 166, 167, 168, 169, 170, 171, 172 and 176.

Twelfth assembly district

The following territory in the county of Milwaukee shall constitute the 12th assembly district:

a) that part of the city of Milwaukee comprising wards 20, 21, 23, 24, 25, 26, 28, 29, 33, 34, 36, 37, 38, 78, 79, 80, 157, 160, 161, 162, 163, 164, 280, 281, 283, 284 and 285.

Thirteenth assembly district

The following territory shall constitute the 13th assembly district:

(1) Milwaukee county. That part of the county of Milwaukee consisting of that part of the city of Milwaukee comprising wards 30, 31, 39, 40, 41, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 131, 286, 288 and 289.

(2) Waukesha county. That part of the county of Waukesha consisting of that part of the city of Milwaukee located in the county.

Fourteenth assembly district

The following territory in the county of Milwaukee shall constitute the 14th assembly district:

a) the city of Wauwatosa.

Fifteenth assembly district

The following territory in the county of Milwaukee shall constitute the 15th assembly district:

a) that part of the city of West Allis comprising wards 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 27, 28 and 29.

****875 Sixteenth assembly district***

The following territory in the county of Milwaukee shall constitute the 16th assembly district:

a) that part of the city of Milwaukee comprising wards 63, 65, 66, 67, 68, 69, 111,

112, 114, 116, 117, 118, 121, 122, 134, 136, 313, 314, 315, 316, 325 and 327.

Seventeenth assembly district

The following territory in the county of Milwaukee shall constitute the 17th assembly district:

a) that part of the city of Milwaukee comprising wards 6, 7, 15, 16, 27, 32, 35, 120, 124, 125, 126, 127, 128, 130, 175, 177, 178, 179, 180, 184, 185, 186, 188, 189 and 190.

Eighteenth assembly district

The following territory in the county of Milwaukee shall constitute the 18th assembly district:

a) that part of the city of Milwaukee comprising wards 70, 71, 72, 73, 74, 75, 76, 77, 123, 129, 135, 187, 293, 294, 317, 318, 319, 320, 321, 322, 324 and 326.

Nineteenth assembly district

The following territory in the county of Milwaukee shall constitute the 19th assembly district:

a) that part of the city of Milwaukee comprising wards 43, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 61, 62, 64, 250, 251, 258, 259, 260, 261, 262, 263 and 265.

Twentieth assembly district

The following territory in the county of Milwaukee shall constitute the 20th assembly district:

- a) the cities of Cudahy and St. Francis;
- b) that part of the city of Milwaukee comprising wards 235, 238, 239, 240, 242, 243, 244, 264, 268, 269 and 270; and
- c) that part of the city of South Milwaukee comprising ward 1.

Twenty-first assembly district

The following territory in the county of Milwaukee shall constitute the 21st assembly district:

- a) the city of Oak Creek;

b) that part of the city of Milwaukee comprising wards 245, 246, 247, 248 and 249; and

c) that part of the city of South Milwaukee comprising wards 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16.

Twenty-second assembly district

The following territory shall constitute the 22nd assembly district:

(1) Milwaukee county. That part of the county of Milwaukee consisting of:

- a) the villages of Fox Point, River Hills and Whitefish Bay;
- b) that part of the village of Bayside located in the county;
- c) that part of the village of Brown Deer comprising ward 3;
- d) that part of the village of Shorewood comprising wards 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11; and
- e) that part of the city of Milwaukee comprising wards 42, 44, 47 and 58.

(2) Ozaukee county. That part of the county of Ozaukee consisting of that part of the village of Bayside located in the county.

Twenty-third assembly district

The following territory shall constitute the 23rd assembly district:

(1) Milwaukee county. That part of the county of Milwaukee consisting of:

- a) that part of the village of Brown Deer comprising wards 1, 2, 4, 5, 6, 7, 8 and 9;
 - b) that part of the city of Glendale comprising wards 3, 4, 5, 6, 8, 9, 10, 11 and 12; and
 - c) that part of the city of Milwaukee comprising wards 155, 156, 158, 272, 273, 274, 275, 277, 278, 279 and 282.
- (2) Ozaukee county. That part of the county of Ozaukee consisting of that part of the city of Mequon comprising wards 11, 13, 14 and 15.

**876 Twenty-fourth assembly district*

The following territory shall constitute the 24th assembly district:

(1) Washington county. That part of the county of Washington consisting of:

- a) the town of Germantown;
- b) that part of the town of Polk comprising wards 6 and 7;
- c) that part of the town of Richfield comprising wards 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15;
- d) the village of Germantown; and
- e) that part of the city of Milwaukee located in the county.

(2) Waukesha county. That part of the county of Waukesha consisting of:

- a) that part of the village of Butler comprising wards 1 and 2; and
- b) that part of the village of Menomonee Falls comprising wards 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23.

Twenty-fifth assembly district

The following territory shall constitute the 25th assembly district:

(1) Calumet county. That part of the county of Calumet consisting of that part of the city of Kiel located in the county.

(2) Manitowoc county. That part of the county of Manitowoc consisting of:

- a) the towns of Centerville, Liberty, Manitowoc, Manitowoc Rapids, Meeme, Newton and Schleswig;
- b) the villages of Cleveland, St. Nazianz and Valders;
- c) the city of Manitowoc; and
- d) that part of the city of Kiel located in the county.

Twenty-sixth assembly district

The following territory in the county of Sheboygan shall constitute the 26th assembly district:

a) the town of Sheboygan;

b) that part of the town of Sheboygan Falls comprising ward 4;

c) the village of Kohler;

d) the city of Sheboygan Falls; and

e) that part of the city of Sheboygan comprising wards 1, 2, 3, 5, 6, 9, 11, 12, 13, 14, 15 and 16.

Twenty-seventh assembly district

The following territory shall constitute the 27th assembly district:

(1) Calumet county. That part of the county of Calumet consisting of:

- a) that part of the town of New Holstein comprising wards 2 and 3; and
- b) the city of New Holstein.

(2) Sheboygan county. That part of the county of Sheboygan consisting of:

- a) the towns of Greenbush, Herman, Lima, Lyndon, Mitchell, Mosel, Plymouth, Rhine, Russell, Scott and Wilson;
- b) that part of the town of Sheboygan Falls comprising wards 1, 2 and 3;

c) the villages of Cascade, Elkhart Lake, Glenbeulah, Howards Grove and Waldo;

d) the city of Plymouth; and

e) that part of the city of Sheboygan comprising wards 4, 7, 8 and 10.

Twenty-eighth assembly district

The following territory shall constitute the 28th assembly district:

(1) Burnett county. The county of Burnett.

(2) Polk county. That part of the county of Polk consisting of:

- a) the towns of Aiden, Apple River, Balsam Lake, Black Brook, Bone Lake, Clam Falls, Clayton, Clear Lake, Eureka,

Farmington, Garfield, Georgetown, Laketown, Lincoln, Lorain, Luck, Milltown, Osceola, St. Croix Falls, Sterling and West Sweden;

b) the villages of Balsam Lake, Centuria, Clayton, Clear Lake, Dresser, Frederic, Luck, Milltown and Osceola; and

c) the cities of Amery and St. Croix Falls.

(3) St. Croix county. That part of the county of St. Croix consisting of:

a) the town of Somerset; and

b) the village of Somerset.

**877 Twenty-ninth assembly district*

The following territory shall constitute the 29th assembly district:

(1) Dunn county. That part of the county of Dunn consisting of:

a) the towns of Lucas, Menomonie, New Haven, Sheridan and Stanton;

b) the village of Knapp; and

c) the city of Menomonie.

(2) Pierce county. That part of the county of Pierce consisting of:

a) the towns of Gilman, Rock Elm and Spring Lake;

b) the village of Elmwood; and

c) that part of the village of Spring Valley located in the county.

(3) St. Croix county. That part of the county of St. Croix consisting of:

a) the towns of Baldwin, Cady, Cylon, Eau Galle, Emerald, Erin Prairie, Forest, Glenwood, Hammond, Kinnickinnic, Pleasant Valley, Richmond, Rush River, Springfield, Stanton, Star Prairie and Warren;

b) the villages of Baldwin, Deer Park, Hammond, Roberts, Star Prairie, Wilson and Woodville;

c) that part of the village of Spring Valley located in the county; and

d) the cities of Glenwood City and New Richmond.

Thirtieth assembly district

The following territory shall constitute the 30th assembly district:

(1) Pierce county. That part of the county of Pierce consisting of:

a) the towns of Clifton, Diamond Bluff, Ellsworth, El Paso, Hartland, Isabelle, Maiden Rock, Martell, Oak Grove, River Falls, Salem, Trenton, Trimble and Union;

b) the villages of Bay City, Ellsworth, Maiden Rock and Plum City;

c) the city of Prescott; and

d) that part of the city of River Falls located in the county.

(2) St. Croix county. That part of the county of St. Croix consisting of:

a) the towns of Hudson, St. Joseph and Troy;

b) the village of North Hudson;

c) the city of Hudson; and

d) that part of the city of River Falls located in the county.

Thirty-first assembly district

The following territory shall constitute the 31st assembly district:

(1) Jefferson county. That part of the county of Jefferson consisting of:

a) the towns of Cold Spring, Concord, Hebron, Palmyra and Sullivan;

b) that part of the town of Jefferson comprising wards 1 and 2;

c) the villages of Palmyra and Sullivan; and

d) that part of the city of Whitewater located in the county.

(2) Rock county. That part of the county of Rock consisting of:

- a) the town of Lima;
- b) that part of the town of Milton comprising ward 1; and
- c) the city of Milton.

(3) Walworth county. That part of the county of Walworth consisting of:

- a) the town of Whitewater;
- b) the village of Mukwonago; and
- c) that part of the city of Whitewater located in the county.

(4) Waukesha county. That part of the county of Waukesha consisting of:

- a) the towns of Eagle and Ottawa;
- b) that part of the town of Genesee comprising wards 1, 2, 3, 4 and 7;
- c) that part of the town of Mukwonago comprising wards 1, 2, 3, 7 and 8;
- d) the villages of Dousman, Eagle and North Prairie; and
- e) that part of the village of Mukwonago comprising wards 3, 5 and 6.

Thirty-second assembly district

The following territory in the county of Waukesha shall constitute the 32nd assembly district:

a) that part of the town of Brookfield comprising wards 2, 3, 4, 5, 6, 7 and 8;

b) that part of the town of Mukwonago comprising wards 4, 5 and 6;

*878 c) that part of the town of Vernon comprising wards 2, 3, 4 and 5;

d) that part of the town of Waukesha comprising wards 2, 3, 4, 5, 7 and 8;

e) that part of the village of Mukwonago comprising wards 1, 2 and 4; and

f) that part of the city of Waukesha comprising wards 1, 2, 3, 4, 5, 6, 7, 11, 12, 13, 14, 15, 16, 23, 24, 25, 26 and 27.

Thirty-third assembly district

The following territory shall constitute the 33rd assembly district:

(1) Washington county. That part of the county of Washington consisting of:

- a) the town of Erin; and
- b) that part of the town of Richfield comprising ward 5.

(2) Waukesha county. That part of the county of Waukesha consisting of:

- a) the towns of Delafield, Merton and Summit;
- b) that part of the town of Genesee comprising wards 5, 6 and 8;
- c) that part of the town of Lisbon comprising wards 2, 8, 9, 10, 11 and 12;
- d) that part of the town of Pewaukee comprising wards 7 and 8;
- e) the villages of Chenequa, Hartland, Merton, Nashotah and Wales;
- f) the city of Delafield; and
- g) that part of the city of Waukesha comprising wards 8, 9 and 10.

Thirty-fourth assembly district

The following territory shall constitute the 34th assembly district:

- (1) Oneida county;
- (2) Vilas county.

Thirty-fifth assembly district

The following territory shall constitute the 35th assembly district:

(1) Langlade county. That part of the county of Langlade consisting of:

a) the towns of Ackley, Ainsworth, Antigo, Elcho, Evergreen, Langlade, Neva, Norwood, Parrish, Peck, Polar, Price, Rolling, Summit, Upham and Vilas; and

b) the city of Antigo.

(2) Lincoln county. The county of Lincoln.

(3) Marathon county. That part of the county of Marathon consisting of:

a) the towns of Berlin, Harrison, Hewitt, Norrie and Plover; and

b) the village of Hatley.

(4) Shawano county. That part of the county of Shawano consisting of the villages of Aniwa and Eland.

Thirty-sixth assembly district

The following territory shall constitute the 36th assembly district:

(1) Whole counties. The counties of Florence, Forest and Menominee.

(2) Langlade county. That part of the county of Langlade consisting of:

a) the town of Wolf River; and

b) the village of White Lake.

(3) Marathon county. That part of the county of Marathon consisting of:

a) the towns of Elderon and Franzen;

b) the village of Elderon; and

c) that part of the village of Birnamwood located in the county.

(4) Marinette county. That part of the county of Marinette consisting of:

a) the towns of Amberg, Athelstane, Beecher, Dunbar, Goodman, Middle Inlet, Niagara, Pembine, Silver Cliff, Stephenson, Wagner and Wausaukee; and

b) the villages of Crivitz, Niagara and Wausaukee.

(5) Oconto county. That part of the county of Oconto consisting of the towns of Armstrong, Bagley, Breed, Doty, Lakewood, Riverview and Townsend.

(6) Portage county. That part of the county of Portage consisting of:

a) the town of Alban; and

b) the village of Rosholt.

(7) Shawano county. That part of the county of Shawano consisting of:

a) the towns of Almon, Aniwa, Bartelme, Birnamwood, Fairbanks, Germania, Hutchins, Morris, Red Springs, Seneca and Wittenberg;

*879 b) the villages of Bowler, Gresham, Mattoon, Tigerton and Wittenberg; and

c) that part of the village of Birnamwood located in the county.

(8) Waupaca county. That part of the county of Waupaca consisting of:

a) the towns of Harrison and Wyoming; and

b) the village of Big Falls.

Thirty-seventh assembly district

The following territory shall constitute the 37th assembly district:

(1) Columbia county. That part of the county of Columbia consisting of that part of the city of Columbus located in the county.

(2) Dane county. That part of the county of Dane consisting of that part of the village of Cambridge located in the county.

(3) Dodge county. That part of the county of Dodge consisting of:

a) the towns of Elba, Portland and Shields;

b) that part of the town of Lowell comprising ward 2;

c) the villages of Lowell and Reeseville; and

d) that part of the city of Columbus located in the county.

(4) Jefferson county. That part of the county of Jefferson consisting of:

a) the towns of Aztalan, Farmington, Koshkonong, Lake Mills, Milford, Oakland, Sumner and Waterloo;

b) that part of the town of Jefferson comprising wards 3 and 4;

c) that part of the town of Watertown comprising wards 1, 3 and 4;

d) the village of Johnson Creek;

e) that part of the village of Cambridge located in the county; and

f) the cities of Fort Atkinson, Jefferson, Lake Mills and Waterloo.

(5) Rock county. That part of the county of Rock consisting of that part of the town of Milton comprising ward 3.

Thirty-eighth assembly district

The following territory shall constitute the 38th assembly district:

(1) Dodge county. That part of the county of Dodge consisting of:

a) the towns of Ashippun, Clyman, Emmet, Hustisford and Lebanon;

b) the villages of Clyman and Hustisford; and

c) that part of the city of Watertown located in the county.

(2) Jefferson county. That part of the county of Jefferson consisting of:

a) the town of Ixonia;

b) that part of the town of Watertown comprising ward 2; and

c) that part of the city of Watertown located in the county.

(3) Waukesha county. That part of the county of Waukesha consisting of:

a) the town of Oconomowoc;

b) the villages of Lac La Belle and Oconomowoc Lake; and

c) the city of Oconomowoc.

Thirty-ninth assembly district

The following territory shall constitute the 39th assembly district:

(1) Columbia county. That part of the county of Columbia consisting of:

a) the town of Randolph;

b) the villages of Cambria and Friesland; and

c) that part of the village of Randolph located in the county.

(2) Dodge county. That part of the county of Dodge consisting of:

a) the towns of Beaver Dam, Burnett, Calamus, Fox Lake, Herman, Hubbard, Leroy, Oak Grove, Theresa, Trenton, Westford and Williamstown;

b) that part of the town of Chester comprising ward 1;

c) that part of the town of Lomira comprising ward 2;

d) that part of the town of Lowell comprising ward 1;

e) the villages of Brownsville, Iron Ridge, Kekoskee and Theresa;

f) that part of the village of Randolph located in the county; and

*880 g) the cities of Beaver Dam, Fox Lake, Horicon, Juneau and Mayville.

Fortieth assembly district

The following territory shall constitute the 40th assembly district:

(1) Outagamie county. That part of the county of Outagamie consisting of:

a) the towns of Deer Creek, Hortonia and Maple Creek;

b) the village of Bear Creek; and

c) that part of the city of New London located in the county.

(2) Waupaca county. That part of the county of Waupaca consisting of:

a) the towns of Bear Creek, Caledonia, Dayton, Dupont, Farmington, Fremont, Helvetia, Iola, Larrabee, Lebanon, Lind, Little Wolf, Matteson, Mukwa, Royalton, St. Lawrence, Scandinavia, Union, Waupaca and Weyauwega;

b) the villages of Embarrass, Fremont, Iola, Ogdensburg and Scandinavia;

c) the cities of Clintonville, Manawa, Marion, Waupaca and Weyauwega; and

d) that part of the city of New London located in the county.

Forty-first assembly district

The following territory shall constitute the 41st assembly district:

(1) Fond du Lac county. That part of the county of Fond du Lac consisting of:

a) the towns of Alto, Metomen and Ripon;

b) the villages of Brandon and Fairwater; and

c) the city of Ripon.

(2) Green Lake county. The county of Green Lake.

(3) Waushara county. That part of the county of Waushara consisting of:

a) the towns of Aurora, Bloomfield, Coloma, Dakota, Deerfield, Hancock, Leon, Marion, Mount Morris, Poysippi, Richford, Saxeville, Springwater, Warren and Wautoma;

b) the villages of Coloma, Hancock, Lohrville, Redgranite and Wild Rose;

c) the city of Wautoma; and

d) that part of the city of Berlin located in the county.

(4) Winnebago county. That part of the county of Winnebago consisting of the towns of Nepeuskun and Rushford.

Forty-second assembly district

The following territory shall constitute the 42nd assembly district:

(1) Adams county. That part of the county of Adams consisting of:

a) the towns of Dell Prairie, Jackson, New Haven and Springville; and

b) that part of the city of Wisconsin Dells located in the county.

(2) Columbia county. That part of the county of Columbia consisting of:

a) the towns of Caledonia, Fort Winnebago, Lewiston, Marcellon, Newport and Wyocena;

b) the villages of Pardeeville and Wyocena;

c) the city of Portage; and

d) that part of the city of Wisconsin Dells located in the county.

(3) Marquette county. The county of Marquette.

(4) Sauk county. That part of the county of Sauk consisting of:

a) the towns of Baraboo, Greenfield and Merrimac;

b) the villages of Lake Delton, Merrimac and West Baraboo;

c) the city of Baraboo; and

d) that part of the city of Wisconsin Dells located in the county.

Forty-third assembly district

The following territory shall constitute the 43rd assembly district:

(1) Rock county. That part of the county of Rock consisting of:

a) the towns of Bradford, Clinton, Johnstown and La Prairie; and

b) the village of Clinton.

(2) Walworth county. That part of the county of Walworth consisting of:

- a) the towns of Darien, Delavan, Lafayette, La Grange, Linn, Lyons, Richmond, *881 Sharon, Spring Prairie, Sugar Creek and Walworth;
- b) that part of the town of Geneva comprising wards 1, 2, 3, 4, 5, 6 and 8;
- c) the villages of Darien, Fontana-on-Geneva Lake, Sharon, Walworth and Williams Bay; and
- d) the cities of Delavan and Elkhorn.

Forty-fourth assembly district

The following territory in the county of Rock shall constitute the 44th assembly district:

- a) that part of the town of Harmony comprising wards 2, 3 and 4; and
- b) that part of the city of Janesville comprising wards 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22.

Forty-fifth assembly district

The following territory in the county of Rock shall constitute the 45th assembly district:

- a) the towns of Beloit, Newark, Rock and Turtle; and
- b) the city of Beloit.

Forty-sixth assembly district

The following territory shall constitute the 46th assembly district:

- (1) Dane county. That part of the county of Dane consisting of:
 - a) the towns of Albion, Christiana, Cottage Grove, Deerfield, Dunkirk, Pleasant Springs, Rutland and Sun Prairie;
 - b) that part of the town of Blooming Grove comprising ward 3;
 - c) the villages of Cottage Grove, Deerfield and Rockdale;
 - d) that part of the village of Brooklyn located in the county; and
 - e) the cities of Stoughton and Sun Prairie.

(2) Green county. That part of the county of Green consisting of that part of the village of Brooklyn located in the county.

(3) Rock county. That part of the county of Rock consisting of:

- a) that part of the town of Fulton comprising ward 3; and
- b) the city of Edgerton.

Forty-seventh assembly district

The following territory shall constitute the 47th assembly district:

(1) Columbia county. That part of the county of Columbia consisting of:

a) the towns of Arlington, Columbus, Courtland, Dekorra, Fountain Prairie, Hampden, Leeds, Lodi, Lowville, Otsego, Pacific, Scott, Springvale and West Point;

b) the villages of Arlington, Doylestown, Fall River, Poynette and Rio; and

c) the city of Lodi.

(2) Dane county. That part of the county of Dane consisting of:

a) the towns of Berry, Black Earth, Bristol, Cross Plains, Dane, Mazomanie, Medina, Roxbury, Vienna, Windsor and York;

b) that part of the town of Middleton comprising ward 4; and

c) the villages of Black Earth, Cross Plains, Dane, De Forest, Marshall and Mazomanie.

Forty-eighth assembly district

The following territory in the county of Dane shall constitute the 48th assembly district:

a) that part of the town of Blooming Grove comprising wards 1 and 2;

b) the village of McFarland;

c) the city of Monona; and

d) that part of the city of Madison comprising wards 1, 2, 3, 4, 5, 6, 7, 8, 9, 20 and 38.

Forty-ninth assembly district

The following territory shall constitute the 49th assembly district:

(1) Grant county. That part of the county of Grant consisting of:

a) the towns of Beetown, Bloomington, Boscobel, Cassville, Castle Rock, Clifton, Ellenboro, Fennimore, Glen Haven, Harrison, Hickory Grove, Liberty, Lima, Little Grant, Marion, Millville, *882 Mount Hope, Mount Ida, Muscoda, North Lancaster, Paris, Patch Grove, Platteville, Potosi, Smelser, South Lancaster, Waterloo, Watterstown, Wingville, Woodman and Wyalusing;

b) the villages of Bagley, Bloomington, Blue River, Cassville, Dickeyville, Mount Hope, Patch Grove, Potosi, Tennyson and Woodman;

c) that part of the village of Livingston located in the county;

d) that part of the village of Montfort located in the county;

e) that part of the village of Muscoda located in the county;

f) the cities of Boscobel, Fennimore, Lancaster and Platteville; and

g) that part of the city of Cuba City located in the county.

(2) Iowa county. That part of the county of Iowa consisting of:

a) the towns of Clyde, Eden, Highland, Mifflin and Pulaski;

b) the villages of Avoca, Cobb, Highland and Rewey;

c) that part of the village of Livingston located in the county;

d) that part of the village of Montfort located in the county; and

e) that part of the village of Muscoda located in the county.

(3) Lafayette county. That part of the county of Lafayette consisting of that part of the city of Cuba City located in the county.

Fiftieth assembly district

The following territory shall constitute the 50th assembly district:

(1) Juneau county. The county of Juneau.

(2) Richland county. That part of the county of Richland consisting of:

a) the towns of Ithaca, Marshall, Richland, Rockbridge, Westford and Willow;

b) that part of the village of Cazenovia located in the county; and

c) the city of Richland Center.

(3) Sauk county. That part of the county of Sauk consisting of:

a) the towns of Dellona, Delton, Excelsior, Fairfield, Freedom, Ironton, La Valle, Reedsburg, Washington, Westfield, Winfield and Woodland;

b) the villages of Ironton, La Valle, Lime Ridge, Loganville, North Freedom and Rock Springs;

c) that part of the village of Cazenovia located in the county; and

d) the city of Reedsburg.

Fifty-first assembly district

The following territory shall constitute the 51st assembly district:

(1) Grant county. That part of the county of Grant consisting of:

a) the towns of Hazel Green and Jamestown; and

b) that part of the village of Hazel Green located in the county.

(2) Iowa county. That part of the county of Iowa consisting of:

a) the towns of Arena, Brigham, Dodgeville, Linden, Mineral Point, Moscow, Ridgeway, Waldwick and Wyoming;

b) the villages of Arena, Barneveld, Hollandale, Linden and Ridgeway;

c) that part of the village of Blanchardville located in the county; and

d) the cities of Dodgeville and Mineral Point.

(3) Lafayette county. That part of the county of Lafayette consisting of:

a) the towns of Argyle, Belmont, Benton, Blanchard, Darlington, Elk Grove, Fayette, Gratiot, Kendall, Lamont, Monticello, New Diggings, Seymour, Shullsburg, Wayne, White Oak Springs, Willow Springs and Wiota;

b) the villages of Argyle, Belmont, Benton, Gratiot and South Wayne;

c) that part of the village of Blanchardville located in the county;

d) that part of the village of Hazel Green located in the county; and

e) the cities of Darlington and Shullsburg.

(4) Sauk county. That part of the county of Sauk consisting of:

*883 a) the towns of Bear Creek, Franklin, Honey Creek, Prairie du Sac, Spring Green, Sumpter and Troy; and

b) the villages of Plain, Prairie du Sac, Sauk City and Spring Green.

Fifty-second assembly district

The following territory in the county of Fond du Lac shall constitute the 52nd assembly district:

a) the towns of Eldorado, Fond du Lac and Friendship;

b) that part of the town of Taycheedah comprising wards 3 and 4;

c) the village of North Fond du Lac; and

d) the city of Fond du Lac.

Fifty-third assembly district

The following territory shall constitute the 53rd assembly district:

(1) Dodge county. That part of the county of Dodge consisting of:

a) that part of the town of Chester comprising ward 2;

b) that part of the town of Lomira comprising ward 1;

c) the village of Lomira; and

d) that part of the city of Waupun located in the county.

(2) Fond du Lac county. That part of the county of Fond du Lac consisting of:

a) the towns of Ashford, Auburn, Byron, Eden, Empire, Forest, Lamartine, Oakfield, Osceola, Rosendale, Springvale and Waupun;

b) the villages of Campbellsport, Eden, Oakfield and Rosendale; and

c) that part of the city of Waupun located in the county.

(3) Winnebago county. That part of the county of Winnebago consisting of:

a) the towns of Black Wolf, Nekimi, Omro and Utica;

b) that part of the town of Algoma comprising wards 1, 2, 3 and 4;

c) that part of the town of Winneconne comprising wards 1 and 3;

d) the village of Winneconne;

e) the city of Omro; and

f) that part of the city of Oshkosh comprising ward 30.

Fifty-fourth assembly district

The following territory in the county of Winnebago shall constitute the 54th assembly district:

a) that part of the town of Algoma comprising ward 5; and

b) that part of the city of Oshkosh comprising wards 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29.

Fifty-fifth assembly district

The following territory in the county of Winnebago shall constitute the 55th assembly district:

- a) that part of the town of Menasha comprising wards 1, 2, 3, 4, 5, 6, 7, 8, 9 and 12;
- b) the city of Neenah; and
- c) that part of the city of Menasha located in the county.

Fifty-sixth assembly district

The following territory shall constitute the 56th assembly district:

- (1) Outagamie county. That part of the county of Outagamie consisting of:
 - a) the towns of Center, Dale, Ellington, Grand Chute and Greenville;
 - b) that part of the town of Black Creek comprising ward 2; and
 - c) the villages of Black Creek and Hortonville.
- (2) Winnebago county. That part of the county of Winnebago consisting of:
 - a) the towns of Clayton, Neenah, Oshkosh, Poygan, Vinland, Winchester and Wolf River;
 - b) that part of the town of Menasha comprising wards 10 and 11;
 - c) that part of the town of Winneconne comprising ward 2; and
 - d) that part of the city of Oshkosh comprising wards 5 and 6.

Fifty-seventh assembly district

The following territory in the county of Outagamie shall constitute the 57th assembly district:

*884 that part of the city of Appleton comprising wards 1, 2, 3, 4, 6, 7, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34.

Fifty-eighth assembly district

The following territory shall constitute the 58th assembly district:

- (1) Dodge county. That part of the county of Dodge consisting of:
 - a) the town of Rubicon;
 - b) the village of Neosho; and
 - c) that part of the city of Hartford located in the county.
- (2) Ozaukee county. That part of the county of Ozaukee consisting of:
 - a) that part of the town of Cedarburg comprising wards 1, 2, 3, 6 and 7; and
 - b) the city of Cedarburg.
- (3) Washington county. That part of the county of Washington consisting of:
 - a) the towns of Addison, Hartford, Jackson, Trenton and West Bend;
 - b) that part of the town of Polk comprising wards 1, 2, 3, 4, 5 and 8;
 - c) the villages of Jackson and Slinger; and
 - d) that part of the city of Hartford located in the county.

Fifty-ninth assembly district

The following territory shall constitute the 59th assembly district:

- (1) Fond du Lac county. That part of the county of Fond du Lac consisting of that part of the village of Kewaskum located in the county.
- (2) Ozaukee county. That part of the county of Ozaukee consisting of:
 - a) the towns of Belgium and Fredonia; and
 - b) the villages of Belgium and Fredonia.
- (3) Sheboygan county. That part of the county of Sheboygan consisting of:
 - a) the towns of Holland and Sherman; and

b) the villages of Adell, Cedar Grove, Oostburg and Random Lake.

(4) Washington county. That part of the county of Washington consisting of:

- a) the towns of Barton, Farmington, Kewaskum and Wayne;
- b) that part of the village of Kewaskum located in the county; and
- c) the city of West Bend.

Sixtieth assembly district

The following territory shall constitute the 60th assembly district:

(1) Ozaukee county. That part of the county of Ozaukee consisting of:

- a) the towns of Grafton, Port Washington and Saukville;
- b) that part of the town of Cedarburg comprising wards 4, 5 and 8;
- c) the villages of Grafton, Saukville and Thiensville;
- d) that part of the village of Newburg located in the county;
- e) the city of Port Washington; and
- f) that part of the city of Mequon comprising wards 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 16 and 17.

(2) Washington county. That part of the county of Washington consisting of that part of the village of Newburg located in the county.

Sixty-first assembly district

The following territory in the county of Racine shall constitute the 61st assembly district:

- a) that part of the town of Mount Pleasant comprising ward 6; and
- b) that part of the city of Racine comprising wards 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 29 and 30.

Sixty-second assembly district

The following territory in the county of Racine shall constitute the 62nd assembly district:

- a) that part of the town of Mount Pleasant comprising wards 1, 3, 4, 5, 11 and 14;
- b) the villages of Elmwood Park and Sturtevant; and
- c) that part of the city of Racine comprising wards 6, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28.

****885 Sixty-third assembly district***

The following territory in the county of Racine shall constitute the 63rd assembly district:

- a) the towns of Caledonia, Dover and Yorkville;
- b) that part of the town of Burlington comprising wards 1, 6 and 7;
- c) that part of the town of Mount Pleasant comprising wards 2, 7, 8, 9, 10, 12, 13 and 15;
- d) the villages of North Bay, Union Grove and Wind Point; and
- e) that part of the city of Burlington comprising wards 1, 2, 3, 4, 5, 7, 14, 15 and 16.

Sixty-fourth assembly district

The following territory in the county of Kenosha shall constitute the 64th assembly district:

- a) that part of the town of Somers comprising wards 1, 5, 6, 7, 8, 9 and 10; and
- b) that part of the city of Kenosha comprising wards 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 19, 20, 21, 22, 29, 30 and 31.

Sixty-fifth assembly district

The following territory in the county of Kenosha shall constitute the 65th assembly district:

- a) that part of the town of Somers comprising ward 2;
- b) the village of Pleasant Prairie; and
- c) that part of the city of Kenosha comprising wards 5, 6, 15, 16, 17, 18, 23, 24, 25, 26, 27, 28, 32, 33 and 34.

Sixty-sixth assembly district

The following territory shall constitute the 66th assembly district:

(1) Kenosha county. That part of the county of Kenosha consisting of:

- a) the towns of Brighton, Bristol, Paris, Randall, Salem and Wheatland;
- b) that part of the town of Somers comprising wards 3 and 4;
- c) the villages of Paddock Lake, Silver Lake and Twin Lakes; and
- d) that part of the village of Genoa City located in the county.

(2) Racine county. That part of the county of Racine consisting of:

- a) that part of the town of Burlington comprising wards 2, 3, 4, 5, 8, 9, 10, 11 and 12; and
- b) that part of the city of Burlington comprising wards 6, 8, 9, 10, 11, 12 and 13.

(3) Walworth county. That part of the county of Walworth consisting of:

- a) the town of Bloomfield;
- b) that part of the town of Geneva comprising ward 7;
- c) that part of the village of Genoa City located in the county;
- d) the city of Lake Geneva; and
- e) that part of the city of Burlington located in the county.

Sixty-seventh assembly district

The following territory shall constitute the 67th assembly district:

(1) Barron county. That part of the county of Barron consisting of that part of the village of New Auburn located in the county.

(2) Chippewa county. That part of the county of Chippewa consisting of:

a) the towns of Anson, Arthur, Auburn, Birch Creek, Bloomer, Cleveland, Colburn, Cooks Valley, Eagle Point, Estella, Goetz, Howard, Lake Holcombe, Ruby, Sampson, Tilden and Woodmohr;

b) that part of the village of New Auburn located in the county; and

c) the cities of Bloomer, Chippewa Falls and Cornell.

(3) Dunn county. That part of the county of Dunn consisting of:

a) the towns of Colfax, Dunn, Eau Galle, Elk Mound, Grant, Hay River, Otter Creek, Peru, Red Cedar, Rock Creek, Sand Creek, Sherman, Spring Brook, Tainter, Tiffany, Weston and Wilson; and

b) the villages of Boyceville, Colfax, Downing, Elk Mound, Ridgeland and Wheeler.

****886 Sixty-eighth assembly district***

The following territory shall constitute the 68th assembly district:

(1) Chippewa county. That part of the county of Chippewa consisting of:

- a) the towns of Delmar, Edson, Hallie, Lafayette, Sigel and Wheaton;
- b) the villages of Boyd and Cadott;
- c) the city of Stanley; and
- d) that part of the city of Eau Claire located in the county.

(2) Eau Claire county. That part of the county of Eau Claire consisting of:

- a) the towns of Seymour and Union; and
- b) that part of the city of Eau Claire comprising wards 1, 7, 8, 9, 10, 11, 12, 13, 14, 19, 23, 24, 29, 34 and 35.

Sixty-ninth assembly district

The following territory shall constitute the 69th assembly district:

(1) Clark county. The county of Clark.

(2) Eau Claire county. That part of the county of Eau Claire consisting of:

- a) the towns of Bridge Creek, Ludington, Otter Creek and Wilson;
- b) that part of the town of Lincoln comprising ward 2; and
- c) the city of Augusta.

(3) Marathon county. That part of the county of Marathon consisting of:

- a) the towns of Brighton, Day, Eau Pleine, Frankfort, Hull, McMillan, Spencer and Wien;
- b) the villages of Fenwood, Spencer and Stratford;
- c) that part of the village of Unity located in the county;
- d) that part of the city of Colby located in the county; and
- e) that part of the city of Marshfield located in the county.

(4) Wood county. That part of the county of Wood consisting of the town of Rock.

Seventieth assembly district

The following territory shall constitute the 70th assembly district:

(1) Portage county. That part of the county of Portage consisting of:

- a) the towns of Carson, Dewey, Eau Pleine, Linwood and Sharon;
- b) that part of the town of Hull comprising wards 1, 2, 3, 4, 5, 6 and 7;
- c) that part of the town of Plover comprising ward 4;
- d) the village of Junction City; and
- e) that part of the village of Milladore located in the county.

(2) Wood county. That part of the county of Wood consisting of:

- a) the towns of Arpin, Auburndale, Cameron, Cary, Cranmoor, Dexter, Hansen, Hiles, Lincoln, Marshfield,

Milladore, Port Edwards, Remington, Richfield, Rudolph, Seneca, Sherry, Sigel and Wood;

- b) the villages of Arpin, Auburndale, Hewitt, Rudolph and Vesper;
- c) that part of the village of Milladore located in the county;
- d) the city of Pittsville; and
- e) that part of the city of Marshfield located in the county.

Seventy-first assembly district

The following territory shall constitute the 71st assembly district:

(1) Portage county. That part of the county of Portage consisting of:

- a) the towns of Almond, Amherst, Belmont, Buena Vista, Lanark, New Hope, Pine Grove and Stockton;
- b) that part of the town of Grant comprising ward 3;
- c) that part of the town of Hull comprising ward 8;
- d) that part of the town of Plover comprising wards 1, 2 and 3;
- e) the villages of Almond, Amherst, Amherst Junction, Nelsonville, Park Ridge, Plover and Whiting; and
- f) the city of Stevens Point.

(2) Waushara county. That part of the county of Waushara consisting of:

- a) the towns of Oasis, Plainfield and Rose; and
- b) the village of Plainfield.

****887 Seventy-second assembly district***

The following territory shall constitute the 72nd assembly district:

(1) Adams county. That part of the county of Adams consisting of:

- a) the towns of Adams, Big Flats, Colburn, Easton, Leola, Lincoln, Monroe, New Chester, Preston, Quincy, Richfield, Rome and Strongs Prairie;
- b) the village of Friendship; and

c) the city of Adams.

(2) Portage county. That part of the county of Portage consisting of that part of the town of Grant comprising wards 1 and 2.

(3) Wood county. That part of the county of Wood consisting of:

- a) the towns of Grand Rapids and Saratoga;
- b) the villages of Biron and Port Edwards; and
- c) the cities of Nekoosa and Wisconsin Rapids.

Seventy-third assembly district

The following territory shall constitute the 73rd assembly district:

(1) Bayfield county. That part of the county of Bayfield consisting of the towns of Barnes, Hughes and Oulu.

(2) Douglas county. The county of Douglas.

(3) Washburn county. That part of the county of Washburn consisting of:

- a) the towns of Bass Lake, Brooklyn, Casey, Chicog, Crystal, Evergreen, Frog Creek, Gull Lake, Minong, Spooner, Springbrook, Stinnett, Stone Lake and Trego; and
- b) the village of Minong.

Seventy-fourth assembly district

The following territory shall constitute the 74th assembly district:

(1) Whole counties. The counties of Ashland, Iron and Sawyer.

(2) Bayfield county. That part of the county of Bayfield consisting of:

- a) the towns of Barksdale, Bayfield, Bayview, Bell, Cable, Clover, Delta, Drummond, Eileen, Grand View, Iron River, Kelly, Keystone, Lincoln, Mason, Namakagon, Orienta, Pilsen, Port Wing, Russell, Tripp and Washburn;
- b) the village of Mason; and

c) the cities of Bayfield and Washburn.

Seventy-fifth assembly district

The following territory shall constitute the 75th assembly district:

(1) Barron county. That part of the county of Barron consisting of:

- a) the towns of Almena, Arland, Barron, Bear Lake, Cedar Lake, Chetek, Clinton, Crystal Lake, Cumberland, Dallas, Dovre, Doyle, Lakeland, Maple Grove, Maple Plain, Oak Grove, Prairie Farm, Prairie Lake, Rice Lake, Sioux Creek, Stanfold, Stanley, Sumner, Turtle Lake and Vance Creek;
- b) the villages of Almena, Cameron, Dallas, Haugen and Prairie Farm;
- c) that part of the village of Turtle Lake located in the county; and
- d) the cities of Barron, Chetek, Cumberland and Rice Lake.

(2) Polk county. That part of the county of Polk consisting of:

- a) the towns of Beaver, Johnstown and McKinley; and
- b) that part of the village of Turtle Lake located in the county.

(3) Washburn county. That part of the county of Washburn consisting of:

- a) the towns of Barronett, Bashaw, Beaver Brook, Birchwood, Long Lake, Madge and Sarona;
- b) the village of Birchwood; and
- c) the cities of Shell Lake and Spooner.

Seventy-sixth assembly district

The following territory in the county of Dane shall constitute the 76th assembly district:

- a) that part of the town of Madison comprising wards 1, 2, 3, 4, 5 and 6;
- b) that part of the city of Fitchburg comprising wards 1, 3 and 4; and

c) that part of the city of Madison comprising wards 34, 40, 41, 45, 46, 47, 50, 51, 52, 53, 56, 62, 64, 65, 66, 67 and 68.

***888 Seventy-seventh assembly district**

The following territory in the county of Dane shall constitute the 77th assembly district:

- a) the village of Shorewood Hills;
- b) that part of the city of Madison comprising wards 32, 42, 43, 44, 48, 49, 54, 55, 57, 58, 59, 60, 61 and 63; and
- c) that part of the city of Middleton comprising wards 2, 3, 4 and 9.

Seventy-eighth assembly district

The following territory in the county of Dane shall constitute the 78th assembly district:

- a) that part of the town of Madison comprising wards 7, 8, 9, 10, 11, 12, 13 and 14;
- b) the village of Maple Bluff; and
- c) that part of the city of Madison comprising wards 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 35, 36, 37 and 39.

Seventy-ninth assembly district

The following territory shall constitute the 79th assembly district:

(1) Dane county. That part of the county of Dane consisting of:

- a) the towns of Blue Mounds, Dunn, Montrose, Oregon, Perry, Primrose, Springdale, Vermont and Verona;
- b) that part of the town of Middleton comprising wards 1, 2 and 3;
- c) the villages of Blue Mounds, Mount Horeb and Oregon;
- d) that part of the village of Belleville located in the county;
- e) the city of Verona;
- f) that part of the city of Fitchburg comprising wards 2, 5, 6, 7, 8, 9 and 10; and
- g) that part of the city of Middleton comprising ward 5.

(2) Green county. That part of the county of Green consisting of:

- a) the towns of Exeter, New Glarus and York;
- b) the village of New Glarus; and
- c) that part of the village of Belleville located in the county.

Eightieth assembly district

The following territory shall constitute the 80th assembly district:

(1) Green county. That part of the county of Green consisting of:

- a) the towns of Adams, Albany, Brooklyn, Cadiz, Clarno, Decatur, Jefferson, Jordan, Monroe, Mount Pleasant, Spring Grove, Sylvester and Washington;
- b) the villages of Albany, Browntown and Monticello; and
- c) the cities of Brodhead and Monroe.

(2) Rock county. That part of the county of Rock consisting of:

- a) the towns of Avon, Center, Janesville, Magnolia, Plymouth, Porter, Spring Valley and Union;
- b) that part of the town of Fulton comprising wards 1, 2 and 4;
- c) that part of the town of Harmony comprising ward 1;
- d) that part of the town of Milton comprising wards 2 and 4;
- e) the villages of Footville and Orfordville;
- f) the city of Evansville; and
- g) that part of the city of Janesville comprising wards 11 and 12.

Eighty-first assembly district

The following territory in the county of Dane shall constitute the 81st assembly district:

- a) the towns of Burke, Springfield and Westport;
- b) the village of Waunakee;

c) that part of the city of Madison comprising wards 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19; and

d) that part of the city of Middleton comprising wards 1, 6, 7, 8 and 10.

Eighty-second assembly district

The following territory shall constitute the 82nd assembly district:

(1) Milwaukee county. That part of the county of Milwaukee consisting of:

a) the village of Greendale;

*889 b) that part of the city of Franklin comprising wards 2, 5, 6, 9, 10, 11, 12, 13, 14, 15, 16 and 17;

c) that part of the city of Greenfield comprising wards 5, 8, 9, 10, 12, 13, 14, 15, 16, 17, 21 and 22; and

d) that part of the city of Milwaukee comprising ward 208.

(2) Racine county. That part of the county of Racine consisting of that part of the town of Raymond comprising ward 2.

Eighty-third assembly district

The following territory shall constitute the 83rd assembly district:

(1) Milwaukee county. That part of the county of Milwaukee consisting of that part of the city of Franklin comprising wards 1, 3, 4, 7 and 8.

(2) Racine county. That part of the county of Racine consisting of:

a) the towns of Norway, Rochester and Waterford;

b) that part of the town of Raymond comprising wards 1, 3 and 4; and

c) the villages of Rochester and Waterford.

(3) Walworth county. That part of the county of Walworth consisting of:

a) the towns of East Troy and Troy; and

b) the village of East Troy.

(4) Waukesha county. That part of the county of Waukesha consisting of:

a) that part of the town of Vernon comprising wards 1, 6, 7, 8, 9 and 10;

b) the village of Big Bend; and

c) that part of the city of Muskego comprising wards 4, 8, 9, 10, 11, 12, 13 and 14.

Eighty-fourth assembly district

The following territory shall constitute the 84th assembly district:

(1) Milwaukee county. That part of the county of Milwaukee consisting of the village of Hales Corners.

(2) Waukesha county. That part of the county of Waukesha consisting of:

a) that part of the town of Waukesha comprising wards 1, 6, 9, 10, 11 and 12;

b) that part of the city of Muskego comprising wards 1, 2, 3, 5, 6 and 7;

c) that part of the city of New Berlin comprising wards 11, 12, 13, 14, 15, 16, 17, 18, 19, 23 and 25; and

d) that part of the city of Waukesha comprising wards 17, 18, 19, 20, 21, 22, 28, 29 and 30.

Eighty-fifth assembly district

The following territory in the county of Marathon shall constitute the 85th assembly district:

a) the towns of Maine, Texas and Wausau;

b) the villages of Brokaw and Rothschild; and

c) the cities of Schofield and Wausau.

Eighty-sixth assembly district

The following territory in the county of Marathon shall constitute the 86th assembly district:

a) the towns of Bergen, Bern, Bevent, Cassel, Cleveland, Easton, Emmet, Green Valley, Guenther, Halsey, Hamburg, Holton, Johnson, Knowlton, Kronenwetter, Marathon, Mosinee, Reid, Rib Falls, Rib Mountain, Rietbrock, Ringle, Stettin and Weston;

b) the villages of Athens, Edgar and Marathon City;

(c) the city of Mosinee; and

d) that part of the city of Abbotsford located in the county.

Eighty-seventh assembly district

The following territory shall constitute the 87th assembly district:

a) the counties of Price, Rusk and Taylor.

Eighty-eighth assembly district

The following territory in the county of Brown shall constitute the 88th assembly district:

a) that part of the city of Green Bay comprising wards 1, 2, 3, 4, 5, 6, 7, 8, 9, *890 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 34 and 35.

Eighty-ninth assembly district

The following territory shall constitute the 89th assembly district:

(1) Brown county. That part of the county of Brown consisting of:

a) the towns of Pittsfield and Suamico; and

b) the village of Pulaski.

(2) Marinette county. That part of the county of Marinette consisting of:

a) the towns of Beaver, Grover, Lake, Peshtigo, Porterfield and Pound;

b) the villages of Coleman and Pound; and

c) the cities of Marinette and Peshtigo.

(3) Oconto county. That part of the county of Oconto consisting of:

a) the towns of Chase, Lena, Little River, Little Suamico, Oconto and Pensaukee;

b) the village of Lena; and

c) the city of Oconto.

Ninetieth assembly district

The following territory in the county of Brown shall constitute the 90th assembly district:

a) the village of Howard;

b) that part of the village of Ashwaubenon comprising wards 3 and 4; and

c) that part of the city of Green Bay comprising wards 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 36, 37, 38, 39, 40, 42, 43 and 44.

Ninety-first assembly district

The following territory shall constitute the 91st assembly district:

(1) Whole counties. The counties of Buffalo, Pepin and Trempealeau.

(2) Jackson county. That part of the county of Jackson consisting of:

a) the towns of Franklin, Garfield, Melrose, North Bend, Northfield and Springfield; and

b) the villages of Melrose and Taylor.

Ninety-second assembly district

The following territory shall constitute the 92nd assembly district:

(1) Eau Claire county. That part of the county of Eau Claire consisting of:

a) the town of Fairchild; and

b) the village of Fairchild.

(2) Jackson county. That part of the county of Jackson consisting of:

a) the towns of Adams, Albion, Alma, Bear Bluff, Brockway, City Point, Cleveland, Curran, Garden Valley, Hixton, Irving, Knapp, Komensky, Manchester and Millston;

b) the villages of Alma Center, Hixton and Merrilan; and

c) the city of Black River Falls.

(3) Monroe county. That part of the county of Monroe consisting of:

a) the towns of Adrian, Angelo, Byron, Clifton, Glendale, Grant, Greenfield, Jefferson, Lafayette, La Grange, Leon, Lincoln, Little Falls, New Lyme, Oakdale, Ridgeville, Scott, Sheldon, Sparta, Tomah, Wellington, Wells and Wilton;

b) the villages of Cashton, Kendall, Norwalk, Oakdale, Warrens, Wilton and Wyeville; and

c) the cities of Sparta and Tomah.

Ninety-third assembly district

The following territory in the county of Eau Claire shall constitute the 93rd assembly district:

a) the towns of Brunswick, Clear Creek, Drammen, Pleasant Valley and Washington;

b) that part of the town of Lincoln comprising ward 1;

c) the village of Fall Creek;

d) the city of Altoona; and

e) that part of the city of Eau Claire comprising wards 2, 3, 4, 5, 6, 15, 17, 18, 20, 21, 22, 25, 26, 27, 28, 30, 31, 32 and 33.

Ninety-fourth assembly district

The following territory shall constitute the 94th assembly district:

(1) La Crosse county. That part of the county of La Crosse consisting of:

*891 a) the towns of Bangor, Barre, Burns, Campbell, Farmington, Hamilton, Holland, Medary, Onalaska and Washington;

b) the villages of Bangor, Holmen, Rockland and West Salem;

c) the city of Onalaska; and

d) that part of the city of La Crosse comprising wards 1, 2 and 3.

(2) Monroe county. That part of the county of Monroe consisting of:

a) the town of Portland; and

b) the village of Melvina.

Ninety-fifth assembly district

The following territory in the county of La Crosse shall constitute the 95th assembly district:

a) the towns of Greenfield and Shelby; and

b) that part of the city of La Crosse comprising wards 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18.

Ninety-sixth assembly district

The following territory shall constitute the 96th assembly district:

(1) Whole counties. The counties of Crawford and Vernon.

(2) Richland county. That part of the county of Richland consisting of:

a) the towns of Akan, Bloom, Buena Vista, Dayton, Eagle, Forest, Henrietta, Orion, Richwood and Sylvan;

b) the villages of Boaz, Lone Rock and Yuba; and

c) that part of the village of Viola located in the county.

Ninety-seventh assembly district

The following territory in the county of Milwaukee shall constitute the 97th assembly district:

a) that part of the city of Greenfield comprising wards 1, 2, 3, 4, 6, 7, 11, 18, 19 and 20;

b) that part of the city of Milwaukee comprising wards 191, 192, 193, 195, 196, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 209, 210 and 211; and

c) that part of the city of West Allis comprising ward 32.

Ninety-eighth assembly district

The following territory shall constitute the 98th assembly district:

(1) Milwaukee county. That part of the county of Milwaukee consisting of that part of the city of West Allis comprising wards 24, 25, 26, 30, 31 and 33.

(2) Waukesha county. That part of the county of Waukesha consisting of:

- a) that part of the town of Brookfield comprising ward 10;
- b) the village of Elm Grove;
- c) that part of the city of Brookfield comprising wards 1, 9, 17, 19, 20, 21, 22, 23 and 24; and
- d) that part of the city of New Berlin comprising wards 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 20, 21, 22 and 24.

Ninety-ninth assembly district

The following territory in the county of Waukesha shall constitute the 99th assembly district:

- a) that part of the town of Brookfield comprising wards 1 and 9;

- b) that part of the town of Lisbon comprising wards 1, 3, 4, 5, 6 and 7;

- c) that part of the town of Pewaukee comprising wards 1, 2, 3, 4, 5, 6, 9, 10, 11 and 12;

- d) the villages of Lannon, Pewaukee and Sussex;

- e) that part of the village of Butler comprising ward 3;

- f) that part of the village of Menomonee Falls comprising wards 24 and 25; and

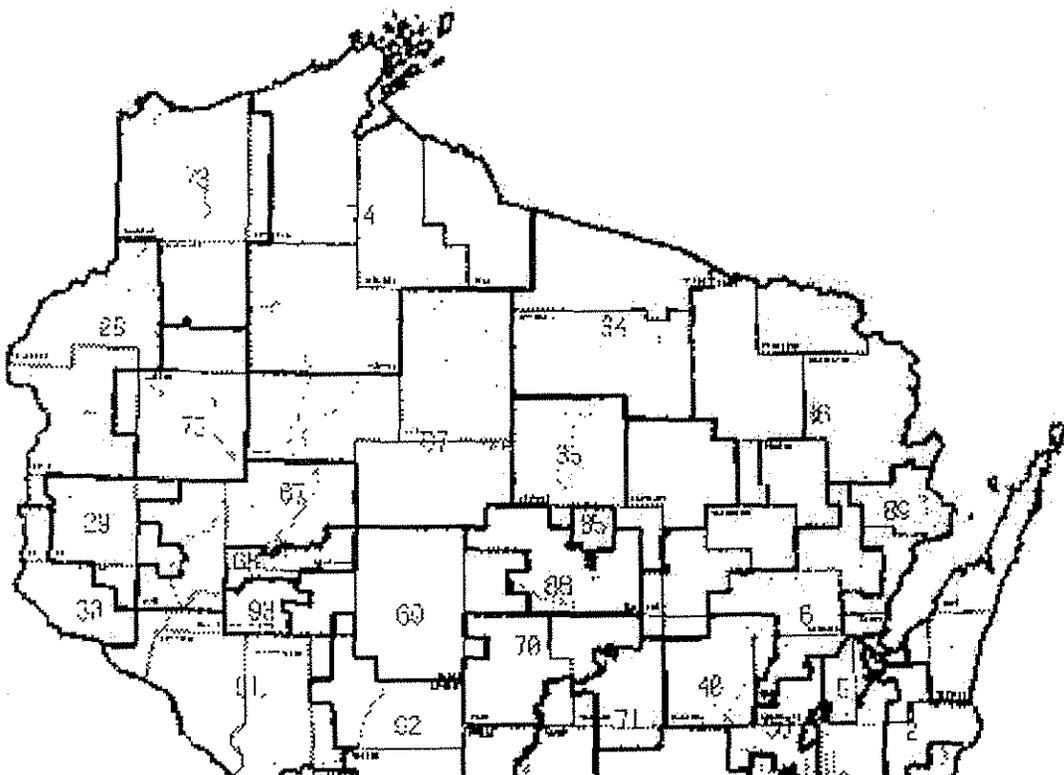
- g) that part of the city of Brookfield comprising wards 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16 and 18.

III. ELECTIONS TO THE LEGISLATURE

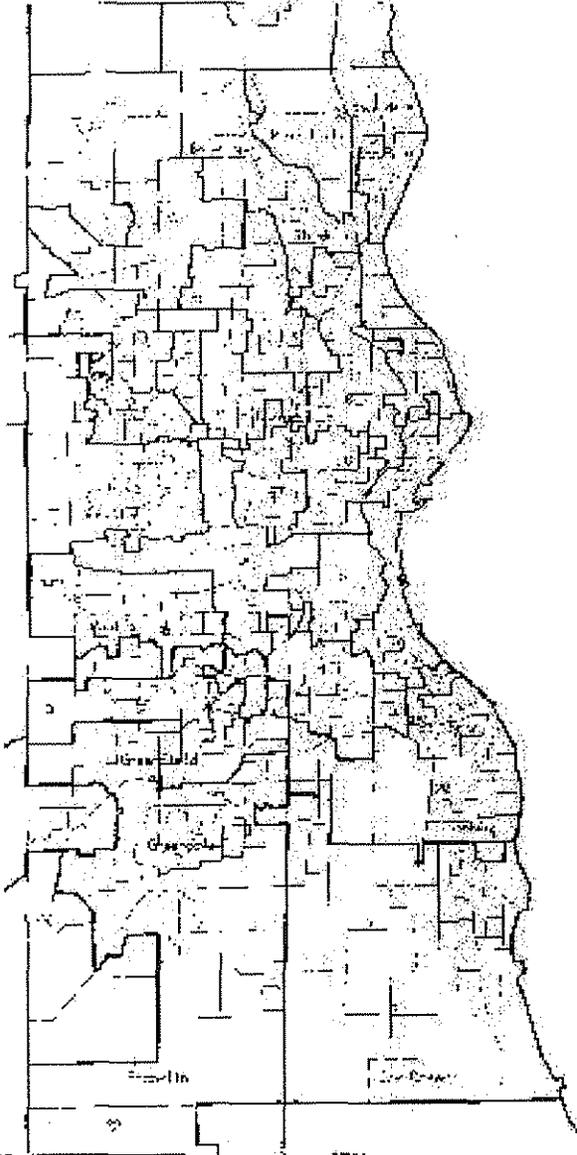
IT IS FURTHER ORDERED that beginning on June 2, 1992, every special election to the legislature called to fill a vacancy for the balance of an unexpired term, every election to recall a member of the legislature, and every regular election to the legislature, *892 shall be from the districts as described in Sections I and II of this order.

APPENDIX

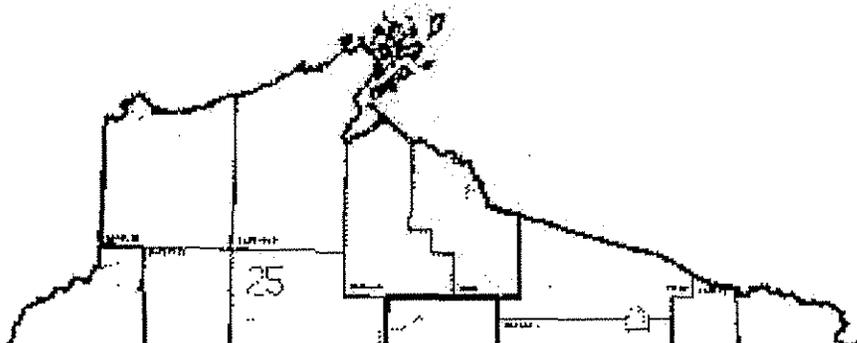
ASSEMBLY DISTRICTS



***893 MILWAUKEE AREA ASSEMBLY DISTRICTS**



***894 SENATE DISTRICTS**



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CHARLES L. SELZER, Appellant, v. MELVIN H. SYNHORST, Secretary of State,
et al., Appellees; ROBERT F. BARCLAY, intervenor

No. 50579

Supreme Court of Iowa

253 Iowa 936; 113 N.W.2d 724; 1962 Iowa Sup. LEXIS 632

March 6, 1962

SUBSEQUENT HISTORY: [***1] Rehearing
Denied May 8, 1962

PRIOR HISTORY: Appeal from Iowa District
Court -- Clair E. Hamilton, Judge.

Declaratory-judgment action to determine constitutionality of chapter 69, Acts of the Fifty-ninth General Assembly, relating to reapportionment of state senatorial districts. Opinion holds Act does not violate Constitution.

DISPOSITION: Affirmed in part and reversed in part.

COUNSEL: William L. Meardon and Ansel Chapman, both of Iowa City, for appellant.

Evan Hultman, Attorney General, Wilbur N. Bump, Solicitor General, of Des Moines, and Louis W. Schultz, County Attorney, Iowa County, of Marengo, for appellees.

D. C. Nolan, of Iowa City, for intervenor.

JUDGES: Snell, J. All Justices concur except Bliss, J., not sitting.

OPINION BY: SNELL

OPINION

[**725] [938] This action for declaratory judgment challenges the constitutionality of Senate File 504, now chapter 69, Acts of the Fifty-ninth General

Assembly, relating to the reapportionment of state senatorial districts.

It should, of course, be kept in mind it is not our function to determine the wisdom of a legislative Act. Unless it contravenes the Constitution, it is valid.

Article III, section 1, Iowa Constitution, provides: "The [*939] powers of the [***2] government of Iowa shall be divided into three separate departments -- the Legislative, the Executive, and the Judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted."

Article III, section 1, Legislative Department, provides: "The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives: * * *."

Section 5 provides: "Senators shall be chosen for the term of four years, at the same time and place as Representatives; * * *."

Section 6 provides: "The number of Senators shall not be less than one third, nor more than one half the representative body; and shall be so classified by lot, that one class, being as nearly one half as possible, shall be elected every two years. When the number of Senators is increased, they shall be annexed by lot to one or the [**726] other of the two classes, so as to keep them as nearly equal in numbers as practicable."

Section 7 provides: "Each house shall choose its own officers, and judge of the [***3] qualification, election, and return of its own members. * * *."

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Section 34, as amended, provides: "The Senate shall be composed of fifty members to be elected from the several senatorial districts, established by law and at the next session of the general assembly held following the taking of the state and national census, they shall be apportioned among the several counties or districts of the state, according to population as shown by the last preceding census." By further amendment it is provided that "no county shall be entitled to more than one (1) senator."

The official 1960 census indicated a population growth and major population changes from that of 1950 within individual counties in the state. This fact prompted action by the General Assembly in 1961 pursuant to section 34, Article III.

Although the Constitution provides for classification so as nearly as possible one half the Senators shall be elected every two years, in some manner in past years the two groups became [*940] uneven in number so 29 Senators were elected at one general election and 21 at the next election, two years later.

Chapter 41, Code, 1958, provides for 50 senatorial districts with each district [***4] having one Senator. The apportionment provides for 15 one-county districts, 21 two-county districts and 14 three-county districts. Chapter 69, Acts of the Fifty-ninth General Assembly, provides for 50 senatorial districts, each having one Senator, with 17 one-county districts, 17 two-county districts and 16 three-county districts. Except for designation by district number, there is no change in eleven of the one-county districts, two of the two-county districts and one of the three-county districts. In the remaining 81 counties, district boundaries are changed.

The Act provides for the nomination and election of Senators from 21 of the new districts in 1962 and election in 26 districts in 1964 for full four-year terms and in three districts, the nineteenth, twenty-sixth and forty-third, for two-year terms in 1964.

This corrects as nearly as possible the present imbalance between holdover and newly elected or re-elected Senators, and after 1964 approximately half the terms expire each two years.

The Act does not affect the terms of Senators now holding certificates of election.

For the legislative session in 1963 and any special session thereafter prior to 1965, seven counties are [***5] attached for the purpose of representation in the Senate to former districts so they are contiguous to the districts to which they are attached. It appears that in these seven counties the voters are arbitrarily assigned for representation to Senators for whom they have had no opportunity to vote.

Chapter 69, Acts of the Fifty-ninth General Assembly, now under attack, passed the Senate April 27 and the House of Representatives May 3, was duly signed by their presiding officers and by the Governor on May 5, all in 1961.

In the reapportionment 15 counties having a population in excess of 40,000 are made one-county districts. Because of geographical location, two additional one-county districts are created, although the population of each is somewhat under the remaining average of 41,000. The other counties are assigned [*941] to districts so as to have as nearly as possible an average population.

The same session of the legislature passed what is known as the "Shaff Resolution", initiating a proposed constitutional amendment for the reapportionment of the legislature.

[**727] In its decision the trial court stated that Senator D. C. Nolan, a resident lawyer of Iowa City [***6] and a member of the Senate from the twenty-fifth senatorial district in 1960, was called as a witness on behalf of plaintiff. Senator Nolan identified exhibits and submitted a plan for the purpose of showing reapportionment of the Senate could be constitutionally made without providing any two-year terms and without attaching counties to other senatorial districts for one session of the legislature.

Neither this testimony nor the exhibits are in the record here. We mention it because of the trial court's comments. It is not for us to pass upon the respective merits of alternative legislative proposals. Attached to intervenor's brief, prepared by Senator Nolan, is an appendix we assume to be the plan referred to.

It is unimportant but interesting to note that under this proposal no attempt is made to equalize the number of terms expiring each two years. Also there is a substantial difference in the population of multiple county districts, with a low of 21,000 in a proposed district consisting of Fremont and Page Counties and a high of 70,000 in a proposed district consisting of Iowa and Johnson Counties.

While the various proposals were being considered by the legislature, the attorney [***7] general, when asked for an opinion, advised the chairman of the Legislative Redistricting Committee that "mere re-enactment of existing senatorial districts or minor adjustments which did not correct any existing inequalities of apportionment would not constitute compliance with the Constitution."

The proposal submitted in argument by counsel for intervenor did not meet with legislative approval.

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The trial court found that it was conceded by all parties that the reason for the "two-year-term" provision of the Act [*942] was to make more nearly equal the number of Senators to be elected at each general election.

The trial court entered a finding and judgment sustaining the constitutionality of Senate File 504, now chapter 69, except the portion which provides two-year terms for Senators to be next elected in districts nineteen, twenty-six and forty-three. The court held said section severable from the rest of the Act, and it does not invalidate the entire law. Under the trial court's decree all Senators to be elected in succeeding general elections hold office for a term of four years, including those Senators to be elected in 1964 from districts nineteen, twenty-six and forty-three, [***8] who, under the provisions of the Act, would otherwise have been elected for two-year terms.

On appeal plaintiff argues the Act is unconstitutional because it provides:

1. For two-year terms in three districts and such part of the Act (held invalid by the trial court but severable from the remainder of the Act) is not so severable.

2. For some counties to be represented in the Sixtieth General Assembly and in any special session before the Sixty-first General Assembly, by more than one Senator.

3. For the representation in the Sixtieth General Assembly and any special session before the Sixty-first General Assembly, of certain counties by Senators not voted for by the residents thereof.

4. For the attaching of counties to existing districts which are not contiguous thereto.

5. For a second reapportionment of the state Senate by the Fifty-ninth General Assembly.

The intervenor, a resident of one of the counties claimed to have been disenfranchised, supports the position of plaintiff with an additional brief and argument.

Defendants, by cross-appeal, contend the part of the Act found invalid by the trial [**728] court is constitutional. Of course they defend the decree in [***9] other respects.

I. We first consider the part of the law held invalid by the trial court, i.e., the provision for the election in three districts of Senators for two-year terms in 1964. This issue appears to be a matter of first impression in our court.

[*943] Article III, section 5, of the Constitution, previously quoted, provides Senators shall be chosen for a term of four years. This is a clear mandate and it is

conceded the legislature cannot arbitrarily establish regular two-year senatorial terms. This constitutional provision, however, is not the only one to be considered.

Article III, section 6, provides for the election as nearly as possible of one half the Senators each two years and keeping each class nearly equal. Section 34 provides for apportionment according to population, except that no county shall be entitled to more than one Senator. We find nothing in the Constitution giving one section greater weight than another.

The most comprehensive discussion of the problem coming to our attention is found in Volume 39, Number 4, Iowa Law Review, in two articles, "The Iowa Senatorial Districts Can be Reapportioned -- A Possible Plan", by George B. Mather and Robert [***10] F. Ray of the Institute of Public Affairs, State University of Iowa, and "Constitutional and Legal Aspects of the Plan", by Robert L. Stoyles and Professor Frank R. Kennedy. We will condense and quote from these two articles.

The constitutional requirements for reapportionment are discussed. Because of the provision that no county shall have more than one Senator, it is impossible to apportion the seats in the Senate into units of equal population. A single county district may have a population greater than the average in multiple county districts.

"* * * Any attempt, however, to apportion the seats should recognize, to the greatest extent possible, the fundamental principle of equality of representation. * * *"

While the details of chapter 69, Fifty-ninth General Assembly, differ from those of the plan discussed in the Law Review articles, the basic approach to the problem is the same in that the larger counties are formed into one-county districts and the other counties into multiple county districts with approximately equal population. In order to bring the number of Senators elected at each election into approximate balance, it was suggested that in a few districts Senators [***11] be elected initially for two-year terms. In a few cases it was also necessary to assign counties to a holdover Senator for a temporary period. It [*944] was recognized that by this procedure for a two-year period citizens of a county would be represented by a Senator in whose election they did not participate, and also that the voters of those counties would not participate in electing a Senator for six years.

The constitutional aspects of the proposal are discussed in the second article. We quote:

"Perhaps the most serious challenge that can be made to the proposed plan involves the requirement in Section 5 of Article III of the Iowa Constitution that 'Senators shall be chosen for the term of four years . . .' The proposed reapportionment plan contemplates a tran-

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sitional election at which senators for four districts shall be elected for a two-year term. Some such procedure must be followed if the constitutional objective of continuity of the senate is to be fully realized. The principle of continuity of the senate was intended to be secured by two provisions in Section 6 of Article III of the Iowa Constitution: (1) In the beginning a classification of senators was to be made [***12] by lot so that 'as nearly one-half as possible, shall be elected every two years.' (2) When the number of senators should thereafter be increased, the new senators were to be annexed by lot to one of the two classes, 'so as to keep them as nearly equal in numbers [**729] as practicable.' It is manifest that the constitutional architects intended that the provision assuring a retention of one-half the members of the senatorial body from one general assembly to the next should be a permanent feature. Moreover, the provision for holdover of half the senate remains intact as a matter of both the letter and the principle of the Constitution. Nevertheless, the vicissitudes of the years have resulted in a departure from the constitutional scheme: In one biennial election year 29 senatorial seats must be filled, and in the next, 21. If the constitutional plan is to be carried out, four of the 29 senators must be transferred to the other class. It does not appear that this change can be accomplished otherwise than by modifying terms of four senators. While constitutional objections may be made to the taking of this step, none seems to be insuperable.

** * *

"Conflict between the four-year [***13] term provision in Section [*945] 5 of Article III and the provision in Section 6 for election of half the senators every two years arises only because of the legislative departure from the requirement in Section 6 that the two classes be as nearly equal as practicable. The four-year term for members of the Senate, however, is an integral part of the constitutional design whereby continuity of the senatorial body is assured. If restoration of the balance between the two classes provided for in Section 6 can be achieved by the reduction, for a single transitional election, of four senatorial terms to two years, no individual rights requiring constitutional protection are disturbed. It would be an argument too stultifying to be admitted to say that when an unconstitutional condition has come about, there is no legislative power to rectify the unconstitutional divergence unless the Constitution itself explicitly authorizes corrective action and elaborates the procedure to be followed. Nor can it be legitimately argued that a constitutional amendment is necessary to enable the legislature to conform to the pre-existing constitutional mandate."

After discussing authorities from other [***14] jurisdictions, the article says:

"* * * The proposal being made herein contemplates nothing so drastic as that of reducing the term of any incumbent senator. If two courts of last resort, presented with constitutional provisions having the same objectives as those found in Article III of the Iowa Constitution, can go so far as to shorten four-year terms of duly elected senators in order to permit the effectuation of such provisions, there should be no difficulty with the proposal here involved contemplating no retroactive reduction of senatorial terms and requiring no judicial aid to establish the length of the four shortened terms.

** * *

"In the suggested reapportionment plan, five counties [seven in the case at bar] will be 'assigned' for a transitional two-year period to districts having senators in whose election the voters of the assigned counties did not participate. Seven counties on the other hand will be assigned to districts under circumstances giving the voters of each of these counties an opportunity to participate in the election of two senators sitting in the same general assembly. These assignments do not appear to [*946] be vulnerable to attack unless shown [***15] to be arbitrary, i.e., not reasonably necessary or related to the attainment of the constitutional objective of a fair reapportionment. It must be assumed that such assignments were foreseen by the draftsmen of the provision for apportionment in Iowa Constitutional Amendment No. 2 of 1904. The essence of reapportionment is the assignment of a county to a new district. In the light of the restrictions on reapportionment explicitly set forth in the Constitution, it is unthinkable that the draftsmen -- who must be presumed to have been practical men as well as men acting in good faith -- intended to imply still another restriction, viz., that counties should be reassigned only to districts of the same class -- i.e., districts electing senators at the same time. While [**730] representation of a constituency different from that which elected the senator or representative is exceptional, it is sometimes unavoidable if both continuity of the legislative body and responsiveness to population growth and change are to be achieved."

The Act is "entitled to the benefit of the presumption of constitutionality usually accorded state legislation. Indeed, there is ample justification for arguing [***16] that in this area the legislative judgment is entitled to more than ordinary respect by the courts. In any event judicial review of a legislature reapportionment should not merely juxtapose the plan adopted against abstract standards of perfection nor, if the court is realistic, even against conceivable alternatives which may be conjured in courtroom argument; the judicial question is, or should be, whether the approach to the constitutional standards achieved by the reapportionment law shall be sustained as against the allocation that would result from an ad-

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verse ruling -- i.e., one conforming to the last valid apportionment. Since invalidation of apportionments does not necessarily stimulate legislatures to more conscientious performance of their constitutional obligations, the courts have properly been influenced to sustain such measures notwithstanding the conceded force of criticisms voiced in the arguments. It is, of course, not within judicial competence to compel legislative bodies to act affirmatively to reapportion.

"The ability of a constitution to endure depends upon its ability to meet the needs of an inevitably and inexorably changing [*947] society. No provision [***17] in the Iowa Constitution contributes more directly to its durability than that requiring periodic reapportionment to reflect population shifts. * * *."

The Act under attack does not shorten the term of any incumbent Senator. No candidate for office has in advance of his election any basic right to be elected for a specified term of years. Elections for short terms to fill vacancies are common in our law. See section 69.12, Code, 1958. The voters in the nineteenth, twenty-sixth and forty-third districts in 1964 will be in the same position as if a vacancy through resignation or death existed. They will elect for a short term. No basic or fundamental rights are denied.

Courts are reluctant to declare legislative enactments unconstitutional, and will do so only when the violation is clear, palpable and practically free from doubt. *State ex rel. Welsh v. Darling*, 216 Iowa 553, 246 N.W. 390, 88 A. L. R. 218; *Cook v. Hannah*, 230 Iowa 249, 297 N.W. 262; *Knorr v. Beardsley*, 240 Iowa 828, 38 N.W.2d 236.

The claimed unconstitutionality of chapter 69, Fifty-ninth General Assembly, in providing for the election of three Senators for two-year terms is not clear, palpable and practically free [***18] from doubt. Of course this leaves the question of severability of this provision moot.

II. Plaintiff challenges the constitutionality of the Act in that some counties will be represented in the Sixtieth General Assembly and in any special session before the Sixty-first General Assembly by more than one Senator.

Because of the change in district boundaries and designation, the voters in seven counties who helped elect Senators in 1960 for four-year terms will, in 1962, be helping elect Senators in their new district for four-year terms. Following the 1962 election a voter in one of these counties could say (if he had voted for successful candidates) that he had voted for and was accordingly represented by two Senators. It is not unusual for a voter to have such an opportunity. It frequently happens when a voter moves from one district to another between elections. The idea that we are personally rep-

resented and represented only by officials for whom we have voted stretches too far the theory of representative government. In some states our [**731] [*948] incumbent President did not receive a majority vote. In Washington, D. C., the residents did not vote at all. The President, [***19] however, is still the President of all the people.

The constitutional amendment of 1928 added to section 34 of Article III the words "but no county shall be entitled to more than one (1) senator."

Here again we find little helpful authority in Iowa. The Iowa Law Review, previously quoted, recognizes the problem and says a provision such as we have is not vulnerable to attack.

The Constitution requires that the Senate be apportioned.

Apportion, according to Webster's Third International Dictionary, means to divide and assign in proportion; divide and distribute proportionately. After each census there must be a new apportionment. With a shift in population, and membership in the Senate limited to 50, it is inconceivable that proper reapportionment could be achieved without change in district boundaries and resulting change in representation.

While the limitations contained in the Constitution must be observed, the Constitution should not be so construed as to defeat its own purpose. Without adjustments in representation, effective reapportionment may not be attained.

The provision "no county shall be entitled to more than one (1) senator" says nothing about whom the Senator represents. [***20] The common sense meaning of the provision is that not more than one Senator shall be elected from the same county at the same time. A single county district can elect only one Senator regardless of the county's population. The limitation is on the election and qualification and not on representation. A Senator represents either the people of the state as a whole, as suggested by the trial court, or the people within the district existing during his tenure of office. He is not a mere mouthpiece for those who voted for him. He is a legislative representative of the people exercising his authority for the welfare and protection of all. We cannot think any member of the Senate would be so narrow as to confine his representation solely to those who voted for him or those counties assigned to him.

In the broad sense, a Senator represents all the people. In the narrow sense, he represents the people within the territorial limits of his district as it exists at a particular time. In neither [*949] event is there such dual representation as to be prejudicial or preferential.

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III. The Act under attack provides that for the legislative sessions in 1963 and at any special session prior [***21] to 1965, seven counties are attached for the purpose of representation to designated districts.

This provision is attacked as violative of the *Fourteenth Amendment to the Constitution of the United States* and section 1 of Article II of the Constitution of Iowa.

The *Fourteenth Amendment to the Constitution of the United States* provides in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * *."

Section 1, Article II, of the Iowa Constitution provides: "Every male citizen of the United States, of the age of twenty one years, who shall have been a resident of this State six months next preceding the election, and of the County in which he claims his vote sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorised by law."

The limitation of suffrage to "male" citizens is now inoperative under the *Nineteenth Amendment to the Constitution of the United States*.

The issues in this case do not fall within this provision of the United States [**732] Constitution. Here there is no question of national citizenship nor of a right to vote.

Nixon v. Herndon, 273 U.S. 536, [***22] 47 S. Ct. 446, 71 L. Ed. 759; *Nixon v. Condon*, 286 U.S. 73, 52 S. Ct. 484, 76 L. Ed. 984, 88 A. L. R. 458; and *Smith v. Allwright*, 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987, 151 A. L. R. 1110, cited by plaintiff, involved the right of resident citizens in Texas to vote in regularly scheduled primary elections. There is no such disqualification in the Iowa law under consideration. *Colegrove v. Green*, 328 U.S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432, involved an Illinois congressional redistricting act and was dismissed because the issue was of a peculiarly political nature.

More nearly in point is *Snowden v. Hughes*, 321 U.S. 1, 6, 64 S. Ct. 397, 400, 88 L. Ed. 497, 502, where the Supreme Court said:

[*950] "The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law. [citations] The right to become a candidate for state office, like the right [***23] to vote for the election of state officers [citations], is a right or privilege of state citizenship, not of national citizenship

which alone is protected by the privileges and immunities clause."

There is no violation of *section 1, Article II, of the Iowa Constitution*.

The voters in the attached counties have the right to vote in "all elections which are now or hereafter may be authorised by law."

For the purpose of interim "representation" the counties are attached to districts. This attachment will continue only until there is a senatorial election in the new district of which they are a part. As soon as there is a Senator to be elected from their district, they can vote. Until there is an election or some one or some thing to vote for, the question of the right to vote is academic but not real. There is no denial of a right to vote until there is an election. There is no disenfranchisement as to a particular office when there is no vacancy to be filled. The Constitution does not say a voter is entitled to vote for every office in our national or state government at every election. It does say he is entitled to vote at all elections authorized by law. That simply means he is [***24] entitled to vote on candidates and propositions submitted to the voters in his voting precinct.

IV. *Article III, section 37, of the Constitution of Iowa* provides: "When a congressional, senatorial, or representative district shall be composed of two or more counties, it shall not be entirely separated by any county belonging to another district; and no county shall be divided in forming a congressional, senatorial, or representative district."

What the Constitution plainly provides is that counties in a district shall be contiguous.

Plaintiff and intervenor contend that the seven counties [*951] attached to districts for the purpose of interim representation are not attached so as to be contiguous. This argument proceeds from the premise that the district numbers to which the counties are attached refer to the number designation of newly created districts.

The Act itself does not support the premise upon which this argument is based.

If the reference in the attaching paragraph is to designations appearing in chapter 41, Code, 1958 (the old Act), the counties are attached so as to be contiguous.

It is argued that the reference is to the newly numbered districts. If this were [***25] so, the counties would not be contiguous.

Chapter 69, Acts of the Fifty-ninth General Assembly, repeals chapter 41, Code of 1958. No saving provisions appear in the Act.

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[**733] It is argued that when chapter 69, Acts of the Fifty-ninth General Assembly, was enacted and approved, it became effective, and coincident therewith, chapter 41 of the Code lost its effect and vitality by repeal.

This would be true except for the wording of the Act.

Section 2 provides that the Act shall be effective as to the nomination and election of Senators from 21 districts in 1962. In all other districts it is effective in 1964. It is then provided the seven counties are attached "to the present districts designated opposite the name of the county." At the time of the passage of the Act, the only "present districts" were the districts identified in chapter 41 of the Code. The use of the term "present districts" in an Act passed in 1961 refers to the districts existing at that time and not to districts to come into official legislative life in 1962 and 1964.

V. The Act is attacked as a second reapportionment of the Senate within a ten-year period.

Article III, section 34, quoted above, provides [***26] for apportionment of the Senate at the next session after the state and national census. The census is taken at ten-year intervals. Apportionment is to be based on the census. Between the dates of the census there would be nothing upon which to base an apportionment. It logically follows there can be only one apportionment within a ten-year period. This assumes, of course, the [*952] first apportionment is valid. A failure to act does not bar subsequent legislatures from acting. The power is a continuing one until the duty is performed. 18 Am. Jur., Elections, section 14.

In addition to chapter 69 (the Act under attack) the Fifty-ninth General Assembly passed Senate Joint Resolution No. 16, now chapter 344, Acts of the Fifty-ninth General Assembly. This is a joint resolution proposing a constitutional amendment providing for the composition

of the General Assembly. This proposal would change some of the provisions of Article III of the Constitution involved in this appeal.

A constitutional amendment so initiated by the legislature must be passed in the same form by two successive sessions of the legislature and then approved by a vote of the people. The process is time consuming. [***27] The passage of the joint resolution is not in itself a reapportionment of the legislature. It is the first step in a three-step process. It is the initiation of a proposed amendment to set up machinery for future reapportionment. That the people through constitutional amendment may in the future change our basic law on apportionment does not make the present senatorial reapportionment Act a second in a ten-year period.

Our present Constitution imposed a duty of reapportioning the Senate on the Fifty-ninth General Assembly. Pursuant to that mandate the legislature acted. The fact that at the same session the legislature proposed a constitutional change did not relieve the legislature of its duty nor make the performance thereof unconstitutional.

The problems facing a legislature attempting to reapportion itself are numerous and difficult. Varying philosophies of government and representation, as well as economic and political pressures, must be resolved. The issues in the case at bar are also difficult. Able and resourceful counsel have presented forceful and logical arguments. Our course, however, is clear. As we say in Division I, it is our duty to uphold the action of the legislature [***28] unless violation of the Constitution is clear, palpable and practically free from doubt.

Violation of the Constitution has not been so established.

[*953] Chapter 69, Acts of the Fifty-ninth General Assembly is valid. -- Affirmed on plaintiff's appeal and reversed on defendant-cross-appellants' appeal.

All Justices concur except Bliss, J., not sitting.