



State Democracy Research Initiative

UNIVERSITY OF WISCONSIN LAW SCHOOL

Redistricting Redux?

How the 2023 Wisconsin Supreme Court race is reviving questions about the state's electoral maps.

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Wisconsin's 2023 state supreme court race has drawn attention in part because of its potential to reshape another branch of state government: the legislature.

Last term, the Court voted 4-3 to adopt [new legislative and congressional maps](#) that hewed closely to the state's prior maps—maps that gave Republicans a [significant electoral advantage](#). Justice Patience Roggensack, a judicial conservative who will retire when her term ends this summer, sided with the majority. Depending on who wins her seat, the Court's ideological balance could flip for the first time in 15 years. That, in turn, could spur litigants to ask the Court to revisit the district maps and address their partisan imbalance. The state's district lines have accordingly featured prominently in [campaign coverage](#).

This guide offers legal background on the supreme court race's potential to shape to the future of Wisconsin's electoral maps. It explains the current redistricting landscape in Wisconsin and describes what may lie ahead.

The backstory: A gerrymandered legislature and a supreme court in flux

By [multiple established measures](#), Wisconsin's state legislature is among the most heavily gerrymandered in the country. Although Democrat Tony Evers won reelection as governor in 2022 by [3.4 percent](#)—what some have called a "[Wisconsin landslide](#)"—the same election put the legislature within two seats of a veto-proof Republican supermajority.

The Republican lock on the legislature is by design. When Republicans won the governor's race and control of the legislature back in 2010—just in time to oversee the decennial redistricting process—they crafted maps [intended to guarantee](#) a Republican majority in the legislature and Wisconsin's congressional delegation. The strategy worked. In the five November elections held under those maps from 2012 to 2020, Republicans won 60 to 65 percent of seats in the assembly, 55 to 63 percent of those in the senate, and five of the state's eight congressional seats—even in years when Democratic candidates won [more total votes](#) statewide.

Republicans gained an even stronger legislative advantage in the most recent redistricting cycle—but this time, the maps were chosen by the Wisconsin Supreme Court. Initially, after the legislature passed a pair of [redistricting bills](#) in the fall of 2021 that carried forward and reinforced the skewed maps of the prior decade, Governor Evers vetoed them, [promising](#) that “these gerrymandered maps will not become law.” The state supreme court then [stepped in](#) to resolve the impasse between the governor and legislature. Rejecting calls to erase the decade-old gerrymander, a [four-justice majority](#) in *Johnson v. Wisconsin Elections Commission* declined to consider the partisan balance of districts and asked parties to propose maps that made the “least change” necessary to the existing districts. In two follow-on 4-3 decisions, the *Johnson* Court initially chose the Governor’s proposed legislative districts, and then, after [intervention](#) by the [U.S. Supreme Court](#), [ultimately adopted](#) the assembly and senate maps drafted by the legislature—the same ones Governor Evers had previously vetoed. (The Court stuck with the congressional districts proposed by the Governor—districts that still gave Republicans an edge due to the Court’s “least change” requirement.)

In the November 2022 election, the first one conducted with the new maps, Republicans [picked up](#) three seats in the assembly and one in the senate. A two-thirds supermajority in both houses is necessary to [override](#) the governor’s veto, and Republicans missed that target by only two seats in the assembly, winning [64 out of 99 districts](#), or 64.6 percent—even though Democrats prevailed in a majority of the statewide races on the ballot. In the state senate, Republicans would have attained a [two-thirds supermajority](#) but for one senator’s subsequent [retirement](#). Republicans also picked up one congressional seat and now hold a 6-2 advantage. These GOP legislative gains stand in contrast to the [vote share](#) in the governor’s race: Governor Evers received 51.2 percent of the vote compared to 47.8 percent for Republican challenger Tim Michels.

In short, although the state’s divided government briefly made more competitive maps appear [within reach](#), the Wisconsin Supreme Court adopted maps that cemented the Republican advantage.

The upcoming race

As soon as the November 2022 races were called, attention immediately shifted to what has been described as the country’s “[biggest](#)” and “[most important](#)” election of 2023: the vote to replace retiring Justice Patience Roggensack on the Wisconsin Supreme Court. Since 2008, the Court has been controlled by a conservative majority, which today consists of Roggensack, Chief Justice Annette Ziegler, and Justices Rebecca Bradley and Brian Hagedorn. (Hagedorn, a self-described judicial conservative, is often the Court’s swing vote.) The Court is filled out by three more liberal justices—Ann Walsh Bradley, Rebecca Dallet, and Jill Karofsky—meaning that the election of another liberal-leaning justice would tip the Court’s ideological balance.

Although redistricting is only one of many significant issues that has (or could) come before the Court, what makes a redistricting lawsuit especially consequential is its potential to transform the rest of state government. New maps would by no means guarantee Democrats a majority in the legislature, but they could generate meaningful competition for legislative control for the first time since 2010.

That is why the state's gerrymandered maps are featuring so prominently in the race to fill the supreme court vacancy. Absent further action by the Court, Wisconsin voters will not have another opportunity to address the legislature's partisan imbalance until the 2030 census results trigger the drawing of new districts.

Aside from the presence of a new justice, how would a future redistricting lawsuit differ from the previous one?

If a redistricting lawsuit were brought in 2023, the case would not be a carbon copy of the litigation the Court resolved last year. It would have a different starting point and would presumably involve distinct legal claims, perhaps relying in part on new facts and evidence, such as the 2022 election results.

Initially, the maps at issue would be different. The Wisconsin Supreme Court in *Johnson* addressed a legal challenge to the constitutionality of the state's 2011 maps, based on claims that the 2020 census had revealed unlawful population disparities among districts. The Court adopted new maps for the state to remedy that unconstitutional malapportionment. Any future litigation would take aim at the state's *current* maps, not the now-defunct maps at issue in *Johnson*. And because the court in *Johnson* cured the challenged population imbalances, litigants challenging these maps would have to identify other legal bases for demanding new maps.

Procedurally, new litigation might begin in one of two places. In contrast to *Johnson*, future litigants could potentially seek to develop a full-fledged factual record at the trial level. Lawsuits ordinarily begin in a trial court, where a judge or jury decides factual questions based on the evidence presented. By the time such a case reaches the Wisconsin Supreme Court, the justices usually defer to the lower court's factual findings. *Johnson*, however, was filed directly in the Wisconsin Supreme Court as an original action, and the parties accepted a set of stipulated facts on which the Court relied. Future litigants might likewise find it preferable to try to proceed directly to the Wisconsin Supreme Court, but if they were to begin in a trial court, they might generate factual findings not present in *Johnson*.

In terms of legal claims, one approach that has been common in other states would contend that the state constitution limits extreme partisan gerrymandering. In 2019, the U.S. Supreme Court held in [Rucho v. Common Cause](#) that federal courts cannot hear partisan gerrymandering

claims under the federal constitution, but it specifically observed that *state* courts could still address partisan gerrymanders under state law. Some state supreme courts, like those in [Pennsylvania](#) and [North Carolina](#), have done so, concluding that extreme gerrymanders violate the people’s right to select the representative of their choice. Anyone advancing such a

partisan gerrymandering claim in Wisconsin would face the *Johnson* majority’s statement that “a right to partisan fairness . . . does not exist” in the Wisconsin Constitution. However, the three [dissenters](#) characterized that as an “advisory opinion” on a question that was not squarely before the Court.

A litigant might also offer a somewhat narrower legal theory mentioned by one of the [Johnson dissents](#): that whether or not political actors must ensure partisan fairness when they draw maps, partisan neutrality should be required for a *court-adopted* map. As Justice Dallet argued, the Court’s “role as a non-partisan institution” means it must “avoid choosing maps designed to benefit one political party over all others.” Indeed, two decades ago, the Court [quoted with approval](#) a federal court’s statement that “[j]udges 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.”

Other claims are also conceivable. For example, a litigant could contend that the current maps do not adequately comply with the [state constitution’s requirement](#) that districts be “in as compact form as practicable” and respect “county, precinct, town or ward lines.” Or a litigant could invoke the Voting Rights Act, a federal law that seeks to assure fair representation for racial minorities. Questions about VRA compliance arose during the *Johnson* case—and, as noted above, went all the way to the U.S. Supreme Court—but the factual record in *Johnson* was insufficient for a full-fledged VRA analysis. A VRA claim, however, would likely implicate only a small subset of legislative districts and not prompt wholesale revision of the maps.

Are there other instances in which new maps have been adopted between decennial censuses?

It is not unusual for electoral maps to be revisited and revised multiple times over the course of a decade. Across the country, there have been numerous examples of both courts and legislatures adopting new maps mid-decade. Currently, a number of states, including Arkansas, Florida, Kentucky, Nevada, New Mexico, New York, and Utah, have active redistricting litigation in which parties seek new maps. In Wisconsin, no law appears to preclude the Wisconsin Supreme Court from reworking the maps it adopted in *Johnson* in response to legal challenges.

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Given that the state’s current electoral maps were the work of a closely divided Wisconsin Supreme Court, it is unsurprising that those maps have been front and center in this year’s

state supreme court race. Whether those who regard the maps as an unlawful gerrymander pursue further litigation, and whether such litigation ultimately succeeds, may well hinge on the Court's newest justice—and thus on the votes of Wisconsinites, who will soon go to the polls to choose that justice.