

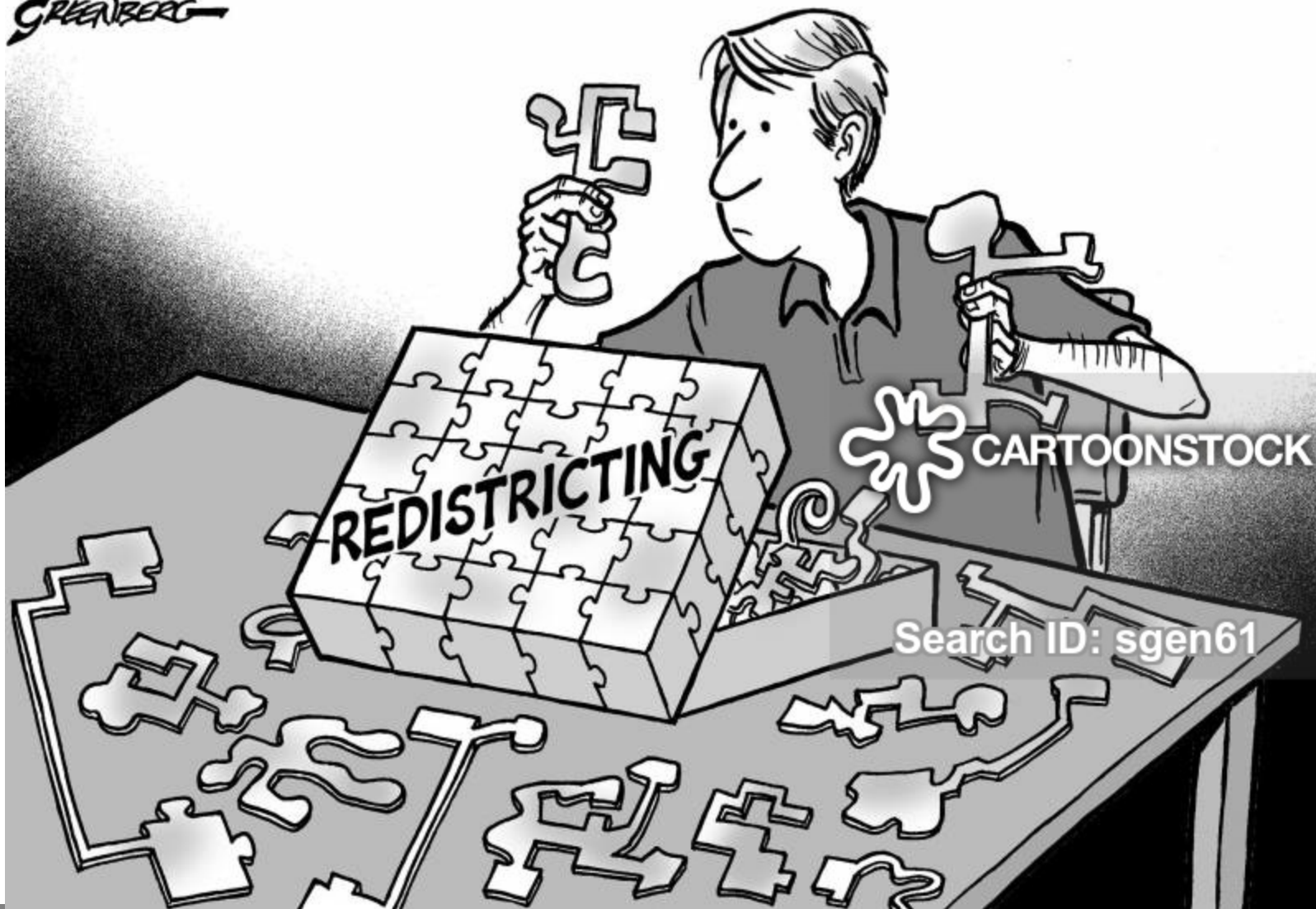
2021 Decennial Redistricting Overview

WCA Webinar

Tuesday, April 28, - 10:00 a.m.

Ben Conard

GREENBERG



CARTOONSTOCK

Search ID: sgen61

- Today's Presentation is Intended to Present a Broad Overview of the Redistricting Process and Important Legal Issues
- WCA has Distributed a Detailed Handbook Including Additional Guidelines for Navigating the Redistricting Process

Background

- The processes associated with reapportionment and redistricting are mandated by federal and state law.
- “Reapportionment” refers to the allocation of political seats among governmental units and traditionally refers to the allocation of congressional seats among the fifty states.
- “Redistricting” refers to the establishment of boundaries for political units such as state legislative and county districts.
- Under Wis. Stat. § 59.10, county governments in Wisconsin are required to redistrict following the federal decennial census (“decennial redistricting”).

DECENNIAL REDISTRICTING PROCEDURE - A BRIEF OVERVIEW

3 Step Process

- Counties begin the decennial redistricting process with a “clean slate.” Wis. Stat. § 59.10(3).
- A county’s ability to redistrict is governed by traditional concepts of redistricting which include: compactness, contiguity and substantial equivalence of population.
- The legislature has adopted a 3 step procedure for the creation of county board districts as set forth in Wis. Stat. § 59.10(3) that applies to all Wisconsin counties with the exception of Milwaukee County and Menominee County.

Step 1: Adoption of a Tentative County Supervisory District Plan

- Each county board is required to create and adopt a tentative county supervisory district plan within *sixty (60) days* after the results of the federal census.
- To accomplish this, each county board must:
 - a. propose a tentative county supervisory district plan establishing the number of supervisory districts proposed by the board and tentative boundaries for each district;
 - b. hold a public hearing on the proposed plan; and
 - c. adopt a tentative plan.

Step 1a: Rules for Drawing Districts

- Each proposed supervisory district is required to consist of whole wards or municipalities.
- The county must be divided into a number of districts equal to the number of supervisors (no multi-member districts), and all districts must be *substantially equal* in population.
- Territory within each district must be contiguous.
- Census blocks may not be divided unless the block is bisected by a municipal boundary or unless a division is required to enable creation of supervisory districts that are substantially equal in population.

Step 1a: Intergovernmental Cooperation

- Counties are required by Wis. Stat. § 59.10(3)(b)1 to work with municipalities in connection with the creation of the tentative plan.
- The statute requires a county board to “solicit suggestions from municipalities concerning the development of an appropriate plan.”

Step 1b: Hold a Public Hearing

- The tentative plan is open to public comment.
- The tentative plan still may be amended after the public hearing and prior to its finalization and adoption.

Step 1c: Adopt the Tentative Plan

- Amend the tentative plan after the public hearing or adopt as drafted.
- Once adopted, the board is required to transmit the tentative plan to each municipal governing body in the county.
- **ANTICIPATED TIME LINE FOR STEP ONE:** April 2021 through May 2021

Step 2: Wards

- Upon receipt of the tentative plan and written statement regarding the creation of a ward from a county, a municipality has *sixty (60) days* to create wards or adjust its ward lines in accordance with the tentative county supervisory redistricting plan.
- A municipality is required to:
 - make a good faith effort to accommodate the tentative plan for the county or counties in which it is located; and
 - to divide itself into wards in a way that permits the creation of supervisory districts that conform to the population requirements of the tentative plan.

Step 2: Wards

- The municipal clerk is required to forward a copy of the ward plan to the county within five (5) days after the municipality has enacted or adopted an ordinance or resolution creating wards in accordance with the tentative supervisory redistricting plan.
- **ANTICIPATED TIME LINE FOR STEP 2:** June 2021 through July 2021

Step 3: Final County Supervisory District Plan

- Public Hearing, Adoption, Numbering of Wards
 - A county board is required to hold a public hearing and to adopt a final supervisory district plan within *sixty (60) days* after every municipality in the county adjusts its wards.
 - The final plan must assign numbers to each district.
- Contiguity Requirement
 - Territory within each supervisory district created by the plan must be contiguous (with limited exceptions).

Step 3: Final County Supervisory District Plan

- The final plan must be submitted to Secretary of State by the County Board Chair
- The plan is then in effect until it is superseded by a subsequent plan enacted under Wis. Stat. § 59.10.

- **ANTICIPATED TIME LINE FOR STEP 3:** August 2021 through September 2021

CREATION OF WARDS



Wards

- 2nd Step in the 3 Step Redistricting Process
- Important to understand this process because it is instrumental to the ability of counties to implement and, ultimately, finalize county supervisory redistricting plans

What are Wards?

- A “ward” means a town, village or city subdivision created to facilitate election administration and establishing election districts (aldermanic, supervisory, legislative and congressional) that are substantially equal in population.

Creation of Wards

- Every city, village, and town is required to be divided into wards
- Wards are created by the common council, or the village or town board
- The boundaries of and number assigned to each ward are intended to be as permanent as possible

Creation of Wards

- Wards do not have to be equal in population, but are, subject to the population limits as follows:
 - Cities with a population of at least 150,000 - not less than 1,000 nor more than 4,000 inhabitants.
 - Cities with a population of at least 39,000 but less than 150,000 - not less than 800 nor more than 3,200 inhabitants.
 - Cities, villages, or towns with a population of at least 10,000 but less than 39,000 - not less than 600 nor more than 2,100 inhabitants.
 - Cities, villages, or towns with a population of less than 10,000 -not less than 300 nor more than 1,000 inhabitants.

Creation of Wards

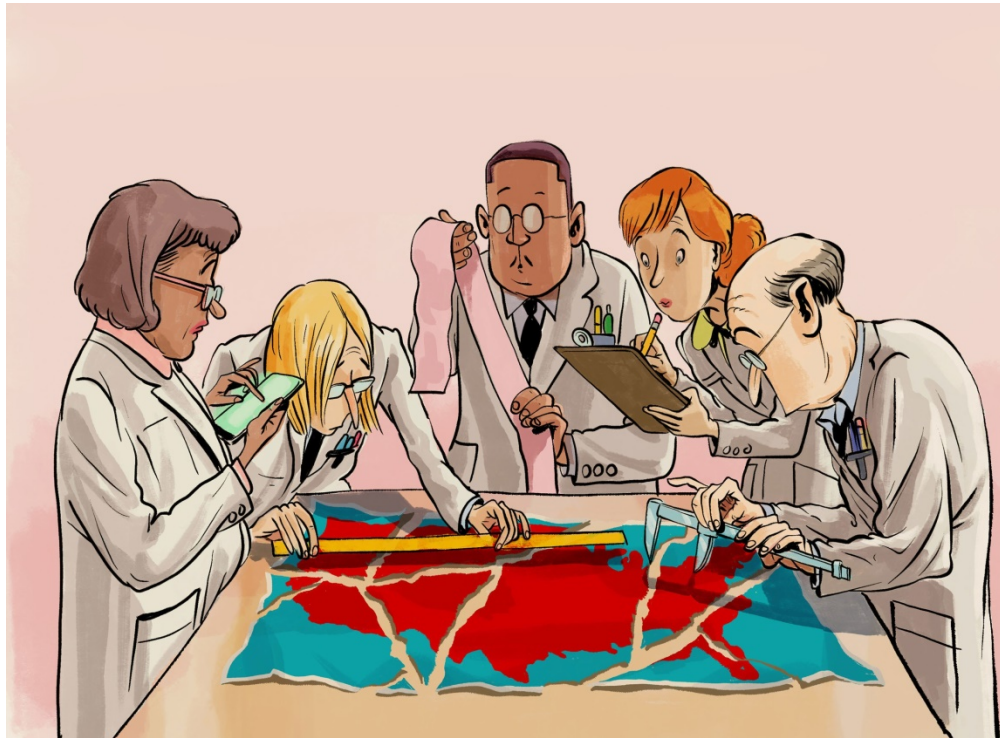
- Once established, the boundaries of each ward are required to remain unchanged until:
 - a further decennial federal census of population indicates that the population of a ward is above or below the applicable population range; or
 - the ward boundaries are required to be changed to permit creation of supervisory or aldermanic districts of substantially equal population or to enhance the participation of members of a racial or language minority group in the political process and their ability to elect representatives of their choice.

Creation of Wards

- Every municipality is required to make a good faith effort to accommodate the tentative plan submitted by the county or counties in which it is located.
- If a municipality is unable to accommodate the tentative plan, the municipality is nonetheless required to divide itself into wards in a way that creates county supervisor districts which are in accordance with the population requirements of the tentative plan.

Creation of Wards

- **County Enforcement of Municipal Division Requirements**
- If a municipality does not divide itself into wards as required by statute, the county in which the municipality is located or any elector of the municipality may petition the circuit court in which the municipality is located and submit a proposed ward division plan for the municipality.
- If the circuit court finds that the existing division of the municipality does not comply with statutory requirements for redistricting, the circuit court will review the plan submitted by the petitioner and, after reasonable notice to the municipality, may adopt the plan or any other plan which complies with the statutory requirements.



LEGAL ISSUES

“One Person-One Vote”

- The “one person, one vote” requirement arises under the equal protection clause of the United States Constitution and requires that members of a local elected body be drawn from districts of *substantially* equal population. Exact equality of population is not required.

Principles of One Person-One Vote

- “Substantially equal in population” is measured utilizing the following statistical methods:
 - Ideal District Size
 - Calculating Relative Deviation from Ideal District Size
 - Overall Range

Ideal District Size

- Population equality is determined by calculating a district's deviation from ideal district size.
- Ideal district size is determined by dividing the total population by the number of seats involved.
- Deviation is determined by calculating the extent to which an actual district is larger (has a “+” deviation) or smaller (has a “-” deviation) than the ideal district size.

Ideal District Size: Example

- The 2010 census reveals that ABC County has a total of 100,000 people with 10 supervisors, one for each district. The “ideal population” for each district is calculated as follows:
 - $100,000 / 10 = 10,000$ people per district

Relative Deviation from Ideal District Size

- Relative deviation is used to determine whether the 10% deviation rule (discussed next) has been achieved.
- Relative deviation is calculated by dividing the population deviation from the ideal population and is expressed in terms of a percentage.

Relative Deviation: Example

- If there is a 500-person deviation from the ideal population of 10,000 people, the relative deviation is calculated as follows:
 - 500 (amount over ideal population) / $10,000$ (ideal population) = $.05$ or 5%

Overall Range

- Once the relative deviation is calculated for each individual district, the overall deviation range is determined.
- This statistic is calculated by determining the difference between districts with highest and lowest relative deviation.
- Overall range is most commonly used in evaluating whether a district plan meets the one-person one-vote equal population standard.

Overall Range: Example

- If the highest and lowest deviations are +5% and -4% respectively, the overall range is 9%.

What is an Acceptable Deviation?

- **The 10% Rule**

- **General rule:** Districts should have a total population deviation of no more than 10% between the most populated district and the least populated district.
 - Deviations below 10% in overall range are generally presumed to be constitutional.
 - Deviations above 10% in overall range are presumed to be unconstitutional.

Justifying Deviations Greater than 10%

- Courts have made exceptions to the 10% rule where a local government can demonstrate that legitimate reasons exist for the deviation.
 - However, a redistricting plan with a deviation of 16.5% is unconstitutional because it substantially deviates from the 10% range that is presumed to be constitutional. *Connor v. Finch*, 431 U.S. 407, 416-418 (1977).

Justifying Deviations Greater than 10%

- A county can justify a deviation greater than 10% based on traditional redistricting concepts, such as:
 - drawing districts that are compact and contiguous (all parts connected and touching);
 - keeping political subdivisions intact;
 - protecting incumbents;
 - preserving the core of existing districts; and
 - complying with the Voting Rights Act.

Minority Populations and Considerations Of Race

- **Dilution and Methods Of Dilution**
- Vote dilution, as opposed to vote denial, refers to the use of redistricting plans and other voting practices that *unlawfully minimize or cancel out* the voting strength of racial and other minorities.
- Three techniques frequently used to dilute minority voting strength are “fracturing,” “stacking,” and “packing.”

Section 2 of The Voting Rights Act: Prevention Of Unlawful Voting Practices

- Section 2 of the Voting Rights Act is designed to prevent dilution of voting strength of racial and other minorities through redistricting.
- Section 2 provides that a voting practice, such as redistricting, is unlawful if it “results” in discrimination, *i.e.*, if, based on the totality of circumstances, it provides minorities with “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”

Section 2 of The Voting Rights Act: Scope

- Section 2 of the Voting Rights Act can apply to any jurisdiction in any state. It enables a person filing suit to prove a violation of Section 2 if, as a result of the challenged practice or structure, plaintiffs did not have an equal opportunity to participate in the political process and to elect representatives of their choice.

Establishing A Section 2 Violation

- *Thornburg v. Gingles*, 478 U.S. 30,44 (1986)
 - 3 Part Test requires that a minority group prove that:
 1. it is sufficiently large and geographically compact to constitute a majority in a single-member district;
 2. it is politically cohesive; and
 3. in the absence of special circumstances, bloc voting by the white majority usually defeats the minority's preferred candidate.”
 - If these three conditions are present, the presumption is that a minority district must be established.

Gingles: Requirement 1

- In order to satisfy the first factor, the minority must make up 50% plus 1 of the voting age population (VAP) in a district on the theory that only those of voting age have the potential to elect candidates of their choice within the meaning of Section 2.
 - See *Bartlett v. Strickland*, 129 S.Ct. 1231 (2009) by holding that: “Only when a geographically compact group of minority voters could form a majority in a single-member district has the first Gingles requirement been met.”

Gingles: Requirement 1

- “Compactness” element
 - Supreme Court has ruled that a district complies with Section 2 if it “is *reasonably* compact and regular, taking into account traditional redistricting principles such as maintaining communities of interest and traditional boundaries.”
 - Most courts have applied an “eyeball” test to determine compactness, *i.e.*, if a district looks reasonably compact and is similar in shape to other districts drawn by the jurisdiction it is deemed compact within the meaning of Section 2 and the first *Gingles* factor.

Gingles: Requirement 2

- “Politically Cohesive”
- Supreme Court held in *Gingles* that political cohesion can be shown by evidence “that a significant number of minority group members usually vote for the same candidates.”
- The Court also stated that racial bloc voting and political cohesion could be established “where there is ‘a consistent relationship between [the] race of the voter and the way in which the voter votes.’”
- Most courts have applied a common sense rule that if a majority of minority voters vote for the same candidates a majority of the time the minority is politically cohesive.

Gingles: Requirement 3

- Whether white bloc voting is “legally significant.”
- Satisfied if the majority votes sufficiently as a bloc to enable it “usually” to defeat the minority’s preferred candidate.
- The fact that some minority candidates may have been elected does not foreclose a Section 2 claim.
- Instead, where a challenged scheme generally works to dilute the minority vote, it cannot be defended on the ground that it sporadically benefits minority voters.

Shaw v. Reno: Restricting Considerations of Race

- The United States Supreme Court has placed strict limits on the manner in which race may be considered in redistricting. *Shaw v. Reno*, 509 U.S. 630 (1993).
- The Court established a strict scrutiny test
 - State or local government must demonstrate that race based factors were used in furtherance of compelling state interest
 - e.g., compliance with the Voting Rights Act

Criteria to Consider

- In light of *Shaw* and the cases that followed it, local governments should consider the following factors:
 - use of identifiable boundaries;
 - using whole voting precincts, where possible and feasible;
 - maintaining communities of interest;
 - basing the new plan on existing precincts;
 - adopting precincts of approximately equal size;
 - drawing precincts that are compact and contiguous;
 - keeping existing representatives in their precincts; and
 - when considering race, narrowly tailor to comply with the Voting Rights Act.

Gerrymandering

- Gerrymandering is the process where the majority party (*i.e.*, the party with a majority of seats in the state legislature) draws an election district map with district boundary lines that give itself an unfair and undeserved numerical vote advantage during each election.
- This numerical advantage is obtained by maximizing the number of districts with a majority of voters from the majority party.

Gerrymandering

- **Concepts:**
 - “Packing”
 - “Vote Dilution”
 - “Fracturing”
- **Results:** Bizarre election district boundaries are drawn to connect distant disjoint areas with thin strips of land running through unpopulated areas such as industrial parks and cemeteries, down highways and railroad tracks, and through bodies of water such as rivers, lakes, and the ocean.

Gerrymandering: *Davis v. Bandemer*, 478 U.S. 109 (1986)

- U.S. Supreme Court held that partisan gerrymandering is a justiciable issue under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.
- The Court denied the claim that district lines must be drawn by allocating to each party a share of seats in proportion to what their anticipated statewide vote would be.
- The Court noted that “unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s or group of voters’ influence on the political process as a whole.”

Gerrymandering: *Gill v. Whitford* 138 S. Ct. 1916 (2018)

- Plaintiffs alleged that they lived in districts that were unconstitutionally gerrymandered, while others claimed that unconstitutionally drawn districts statewide violated their rights.
- The district court held that Wisconsin legislative districts were an unconstitutional political gerrymander that impeded the minority party's ability to turn its votes into legislative seats.
- On appeal to the U.S. Supreme Court in 2018, the Court held that the plaintiffs lacked standing to bring the case.

Gerrymandering: *Gill v. Whitford* 138 S. Ct. 1916 (2018)

- Without ruling on the merits of the case, the Supreme Court remanded the case back to the district court to allow the plaintiffs an opportunity to provide more evidence that would prove concrete injuries to their constitutional rights.
- The Court acknowledged that this was an unusual move. However, this is an area of law that has been unsettled for many years.
- The district court will probably issue another order in this case in 2020, which could be appealed again to the U.S. Supreme Court.

Gerrymandering

- The U.S. Supreme Court also heard oral argument in the spring of 2019 in two partisan gerrymandering cases challenging congressional districts in North Carolina and Maryland.
- Although all three of these cases focus on partisan gerrymandering, which may not affect nonpartisan county board districts, county officials should be aware that there could be U.S. Supreme Court decisions that would draw a lot of attention to the gerrymandering issue, and could be used by critics of redistricting plans.

Determination of County Board Size in Decennial Redistricting

- The maximum number of county board supervisors any county may have is governed by Wis. Stat. § 59.10(3) as follows:
 - Counties having a population of less than 750,000 but at least 100,000: 47 supervisors.
 - Counties having a population of less than 100,000 but at least 50,000: 39 supervisors.
 - Counties having a population of less than 50,000 but at least 25,000: 31 supervisors.
 - Counties having a population of less than 25,000 and containing more than one town: 21 supervisors.

QUESTIONS?