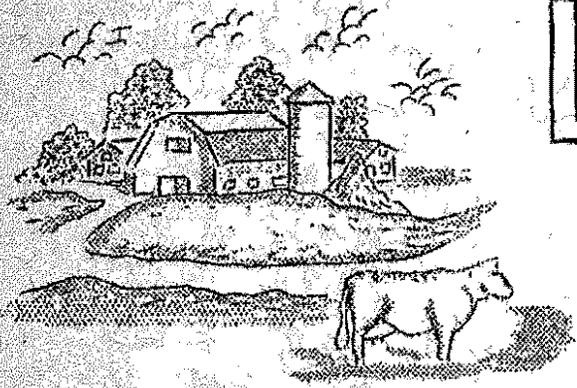
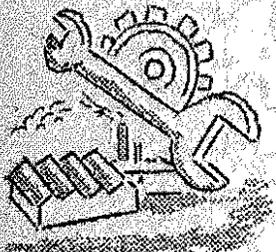


A WISCONSIN LEGISLATIVE REFERENCE LIBRARY REPORT



*Legislative Apportionment In
Wisconsin; The Development
Between 1950 and 1960*

Prepared by
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LEGISLATIVE APPORTIONMENT IN WISCONSIN;
THE DEVELOPMENT BETWEEN 1950 and 1960

Since 1848 the Wisconsin Constitution has required that the legislature apportion and district the members of the senate and assembly according to the number of inhabitants every 10 years and that this be done by single member districts. Were this to be done precisely, it would mean that each assembly district would contain 1% of the state's population and each senate district would contain 3.03%. This is by no means attainable because of other constitutional restrictions, such as the requirement that districts must be divided along county, town or ward lines. The result is that at best the apportionment only approximates equality.

Population, which has dominated the apportionment process since the beginning in Wisconsin, has resulted in the concentration of legislative seats in the populous areas and the increase in the size of the sparsely populated districts. While resistance to population as the basic measure of legislative districts evolved as a partisan issue, it has become more nearly a regional issue in very recent years.

Drastic population shifts in the 1930's and 1940's provided gross inequalities in representation by 1950 with the result that action seemed imperative. The 1950's saw the most active and extended concern over the reapportionment issue in the history of the state. Reapportionment in 1960 must be considered in the light of what happened in the prior decade.

The basic reapportionment law of the 1950's was Chapter 728, Laws of 1951, which came to be known as the Rosenberry Act after the chairman of the Legislative Council committee which initiated the proposal, the late Chief Justice Marvin Rosenberry. It was based on population exclusively.

The second facet of the 1950's struggle over reapportionment culminated in the Rogan Act which sought to apportion the senate partly on an area basis.

Behind these 2 themes in the chronology of the 1950's lay a variety of background efforts which both assisted and impeded the major issues. They will in turn be treated separately.*

*For prior studies by the Wisconsin Legislative Reference Library on the subject of apportionment of the state legislature, see: "Reapportionment in Wisconsin" (328.13/W7b), and "Analysis of Chapter 728, Laws 1951" (328.13/W7h). Loan copies may be obtained from the Wisconsin Legislative Reference Library, State Capitol, Madison 2, Wisconsin, for a 2-week loan period.

The present study is largely a restatement of "Reapportionment of the State Legislature in Wisconsin, 1951 to 1954" (328.13/W7q), bringing the prior text up to date through 1960.

THE ROSENBERRY ACT AND ITS REPERCUSSIONS

Chapter 728, Laws of 1951, the Rosenberry Act, was published August 17, 1951. Sections 1 and 2 of the law apportioned the senate and assembly according to population, based on the 1950 Federal Census, in conformity with section 3 of Article IV of the Wisconsin Constitution. Section 3 of Chapter 728 provided for an advisory referendum--to be held in conjunction with the general election of November 1952--on the question of whether the apportionment of either house of the Wisconsin legislature should be based on area as well as on population. The section further provided that sections 1 and 2 of the act would become operative on January 1, 1954, only if the voters rejected the area apportionment concept in the referendum. The final section of Chapter 728, Laws of 1951 (Sec. 4) was a nonseverability clause directing that the entire act should become inoperative in case the courts should hold any one of the sections preceding invalid.

Less than a year later the referendum provision of the Rosenberry Act was challenged in State ex rel. Broughton v. Zimmerman, 261 Wis. 398 (1952). This action alleged that the legislature, having fulfilled its constitutional obligation to reapportion (Secs. 1 and 2, Ch. 728, Laws 1951) could not qualify the execution of the apportionment act by additional provisions (Secs. 3 and 4, Ch. 728, Laws 1951). Accordingly, the suit petitioned the court to compel the holding of the 1952 legislative elections in conformity with the legislative apportionment of the Rosenberry Act.

The Wisconsin Supreme Court denied the petition. Basing its decision on the 1910 ruling in State ex rel. Van Alstyne v. Frear, 142 Wis. 320, the court held that the legislature acted within its powers when it made the operation of Chapter 728, Laws 1951, dependent upon the outcome of the referendum on the area question. "While the legislature may not delegate its power to make a law, it can make a law to become operative on the happening of a certain contingency...on which the law makes or intends to make its own action depend."

The court also stated that the legislature acted within its powers in adding the nonseverability clause. It held the question of severability, for any law, one of legislative intent, and could find no valid reason why the legislature should not be permitted to definitely state its intention in this respect.

The major concern of the court was with the postponed effective date of Chapter 728, Laws of 1951, in case the outcome of the November, 1952 referendum should make the act operative. The court likened the situation here to one in which the legislature fails to reapportion at its first biennial session following the publication of the federal census. The court held that the duty of the legislature to reapportion "is a continuing one so that, if the legislature fails to reapportion at its first session after the census, it may do so at a subsequent session."

Pursuant to section 3 of Chapter 728, Laws of 1951, the following question was submitted to the voters of Wisconsin at the election of November 4, 1952: "Shall the Constitution be amended to

provide for the establishment of either senate or assembly districts on an area as well as a population basis?" In a very heavy turnout, attributable at least in part to the heated campaign concerning the "area v. population" issue, the proposition was rejected by a vote of 753,092 "NO" to 689,615 "YES".

Rejection of the area apportionment proposition fulfilled the conditions for the execution of the Rosenberry Act. By its section 4, Chapter 728, Laws of 1951, was to become operative on January 1, 1954, to govern Wisconsin legislative apportionment for the rest of the 1950 decade.

The Rosenberry Act was next challenged on another ground.

Requesting the Attorney General to render an opinion concerning the constitutionality of the 1951 Rosenberry Act, Senator Clifford W. Krueger of Merrill, Lincoln county, alleged that it was "totally and completely unconstitutional" to have voters represented in the state senate by a person for whom they did not have a chance to vote. His reference was to the situation in Lincoln, Dunn and Portage counties. These counties would not hold elections for the state senate from 1950 until 1956 because of the state senate districts reapportionment in the Rosenberry Act.

Attorney General Vernon Thomson replied informally (12/24/1953) that such a lack of elected representation, "while it has elements of injustice, is a necessary concomitant of reapportionment of the senate" arising because senators, serving 4-year terms, are not all elected at the same time. He cited the 1892 Cunningham case (81 Wis. 440, 531) where the Supreme Court had held that the power of the legislature to make senate districts was absolute even though some electors were unable to vote for 6 years.

The Rosenberry Act (Ch. 728, Laws of 1951) inadvertently listed a village in Marathon county, and a town in Dodge county, in the wrong assembly districts. In Milwaukee county, the city of Wauwatosa had changed its ward lines as of December 31, 1952. Changes in Brown, Dane, Dodge, Eau Claire and Marathon counties also necessitated some corrections.

As a result, several proposals to make changes in assembly districts were introduced in the 1953 session. In June of 1953, the various proposed changes were consolidated in Bill 668, S., which passed and became Chapter 550, Laws of 1953.

This act was immediately challenged. In a taxpayer's suit decided in March of 1954 (State ex rel. Smith v. Zimmerman, 266 Wis. 307) a citizen of Green Bay questioned the validity of the revision in Brown county's assembly districts made by Chapter 550, Laws of 1953.

The Rosenberry Act had divided Brown county into 3 assembly districts: (1) the city of Green Bay west of the Fox river, plus 2 wards on the east bank; (2) the remaining east bank wards of Green Bay plus the towns of Allouez and Preble; (3) the remainder of the county.

After the 1951 Rosenberry Act had been enacted, Green Bay created 2 new wards. Chapter 550, Laws of 1953, amended several of the assembly districts created by the Rosenberry Act. This was in the nature of corrective legislation. However, while the Brown county provision presumably was made only in consequence of the Green Bay ward changes, Chapter 550, Laws of 1953, also affected other municipalities in that county: the town of Preble was changed from the 2nd to the 1st district, the town of Allouez from the 2nd to the 3rd, and 2 west bank wards of the city of DePere from the 3rd to the 2nd district.

Attorney General Vernon Thomson submitted a brief on behalf of the Secretary of State. It was his contention that the Brown County reapportionment by Chapter 550, Laws of 1953, was merely incidental to the changes effected by the alteration of ward lines in Green Bay, and was thus within the 1861 rule of the Slauson et al. v. Racine case, 13 Wis. 398. In that case, the court had upheld as incidental the change in an assembly district boundary resulting from the annexation to a city of territory situated in an adjoining assembly district.

Petitioner Smith claimed that the assembly district changes in Brown county (Ch. 550, Laws of 1953) constituted another apportionment within the decade covered by the Rosenberry Act apportionment, an action prohibited under the 1953 rule of State ex rel. Thomson v. Zimmerman. The Supreme Court agreed. Because the Brown county provisions of Chapter 550, Laws of 1953, affected territory not part of Green Bay, the court held the Brown county provisions to be an attempt to reapportion within the decade contrary to Article IV, section 3, of the Wisconsin Constitution. Thus, as far as Brown county was concerned, Chapter 550, Laws of 1953, was set aside and the controlling apportionment provisions were those of Chapter 728, Laws of 1951.

THE MOVE FOR AREA APPORTIONMENT

The second facet of the reapportionment developments of the 1950's was concerned with the efforts to insert the concept of area into the processes. This is normally associated with the so-called Rogan Act in which this movement had its culmination.

In Wisconsin, proposed constitutional amendments must be approved by a majority of the elected members in each of the 2 houses, in each of 2 succeeding state legislatures, before they can be submitted to the people for ratification.

During the 1951 session of the legislature 3 joint resolutions to amend the apportionment provisions of the Wisconsin Constitution were given "first consideration" approval. Jt. Res. 55 proposed to base senate apportionment 40% on area and 60% on population. Jt. Res. 56 apportioned the assembly into districts containing such territory as specified in the proposal. Jt. Res. 59 provided in general terms for senate apportionment on an area and population basis, permitted assembly districts to cross county lines, and senate districts to split assembly districts.

Jt. Res. 56 of 1951 was reintroduced in the 1953 session as Assembly Jt. Res. 5. It was returned to its author at the end of

the session of 1953. The same disposition was then taken in regard to Jt. Res. 55 of 1951, reintroduced as Assembly Jt. Res. 6 in the 1953 legislative session.

Jt. Res. 59 of 1951 was reintroduced as Assembly Jt. Res. 7 of 1953. This was the proposal which in general terms provided for the apportionment of the senate on an "area and population" basis, and which permitted assembly districts to cross county lines. It also permitted the splitting of assembly districts in the apportionment of the senate. The legislature of 1953 gave second consideration approval to this proposal; the legislation became Jt. Res. 9 of 1953.

Legislative action on Jt. Res. 9 of 1953 had been taken so early in the 1953 session (the joint resolution was enacted and published by Feb. 21, 1953) that it was possible to submit the amendment to the people of Wisconsin for ratification at the election of April 7, 1953.

By the terms of Jt. Res. 9 of 1953, the following question was printed on the ballot: "Shall sections 3, 4 and 5 of article IV of the constitution be amended so that the legislature shall apportion, along town, village or ward lines, the senate districts on the basis of area and population and the assembly districts according to population?" The people voted 433,043 "FOR" the adoption of the constitutional amendment, and 406,133 "AGAINST". The constitutional amendment was thereby ratified and the Wisconsin Constitution amended accordingly.

The 1953 constitutional amendment provided for the "area and population" apportionment of the senate only in general terms. Specific implementation of the constitutional concept was vested in the legislature, within the constitutional text. In implementation of the constitutional amendment, the legislature enacted Chapter 242, Laws of 1953. This legislation became known as the "Rogan Act," after the then senator, Paul Rogan, who had sponsored the drafting of the proposal.

The Rogan Act of 1953 dealt essentially with the senate, apportioning the senate approximately 30% on area (dry land area as last published in the federal census of 1940) and 70% on population, making the following changes in senate districts:

1. Brown county was eliminated as a single-county senate district, and combined with Oconto county.
2. Various parts of Milwaukee county were combined to reduce the number of senate districts in that county from 8 to 6.
3. The number of senate districts in Dane county was reduced from 2 to 1.
4. By the readjustment of counties among senate districts, and the reduction of area in some senate districts, the legislature created 3 new senate districts to replace those eliminated in Milwaukee and Dane counties.

Secretary of State Fred Zimmerman let it be known that he would not utilize Chapter 242, Laws of 1953 (Rogan Act) in calling the election for state legislators in 1954 (Milw. Jour. 6/5/1953). In

the resulting litigation between Attorney General, later Governor, Vernon W. Thomson and the late Secretary of State Fred R. Zimmerman, the Wisconsin Supreme Court took original jurisdiction.

Deciding State ex rel. Thomson v. Zimmerman, 264 Wis. 644 (1953) by invalidating the 1953 constitutional amendment, the court based its written opinion on 2 prior cases:

(1) Article XII, section 1, of the Wisconsin Constitution, requires that if more than one amendment be submitted to the people, they be submitted in such fashion that the people may vote on each amendment separately. In State ex rel. Hudd v. Timme, 54 Wis. 318 (1882), the court held that this provision does not require the separate submission of each proposed constitutional change within a single amendment when each is a reasonably necessary part of the same single purpose.

In the 1953 controversy, the court found that the various aspects of the constitutional amendment were not reasonably necessary parts of the same single purpose. Rather, the court held, the change which permitted assembly districts to cross county lines was not related to the proposal of apportioning the senate according to the concept of "area and population". The same objection was applied to the elimination of the former exclusion of "Indians not taxed, soldiers, and officers of the United States army and navy" from the apportionment formula.

(2) In the 1925 case of State ex rel. Ekern v. Zimmerman, 187 Wis. 180, the court established the rule that the question submitted to the people (concerning ratification of a constitutional amendment) must reasonably, intelligently, and fairly comprise, or have reference to, every essential of the amendment. This rule, the court found in 1953, had not been observed in the submission to the people of the 1953 constitutional amendment. According to the court, the phrasing of the question had implied that senate districts as well as assembly districts would have to be created along town, village, or ward lines, while by the changes actually proposed senate districts were required merely to be contiguous and convenient.

For these reasons, the court concluded that the vote of April 7, 1953, did not constitute ratification of the constitutional amendment by the people, and "the Rogan Act, ch. 242, laws of 1953, which relies on the amendment for its own constitutionality, must be declared unconstitutional and void."

"It is quite clear," the court stated in State ex rel. Thomson v. Zimmerman, "that the invalid Rogan Act did not repeal or supersede the Rosenberry Act... The latter remains the law under which the secretary of state is required to issue the call for elections ... Under the constitution as it existed in 1951, ... no more than one valid apportionment may be made in the period between the federal enumerations... (But,) it lies within the power of the people to amend that portion of sec. 3, art. IV, Const., which sets the time at which apportionments may be made... Until such possible amendment or until a new apportionment is made following a new

enumeration under the authority of the United States, the call for elections of legislators will be governed by the Rosenberry Act."

The Thomson v. Zimmerman decision did not say that it was impossible or "wrong" to amend the Wisconsin Constitution to the text proposed by the 1953 constitutional amendment. The decision simply meant that (a) the amendment had not been validly ratified and (b) that even had ratification been valid, the enactment of the Rosenberry Act precluded a renewed apportionment during the decade of the 1950's.

It is debatable whether the legislature could have, by a law, again submitted the 1953 amendment to the people of Wisconsin for ratification, rephrasing the ratification questions to comply with the Thomson v. Zimmerman decision. The legislature did not choose this alternative. But, had such a maneuver been tried successfully, the 1960 census apportionment would have been based on it although it would have been too late to do anything about it for the 1950 decade.

SUBSEQUENT EFFORTS TO AMEND THE CONSTITUTIONAL PROVISIONS RELATING TO REAPPORTIONMENT

In reaction to the Supreme Court's decision in State ex rel. Thomson v. Zimmerman, 3 joint resolutions dealing with the question of legislative apportionment were introduced and adopted on first consideration by the adjourned session of the 1953 Legislature.

Senate Jt. Res. 65 (became JR 70, 1953) provided that "at their first session after the adoption of this amendment" the legislature should apportion the senate on the basis of area and population. This wording was designed to overcome the court's objection that reapportionment could constitutionally be had only once for each decennial period. If adopted on second consideration and ratified by the people, the amendment would have made it possible to again apportion the senate during the 1950's.

Senate Jt. Res. 66 (became JR 71, 1953) would have permitted the apportionment of the senate without regard to assembly districts; senate districts merely being required to be bounded by "county, town, and ward lines."

Senate Jt. Res. 67 (became JR 72, 1953) proposed a permanent apportionment of the assembly; each assembly district to contain counties or territory as specified. Again, in order to overcome the "one apportionment per census" objection, the proposal specified that the new system was to become operative "beginning with the first even-numbered" year's November election following ratification of the amendment.

Two of the new constitutional amendment proposals passed on first consideration in the adjourned session of 1953 were never reintroduced for second consideration in the session of 1955. Jt. Res. 72 of 1953, which would have apportioned the assembly into permanent, constitutionally specified, districts, was reintroduced

as Assembly Jt. Res. 43 of 1955 but failed in the house of introduction.

Assembly Jt. Res. 93 of 1955 proposed to increase assembly membership to allow for area representation, to allocate at least one assembly district to each county, and to apportion the remaining seats on the basis of population. The proposal was returned to its authors.

In 1957, Assembly Jt. Res. 82 proposed permanent apportionment of the assembly to contain counties as specified in the constitution. The assembly refused to engross this proposal.

In 1959, Senate Jt. Res. 11 proposed that legislative apportionment following each decennial census should become the task of an apportionment commission if the legislature failed to comply with the constitutional mandate at the first session following the publication of the census. The proposal was rejected in the senate. Assembly Jt. Res. 61, proposing to increase assembly membership to allow for area representation, was rejected in the assembly.

The 1959 Legislature passed on first consideration a proposal (SJR 12, became JR 30) to eliminate the "Indians not taxed" exclusion from the population count for apportionment purposes. This proposal did not eliminate the exclusion of "soldiers and officers of the United States army and navy" stationed in Wisconsin. In order to become effective, this proposed constitutional amendment requires the second consideration approval by the legislature of 1961, and ratification by the people.

Finally, by Senate Jt. Res. 94 of 1959, the whole question of reapportionment was referred to the Wisconsin Legislative Council for study during the 1959 to 1961 interim. The proposal was adopted and became Jt. Res. 46 of 1959.

CORRECTIVE LEGISLATION RELATING TO APPORTIONMENT, 1953-59

1953 Legislation in Pursuance of the Rogan Act's Invalidation: When the legislature reconvened for the adjourned part of the 1953 session in October of 1953, it took action to reconcile the Wisconsin Statutes with the decision of the court in State ex rel. Thomson v. Zimmerman. The resulting law, Chapter 687, Laws of 1953, geared the state senate districts to assembly districts instead of to wards, and made corrections in the description of 2 assembly districts. The law also instructed the common council of the city of Milwaukee to re-establish ward lines in accordance with the ordinance of November 1950 which had included approximately 1% of the population of the state in each ward, and which had been used in the Rosenberry Act's apportionment of Milwaukee county.

Chapter 665, Laws of 1955, was the result of a revisor's bill prepared in cooperation with the secretary of state. This law made corrections in the assembly districts of Brown, Dane, Eau Claire, Marathon, Milwaukee, Racine and Waukesha counties, occasioned generally by municipal incorporations in those counties. For Brown and Eau Claire counties (Ch. 550, Laws of 1953), and for Milwaukee county (Chs. 550 and 687, Laws of 1953) the 1955 law specifically

eliminated the changes from the Rosenberry Act apportionment made by 1953 legislation. The 1955 law also eliminated changes made in the senate districts of Milwaukee county by Chapter 687, Laws of 1953.

Chapter 483, Laws of 1957, restored assembly districts in La Crosse county to the Rosenberry Act apportionment by providing that the ward lines of the city of La Crosse should be those existing on August 17, 1951.

Chapter 100, Laws of 1959, was again a revisor's bill prepared in cooperation with the secretary of state for the purpose of making corrections in senate and assembly districts due to municipal incorporations and a court decision invalidating the incorporation as a city of the town of Preble in Brown county. The law affected assembly districts in Brown, Dane, Dodge, Manitowoc, Milwaukee and Waukesha counties, and senate districts in Milwaukee and Dane counties.

THE 1960 APPORTIONMENT OF THE WISCONSIN LEGISLATURE

Under authority of 1959 Jt. Res. 46, the Legislative Council has formed a committee on reapportionment consisting of 4 senators and 6 assemblymen, with equal representation for both political parties. The committee has 5 additional, "public," members.

Tentative reapportionment proposals worked out by this committee, have been announced in the state press (e.g. Mil. Sen. 11/16/60). It is expected that the committee's plans for reapportionment of congressional, senate and assembly districts will be submitted by the Legislative Council to the 1961 Wisconsin Legislature.

All attempts during the 1950's to amend the Wisconsin Constitution to allow for area representation were unsuccessful. Therefore, such redistricting plans as the Legislative Council may submit to the 1961 Legislature will be based on the "population only" principle of the present constitutional text. Barring any change in the constitutional text, apportionment of Wisconsin legislative districts by the 1961 Legislature would exhaust the legislative authority to reapportion during the coming decade.

The "area and population" versus "population only" controversy remains unresolved.