

# BACKGROUND BRIEF

## A BRIEF HISTORY OF LEGISLATIVE APPORTIONMENT IN MICHIGAN

Jenny McInerney, Legislative Analyst  
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### FAST FACTS

- Redistricting determined by state and federal courts and their appointees in 1964, 1972, 1982, and 1992, when the Commission on Legislative Apportionment deadlocked (and after that commission was deemed invalid in 1982).
- Legislature determined redistricting in 2001 and 2011.
- Ballot Proposal 2 of 2018 is a constitutional amendment that would reinstate an apportionment commission responsible for determining State Senate, State House, and Congressional boundaries.

### INTRODUCTION

In 1787, the U.S. Constitution left the conduct of elections up to the states, merely instructing that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations...”<sup>1</sup> This rule endures, and it has resulted in divergent elections processes from state to state. In Michigan and many other states—32 total for state legislative districts and 34 total for congressional districts—the state legislature is charged with drawing election maps.<sup>2</sup> A map is adopted in Michigan if it is approved by a simple majority of both state houses (at least 56 in the House of Representatives and 20 in the Senate) and approved by the governor.

Currently, as long as a redistricting plan is drawn according to the following requirements, it is in compliance with federal law:

- Following the latest decennial census (conducted every 10 years, with the next to be conducted in 2020).
- Ensuring equal population in each district.
- In compliance with the Voting Rights Act of 1965, which prohibits racial discrimination in voting laws.

Unusually, the composition and function of the Commission on Legislative Apportionment described in Section 6 of Article IV of the Michigan Constitution does not represent current apportionment/redistricting practice. As described below, the process prescribed in the 1963 Constitution was deemed invalid by the Michigan Supreme Court in 1982, with the court finding that its weighted land/population formulae violated the “one person, one vote” equal protection guarantee. State and federal courts oversaw the redistricting process until it was resumed by the legislature for the latest two cycles, in 2001 and 2011.

### STATE HOUSE AND SENATE DISTRICTS

#### *Apportionment in Michigan 1835-1962*

Generally, the Michigan Constitutions of 1835, 1850, and 1908 stated that the legislature would apportion senators and representatives every ten years based on

<sup>1</sup> Article I, Section 4 of the U.S. Constitution.

<sup>2</sup> <https://www.brennancenter.org/analysis/who-draws-maps-states-redrawing-congressional-and-state-district-lines>

state and U.S. census results.<sup>3</sup> However, Senate district boundaries were based more on geography than on population. This was thought to reflect the federal model of representation, in which the Senate is based on governmental jurisdictions and the House is based on population. The resulting disparities among Senate districts troubled some. For instance, in the 1940s, the four westernmost Upper Peninsula counties composed a single state Senate district with a population of 72,350, while Wayne County's 18th Senate district had a population of 528,234.<sup>4</sup>

A 1952 amendment to the 1908 Constitution increased the number of state senators from 32 to 34, alleviating this concern somewhat, but also stated explicitly the boundaries of each district, thereby locking in place any disparities regardless of population and limiting the legislature's redistricting task to the state House.

### ***U.S. Supreme Court cases and the 1963 Constitution***

While the Constitutional Convention for Michigan's Constitution of 1963 was ongoing, the U.S. Supreme Court held in *Baker v Carr*<sup>5</sup> that federal courts could intervene in and decide redistricting cases. In light of *Baker*, the U.S. Supreme Court vacated a judgment rendered by the Michigan Supreme Court in *Scholle v Hare*<sup>6</sup> and remanded it back to that lower court. In *Scholle*, the plaintiff had petitioned the Michigan Supreme Court for a writ of mandamus to restrain the Secretary of State from conducting the upcoming state Senate election. Because the Senate districts were so unequal in population, the plaintiff argued, the 1952 amendment to the Michigan Constitution denied him equal protection of the laws and due process of law contrary to the Fourteenth Amendment to the U.S. Constitution. On remand,<sup>7</sup> the Michigan Supreme Court agreed, finding that "when any apportionment plan provides some elective districts having more than double the population of others, that plan cannot be sustained."

The Constitution of 1963 introduced a bipartisan Commission on Legislative Apportionment to draw the state's House and Senate districts, but retained the use of population and geography in apportioning legislative seats (using weighted land area/population formulae). The four Republicans and four Democrats on the commission (and, if a third party received more than 25% of the vote in the previous gubernatorial election, four members of that party) would adopt redistricting plans by a majority vote. If a majority of commission members could not agree, the Michigan Supreme Court was directed to choose a redistricting plan before the next election.

However, on June 15, 1964, the U.S. Supreme Court issued its landmark decision in *Reynolds v Sims* that all state legislative bodies had to apportion seats based on population (not a combination of population and geography, as was the case for Michigan Senate seats). Following the *Reynolds* decision, one justice of the Michigan Supreme Court in 1964, and another following the next census in 1972, expressed the view "that the commission and this Court's authority is limited to districting according to the apportionment rules prescribed in art 4 §§ 2-6, and that since those rules are no longer wholly valid neither the commission nor this Court can properly act at all."<sup>8</sup>

Regardless of those concerns, the Michigan Supreme Court approved apportionment plans after the apportionment commission deadlocked in both 1964 and 1972.

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<sup>3</sup> Of note, the Constitution of 1835 stated that the legislature would apportion "according to the number of white inhabitants," and the Constitution of 1850 stated that it would do so "exclusive of persons of Indian descent, who are not civilized or are members of any tribe."

<sup>4</sup> <http://annarborchronicle.com/wp-content/uploads/2011/02/Apol-history-of-Michigan-reapportionment.pdf>

<sup>5</sup> In *Baker v Carr*, 369 US 186 (1962)

<sup>6</sup> *Scholle v Hare*, 369 US 429 (1962)

<sup>7</sup> *Scholle v Hare*, 367 Mich 176, 116 NW2d 350 (Mich 1962)

<sup>8</sup> *In re Apportionment of State Legislature-1982*, 413 Mich 96; 321 NW 2d 565 (1982)

### **1982: Invalidation of apportionment commission**

In 1982, following another deadlock for the apportionment commission, the Michigan Supreme Court again considered the apportionment of state House and Senate seats. However, this time the court considered whether the procedure prescribed in the state Constitution was invalidated by the *Reynolds* decision.

Ultimately, the court declared the apportionment sections of the 1963 Constitution to be invalid, disbanded the apportionment commission, and authorized the legislature to once again take control of apportionment. The court held that provisions

... establishing weighted land area/population formulae taking into account land area as well as population (thereby apportioning to less populous areas a larger number of senators and representatives than would be apportioned thereto based on population alone), are invalid under the Equal Protection Clause of the United States Constitution as elucidated in *Reynolds v Sims*, and subsequent decisions of the United States Supreme Court.<sup>9</sup>

Finding that the legislative procedure for producing a plan would be too time-consuming in the 1980 cycle, especially given that two years had already passed since the 1980 census, the court directed the former Director of Elections Bernard Apol to produce a plan conforming to specific criteria set out by the court, including the following:

- The districts shall have a population not exceeding 108.2% and not less than 91.8% of the ideal district, which, based on the 1980 census, would contain 243,739 persons in the Senate and 84,201 persons in the House.
- The boundaries of the districts shall first be drawn to contain only whole counties to the extent this can be done within the 16.4% range of divergence and to minimize within that range the number of county lines which are broken.

After approving certain modifications to the Apol plan, the court approved the submission in May 1982.

### **1992: Redistricting by special masters**

When the legislature failed to act following the 1990 census, the Michigan Supreme Court appointed three special masters to consider plans submitted by several sources, including the major political parties. Finding that none of the plans conformed to the 1982 criteria, or that they did so only facially, the masters drew their own plan. They noted that, as in 1982, the political parties stipulated that 16.4 percentage points was the maximum allowable population divergence, and continued,

The one thing that has become clear as this panel reviewed the submittals and set about its own task, was that there should be no absolute hierarchy of criteria. While counties may be the building blocks of our apportionment system (1982, 413 Mich. [at] 125 [321 N.W.2d 565]), county lines were ‘broken’ when necessary to achieve acceptable population divergence; flexibility in population divergence was employed to maintain minority electoral participation already realized; VRA [Voting Rights Act of 1965] interests were recognized and followed, but not to the exclusion of concerns of integrity of existing boundary lines, communities of interest, compactness and contiguity.<sup>10</sup>

The special masters’ plan was adopted following public hearing. In response to concerns that the masters drew districts into which an excessive number of black persons were concentrated, the court determined that the masters had succeeded in “spreading the black population of Wayne County to a greater extent than was the case under the 1982

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<sup>9</sup> *Id.*

<sup>10</sup> *In re Apportionment, State Legislature-1992*, 439 Mich 715 (1992)

apportionment.” The court pointed to the fact that the masters reduced the number of districts with over 90 percent black persons from five to three, and “reduced the number of arguably packed (over 80 percent black) districts from nine to seven.”<sup>11</sup>

### ***1996: The legislature resumes redistricting responsibility***

In 1996, the Michigan Legislature enacted Public Act 463 (House Bill 5275), establishing statutory standards for redistricting that closely aligned with the Apol standards developed in 1982. According to the House Fiscal Agency analysis for that bill, codification of the standards was intended to “provide institutional memory that otherwise will be lacking, particularly since the advent of term limits means that no one in the state House now will be serving there when the next redistricting plan will be developed.”<sup>12</sup> These latest statutory guidelines allowed population deviation between districts of up to 10%, or 5% higher or lower than the state average.

### ***2001 and 2011: Legislative redistricting***

In Public Act 116 of 2001 (House Bill 4965)<sup>13</sup> and Public Act 129 of 2011 (Senate Bill 498),<sup>14</sup> the legislature determined the redistricting of legislative seats. Because the House, Senate, and Governor’s office were controlled by the same political party, this process was comparatively uneventful.

## **CONGRESSIONAL DISTRICTS**

### ***1972-1992: U.S. District Court-ordered maps***

Following the 1970, 1980, and 1990 censuses, during which time the number of Michigan congressional seats fell from 19 to 16,<sup>15</sup> the legislature failed to establish congressional district maps. (The legislature did pass House Bill 4020 in 1982, which would have established a plan for that cycle, but the bill was vetoed by Governor William G. Milliken as being unfair.) In each case, plaintiffs brought suit in U.S. District Court, arguing that the existing plans were unconstitutional given population shifts and reductions resulting in unequal districts.

In 1972, the court ordered adoption of the plan submitted by one of the intervening plaintiffs, as it met the criteria set out in other court cases on congressional apportionment: “(1) population variances among the districts were minimal, thereby preserving the ‘one man, one vote’ standard; (2) the districts were contiguous; (3) the districts were reasonably compact; and (4) political subdivisions in the district were maintained intact insofar as possible.”<sup>16</sup>

In 1982, the court ordered adoption of what it called Democratic Plan A, with modifications submitted by the Republican Party. In 1992, the court instructed both sets of plaintiffs—one group representing the Republican Party, and one representing the Democratic Party—to submit districting plans, which they did, but the court instead adopted its own plan. Neither side objected to the plan within the eight days allowed by the court, and the court adopted the plan on April 6, 1992.<sup>17</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> House Legislative Analysis Section analysis: <http://www.legislature.mi.gov/documents/1995-1996/billanalysis/House/pdf/1995-HLA-5275-B.pdf>

<sup>13</sup> <http://legislature.mi.gov/doc.aspx?2001-HB-4965>

<sup>14</sup> <http://legislature.mi.gov/doc.aspx?2011-SB-0498>

<sup>15</sup> Michigan had 19 seats from 1965 to 1983; 18 seats from 1983 to 1993; 16 seats from 1993 to 2003; 15 seats from 2003 to 2013; and currently has 14 seats. The state is expected to have 13 seats following the 2020 census. <https://crcmich.org/2020-census-likely-to-rob-michigan-of-another-congressional-seat-rural-reps-get-ready-for-more-driving/>

<sup>16</sup> *Dunnell v Austin*, 344 F Supp 210 (E D Mich. 1972)

<sup>17</sup> See <http://www.legislature.mi.gov/documents/2001-2002/michiganmanual/2001-mm-p0656-p0670.pdf>

### **1999: Congressional Redistricting Act**

Prior to the 2000 decennial census, the Michigan legislature enacted Public Act 221 of 1999 (Senate Bill 801)<sup>18</sup> to apply the Apol standards established for state House and Senate redistricting in Public Act 463 of 1996 to congressional redistricting as well.

### **2001 and 2011: Redistricting returns to the legislature**

As with the state House and Senate district plans, the legislature resumed control of the congressional redistricting process following the 2000 census cycle. In 2001, the legislature amended for the first time the congressional apportionment act enacted in 1964 (which was intended to be amended following each decennial census).<sup>19</sup> Public Act 115 of 2001 reflected the reduction in congressional seats from 19 to 15 in the intervening 47 years, and stated the intention that it comply with the Voting Rights Act of 1965 and the Equal Protection Clause and subsequent cases concerning racial gerrymandering. It went on to say:

In light of these dual obligations, the plan avoids any practice or district lines that result in the denial of any racial or ethnic group's equal opportunity to elect a representative of its choice and, at the same time, does not subordinate traditional redistricting principles for the purpose of accomplishing a racial gerrymander or creating a majority-minority district. As a consequence, the plan does not result in a retrogression or dilution of minority voting strength... [h]owever, the plan does not sacrifice traditional neutral principles, such as, most importantly, preservation of county and municipal boundaries, for the purpose of engaging in a gerrymander that unnecessarily favors 1 racial group over others.

Despite a series of challenges to the 2001 redistricting, the Michigan Supreme Court found that the legislature was not bound by the redistricting guidelines it had enacted two years earlier, as Public Act 221 of 1999.<sup>20</sup> Instead, the court found, one public act functionally overturned the other.

The 2010 census further reduced the number of Michigan's congressional seats from 15 to 14. With the House, Senate, and Governor's office controlled by the same political party, the legislature's redistricting proceeded without gridlock.<sup>21</sup>

## **BALLOT PROPOSAL 2 OF 2018**

Proposal 2, which Michigan voters will consider at the November 2018 general election, would effectively reinstate a version of the Commission on Legislative Apportionment described in Article IV, Section 6 of the Michigan Constitution of 1963. The commission has not been operational since it was deemed invalid by the Michigan Supreme Court in 1982. Proposal 2 would revise the makeup of the state's apportionment commission from eight members representing the two main political parties to 13 members, with eight members representing those parties and five who self-identify as unaffiliated. It would also introduce criteria for constructing redistricting plans and revise the process by which the commission would decide on the ultimate plans.

The House Fiscal Agency's analysis of Proposal 2 can be found here:

[http://www.house.mi.gov/hfa/PDF/TestPDF/Ballot\\_Proposal\\_2018-2\\_VNP\\_Redistricting.pdf](http://www.house.mi.gov/hfa/PDF/TestPDF/Ballot_Proposal_2018-2_VNP_Redistricting.pdf)

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<sup>18</sup> House Legislative Analysis Section analysis of PA 221 of 1999 (SB 810):

<http://www.legislature.mi.gov/documents/1999-2000/billanalysis/House/pdf/1999-HLA-0810-A.pdf>

<sup>19</sup> Public Act 115 of 2001 (Senate Bill 546): <http://legislature.mi.gov/doc.aspx?2001-SB-0546>

<sup>20</sup> *Michigan's Apportionment Puzzle*, Legislative Research Division, Michigan Legislative Service Bureau, Research Report Vol 19, No 2 (Revised January 2003); *LeRoux v Secretary of State*, 465 Mich 594, 640 NW2d 849 (2002)

<sup>21</sup> Public Act 128 of 2011 (House Bill 4780): <http://legislature.mi.gov/doc.aspx?2011-HB-4780>