WISCONSIN - LEGISLATIVE REFERENCE BUREAU

# Decision of the Wisconsin Supreme court in State ex rel. Reynolds v. Zimmerman, relating to legislative apportionment

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Brief 64-1

Wisconsin Briefs from the LEGISLATIVE REFERENCE BUREAU

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## DECISION OF THE WISCONSIN SUPREME COURT IN State ex rel. Reynolds v. Zimmerman, RELATING TO LEGISLATIVE APPORTIONMENT

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Editor's Note: This "Wisconsin Brief" contains the complete text of the opinion handed down by the Wisconsin Supreme Court under the date of February 28, 1964. It was copied from an advance typewritten copy which carried the caveat "This opinion is subject to further editing and modification. The official version will appear in the bound volume of the Wisconsin Reports."

The text of the typewritten opinion consists of 4 parts: (1) a case history statement by the Wisconsin Supreme Court; (2) a summary of the background of legislative apportionment action in Wisconsin since the 1960 Federal Census; (3) the "opinion" proper, written by Mr. Justice Wilkie; and (4) the 5-part judgment of the court.

In the following, we have copied the text as submitted to us, but have inserted headings as outlined above, and have combined all footnotes at the end of the paper.

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Supreme Court of the State of Wisconsin, No. St. 19, August Term, 1963; State ex rel. John W. Reynolds, Governor, Relator, v. Robert C. Zimmerman, Secretary of State, Respondent.

(1) Case History Statement by the Wisconsin Supreme Court.

This is an original action seeking to enjoin the respondent, Robert C. Zimmerman, the Secretary of State, from holding the 1964 elections of the state legislature pursuant to ch. 4, Stats. (otherwise described as the Rosenberry legislative apportionment), and to mandamus the respondent to hold the elections pursuant to such reapportionment plan as this court may direct or to hold the elections at large.

The court granted leave to permit Frank E. Panzer, president pro tem of the Wisconsin senate, and Robert D. Haase, speaker of the Assembly of Wisconsin, to intervene as respondents and permitted them to assert that enrolled joint resolution 49, adopted by the legislature subsequent to the commencement of the original action, is a valid legislative apportionment plan. The relator amended his original petition, seeking to enjoin the respondent from holding the 1964 elections pursuant to this joint resolution. Injunction granted; other affirmative relief granted.

(2) Wisconsin Legislative Apportionment Action Since 1960 Census.

It is necessary to describe the background in which this litigation arises.

On January 12, 1962, the 1961 Wisconsin legislature recessed until January 9, 1963, without having reapportioned the Wisconsin legislative districts pursuant to the 1960 census. In January of 1962 the relator, John W. Reynolds, now Governor, then Attorney General of the state of Wisconsin, petitioned this court, asking for an injunction restraining the 1962 elections from being held pursuant to ch. 4, Stats., and a writ of mandamus, directing the respondent to conduct the elections pursuant to such plan as the court might direct, or to conduct the elections at large.

In March of 1962 this court dismissed this petition with the proviso that "the state of Wisconsin upon relation of the Attorney General may submit a new application after June 1, 1963."

On June 5, 1962, Governor Gaylord Nelson called the legislature into special session solely for the purpose of effecting a reapportionment of legislative seats pursuant to the 1960 census. Three bills on the subject of reapportionment were passed, vetoed by Governor Nelson, and failed to pass over his veto. Concurrently with the special legislative session, the relator, then Attorney General of the State of Wisconsin, commenced an action in the federal district court, western district of Wisconsin, seeking to enjoin the 1962 state legislative elections on the grounds that in the light of Baker v. Carr,[1] decided in March of 1962, the present Wisconsin apportionment was a denial of equal protection of the law under the Fourteenth amendment of the United States constitution. A three-man district court was convened and a special master, Emmert Wingert, was appointed to serve as master. The special master made extensive findings of fact and concluded that the Wisconsin reapportionment was not a denial of federal constitutional rights. The federal court, on August 14, 1962, dismissed the state's action, not on the constitutional merits, but rather on the grounds that given the imminence of the 1962 elections, any affirmative relief would be so disruptive of the state electoral process as to not be justified on any equitable grounds.[2] The order of the district court granted the relator leave to resume the action subsequent to the 1962 elections, if the Wisconsin legislature had not reapportioned in the interim.

On January 9, 1963, the 1963-1964 legislature convened. In June of 1963, senate bill 575, S, seeking to reapportion Wisconsin legislative districts, passed both houses of the legislature. This bill was vetoed by the relator and his veto was not overridden.

In June of 1963, the relator, after alleging that the Attorney General of the state of Wisconsin was not prepared to commence the suit, again petitioned this court to enjoin the 1964 Wisconsin legislative elections and to mandamus the respondent to conduct the elections (1) either pursuant to such plan as this court might direct, or (2) at large, on the grounds that the present Wisconsin reapportionment was a violation of secs. 3, 4, and 5, art. IV, Wis. Const., and the Fourteenth amendment, U. S. Const. Permission to commence such an original action was granted on June 14, 1963. A

revised petition by the relator was filed on August 2, 1963.

In August of 1963, both houses of the legislature passed joint resolution 49, purporting to reapportion the Wisconsin legislative districts. In substance, joint resolution 49 was nearly identical to 575,S, which was vetoed by the Governor. In response to the petition, the respondent has replied that he will conduct the 1964 elections pursuant to joint resolution 49 unless directed to do otherwise by this court, and more specifically, if joint resolution 49 is held not to be a proper reapportionment measure, unless otherwise directed by this court, he will conduct the 1964 legislative elections pursuant to ch. 4, Stats., the so-called Rosenberry apportionment plan.

In October of 1963, this court permitted the intervening respondents to intervene in the action for the purpose of seeking a declaration from this court that joint resolution 49 is a proper exercise of legislative apportioning power and that the reapportionment scheme set forth in the joint resolution is consistent with both the Wisconsin and United States constitutions. The relator amended his petition seeking to enjoin the respondent Secretary of State from holding the 1964 elections pursuant to this joint resolution.

(3) Text of the Opinion, Delivered by Mr. Justice Wilkie.

WILKIE, J. Five issues are raised in this original action. They are:

1. Does the relator, as Governor, have standing to allege that a particular reapportionment plan violates both the state and federal constitutional rights of the citizens of the state of Wisconsin?

2. May the legislature reapportion the legislative districts of the state of Wisconsin without the concurrence of the executive?

3. Assuming that the reapportionment plan set forth in ch. 4, Stats., 1961, is a violation of art. IV, Wis. Const., may this court grant some form of affirmative relief?

4. Is the reapportionment scheme set forth in ch. 4, Stats., a violation of the standard of per capita equality of representation set forth in sec. 3, art. IV, Wis. Const.?

5. Assuming that the "Rosenberry plan" is inconsistent with the standard of per capita equality of representation, what is the most appropriate form of relief that this court can offer?

Issue 1. Does the relator, as Governor, have standing to allege that a particular reapportionment plan violates both the state and federal constitutional rights of the citizens of the state of Wisconsin?

This court has consistently held that the state, acting either through the Governor or the Attorney General, may challenge the constitutionality of a state reapportionment plan as a violation of state constitutional rights of the citizens.

> "We, therefore, hold that the governor is authorized under sec. 14.12 to direct the attorney general to commence a parens patriae type of action to enforce the constitutional rights of its citizens, . . .
>
> "It is firmly established by the decisions of this court that the state is the proper party plaintiff to test the validity of an apportionment law in order to protect the constitutional right of its citizens to an equitable apportionment."[3]

While it is generally true that a state, as parens patriae, may not assert violations of federal constitutional rights on behalf of its citizens,[4] it is reasonably clear that a claim that a malapportionment denies equal protection of the laws must be treated as an exception to this rule. In Colegrove v. Green,[5] the court, addressing itself to the problem of the standing of private plaintiffs, said:

> "The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity."

Therefore, the court recognized that a claim of denial of equal protection as the result of malapportionment was not necessarily a claim of an individual injury. In Colegrove, of course, the United States supreme court went on to hold that the substantive claims raised by the plaintiffs were not justiciable because they were "political questions." In Baker v. Carr, supra, the United States supreme court ruled that an allegation that a malapportionment denied equal protection of laws was a justiciable issue.

We conclude that the state, as the representative of the polity, must be permitted to raise the substantive issues surrounding the constitutionality of an apportionment under the provisions of either the state or federal constitutions.

Issue 2. May the legislature reapportion the legislative districts of the state of Wisconsin without the concurrence of the executive?

The respondent and the intervening respondents maintain that the legislature may effect a valid reapportionment of the state's legislative districts by joint resolution, i.e., without the concurrence of the executive. Their argument derives from a largely textual analysis of the constitution. Sec. 3, art. IV, relating to apportionment of state legislative districts, states:

> "At their first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants, excluding Indians not taxed, soldiers, and officers of the United States army and navy." (Emphasis added.)

Sec. 10, art. XIV, Wis. Const., relating to apportionment of federal congressional districts, provides: