



BETWEEN THE LINES

Much is at stake in redrawing the boundaries of Wisconsin's political districts.

By Larry Sandler

In one sense, redistricting is just one huge math problem—a whole lot of number-crunching to divide everybody in the state into substantially equal groups, with the result being lines on maps to mark the geographic areas where those equal populations live.

Put that way, it seems so mundane a task that it could be assigned to an agency of bureaucrats plugging data into computers. Indeed, that's exactly what neighboring Iowa actually does.

But Wisconsin doesn't, and neither does any other state, because that huge math problem is also a huge political issue. Redistricting has the potential to decide control of both houses of the state legislature for the next decade.

That's five biennial budgets, totaling close to half a trillion dollars of spending, taxes, fees and borrowing; countless major policy decisions on education, health, public safety, transportation, natural resources, and human services; dozens of laws shaping criminal justice, civil litigation, and elections; and confirmation of gubernatorial appointees during three terms. All of these things and more ride on where those lines are drawn.

The redistricting done every 10 years, after the U.S. census is completed, also sets boundaries for many other elected officials, from the U.S. House of Representatives to local city councils and school boards. On every level, district lines can, and often do, affect decision making.

The impact of the COVID-19 pandemic has slowed the release of 2020 census figures, and thus slowed the redistricting process. But the stakes are high, and maneuvering by people across the political spectrum has been underway for months. That can be seen in the legal and political firepower amassed on both sides of a case involving what might look initially like an arcane rules matter. Awaiting a decision by the Wisconsin Supreme Court as of deadline for this article, the outcome of the case involving Supreme Court Rules Petition 20-03 will affect the handling of legislative-redistricting decisions that might not be finalized until 2022. Who will make the call on the new political boundaries—politicians themselves, state judges, federal judges, or others—remained unsettled well into 2021.

Drawing district lines is at the heart of democratic representative government, a primary mechanism for enforcing the constitutional mandate that every citizen's vote counts equally.

But with so much depending on the outcome, redistricting is also the focus of rampant political gamesmanship, hard-fought litigation, and persistent calls for reform. It is a system rooted in more than two centuries of law and history, but very much steered by the politics of the moment.

During the 2020–2022 cycle, Marquette Law School's Lubar Center for Public Policy Research and Civic Education is placing particular emphasis on reporting and programs concerning redistricting. This set of articles for the *Marquette Lawyer* by Larry Sandler, including the "sidebars" on pp. 44–51, is part of that initiative. Sandler is a freelance journalist with more than 35 years of experience covering government and business in southeastern Wisconsin for the *Milwaukee Journal Sentinel* and other publications.



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Mapping Out the Law

Redistricting is derived from the United States Constitution, although it is never directly mentioned there. Article I of the nation's founding document says that the number of U.S. House members from each state will be determined by population, based on a nationwide census every 10 years, but it leaves the details up to Congress and the states. It doesn't say anything about redistricting state legislatures.

Yet the concept of electing state legislators from districts had already taken hold by the time the Constitution was ratified. Wisconsin's territorial legislature was elected by districts, starting in 1836, says a 2016 report on redistricting by the state's Legislative Reference Bureau (LRB). After statehood, the 1848 constitution specified that those districts should be determined "according to the number of inhabitants."

Despite that language, lawmakers decided that ensuring that each district had an equal "number of inhabitants" was secondary to respecting political geography, and, for more than 100 years, Wisconsin legislative districts were based largely on county lines, the LRB report says. The state supreme court upheld this principle in 1892, ruling that populous counties could be split into multiple districts and sparsely populated counties could be joined to make a single district, but that districts could not be constructed from pieces of different counties.

At the same time, the Fourteenth Amendment to the U.S. Constitution guarantees everyone "the equal protection of the laws," and the 1960s brought new legal force to those words.

In its landmark 1962 *Baker v. Carr* decision, the U.S. Supreme Court established the "one person, one vote" standard and ruled that federal courts could hear constitutional challenges to state legislative districting (and redistricting). Congressional legislation has provided that, unlike most cases, such challenges are heard by three-judge panels, consisting of both district and appellate judges, and any appeals go directly to the nation's high court.

Baker v. Carr was followed in 1964 by *Reynolds v. Sims*, which required both houses of a state legislature to be redistricted according to population, and *Wesberry v. Sanders*, which held that districts must be equal in population. In 1973, the high court clarified that state legislative districts—unlike congressional districts—need only be "as nearly uniform as practicable," rather than exactly equal.

Meanwhile, Congress approved the Voting Rights Act of 1965, outlawing discrimination against racial and linguistic minorities in election procedures, including the way that districts are drawn. The 1986 *Thornburg v. Gingles* decision established that the act prohibits even unintentional discrimination in redistricting.

Legal challenges alleging only a Voting Rights Act violation, but not a constitutional violation, proceed through federal court in the ordinary way, rather than with an original three-judge panel.

A New Era of Redistricting

With the legal landscape transformed, "[t]he 1960s ushered in a completely new world in redistricting nationally and in Wisconsin," the Wisconsin LRB report says.

In addition to new laws, new court decisions, and new ideas about equality and justice, advances in technology have allowed the Census Bureau to release detailed demographic information more quickly, the report explains. Those developments also heightened awareness of the political impact of redistricting.

That's not to say that politics weren't already deeply embedded in the process from the beginning.

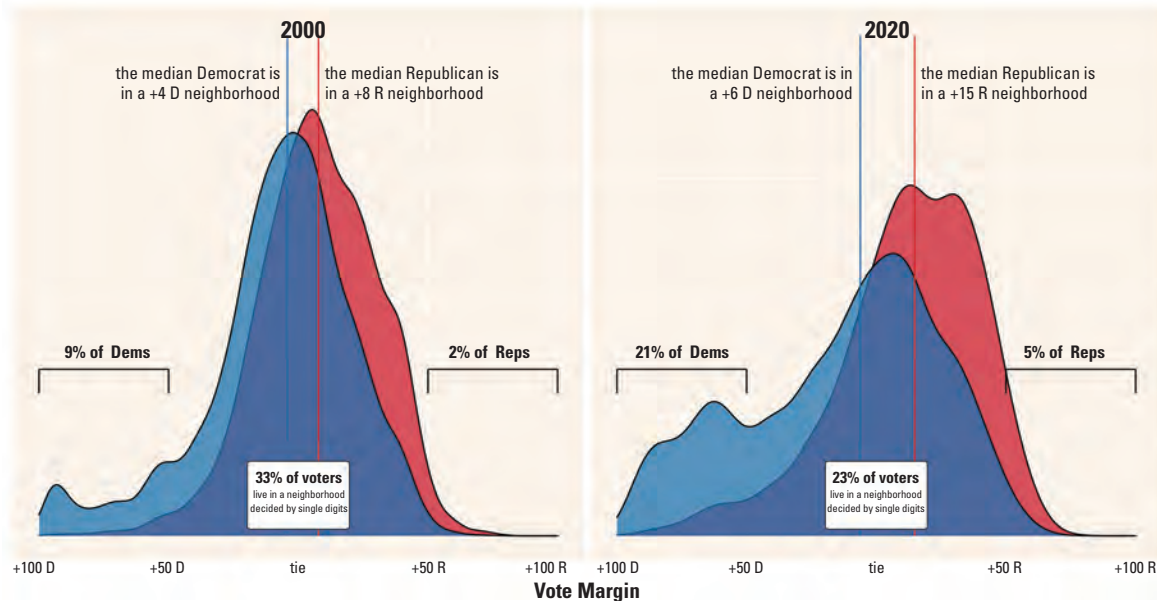
In the most famous example, from 1812, the Massachusetts legislature drew a bizarrely shaped state senate district, which benefited Governor Elbridge Gerry's Democratic-Republican Party. After Gerry, a signer of the Declaration of Independence and delegate to the 1787 Constitutional Convention, signed the map into law, a political cartoon compared the narrow, curving district to a monstrous salamander, and dubbed it a "Gerry-mander." Ever since, the practice of drawing districts for political advantage has been known as gerrymandering.

But in Wisconsin in recent times, political divisions thwarted gerrymandering attempts for four decades. In most of those decades, the same divisions also failed to produce compromises, and redistricting wound up in court, where judges drew the maps.

The history of drawing state legislative maps has been more tumultuous than for congressional maps. (See the sidebar article on page 49 about the state's congressional redistricting.) Those political and legal machinations are summarized in the LRB report and in the 2007 report of a task force appointed by the Wisconsin Supreme Court to study redistricting rules for the justices.

In a narrowly divided state, shifting political geography

The partisan lean of neighborhoods where Wisconsin's Democratic and Republican voters live, 2000 and 2020



Wisconsin is becoming more politically polarized, a trend that has significant implications for redistricting. In the 2000 presidential election, a third of voters lived in neighborhoods where the percentage of support for the parties differed by single-digit margins. By the 2020 election, fewer than a quarter of voters lived in neighborhoods that were so closely divided. In addition, in 2020, 21 percent of Democratic voters and 5 percent of Republican voters lived in neighborhoods that overwhelmingly favored their party, more than twice the percentages of those living in lopsided neighborhoods in 2000 (then 9 percent of Democrats and 2 percent of Republicans).

1960s: After the 1960 census, Republicans controlled both Wisconsin's Assembly and Senate, but could not agree on a redistricting plan until after the U.S. Supreme Court handed down its ruling in *Baker v. Carr* in March 1962. The Democratic governor, Gaylord Nelson, vetoed the plan, and the legislature failed in override attempts or to bypass him by including its plan in a joint resolution instead of a law.

A federal court allowed the state to use its old maps for the 1962 elections, in which the GOP held on to its legislative majorities and Democrat John Reynolds succeeded Nelson as governor. After Reynolds vetoed a Republican-sponsored plan, the legislature sustained his veto but adopted a joint resolution to enact its map without his signature.

Reynolds then appealed to the state high court, which ruled the joint resolution approach unconstitutional in *Reynolds v. Zimmerman*. In that February 1964 decision, the Wisconsin Supreme Court also issued an ultimatum: If a redistricting plan wasn't law by May 1, the justices would draw the maps themselves. The court did just that, after Reynolds vetoed yet another GOP-backed plan and the legislature failed to override his veto.

1970s: Following the 1970 census, the Democratic-controlled Assembly and Republican-led state Senate were unable to agree on a redistricting plan, drawing another state supreme court

ultimatum. Governor Patrick Lucey, a Democrat, called the legislature into special session, opening with a joint session in which he personally beseeched lawmakers to adopt equitable maps.

They heeded Lucey's call, and he signed the resulting plan. For the first time, every district was within 1 percent of the statewide average population. Also as part of this act, the legislature created the system of wards, or voting units, that would become building blocks for future state, federal, and local redistricting plans. (See the sidebar article on page 46 about local redistricting in Wisconsin.)

1980s: With Democrats in control of both chambers after the 1980 census, the legislature agreed on a redistricting plan, only to face a veto from the Republican governor, Lee Dreyfus. The state's largest labor organization, the Wisconsin AFL-CIO, filed suit, leading a panel of three federal judges to draw the maps.

But the court's maps were only used once. Democrats scored a trifecta in the 1982 elections, keeping their hold on both houses while Governor Anthony Earl replaced Dreyfus. The legislature then adopted its own maps, which Earl signed into law.

1990s: As they had a decade before, Democrats controlled both chambers of the state legislature after the 1990 census. And in a repeat of the early-1980s pattern, they approved a redistricting plan that was vetoed by the GOP governor, Tommy

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After five decades of shifting political tides, the “red wave” election of 2010 was perfectly timed for Republicans.

Thompson. This time, the Republicans filed suit, led by Assembly GOP leader David Prosser, resulting in another map drawn by a three-judge federal panel.

2000s: Following the 2000 Census, Democrats held the Senate, while Republicans controlled the Assembly. They couldn't agree on a redistricting plan to send to Governor Scott McCallum, a Republican. That triggered 2002 litigation in both federal court and state court. As a three-judge federal panel was considering the case, the Republican speaker of the Assembly, Scott Jensen, asked the state supreme court to intervene. Unlike their predecessors of the 1960s and 1970s, the justices declined, deferring to the federal court, which drew the maps.

Power Play

After five decades of shifting political tides, the “red wave” election of 2010 was perfectly timed for Republicans. In the first midterm balloting under President Barack Obama, a Democrat, the GOP swept to big gains both nationally and statewide, taking over Wisconsin's lower house, Senate, and governor's office—the first time in 72 years that all three changed hands simultaneously.

That handed Republicans complete control of redistricting for the first time since the 1950s. But Democrats soon mounted recalls against six GOP senators in an effort to capitalize on opposition to 2011 Act 10, which had stripped most public-employee unions of nearly all collective-bargaining rights. Republicans retaliated by launching recalls against three Democratic senators.

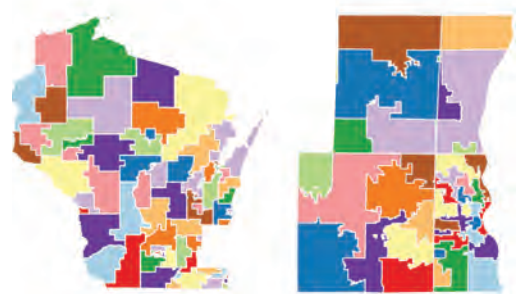
With the Senate divided 19–14, Democrats needed a net gain of three seats in the nine recall elections to retake the upper chamber. If redistricting proceeded on the usual timetable, Democrats would have a shot at influencing—or blocking—the legislature's maps.

Republicans swiftly upended the timetable. Instead of waiting for local governments to redraw wards based on tentative county supervisory districts, the GOP used census blocks to start drawing legislative districts as soon as detailed census data became available, then retroactively legalized that process (2011 Act 39).

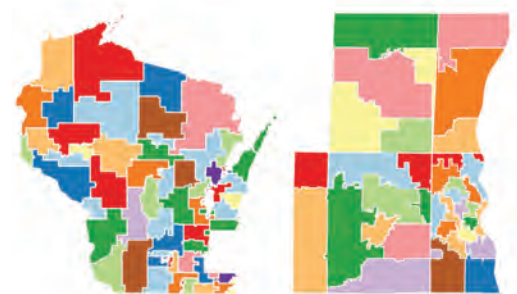
Aided by powerful new computer technology, Republicans created their maps in remarkable secrecy. They drafted the maps in the Madison law offices of Michael Best & Friedrich and required GOP lawmakers to sign nondisclosure agreements (NDAs) just to get a look at their own districts, without being allowed to see the entire draft maps.

ASSEMBLY DISTRICTS BY DECADE

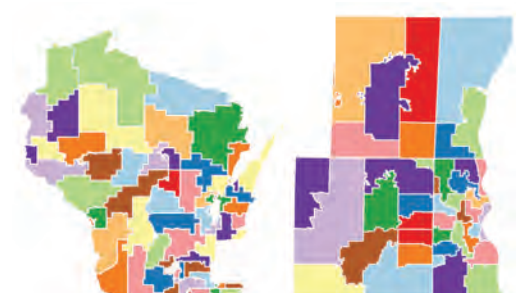
1990s



2000s



2010s



These maps show the boundaries of state Assembly districts during the past three decades (the insets on the right show the Milwaukee metro area, which is whited out to the left).

The court-drawn map of districts for the 2000s changed relatively little from the previous court-drawn map for the 1990s, but the map drawn by Republican legislative leaders for the 2010s differed significantly. In the 2010s, 35 percent of the state (by area) wound up in a different district, more than twice the 17 percent shift of a decade earlier. Similarly, the total perimeter of all Assembly districts, a measure of their boundaries' complexity, grew by 5.3 percent in the 2010s, more than three times the 1.7 percent increase the prior decade. The varying colors in the map are simply to make the district boundaries more visible.

Madison attorney Jim Troupis, who was involved in this process, maintains that the secrecy was nothing new. Like other legislation, district maps are commonly drafted behind closed doors rather than in open committee meetings, says Troupis, a former judge who also represented Republicans in the previous two rounds of redistricting.

But this time was different, because the GOP's unified control of state government meant that its maps would become law, argued Doug Poland, the Madison attorney who represented the Democratic side. By drawing maps in law offices and using NDAs, Republicans tried to cloak their work behind a veil of attorney-client privilege and legislative privilege that a three-judge federal panel partly rejected, but that Democrats could not fully remove until they later (and briefly) retook the Senate, says Poland, now litigation director for progressive legal organization Law Forward, in Madison.

The legislature approved the maps in July 2011, and Governor Scott Walker signed them into law the next month. This was the earliest that a state redistricting plan had been enacted since 1921, the LRB noted. Walker's signature came on the same day as most of the recall elections, where the Republicans maintained control of the Senate, but by a narrower (17–16) margin.

Democrats promptly filed suit to challenge the maps. In 2012, a three-judge federal court upheld most of the maps but ordered the boundary between Assembly Districts 8 and 9 to be redrawn to give Milwaukee's Hispanic community a supermajority in District 8. When the legislature didn't do so, the court approved a revised map for those districts, drawn by Kenneth Mayer, a University of Wisconsin-Madison political science professor who served as an expert witness for the Democratic side, Poland said.

In contrast to previous cycles, however, litigation did not end there.

Democrats saw the impact of the GOP maps in the 2012 election. Obama carried the state by seven percentage points on his way to reelection, and Democrat Tammy Baldwin defeated Tommy Thompson by six points to win a U.S. Senate seat. But Republicans boosted their majority in the Assembly from 58 to 60 seats (out of 99) and took back the state Senate from Democrats, who had briefly held the upper chamber after a 2012 recall election.

Republican Dale Schultz, a former Senate majority leader, calls the 2012 election "an epiphany" that led him to join forces with former

Senate Democratic leader Tim Cullen to work for changes in redistricting. "I realized we had invented a process that was thwarting the will of the voters," Schultz said at an October 2020 "On the Issues with Mike Gousha" online program from Marquette University Law School.

"The 2011 round [of redistricting] was an intentional and extreme gerrymander, probably one of the most extreme in American history," said Mayer, who also had been an expert witness for the Democrats in 2002.

However, as Republicans argued at the time, partisan gerrymandering wasn't illegal. Unlike gerrymandering based on racial discrimination, the courts had repeatedly refused to step in. The only glimmer of hope for gerrymandering opponents was that U.S. Supreme Court Justice Anthony Kennedy, a frequent swing vote, had suggested in 2004, in a case called *Vieth v. Jubelirer*, that the practice might be unconstitutional if someone could "define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights."

With Kennedy's words in mind, then-University of Chicago law professor Nicholas Stephanopoulos and policy analyst Eric McGhee devised the "efficiency gap," which measures "wasted votes"—votes in excess of the majority needed to win a seat—to demonstrate the impact of "packing" party loyalists into the fewest possible supermajority districts or "cracking" them between districts (the latter to prevent them from gaining a majority in any one district).

For example, if Democrats win one district with 70 percent of the votes, they have "wasted" 20 percent. If Republicans win two adjacent districts with 55 percent each, they have "wasted" only 10 percent of the combined vote. For all three districts together in this example, the efficiency gap favors the Republicans—and drawing the lines differently might have allowed the Democrats to win all three with approximately 53 percent each.

Based on the efficiency gap, Poland and Stephanopoulos convinced a three-judge panel in 2016 to strike down Wisconsin's Republican-drawn maps, the first time a federal court had ruled against a partisan gerrymander. In 2018, in *Gill v. Whitford*, the Supreme Court set aside the decision for failure of the plaintiffs to have shown adequate legal standing to proceed in federal court, but it sent the case back to the federal district court for further proceedings on the matter.

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While *Gill* was returning to the lower court, Kennedy retired. In 2019, his successor, Justice Brett Kavanaugh, joined in a 5–4 decision, written by Chief Justice John Roberts: *Rucho v. Common Cause* ruled that “partisan gerrymandering claims present political questions beyond the reach of the federal courts.”

Within a week, the three-judge federal district court in Wisconsin dismissed the *Gill* case.

Redrawing the Rules

Given the history, no one expects a bipartisan agreement to emerge from the current round of redistricting. Republicans still have a firm grip on both houses of the legislature, but a Democratic governor, Tony Evers, holds the veto pen.

“The probability of an actual compromise between the legislature and the governor is approximately nil,” Mayer said.

“Adopting a new map for redistricting after the 2020 census will likely be difficult and any dispute will end up in the courts (as it did the last time Wisconsin had divided government in 2001),” the conservative Wisconsin Institute for Law and Liberty (WILL) wrote in support of a petition for a new state supreme court rule on redistricting cases.

WILL filed the petition on behalf of Jensen, the former GOP speaker of the Assembly who tried to shift the 2000s redistricting litigation from federal to state court. When the justices demurred back then, they said they did not have procedures in place to handle such a case. WILL and Jensen, now a school-choice lobbyist, said it was time to create such procedures.

The court previously had attempted to do so. In 2003, the justices named a committee of legal and political science professors—including Mayer and Peter Rofes, a Marquette University law professor—to propose a rule. The committee came back with its recommendations in 2007, and, in response to justices’ concerns, followed up with a revised version in 2008.

The committee’s proposed rule called for a panel of five randomly selected state appellate judges to hear redistricting challenges—and if necessary, draw new maps. Their decision could be appealed to the Wisconsin Supreme Court. That structure recognized that such cases require substantial fact-finding, and that the supreme court and its counterparts “do their best work when others have taken their shots before” and “cleared away the underbrush,” Rofes said. But in 2009, the justices rejected that proposal, 4–3, with conservatives in the majority.

“I do not think the court, this court, which consists of elected officials, really ought to be jumping into this political thicket,” said Prosser, the former Republican speaker of the Assembly who by then was a justice. He also called the rule “almost like an invitation [to the legislature] to fail” at redistricting, since the court would be ready to step in if lawmakers were deadlocked.

Jensen’s proposed rule, by contrast, would provide for the supreme court to exercise original jurisdiction over redistricting cases, although the justices could appoint a circuit judge or special master if they determined facts to be in dispute. His petition is supported by Republican legislative leaders and the state’s five GOP congressmen.

WILL President Rick Esenberg called redistricting “a quintessential original action case,” because of its statewide importance and the “considerable urgency” to resolve all redistricting issues before June 1 of the election year, when candidates can start circulating nominating petitions for fall elections.

That urgency could be even greater in this cycle, because of a major delay in releasing census data. Ordinarily, the Census Bureau would have sent detailed data to all states by March 31 of this year. But coronavirus complications repeatedly pushed back that timeline, and in February, the bureau said its new deadline would be September 30, sharply compressing the time available for legislative and court action.

Law Forward, which has led the charge against the proposed rule, is backed by Evers and others who filed hundreds of comments in opposition, including lawyers, academics, and progressive groups. If the high court wants a rule, it should be studied in detail, “not just based on the musings of Rick Esenberg and Scott Jensen,” Poland said.

Esenberg said redistricting is a state question that belongs in state court. Poland said three-judge federal panels have demonstrated experience and expertise in redistricting issues. He and Esenberg agree, however, that state and federal courts have concurrent jurisdiction and plaintiffs can try to get relief in either venue.

Underlying the legal debate is the political question whether either side has an advantage in either court. WILL has a recent history of filing original-jurisdiction actions with the state supreme court, and Poland called its proposed rule “forum-shopping in the extreme.” Esenberg denied this, saying that the independent streak shown by Justice Brian Hagedorn shows the court isn’t that predictable.

In fact, Hagedorn lamented the trend toward original actions in rejecting an unrelated WILL-filed lawsuit in December, writing, “This court is designed to be the court of last resort, not the court of first resort.”

And at a January 2021 public hearing on the proposed rule, Chief Justice Patience Roggensack, as she had in 2009, expressed deep skepticism at the idea of the court’s drawing the maps. As of late April, the court had not announced a decision on the rule.

Another previously rejected idea that could resurface is redistricting by joint legislative resolution to bypass Evers. Although the state supreme court found that tactic unconstitutional in the 1964 *Reynolds* case, the progressive *Wisconsin Examiner* reported in 2019 that Republicans were considering it again. GOP leaders denied discussing that option but didn’t completely rule it out.

Commissioning a Map

With that history in mind—and similar experiences in other states—it may not be a surprise that some people want to find a less contentious and less politicized way to handle redistricting. Many cite Iowa as a model. Since 1981, that state’s maps have been drawn by its nonpartisan Legislative Services Agency, under the guidance of a bipartisan commission, subject to approval by lawmakers. However, no other state has adopted a similar system. In Wisconsin, Cullen and Schultz cosponsored a bill in 2013 to assign redistricting to the LRB, but that bill died in committee without a hearing.

A more common method is the use of a bipartisan commission, often including independents or third-party representatives, to draw the lines. In 14 states, those commissions have primary responsibility for legislative (and often congressional) redistricting, without lawmakers’ approval. Politicians are prohibited from serving on the most independent of these commissions (in Alaska, Arizona, California, Colorado, Hawaii, Idaho, Michigan, Montana, and Washington), an approach upheld by the Supreme Court in a case from Arizona. By contrast, five other states (Arkansas, Missouri, New Jersey, Ohio, and Pennsylvania) not only have politicians on their commissions but also sometimes include their governor and other high-ranking officials on them.

Another five states (Connecticut, Illinois, Mississippi, Oklahoma, and Texas) have backup

commissions, typically consisting of top state officials, that swing into action if lawmakers cannot agree on maps by a set deadline. Five more states (Maine, New York, Rhode Island, Utah, and Vermont) have constitutionally or legislatively authorized advisory commissions whose work is subject to lawmakers’ approval.

In Wisconsin, creation of some sort of “nonpartisan procedure” for redistricting has been endorsed in advisory referendum questions approved by voters in 28 counties and 19 municipalities and in resolutions adopted by 54 of the state’s 72 county boards. That idea also was backed by 72 percent of respondents in a 2019 Marquette Law School Poll.

Wisconsin’s legislature, however, hasn’t agreed to give up any of its redistricting authority. And as Mayer noted, voters here don’t have the power to bypass lawmakers and initiate a referendum on a constitutional amendment by petition, the way Arizona, California, Colorado, and Michigan established their commissions in recent years. Instead, Evers followed Virginia’s lead in creating an advisory commission by executive order. His nine-member People’s Maps Commission has been holding hearings to take comments from experts and residents about how the lines should be drawn.

Evers empowered three retired judges to pick commission members and banned politicians and lobbyists from serving on the panel, but Republican legislative leaders slammed the commission as partisan and vowed to ignore its maps. Cullen, the Democrat speaking at the October 2020 Marquette forum, said that the panel erred by inviting Obama’s former attorney general, Eric Holder, a national leader of Democrats’ redistricting and fundraising efforts, to address its first meeting. Evers’s office did not respond to requests for an interview with the commission chairman, Milwaukee physician Christopher Ford.

Still, the commission’s maps could play a role in any litigation over the issue. Schultz said they should show “what a fair map looks like.”

Troupis, the longtime Republican lawyer, said it would be preferable for elected officials to negotiate a compromise on redistricting without judicial intervention, as the state constitution intends. “The courts are a poor substitute for the political process,” Troupis said. “We do the best we can as lawyers and judges.” ■

With that history in mind—and similar experiences in other states—it may not be a surprise that some people want to find a less contentious and less politicized way to handle redistricting. Many cite Iowa as a model.



Red State, Blue State

Densely populated Democratic cities lead to GOP redistricting edge.

In Wisconsin's often-heated redistricting debates, one fact is frequently overlooked. Even if Republicans had not gerrymandered legislative districts, they probably still would hold a majority of seats in both houses of the Wisconsin legislature—likely not as large or as safe a majority, but a majority still.

The reasons for this are rooted in the state's political geography, its ideological split personality, and its urban-rural divide. These are nuances that get lost in some of the shorthand characterizations of Wisconsin as a “battleground,” “purple,” or “swing” state, or as a place where Democrats win most of the votes while Republicans win most of the legislative seats.

“My preferred description is that Wisconsin, politically speaking, is not one moderate state; rather, it is one very conservative state overlapping another very liberal one,” said John D. Johnson, research fellow in the Lubar Center for Public Policy Research and Civic Education at Marquette Law School.

Historically, “Wisconsin gave the nation the rabid anti-communist Sen. Joseph McCarthy at the same time Milwaukee elected its third mayor from the Socialist Party,” Johnson noted at an “On the Issues with Mike Gousha” online program at Marquette Law School in February.

That divide reflects the increasing tendency of Democrats to concentrate in cities, while

“My preferred description is that Wisconsin, politically speaking, is not one moderate state; rather, it is one very conservative state overlapping another very liberal one,” said John D. Johnson

Republicans are more spread out through rural and suburban areas, Johnson said. He called this “asymmetrical polarization,” pointing out that 21 percent of Democrat Joe Biden's 2020 Wisconsin votes came in wards that he carried by at least 50 percentage points. That compares with Democratic presidential candidate Al Gore, who in 2000 received only 9 percent of his vote in Wisconsin from wards with such lopsided results.

This is a national trend. In his 2008 book, *The Big Sort: Why the Clustering of Like-Minded America Is Tearing Us Apart*, journalist Bill Bishop argued that, since the 1960s, Americans have been segregating themselves into areas where others agree with them politically.

But in his own 2019 book, *Why Cities Lose: The Deep Roots of the Urban-Rural Political Divide*, political scientist Jonathan Rodden contended that the split goes much further back, to the 19th century's urban concentration of unionized manufacturing workers, through the 20th century's migration of immigrants and people of color to cities, culminating with the 21st-century preference of highly educated “knowledge workers” for urban neighborhoods—all bolstering big-city Democratic coalitions.

However, that urban strength becomes a statewide weakness for Democrats when legislative districts are drawn, said Johnson and Rodden, a professor at Stanford University's Hoover Institution. Because various state and federal

laws and court decisions require districts to be compact and contiguous, to respect city and county lines wherever possible, and to maximize opportunities for racial and linguistic minorities to elect representatives, Democrats typically will be packed into a disproportionately small number of predominantly urban districts, they said.

Some on the GOP side cite this demographic logic as proof that they didn't do anything wrong in their 2011 Wisconsin legislative redistricting.

"A political result does not make it political gerrymandering," said Madison attorney Jim Troupis, who worked on the 2011 maps and represented Republicans in the previous two rounds of redistricting. "Because legislative districts are geographic to a significant degree, the results will naturally reflect the geography that the state has."

Even the maps drawn by a federal court after the 2000 census skewed unintentionally in favor of Republicans, conceded Law Forward litigation director Doug Poland, the Madison attorney who represented Democrats in two lawsuits over the 2011 maps.

Running Up the Score

But the Republican-drawn 2011 maps went far beyond reflecting the GOP's built-in advantage, said Johnson and Kenneth Mayer, a University of Wisconsin-Madison professor of political science.

Although "cities tend to be much more Democratic . . . , that does not come close to explaining the size, the scope, the endurance of the gerrymander," said Mayer, who has served as an expert witness for Democrats in redistricting litigation.

"Over the past decade, mathematicians and quantitative social scientists have developed a set of sophisticated methods for measuring the partisan bias of maps," Johnson said. "No matter the technique used, every examination of Wisconsin's state Assembly map reveals a remarkable gerrymander."

Mayer and Johnson pointed to the work of Jowei Chen, a University of Michigan political scientist who studied the Wisconsin maps. "Wisconsin's natural political geography, combined with a nonpartisan process following traditional districting principles, could plausibly produce a plan with a modest amount of Republican-favoring electoral bias," Chen wrote in a 2017 article in the *Election Law Journal*. However, "these levels of natural electoral bias pale in comparison to the much more extreme electoral bias exhibited by the [GOP] plan."

Based on his own research, Johnson said, "The gerrymandered map drawn in 2011 probably hasn't cost the Democrats control of the Assembly in any election this decade, with the possible exception of 2012. Nonetheless, it has inflated the Republican majority in the close elections of 2012, 2018, and 2020." And, in each election, he said, it has meant that many Wisconsinites have not had real competition for their votes.

For example, a different map might energize Democrats to compete in more districts that they now leave uncontested, Johnson said, and it might enable them to raise more campaign cash, while increasing the chances that they could retake the majority if the statewide political tide turned in their favor.

But alternative approaches pose other challenges.

In his executive order in 2020 creating the People's Maps Commission, the Democratic governor, Tony Evers, directed the new advisory body to propose maps that "shall, whenever possible," be "free from partisan bias and partisan advantage."

To fulfill that mandate, former Democratic Assembly member Fred Kessler argued, the commission should ignore traditional rules and guidelines that limit crossing county and municipal lines. It should look at partisan voting data to intentionally draw a certain number of competitive districts, Kessler said in a column written for *The Fulcrum* and reprinted in the *Wisconsin State Journal*.

"I think that's a terrible idea," said Kessler's fellow Democrat, former Senate Majority Leader Tim Cullen. Trying to engineer districts that way "would be gerrymandering competitiveness," Cullen said at an October 2020 "On the Issues with Mike Gousha" program.

Wisconsin Institute for Law and Liberty President Rick Esenberg agreed that mandating competitive districts would be just "a different form of gerrymandering."

Iowa's Legislative Services Agency is prohibited from using election results in redistricting, and maps drawn by the nonpartisan civil servants still have increased competitiveness, former Senate Republican leader Dale Schultz said during the October program.

"No map is perfect," said Schultz, who has joined forces with Cullen to work for changes in redistricting. But once maps are drawn, he added, "It will be obvious what's a fair map and what's not a fair map." ■

[T]hat urban strength becomes a statewide weakness for Democrats when legislative districts are drawn



Closer to Home

Local governments go first—usually—in Wisconsin redistricting.

Every 10 years, the redistricting spotlight is trained on the state legislatures and Congress. But in Wisconsin, the process typically starts at the local level, and every municipal and county government plays a role.

In the 2010 cycle, however, the Wisconsin legislature pushed the locals out of the way to dash ahead with unusually swift redistricting plans for itself and the state's U.S. House seats. And in the current cycle, the coronavirus pandemic has slowed census results so much that local governments might not be able to finish their work in time for the spring 2022 elections. Meanwhile, Wisconsin's two largest counties have established redistricting commissions—a model that their voters, through advisory referendums, have urged the state to adopt as well.

Like the legislature, local governments must keep districts substantially equal in population, draw districts so that they are compact and contiguous, and respect the voting rights of racial and linguistic minorities. In addition to the laws and court decisions that guide state and federal redistricting, a 1965 decision by the Wisconsin Supreme Court struck down most counties' systems of allocating supervisors by individual towns and, for villages and cities, by municipal wards; as summarized by the state's Legislative Reference Bureau (LRB) in a 2016 report, the result of those systems had been that "members of the county board represented constituencies that were sometimes vastly different in population."

Under a process established in the 1970s, Wisconsin gives its counties the first shot at using the census data. Within 60 days of receiving those data—but no later than July 1, current state law says—the counties must tentatively redraw the lines of their supervisory districts. Those supervisory district maps are shared with the cities, villages, and towns within each county. The municipal governments then have another 60 days to use the tentative county board maps to redraw lines for their voting wards, the equivalent of precincts in other states.

Because nobody is elected from the wards themselves, they aren't required to have substantially equal populations like aldermanic, supervisory, and legislative districts, the Wisconsin LRB explained in its guidebook, *Redistricting in Wisconsin 2020*. Instead, state law sets acceptable population ranges for wards according to the size of each municipality.

Like the legislature, local governments must keep districts substantially equal in population, draw districts so they are compact and contiguous, and respect the rights of racial and linguistic minorities.

While wards must be adjusted if they fall outside those population ranges, they otherwise aren't supposed to change much, to ensure consistency and convenience for voters, the guidebook said. But they must be compact and contiguous and should be set up to accommodate the creation of aldermanic, supervisory, legislative, and congressional districts that meet all legal requirements, including protecting the voting rights of people of color, according to the guidebook.

Adoption of the ward maps sets off another 60-day clock, this one for cities to redraw aldermanic districts and for counties to finalize their supervisory districts. That's not an issue for villages, towns, or nearly all school districts, which elect their board members at large from the entire community. Some smaller cities also elect all their aldermen at large, while Eau Claire elects five city council members from districts but elects the council president and five other members at large.

However, redistricting timelines do matter—in different ways—for the Milwaukee Public Schools (MPS) and the Racine Unified School District (RUSD) school boards. Since the early 1980s, state law has required MPS, Wisconsin's largest K–12 school system, to elect eight of its nine board members from districts, leaving just one seat elected at large. The state legislature shifted RUSD to electing all nine of its board members from districts as well, starting with the 2016 election.

At the time the first of these laws was adopted, the Milwaukee Common Council had 16 members, and the law specified that each of the eight school board districts would consist of two aldermanic districts. Within a few years, however, the law was changed to empower the Milwaukee school board to redistrict itself the same way that common councils do, and on the same schedule, within 60 days following the finalization of ward maps.

That was necessary because Milwaukee's council wasn't required to remain at 16 members or any other number divisible by eight. The redistricting process gives county boards and common councils the chance to change their sizes, and the Milwaukee Common Council took that opportunity to grow from 16 to 17 members, starting with the 1992 election, and then to shrink to 15 members, beginning with the 2004 election.

Similarly, the Milwaukee County Board of Supervisors dropped from 25 to 19 members, starting with the 2004 election, and then to 18 members, since the election in 2012.

For the upcoming redistricting cycle, Milwaukee Common Council President Cavalier Johnson and Milwaukee County Board of Supervisors Chair Marcelia Nicholson said earlier this year that they weren't aware of any efforts to change the sizes of their respective bodies. Madison voters opposed resizing their city council in an April 2021 advisory referendum. The issue has been discussed for such bodies as the West Allis Common Council and the Dane, Jefferson, and Marathon county boards.

New Directions

The usual process changed in a big way for the last redistricting cycle, and more changes are ahead this time. A decade ago, Republicans were in control of state government and eager to cement that hold by approving new legislative and congressional district maps before a series of 2011 Senate recall elections that threatened their majority in the upper chamber, the LRB noted in its 2016 report.

Instead of waiting for local governments to redraw ward lines, GOP lawmakers used census blocks to start drawing their own maps. Those maps, approved in July 2011, were accompanied by a new law, 2011 Act 39, which retroactively authorized the new process and required local governments to adjust their ward lines to fit the legislative and congressional districts, instead of the other way around.

This time, the political calculus is different, with Republicans still running the legislature but Democrat Tony Evers in the governor's office and no recall elections on the horizon. GOP legislative leaders haven't said whether they plan to again invoke the Act 39 process, but the LRB guidebook warns local governments that it is possible.

Unlike common councils, county boards, and the MPS board, the Racine-area school board, RUSD, is required to follow the same process as Act 39, using census blocks to redistrict itself within 60 days after detailed census results are available, without waiting for ward maps.

A larger concern for the current redistricting cycle is the pandemic-driven delay in census results. That has repeatedly pushed back the U.S. Census Bureau's release of detailed redistricting data to the states. As of late April, those data were expected in late September, about six months later than usual.

That would force every county in Wisconsin to miss its statutory July 1 deadline to adopt a tentative supervisory district map. And if local governments then took the full 60 days each to draw up preliminary county board maps (and the RUSD map), then ward maps, and then aldermanic, MPS board, and final supervisory maps, they would not be done in time for the February 2022 primaries, let alone by December 1, 2021, the first day for candidates in the spring 2022 elections to circulate nominating petitions. As a result, the spring 2022 elections might have to use the existing maps, said Joseph Kreye, a senior coordinating attorney at the LRB.

In a January 2021 email, shortly after the Census Bureau announced a delay to late July, Mark O'Connell, executive director of the Wisconsin Counties Association, said, "We are aware of this issue and are working on a fix which likely will require legislative action."

Yet another new development is the rise of redistricting commissions to redraw the Dane and Milwaukee county board maps, a process approved by supervisors in each of those counties in 2016. Although the commission system is best known for its use in legislative and congressional redistricting in certain states, it is catching on in a growing number of cities and counties, primarily in California.

Milwaukee County's commission will consist of six retired judges, appointed by Nicholson and confirmed by the board, with technical assistance from the Southeastern Wisconsin Regional Planning Commission staff. Dane County's commission will consist of 11 citizens (none of whom is involved in formal politics or lobbying), appointed by the board chair and the county clerk and confirmed by the board, with technical assistance from county planners. In each county, the maps must be approved by the county board, and the commission will get at least one chance to redraw the map if the board rejects its first proposal.

Milwaukee County also has offered its system, free of charge, to help any municipality in the county redraw its ward and aldermanic district maps. Glendale was the first suburb to accept the county's offer. The city of Milwaukee is expected to use its normal process, with help from the city's Legislative Reference Bureau, its common council president said. The Milwaukee school board also plans to use the city bureau, as it did in the last cycle, assistant board clerk Jillian Kawala said. ■

The usual process changed in a big way for the last redistricting cycle, and more changes are ahead this time.





House Rules

Drama is rare in Wisconsin congressional redistricting.

If Wisconsin's state legislative redistricting process seems as genteel as a mixed martial arts fight to the death, redrawing its U.S. House district lines has been more often like a friendly round of golf.

While legislative maps emerged from gridlock, veto battles, and lawsuits, congressional maps were long produced through bipartisan backroom meetings, approved by both houses of the legislature, and signed by the governor, with little if any significant litigation. That process didn't break down until 2012, when a court challenge failed, with far less attention than that given to the legislative maps being disputed in the same case.

One reason for the difference in intensity is the difference in stakes. Legislative redistricting can play a major role in determining control of both houses of the state legislature for a decade. By contrast, only in one specific and rare situation could majority control of an individual state's House delegation have an unquestionable impact.

When no presidential candidate commands a majority of the Electoral College, the U.S. Constitution calls for the House to choose a president from among the top three candidates, with members voting as state delegations rather than as individuals. But that has happened only twice in American history: after the 1800 election, when the House broke a tie between Thomas Jefferson and Aaron Burr in Jefferson's favor, and after the 1824 election, when none of the four main candidates won an Electoral College majority and the House picked runner-up John Quincy Adams over plurality winner Andrew Jackson. Otherwise, congressional redistricting is a small piece of a much larger nationwide puzzle, and Wisconsin is too closely divided to have much impact on control of the House.

"If you have a stable electorate," Wisconsin's eight-member delegation will have "a pretty even split" between the two major parties, either 4-4 or 5-3, and that's "not worth fighting about," said

One reason for the difference in intensity is the difference in stakes.

Milwaukee attorney Thomas L. Shriner, Jr., who represented House Republicans in the last four rounds of redistricting.


History bears out Shriner's point about the even split. The House delegation was divided 4-4 between Democrats and Republicans for the first four years after Wisconsin dropped to eight seats in 2002. Democrats enjoyed a 5-3 majority for the next four years, until Republicans gained a 5-3 advantage in the 2010 "red wave" election, maintaining that edge since then.

Similarly, over the prior 30 years, when the state had nine House seats, the delegation was split 5-4 in Democrats' favor for 20 years and 5-4 in Republicans' favor for four years. Only for six years did either party hold a 6-3 majority: the Democrats, for four years after scoring big gains nationwide in the 1974 backlash against GOP President Richard Nixon's Watergate scandal, and the Republicans, for two years after their party captured the House in 1994, the midterm election during Democratic President Bill Clinton's first term.

As a result, "congressional gerrymandering has a different motive than legislative gerrymandering," former Wisconsin Senate Democratic leader Tim Cullen said at an October 2020 "On the Issues with Mike Gousha" program presented by Marquette University Law School.

"Legislative gerrymandering is done for partisan purposes, to help the party in power. That's what we have in Wisconsin right now. But congressional gerrymandering . . . is what I call incumbent gerrymandering," Cullen said. At least since the 1970s, incumbent members of Congress essentially have been drawing their own maps, and "they try to make every seat safe," he said.

"The congressional representatives figured out a long time ago that they wanted to protect themselves as incumbents," said Shriner, who teaches as an adjunct professor of law at Marquette. "People scratch each other's backs."



Drawing by Numbers

Of course, no such back-scratching is required by the Constitution or related federal laws and court decisions, which set the basic guidelines for reapportioning and redistricting the House.

First, results of the decennial national census are used to determine how many of the 435 House seats are assigned to each state. Under this process, known as reapportionment, Wisconsin dropped from 10 seats to nine after the 1970 census, and from nine to eight seats after the 2000 census, as its proportionate share of the nation's population declined.

In 2020, then-President Donald Trump threw a new wrinkle into the system by ordering the Census Bureau to exclude undocumented immigrants from the reapportionment figures, notwithstanding the bureau's constitutional mandate to count "the whole number of persons." This order was challenged in court, delayed by coronavirus complications, and ultimately reversed by President Joe Biden.

In late April, the Census Bureau released population totals establishing the size of the congressional delegation for each state. The result is that Wisconsin will continue to have eight members of the House for the next decade.

After this reapportionment, the Census Bureau sends each state the detailed data needed to draw up House districts in the 43 states that have more than one seat in that chamber. As of late April, those figures were expected to arrive by September 30, six months behind the normal timeline.

For the most part, the requirements for drawing congressional districts are the same as those for state legislative districts, in that they must be compact and contiguous and cannot impair the voting rights of racial or linguistic minorities. Both types of districts are governed by such landmark decisions as the U.S. Supreme Court's "one person, one vote" holding in *Baker v. Carr* (1962).

One significant difference, however, is that while legislative districts need be only substantially equal in population, congressional districts within each state must be almost exactly equal, according to *Redistricting in Wisconsin*, a 2016 report by the Wisconsin Legislative Reference Bureau (LRB).

Before *Baker v. Carr*, the state legislature didn't bother to change congressional district lines from 1931 to 1963, and by the 1960 census, the largest districts had more than twice the population of the smallest, the LRB report says. By contrast, the populations of state legislative districts drawn in 1963 varied by no more than 25,000 residents.

... this level of agreement was achieved by incumbent congressional representatives submitting their own plans to the legislature over those four decades.

The absolute-equality standard was established under decisions of the high court in 1964 and 1983 and has been reflected in Wisconsin redistricting plans from the 1990s on. For example, after the redistricting following the 2010 census, six of Wisconsin's House districts had 710,873 residents each, and the other two each had 710,874, the LRB report notes.

History Behind the Lines

After the 1970, 1990, and 2000 censuses, congressional redistricting plans passed both houses of the state legislature and were signed by the governor without litigation, according to the LRB report. In the 1980 cycle, then-Governor Lee Dreyfus initially vetoed the plan, triggering a federal lawsuit, but he later signed a revised plan approved by the legislature.

As Shriner and Cullen observed, this level of agreement was achieved by incumbent congressional representatives submitting their own plans to the legislature over those four decades. In the 1980s, 1990s, and 2000s, veteran Democratic representative Dave Obey said, he and another Wisconsin member of Congress, Republican James Sensenbrenner, "would sit down as 'gentlemen' and redraw the lines to account for shifts in population without creating major disruptions," Dave Zweifel of the Madison *Capital Times* wrote in a 2011 essay.

That changed after Obey's retirement in 2011. Although Sensenbrenner was still the delegation's senior Republican, then-Representative Paul Ryan took the lead on redistricting for the GOP side, said Shriner and Madison attorney James Olson, the latter of whom represented House Democrats during the 2010 redistricting cycle.

With their party controlling both houses of the Wisconsin legislature and the governor's office, "the Republican members . . . expressed their desire to draw districts that would maximize the chances for Republicans to be elected," although they conferred at least briefly with their Democratic colleagues. So found a three-judge federal court in its 2012 decision in *Baldus v. Wisconsin Government Accountability Board*, the lawsuit Democrats filed that challenged both the legislative and congressional maps.

The change was most dramatic in Obey's former 7th District, where GOP Representative Sean Duffy had succeeded him. Traditionally Democratic areas were swapped with more-Republican areas in neighboring districts to strengthen Duffy's position, Olson said.

Obey was appalled, according to Olson and Zweifel. But, as in previous years, the congressional plan was approved by the legislature and signed by the governor, then Scott Walker. And with no clear legal standard outlawing gerrymandering for partisan purposes, the map was upheld by the court in *Baldus*.

What Happens Now?

In the current round of redistricting, Republicans again control both houses of the legislature, but the governor's office is in the hands of Democrat Tony Evers, who has named an advisory commission to propose congressional and legislative maps.

It is not clear whether incumbent House members will again draw their own map; neither Rep. Glenn Grothman, the senior Republican, nor Rep. Ron Kind, the senior Democrat, responded to requests for comment on the matter.

As with legislative redistricting, the congressional districts will be influenced to a significant degree by the state's political geography, *Milwaukee Journal Sentinel* Washington Bureau Chief Craig Gilbert wrote in a December 2020 analysis. "On the whole, Democrats begin the next redistricting process with a disadvantage: their voters are disproportionately clustered within two districts—one anchored by Milwaukee and one by Madison," wrote Gilbert, a former Lubar Fellow at Marquette Law School. "The result in the current map is two ultra-blue districts (the 2nd and 4th), five pretty Republican districts (the 1st, 5th, 6th, 7th and 8th), and then the purple but Republican-trending 3rd.

"The signature political trends of the past decade—the growing urban-rural gap and the emergence of the suburbs as the hottest partisan battleground—will color the fight over the next congressional map," Gilbert concluded.

Those trends have contributed to an increasing GOP strength in Kind's western 3rd District, Rep. Tom Tiffany's northern 7th District (formerly represented by Duffy), and Rep. Mike Gallagher's northeastern 8th District, while Rep. Scott Fitzgerald's suburban 5th District (formerly represented by Sensenbrenner) is still rather red but no longer as overwhelmingly Republican as it used to be, Gilbert wrote.

As a result, redistricting is unlikely to change the Democratic hold on Rep. Mark Pocan's Madison-based 2nd District and Rep. Gwen Moore's Milwaukee-based 4th District, or the Republican dominance in the 5th, 7th and 8th districts, Gilbert said. But how the lines are drawn could affect the competitiveness of Kind's district, GOP representative Bryan Steil's southeastern 1st District, and possibly even Grothman's east-central 6th District, Gilbert suggested. That's where parties are most likely to jockey for political advantage, something that Shriner sees as a normal part of redistricting.

"I don't know why anyone would be surprised that a political question would get decided along the lines of politics," he said. "It's an intensely political business." ■

"The result in the current map is two ultra-blue districts (the 2nd and 4th), five pretty Republican districts (the 1st, 5th, 6th, 7th and 8th), and then the purple but Republican-trending 3rd."

Craig Gilbert

