





# 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

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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.

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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." ■

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