

November 30, 2020

Wisconsin Supreme Court
Sheila Reiff, Clerk of the Supreme Court and Court of Appeals
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Regarding a proposed rule for the Wisconsin Supreme Court to take original jurisdiction of redistricting lawsuits. (Petition 20-03).

Bipartisan comment of former State Senate Majority Leaders, Sen. Dale Schultz and Sen. Tim Cullen.

Three of the past four redistricting proposals in Wisconsin occurred during split government where partisan differences required intervention in court for resolution. Federal courts in 1981, 1991, and 2001 drew fair maps to the overall satisfaction of both political parties (at least one of us was in the Legislature during those years). The most recent redistricting in 2011 was done under unified partisan control of both legislative bodies and the governorship. Even so, that redistricting plan required modification by a federal court.

Given that Wisconsin voters have traditionally cast their ballots for candidates for public office nearly equally between Republican and Democratic candidates, redistricting has been furiously contested in the past and is expected to be so in 2021 with a Democratic Governor and an overwhelming Republican majority in both houses of the Legislature. The likelihood is that this split will lead to some conflict, and potentially serious conflict, requiring resolution by the courts. This likelihood of litigation does not, however, counsel in favor of the rule proposed here. The proposed rule threatens to make any redistricting disputes even sharper and more intense by discouraging the political branches from reaching a workable compromise.

As former Republican and Democrat State Senate majority leaders, we know that to serve the people of our state, we have to come together and come to the table. We also know that in times of increased political division, it is unlikely the Legislature will accomplish this important work if it knows the State Supreme Court is waiting, willing to take the issue out of their hands. We ask you to respect the Legislature as a coequal branch of government, and not adopt this rule that would prematurely involve the court in a political question.

The Wisconsin Supreme Court declined to take up redistricting disputes in 2002 because it did not have a procedure in place to handle such disputes. It indicated it would adopt a procedure to handle future redistricting suits, but after extensive study and debate, it concluded seven years later in 2009 that adopting a rule did not serve the Court's interests. We agree with many of the concerns the Court expressed at that time, including then-Justice Roggensack's warning that a rule on original jurisdiction would push a dispute to the Court prematurely:

“That to me seems really to put your foot in the political hole because if we’re going to set up a plan before the legislature has failed and now they fail and we got this plan ready to go, boy I think that’s really putting the court right in the middle of where I don’t want to be.”¹ – Justice Roggensack

Our former colleague and yours, Justice David Prosser, who formerly led the State Assembly as Speaker, was also clear that he did not find a rule on this subject advisable. He stated he would vote *against* taking original jurisdiction “every time.”² Justice Prosser continued to caution against such a rule, even after the Court received a supplemental report in 2008 incorporating comments from the justices and clarifying parts of the committee’s proposal:

“I don’t see how I can possibly vote for a plan that puts this court right in the middle of reapportionment and almost encourages us to be a part of it.”³

Justice Prosser opposed any plan that would risk conflating the legislative and judicial roles:

“The plan, whatever the details are, would inject this court into the process. We would be saying, ‘Legislature, we want you to do your thing, but we are here and ready to take over if you fail.’ That’s almost like an invitation to fail.”⁴

“I do not think the court, this court, which consists of elected officials, really ought to be jumping into this political thicket.”⁵

The question before the Court is whether to adopt the specific proposed rule to make this Court *the* court of original jurisdiction in redistricting disputes. We have already stated why we agree with the 2009 Court that this is not appropriate. We also believe that adopting the specific proposed rule here will deprive this Court of the benefit of the discovery and full review that occurs when the process begins in a lower court.

A fundamental premise of representative democracy is that the people’s legislative representatives should reflect the preferences of the voters. The voters express their preferences largely through their partisan choices. Any shortcomings in this process will undermine faith in the system, a faith that is essential TO democratic governance itself. We

¹ Roggensack comment at 2:04:12, WisconsinEye footage of Supreme Court Administrative Conference, April 8, 2008. Available at <https://wiseye.org/2008/04/08/supreme-court-rules-hearing-and-open-administrative-conference-part-3-of-4/>

² Wisconsin Supreme Court Open Administrative Conference on April 8, 2008. Justice Prosser at 1:58:10. Available at <https://wiseye.org/2008/04/08/supreme-court-rules-hearing-and-open-administrative-conference-part-3-of-4/>

³ Wisconsin Supreme Court Open Administrative Conference on January 22, 2009. Justice Prosser at 23:58 available at <https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/>

⁴ *Id.* Justice Prosser at 16:14.

⁵ *Id.* Justice Prosser at 14:58.

urge the Court to consider the wide-reaching impacts of redistricting and the proposed rule at hand, and decline to adopt this rule.

Sincerely,

Sen. Dale Schultz

Former State Senate Majority Leader

Sen. Tim Cullen

Former State Senate Majority Leader