

IN THE SUPREME COURT OF WISCONSIN
Rules Petition 20-03

IN RE: PETITION FOR PROPOSED RULE TO AMEND WIS. STAT. § 809.70 (RELATING
TO REDISTRICTING)

COMMENTS FROM ELECTION LAW SCHOLARS

We are three legal scholars with nationally recognized expertise in election law and related matters. We submit this comment to convey our concerns about the proposed redistricting rule currently under consideration before the Court.

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Nicholas Stephanopoulos is a Professor of Law at Harvard Law School. His scholarly work on redistricting topics, including partisan gerrymandering, racial gerrymandering, and the Voting Rights Act, regularly appears in leading law journals and has been cited on multiple occasions by courts. He is also the co-founder of PlanScore (planscore.org), a nonpartisan website that evaluates district plans, and he was involved in litigation over Wisconsin's state legislative plan in the 2010s redistricting cycle.

Robert Yablon is an Associate Professor of Law at the University of Wisconsin Law School. His scholarship on election-law issues has appeared in leading law journals, and he has worked extensively on additional topics relevant here, including the federal census and Wisconsin constitutional law and court procedure.

I. This Court has previously declined to adopt rules that would invite redistricting litigation, and now would be an especially injudicious time to change course.

In 2003, this Court appointed a committee of experts “to review Wisconsin state legislative redistricting history, redistricting rules and procedures in other jurisdictions[] and to propose procedural rules in the event that due to a legislative impasse, an original action challenging existing districts would be filed and accepted.” *In the Matter of the Adoption of Procedure for Original Action Cases Involving State Legislative Redistricting* (Jan. 30, 2009), <https://www.wicourts.gov/sc/scord/DisplayDocument.html?content=html&seqNo=35414>. After nearly four years of work, the committee submitted a report to this Court in September 2007. The Court received comments, held an open administrative conference in early 2008, and asked the committee for a supplemental memorandum. The Court invited further comments and held an additional open administrative conference in January 2009. At that conference, the Court discussed the matter and ultimately voted not to move forward with the adoption of rules for redistricting litigation. *See id.*

The memorandum in support of this rules petition makes no reference whatsoever to these extensive prior proceedings. That is a bewildering omission. To overlook the relevant history is to miss hugely important lessons about the challenges of rulemaking in this area.

In particular, petitioners fail to grapple with this Court’s previously expressed reasons for declining to adopt a rule. When this Court last considered the issue, two overarching concerns drove its decision not to act: first, that adopting rules would encourage redistricting disputes to be

resolved through litigation in this Court rather than through the political process; and second, that inviting politically fraught redistricting litigation would threaten the Court's institutional integrity. On each of these scores, this proposed rule is far worse than the proposal that the Court previously rejected.

A. The proposed rule encourages premature litigation and discourages political compromise.

Consider first the problem of incentivizing litigation. Chief Justice Roggensack stated it this way during the earlier proceedings: “My concern is that setting up rules ... puts us into the redistricting process in a very formal and a very affirmative way.”¹ In particular, the Chief Justice and several others wanted to avoid encouraging adjudication before allowing the political process to run its course. In the Chief Justice's words, to involve the Court prematurely, “before the legislature has failed,” would put the Court “in a political hole”—“right in the middle of where I don't want to be.” Justice Ziegler similarly worried “about the court acting as a superlegislature,” and said that she “like[d] the idea of creating an incentive for the legislature to do *its* job.” Justice Prosser, himself a former legislative leader, had the same instinct. Rather than allowing litigation before there was a political impasse, he explained that it would be better to “put the legislature's feet to the fire instead of the court's feet to the fire.” “Our goal,” he said, “ought to be to do everything possible to encourage the Legislature to do this job themselves with the governor.”

State constitutional principles underlie these sentiments. Members of this Court stated that they saw no clear legal grounding for the Court's involvement. As Chief Justice Roggensack correctly noted, “the legislature is required by the Constitution when they get the census information to redistrict.” *See* Wis. Const. art. IV, § 3 (“At its first session after each enumeration

¹ The quotes offered here from members of the Court have been transcribed from recordings of the open administrative conferences that the Court held in April 2008 and January 2009.

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.”). Thus, in the Chief Justice’s words, putting redistricting “on the court’s plate ... threatens the very separation of powers for the state of Wisconsin’s tripartite system of government.” Justice Ziegler agreed: “My concerns stem from separation of powers to make sure we don’t usurp the legislative function. It is their job to figure this out.... That’s how our system of government is set up.”

The Court had these concerns even though the committee recommendations then under consideration had sought to avoid premature litigation by limiting actions to instances in which there was indeed a political impasse. In its proposal, the committee wrote of the judiciary getting involved “after a legislative deadlock,” and stated that “the Court needs to avoid being involved prematurely and foreclosing legislative action.” *See* The Courts and Redistricting in Wisconsin: A Proposal Wisconsin Supreme Court: Redistricting Committee at 3, 5; *id.* at 6 (“The guidelines we propose would apply only when the state Legislature has been unable to complete the redistricting process in a timely fashion.”). Specifically, the committee recommended that “[t]o avoid premature filing of actions in the Court,” litigation could be initiated no earlier than December 1 of the year in which the census data was provided to the legislature. *Id.* at 9.

This proposed rule, in contrast, encourages a sprint to the courthouse. Parties are invited to file an original action in this Court months before the legislature could even *begin* the redistricting process. Under the proposed rule, a petition for an original action related to redistricting is deemed “ripe” (apparently overriding normal ripeness principles) the moment “the U.S. Census Bureau delivers apportionment counts to the President and Congress.” But those apportionment counts are merely total population numbers for each state. The more specific state-

level population data that lawmakers (and courts) need in order to draw district maps generally is not released until about 90 days later.

Opening this Court's doors so early would entirely short circuit the political process and raise serious state constitutional questions. By making litigation the first resort, the proposed rule would send a message that the political branches need not assume any responsibility for redistricting. Indeed, the preamble to the rule expressly presumes that the legislative process will fail simply because no party has unilateral government control, which is not a premise this Court should validate. It seems highly problematic to declare that an original redistricting action is ripe for adjudication in this Court before the legislature has any opportunity to "apportion and district anew" "[a]t its first session after [an] enumeration," as the state constitution directs. Wis. Const. art. IV, § 3. Such a rule would flout the settled understanding that redistricting is "an inherently political and legislative—not judicial—task." *Jensen v. Wis. Elections Bd.*, 249 Wis.2d 706, 713, 639 N.W.2d 537 (2002). Conversely, denying this rulemaking petition would send an important signal to the political branches that the onus really is on them to attempt to hash out their differences and fulfill their legal duties. *See id.* ("The framers in their wisdom entrusted this decennial exercise to the legislative branch because the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely these sorts of political and policy decisions, is preferable to any other.").

Significantly, we are aware of no other state that invites redistricting litigation at such an early stage. The majority of states do not have laws that specifically address the timing of redistricting litigation. But those that do seek to make clear that courts will get involved only as a backstop.² Having previously recognized the danger of premature litigation and sought to avoid

² *See, e.g.*, Conn. Const. amend art. XXVI(d) (providing that the state's supreme court may act if no districting plan has been enacted by November 30 of the year in which census results become available); Fla. Const. art. 3, § 16(b)

it, this Court should not now make Wisconsin the only state in the country to invite redistricting litigation as a first resort.

The memorandum in support of the petition suggests (at 5) that authorizing immediate redistricting litigation would help “to put state court actions on par with federal court actions,” but that is wrong. No federal rule expressly classifies redistricting cases as ripe the moment apportionment data is released. In redistricting cases, federal courts apply general ripeness principles to the specific situations before them. And the U.S. Supreme Court has stressed that federal courts must be careful not to jump the gun and interfere in ongoing state redistricting processes. Among other things, that means giving deference to state courts that choose to take on redistricting cases and resolve them in a timely fashion. *See Growe v. Emison*, 507 U.S. 25, 34 (1993) (“Absent evidence that the[] state branches will fail timely to [redistrict], a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.”). In other words, this Court simply doesn’t need a “sue immediately” rule to avoid federal court usurpation. Existing federal doctrines already address that concern. The proposed rule would serve only to encourage those who have primary redistricting responsibility under Wisconsin law (namely, the legislature and governor) to pass the buck to this Court.

B. The proposed rule sits uneasily with this Court’s previously expressed preference to avoid politically charged redistricting matters.

Consider next the Court’s institutional integrity. Front and center during the prior proceedings were concerns that redistricting litigation would inject the Court into partisan feuds and undermine public perceptions of the Court’s neutrality. Explaining why she believed it was

(providing for judicial involvement if the “legislature finally adjourns” a special apportionment session without adopting a plan); Me. Rev. Stat. 21-A, § 1206(2) (authorizing the state’s high court to make an apportionment “[i]f the Legislature fails to [do so] by June 11th of the year in which apportionment is required”); Mich. Comp. L. § 3.73 (allowing lawsuits only after the state’s deadline for the legislature to enact a plan); Wash. Rev. Code § 44.05.100(d) (providing that if a redistricting plan is not approved by “November 15th of the year ending in one,” then “the supreme court shall adopt a plan”).

“institutionally unwise” to adopt a redistricting rule, Chief Justice Roggensack stated that “it has the probability to increase the political pressures on this court in a partisan way that is totally inconsistent with our jobs as a nonpartisan judiciary.... Redistricting is a huge danger to put on the court's plate and a danger we do not need to accept.” She added: “if we ... insert ourselves into the actual lawmaking function which is what redistricting is, I think the public cannot help but perceive us as less impartial and perhaps question our impartiality on other matters.” Justice Ziegler similarly worried about placing the Court “squarely within the sights of the partisan political framework.” And Justice Prosser lamented that it would “turn this Court into a much more political operation.”

The Court feared that it would be immersed in partisan wrangling and accused of political bias even though the proposal then under consideration attempted to mitigate those dangers in at least two ways: First, the proposal reflected careful study by a group of independent, nonpartisan experts. Second, it insulated the Court to some extent by recommending that redistricting cases would be heard first by a specially constituted appellate tribunal rather than the Court itself, which would have a more circumscribed reviewing role.

Neither of those mitigating factors is present here, which means that this proposed rule dramatically amplifies the risks the Court previously identified as grounds for rejecting the previously suggested rule:

First, this proposed rule does not have nearly the same claim to objectivity. The petitioners are one former partisan elected leader of the legislature and one legal advocacy organization. They appear to have crafted their proposal behind closed doors with minimal effort at vetting.

Second, this proposed rule encourages redistricting cases to be brought directly to this Court as original actions, and it puts the onus entirely on this Court to manage those complex and

contentious suits in their entirety. And such suits truly are complicated and resource intensive. They require courts to consider a host of legal requirements (including one person, one vote principles; the Voting Rights Act; state constitutional rules about compactness and political division boundaries; and state statutes) as well as a range of prudential factors, and to do it in the midst of intense political wrangling.

Third, the provision of the rule that grants political parties a right to intervene in redistricting cases would ratchet up the political tensions even further. It would put this Court in the uncomfortable position of assessing maps that are expressly denominated as “Democratic” or “Republican.” And more than that, a formal grant of privileged litigation status to political parties and to each legislative chamber amounts to a message from the Court that partisan interests and the interests of incumbents should predominate in the redistricting process. That is problematic.

Finally, the Court would be diving in at a time when our increasingly polarized politics and an already divisive docket heighten this Court’s institutional challenges. If the Court was reluctant to act before, even with the safeguards suggested during the previous rulemaking proceedings, it should be all the more reluctant now to adopt a rule that provides so similar insulation from concerns about partisan favoritism.

And there is no greater need for the Court to involve itself today. During its prior proceedings, several members of this Court expressed a preference that redistricting litigation be resolved in a federal forum. They noted that life-tenured federal judges are insulated from some of the pressures facing an elected state judiciary and that they have relevant expertise and experience. As Justice Ziegler put it, “We have a federal court who has lifetime appointments, and they’ve done this three times and apparently have done it successfully.” Chief Justice Roggensack likewise observed that the federal courts “had proven their competence in the past,”

“had done a good job,” and “are not elected officials that are apt to be seen as partisans when they do the job of redistricting.” Justice Prosser added, “Let them go to the federal court.”

Contrary to the petition’s suggestions, federal law in no way compels unwilling state courts to enmesh themselves in redistricting disputes. What the U.S. Supreme Court has indicated is that “reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.” *Growe v. Emison*, 507 U.S. 25, 34 (1993) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). All that means is the federal courts shouldn’t step on the toes of state actors while they attempt to do their redistricting work. Thus, *if* a state court becomes involved in the redistricting process (perhaps because state law affirmatively vests the court with responsibility), then the federal courts should not unduly interfere. But *whether* a state court chooses to get involved is left to that court and to state law. As this Court well understood when it declined to act last time, it is certainly under no federal law obligation to accept an original redistricting action. *See Lawyer v. Dep’t of Justice*, 521 U.S. 567, 576 (1997) (“A State should be given the opportunity to make its own redistricting decisions so long as that is practically possible *and the State chooses to take the opportunity.*”) (emphasis added). Of course, redistricting cases *can* be heard in Wisconsin courts even without the proposed rule, so declining to adopt the current proposal does not commit the Court to remaining on the sidelines should it ultimately decide that its involvement is warranted.

II. The proposed rule has significant technical and conceptual deficiencies.

Beyond these big-picture problems, the proposed rule suffers from ambiguities, technical defects, and conceptual fallacies that would likely create headaches. If this Court ever chose to accept an original redistricting action, it would be better off using the standard procedural rules already on the books rather than trying to muddle through the untested provisions of this proposal. The following is a partial list of deficiencies:

- The proposed rule provides that an “original action under this section may be filed and is ripe any time after the U.S. Census Bureau delivers apportionment counts to the President and Congress as required by law.” Technically speaking, actions under this provision would never be ripe because the U.S. Census Bureau does not deliver the apportionment counts to the President or to Congress. Instead, it is the Secretary of Commerce who presents the data to the President. *See* 13 U.S.C. § 141(b). The President, in turn, transmits an apportionment statement to Congress a short time later. *See* 2 U.S.C. 2a(a).
 - Even if the Census Bureau could be said to make these deliveries, the fact that the President and Congress do not receive the data at same time may lead to confusion about when suits may be filed.
 - Additionally, as noted above, this initial census data does not kick off the state redistricting process. It simply identifies total state populations for the apportionment of congressional seats among states. It is therefore unclear why either of these dates should be the relevant trigger. At this stage, the state has not yet received any data. The state officially receives its first census information from the House clerk, who transmits a certificate to the governor within 15 days after the President provides the apportionment counts to Congress. *See* 2 U.S.C. § 2a(b). But again, this is just the overall number of congressional seats to which the state is entitled, not the information the state needs for redistricting. That information does not arrive until approximately 90 days later, and it is only then that the redistricting process can even begin. Indeed, the memorandum in support of the rule acknowledges this (at 4), and further recognizes (at 5) that litigation likely

“cannot proceed very far until approximately December 2021 (or maybe even later).” It is bizarre that the rule would deem litigation “ripe” nearly a year earlier.

- The proposed rule provides that “political parties shall be granted intervention as of right.” The term “political parties” is vague and perhaps broader than the petitioners intend, and it is not apparent why parties should receive this special status.
 - First, the proposed rule is not limited to parties that expect to have candidates on the ballot for state legislative or congressional elections. Minor parties without a presence in the relevant elections (and presumably even ones with no regular presence in Wisconsin) would be entitled to intervene.
 - Second, political parties have multiple organizational manifestations. Could a national party committee and a state committee of the same party both choose to intervene? What about local party organizations?
 - Additionally, there is no good reason for conferring that right. In post-census litigation to ensure compliance with the federal equal-population principle, the rights at stake are the rights of citizens to equal representation. Political parties are not the relevant right-holders, and other actors have interests that are at least as significant. Local governments, for example, have a direct interest in the lines that may bisect their communities and potentially even undo the wards they create. *See* Wis. Const. art. IV, § 4 (requiring “districts to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable”); Wis. Stat. § 5.15 (describing the process for creating local wards). Yet the rule does not give them a right to intervene. The rule similarly overlooks

groups representing minority voters who may have particular interests in ensuring that their votes are not diluted in violation of the Voting Rights Act.

- Petitioners say that they drew this political party intervention rule from Michigan law, but that Michigan provision is highly unusual. Other states have not given political parties a categorical right to intervene in redistricting cases. (For reasons they do not disclose, petitioners declined to incorporate other aspects of Michigan's rule into their proposal, including provisions that bar suits until after the legislature fails to meet a legal deadline for enacting a plan, that make the state supreme court's jurisdiction exclusive, and that allow for special masters to assist with the process. *See Mich. Comp. L. §§ 3.71-.73.*)
- Rather than providing for political parties to intervene as of right, it would seem more appropriate for intervention to be discretionary with a presumption that it would suffice for parties to participate as *amici* if they are so inclined.
- Along similar lines, the proposed rule would allow the governor and each legislative chamber to intervene as of right. It may well be sensible for these actors to play a role in the litigation, including to help mitigate unintended consequences of particular redistricting lines. But it is not apparent that these actors have three distinct legal interests in the content of the maps that require their full participation as parties. *See, e.g., Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953-56 (2019) (holding that a single legislative chamber did not have a legally cognizable interest that conferred standing to appeal the invalidation of a state redistricting plan). Once the political branches either adopt a map sufficient for judicial review or reach an impasse that forces a court to act,

their formal institutional role is complete. If they wish to be involved in the litigation, participating in an *amicus* capacity should suffice.

- The proposed rule contemplates (at § 809.70(5)(f) and (i)) that the court may prepare and revise its own redistricting plan rather than being forced to choose among litigant-created plans, all of which may have important flaws. Yet the rule does not explain *how* the Court would do this technically complicated and labor-intensive work, which can require weeks or months of nonstop effort. It does not, for instance, specify that the Court may retain a special master to assist it. Nor does it authorize the Court to draw on the resources and expertise of the Legislative Technology Services Bureau. (It does allow the Court to refer factual disputes to a referee, but the referee’s role does not appear to extend to preparing a plan.) During the prior rulemaking process, Chief Justice Roggensack expressed concern that no provision had been made in terms of “(a) how are we going to staff this, and (b) where are we going to get the money for it.” Justice Ziegler likewise observed that “funding is an issue.” The proposed rule offers nothing on these fronts.
- In fact, the rule may needlessly limit the Court’s ability to consider and adopt potentially helpful redistricting proposals. The text (at § 809.70(5)(c) and (f)) suggests that the Court should choose a plan that is either submitted by a party or prepared by the Court. But what about a plan put forward by a participant without the status of an intervenor? A range of Wisconsin residents and organizations have the opportunity to offer their expertise during the legislative redistricting process. It is not clear why the Court would want to foreclose the option of considering plans offered by such actors (or, conversely, to require all such actors to seek to intervene if they wish to present a plan).

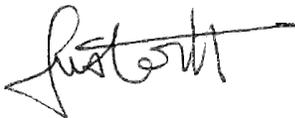
- The proposed rule provides that “Requests to the supreme court to take jurisdiction of any case which relates to congressional and/or state legislative redistricting shall be through a petition for an original action under this section.” According to the supporting memo (at 4), this provision does not make original actions the exclusive option for redistricting-related matters. A litigant could still choose to file suit in a circuit court even as this Court is considering an original redistricting action. *See* Wis. Stat. § 751.035. The rule provides no obvious mechanism for this Court to structure or avoid such parallel proceedings.

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In short, the proposed rule would be a recipe for confusion and conflict. If it were adopted, the Court might well find itself short-circuiting the legislative process only to become bogged down in procedural disputes that would make redistricting litigation even more contentious and time consuming to resolve. With sufficient time and care, it might be possible to craft a better rule—one that would encourage the political branches to overcome their differences and fulfil their redistricting duties while positioning the Court to be an efficient and effective last-resort backstop. But in our view, this proposed rule would do more harm than good.

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