

State Judicial Elections and Environmental Law: Case Studies of Montana, North Carolina,  
Washington and Wisconsin.

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Introduction and Overview

This paper presents cases studies of the judicial electoral process and its implications for environmental law in four states: Montana, North Carolina, Washington, and Wisconsin. The growing politicization and expense of state judicial elections have been widely documented.<sup>1</sup> Prior research has also documented efforts of certain segments of the business community and their ideological allies to attempt to influence state environmental law by participating in judicial electoral politics.<sup>2</sup> This paper seeks to advance the state of knowledge by focusing on four specific states and taking an in depth look at the how the electoral process has actually affected the evolution of environmental law in these states.

While the federal courts, and the U.S. Supreme Court in particular, are the more high profile players in the development of the environmental law, the state courts vie in importance in the enforcement and development of environmental by virtue of the breadth of their jurisdictions and because the federal government has delegated so much responsibility for enforcing environmental law to the states. The importance of the state courts to the development of environmental law by itself makes a study of how the process for selecting supreme justices may affect the content of environmental law worthwhile.

In addition, however, certain segments of the business community and their allies have focused on the elected state courts as promising targets for achieving policy change. Starting in the mid-1990s, consulting firms and advocacy groups financed by David and Charles Koch initiated a nationwide effort to change the direction of state law on the environment and a host of other

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<sup>1</sup> See, e.g., Alan Blinder, *Conservatives See Potential in Tennessee Judicial Race*, The New York Times, August 5, 2014.

<sup>2</sup> See John D. Echeverria, *Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections*, 9 N.Y.U. Envtl. L.J. 217 (2001).

issues by organizing political efforts to elect conservative candidate to the state elected courts.<sup>3</sup> The Kochs launched this effort because they realized that the state courts play an important role in developing and applying environmental law. But they also realized that because state judicial elections had traditionally been very low-key and inexpensive, a modest investment of effort and money could yield significant political results. In other words, compared to other opportunities to invest money in order to change the direction of law and public policy, the Kochs thought state judicial elections offered a particularly promising bang for the buck.

This paper pursues the efforts by the Koch and their allies to influence the direction of environmental law and policy by participating in state judicial elections by focusing on four states. In brief, the conclusions of this study are as follows:

Montana's Supreme Court had long distinguished itself from other state courts by demonstrating a special interest and sympathy for the goals of environmental law, a stance consistent with and arguably mandated by the State's virtually unique recognition of a constitutional right to "a clean and healthful environment." In recent years, however, environmental advocates have suffered some notable losses before the Supreme Court, for example, in a decision declining to apply the Montana Environmental Policy Act to a major lease of state lands for coal mining, and in a decision declining to apply the "strict scrutiny" mandated by the constitutional right to a clean and healthful environment to an agency's interpretation of its own regulations. Even when the environmentalist side has prevailed in recent years as in an important stream access case, the Court was sharply split over the case. In 2012, the U.S. Supreme Court struck down Montana's 100 year old, voter-approved ban on participation by natural resource industries and other companies in electoral politics. Also in 2012, a federal appeals court struck down Montana's long-time ban on non-partisan elections. On the elections front, in 2012, Montana Growth Network, led by a Montana Tea party activist and funded by handful of wealthy but anonymous donors (possibly including the Kochs) helped secure the election of conservative Laurie McKinnon by running harsh attacks ads directed at both McKinnon's liberal opponents. In 2014, a long-time incumbent, who has generally voted to uphold environmental protections, is being challenged by a hard-right ideologue whose election would further swing the Court to the right. In sum, conservative forces have made considerable progress and are continuing in their efforts to change the direction on environmental law in Montana by changing the personnel on the Court.

The North Carolina Supreme Court has already become a virtual sinkhole for environmental law. Over the last fifteen years, in *every* instance in which the Court has exercised its discretion to review a major environmental law issue, the Court has sided with the anti-environmental protections side of the dispute. Throughout this period, the Court (which is nominally nonpartisan) has been dominated by justices associated with the Republican Party. In 2012, in a hard fought contest for control of the Court, the Republican Paul Newby narrowly prevailed over

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<sup>3</sup> See John D. Echeverria, *Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections*, 9 N.Y.U. Envtl. L.J. 217 (2001).

Democrat Sam Ervin IV; independent expenditures in support of Newby outpaced those in support on Ervin by a margin of 8 to 1, with Newby's support coming from American for Prosperity (a recipient of Koch funding), Justice for All NC (funded by the Republican State Leadership Committee), and the North Carolina Judicial Coalition (with major funding from the NC Chamber of Commerce and parent company of R.J. Reynolds Tobacco). In 2014, the three Democrats on the Court all face stiff challenges for reelection; Robin Hudson, today the sole consistent dissenter from the Court's determination to weaken environmental protections, survived a bitterly contested primary challenge in which a controversial television ad financed by Justice for All NC attacked Hudson for being "soft of child molesters." In sum, the situation in North Carolina is bleak and has the potential to become bleaker still.

Washington State offers a rare example of a state in which the voters have placed a centrist bloc in control of the state supreme court and soundly rejected a bid by segments of the business community and their ideological allies to turn the Court in a conservative direction. Over the last fourteen years, the outcomes of the Court's decisions in environmental cases have split equally between the pro- and anti-environmental sides of the dispute, which is the result one would expect if the Court were deciding cases on the merits without any particular ideological predisposition. In 2006, following the election of two very conservative justices who consistently voted against environmental protections, business interests and property rights advocates pushed for the election of three more conservative justices. But as a result of an aggressive and well-funded (if still out-matched) effort by environmental advocates, labor unions and other liberal groups, all three candidate were defeated. In 2010, after fifteen years on the Court, Justice Richard Sanders, the Court's original "property rights justice," was ousted from his seat by a liberal opponent, and he failed in a 2012 bid to regain a place on the Court in race to fill an open seat on the Court. Following this tumult, Washington judicial elections have lost their sharp partisan edge and environmental advocates in Washington are assured (at least for the time being) of a reasonable shot at having their cases fairly resolved on the merits.

Wisconsin also illustrates the effect of partisanship on judicial decision making, despite the nominally non-partisan process for electing justices to the Wisconsin Supreme Court. An examination of major environmental law cases decided between 2000 and 2013 shows that, almost without exception, justices associated with the Republican Party voted on the anti-environmental protection side while justices associated with the Democratic Party consistently voted on the pro-environmental side. In addition, as partisan control of the court swung back and forth over this period, the outcomes of the environmental cases before the Court also swung back and forth, with environmental advocates almost always winning while the Democrats were in control and almost always losing while the Republicans were in control. In keeping with the "purple" character of the Wisconsin judiciary, recent elections to the Wisconsin Supreme Court have been ferocious, and ferociously expensive, political contests. Since 2007, millions of dollars have been expended in independent expenditure campaigns in each judicial election supporting and attacking candidates for seats on the Wisconsin Supreme Court. In 2007, Joanne

Kloppenborg, a long-time environmental attorney with the Attorney General's Office, failed in a bid to unseat Justice David Prosser by a scant 7000 votes; Prosser benefited from a \$2.21 million independent expenditure campaign, with half of this amount provided by the Koch-backed Americans for Prosperity. In short, the Wisconsin Supreme Court, and its environmental jurisprudence, will continue to be contested at the ballot box for the foreseeable future.

Even though this sampling of state judicial politics is quite limited, some general conclusions are possible. First, as common sense would suggest, the identities of the persons elected to the state supreme court have an enormous influence on the character and direction of the state's environmental law jurisprudence. Some state courts seek to support the goals of environmental laws and other state courts seek to undermine them, and the ideological orientation of the Court majority determines in which direction any particular state court is headed.

Second, voters across the country appear anxious to support candidates who will rule fairly and in accordance with "the law." At the same time, they tend to reject candidates who they perceive as extremist in either direction. But sober and objective judging is a relative abstraction and voters have little basis for making a discerning judgment about whether judges are actually centrist in their decision making, much less about the potential performance of candidates for judicial office. As a result, negative campaigning, both by candidates themselves and by "independent expenditure" groups, appears to play an outsize role in the judicial elections. Most candidates seek to stake out a middle ground, and those candidates who adopt an explicitly ideological posture, such as Richard Sanders of Washington, tend to pay the price at the polls. Most judicial elections involve an effort to disabuse voters of candidates' claims, sometimes factually supported, sometimes not, that they represent the centrist candidate in race.

Finally, supporters of judicial candidates appear to do themselves no favors by suggesting that their favored candidate will produce particular outcomes once elected to the judiciary. While such appeals may motivate some voters to vote for a candidate, they appear as likely to motivate voters to vote for the opposing candidate, and will generally alienate voters who seek to elect a judge without a political agenda. Washington Conservation Voters appears to have adopted an effective approach by explicitly "not demand[ing] that judicial candidates have a particular ideological inclination," and instead committing to endorse "those candidates that are fully committed to a fair and impartial judiciary, thereby ensuring that our friends and allies will receive a fair shot when arguing environmental cases before our appellate courts."

At the end of the day, it is difficult to make a judgment on whether elected judges or judges selected through other means are more political in their approach to environmental law cases. As described in detail below, elected state judges are often quite predictable in how they will come down in environmental cases. But the justices on the U.S. Supreme Court are also very predictable, often splitting in controversial environmental law cases along very predictable lines. Whether one type of court is more "political" than the other is hard to say. But what is obvious, to the extent judges are merely politicians in black robes the methods for their selection vary

significantly. Federal judges including U.S. Supreme Court justices are nominated by the president, making the presidential election the primary determinant of the future political direction of the federal judiciary; in the minds of the some, the power of the president to fill upcoming vacancies on the Supreme Court should be the primary factor in choosing whom to vote for as president. But in state the judicial elections, voters and advocacy groups have a direct and immediate role in the selection process. If this research effort has one message to convey it is that those who are affected by and care about decisions by their elected state courts cannot afford to sit on the sidelines of these contests,.

## MONTANA

### Montanans' Right to a Clean and Healthful Environment

In the arena of environmental law Montana stands apart from most other states because of its constitutional provisions recognizing a right to a “clean and healthful environment.”<sup>4</sup> Historically, the Montana Supreme Court has been willing to invest these constitutional provisions with genuine meaning, a practice justified by Montanans’ decision to include these provisions in their Constitution in the first place.<sup>5</sup> Thus, when it came to the development of its environmental jurisprudence, Montana outpaced most other states. Numerous Montana Supreme Court decisions interpreted and applied the constitutional provisions to provide Montanans a level of legal environmental protection beyond that provided in other states. Even in cases not specifically implicating the constitutional provisions, their inclusion in the Montana Constitution encouraged the Court to approach environmental law issues with sympathy for the goals of environmental law.

In recent years, however, arguably due in part to changes in the composition of the Court, as well as the political advocacy surrounding the judicial selection process, the Court has become somewhat more ambivalent and circumspect in its approach to environmental law. Current and future contests for seats on the Supreme Court have the potential to begin to reverse the Court’s environmentally protective jurisprudence.

The preamble to the Montana Constitution displays an extraordinary appreciation for the value of Montana’s natural resources: “We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution.”<sup>6</sup> But the truly remarkable

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<sup>4</sup> MONT. CONST., Art. II, sec. 3; Art. IX. *See* Sylvia Ewald, *State Court Adjudication of Environmental Rights: Lessons from the Adjudication of the Right to Education and the Right to Welfare*, 36 *Col. J. Envtl Law* 413, 422-38 (2011) (describing the half dozen other states with constitutions establishing environmental rights)

<sup>5</sup> The highest courts of most other states with constitutional rights to environmental protection have followed a more timid path in developing their environmental rights jurisprudence. *See id.* The Pennsylvania Supreme recently issued a decision invigorating the long-moribund right to environmental protection under the Pennsylvania Constitution. *See Robinson Tp., Washington County v. Com.*, 83 A.3d 901 (Pa. 2013)

<sup>6</sup> MONT. CONST. pmbl.

parts of the Constitution, as revised in 1972, are the provisions that give operational meaning to these sentiments. Article II, section 3 declares, under the heading of “Inalienable Rights,” that “All persons are born free and have certain inalienable rights,” including “the right to a clean and healthful environment.” An entire article of the Constitution, Article IX, is devoted to “Environment and Natural Resources,” and includes the statement that “The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.”

While the Supreme Court was initially slow to recognize the significance of these provisions,<sup>7</sup> in 1999, in *Montana Environmental Information Center v. DEQ*,<sup>8</sup> the Court determined, unanimously, that the guarantee of a clean and healthful environment represented a “fundamental right” under the Montana Constitution, on a par with freedom of speech or freedom of religion. The Court ruled in light of these provisions that a trial court had erred in rejecting an environmental group’s challenge to the issuance of discharge permits for a proposed mine without complying with the State’s “anti-degradation” policy. The Department of Environmental Quality’s grant of an exemption from the anti-degradation policy could be upheld, the Court explained, only if it furthered a compelling governmental interest, was closely tailored to effectuate that interest and represented the least environmentally destructive method to achieve the State’s goal.<sup>9</sup>

In 2001, in *Cape-France Enterprises v. Estate of Peed*,<sup>10</sup> the Court extended the ruling in *MEIC* by holding that the constitutional right to a clean and healthy environment applied not only to the government but to private parties as well. After a landowner signed a land-sale contract, the Department of Environmental Quality informed the owner of potential groundwater pollution under the land, the need to do water testing before the land could be sold, and the risk

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<sup>7</sup> See *Kadillak v. Anaconda Co.*, 602 P.2d 147 (Mont. 1979) (ruling that State Board of Land Commissioners was not required under the Montana Environmental Policy Act to prepare an EIS prior to issuing an operating permit under the Hardrock Mining Act, given that the act included a strict 60-day deadline for acting on an application for a permit, which precluded compliance with the time-consuming MEPA, and rejecting the argument that the result should be different in Montana based on the constitutional right to a clean and healthful environment). See generally Jack Tuholske, “The Legislature Shall Make No Law . . . Abridging Montanans’ Constitutional Rights to a Clean and Healthful Environment, 15 Southeastern Env’tl L. J. 311 (2007) (discussing the history of judicial implementation of the Montana right to a clean and healthful environment).

<sup>8</sup> 988 P.2d 1236 (Mt. 1999).

<sup>9</sup> *Id.* at 1246.

<sup>10</sup> 29 P.3d 1011 (Mt. 2001).

of liability as a result of any pumping associated with the water testing. In these circumstances, the Court ruled, the constitutional right to a clean and healthy environment entitled the landowner to rescind the contract.

The following year in *Hagener v. Wallace*,<sup>11</sup> the Court upheld the authority of the Department of Fish, Wildlife & Parks to sue to block the transfer of 500 game farm elk to the Crow Indian Reservation in order to protect the native elk population, observing that “the statutes at issue in this case are not mere technicalities or unreasonable obstacles to private enterprise,” but rather “are essential to ensure the health and safety of Montana’s natural wildlife population,” and “reflect the theory underlying environmental protection that being proactive rather than reactive is necessary to ensure that future generations enjoy both a healthy environment and the wildlife it supports.”<sup>12</sup>

In 2010, in the most recent environmental-side win involving Montana’s constitutionally-based environmental right,<sup>13</sup> the Court ruled in *State ex rel. Dept. of Environmental Quality v. BNSF Ry. Co.*,<sup>14</sup> that in view of the right to a clean and healthy environment it was appropriate to interpret the State Comprehensive Environmental Cleanup and Responsibility Act (“CECRA”) more broadly than the parallel federal superfund law. The U.S. Supreme had Court determined that the federal superfund law did not support the theory of “arranger” liability,<sup>15</sup> but the Montana Supreme Court ruled that it was still appropriate to apply arranger liability theory under state law. Citing the constitutional right to a clean and healthy environment, the Court stated that “[a] broad scope of arranger liability best serves CECRA’s stated purpose to protect the public

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<sup>11</sup> 47 P.3d 847 (Mt. 2002).

<sup>12</sup> *Id.* at 854.

<sup>13</sup> The Montana Supreme Court did not invariably rule in favor of a broad reading of the constitutional right to a clean and healthful environment. In *Merlin Meyers Revocable Trust v. Yellowstone Co.*, 53 P.2d 1268 (Mont. 2002), the Supreme Court ruled that county commissioners could not properly invoke the right to a clean and healthful environment to justify barring sand and gravel operations in nonresidential zoning districts in violation of state statutory law. *See also* *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079 (Mt. 2007) (ruling that landowner could recover damages for groundwater contamination due to refinery operation on a common law tort theory, but pretermitted issue of whether a constitutional tort claim can be brought under Article II, section 3 of the Montana Constitution).

<sup>14</sup> 246 P.3d 1037 (Mt. 2010).

<sup>15</sup> *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009).



health and welfare of all Montana citizens against the dangers arising from releases of hazardous or deleterious substances.”<sup>16</sup>

In other environmental cases the Montana Supreme Court has also generally supported environmental protection policies, either favoring environmental groups and citizens in cases against the government, or favoring the government in cases against resource industries and polluters. Thus, the court generally has adopted an expansive reading of the Montana Environmental Policy Act (Montana’s “little NEPA”),<sup>17</sup> upheld municipal bans on smoking in video gaming establishments,<sup>18</sup> reversed Department of Environmental (DEQ) air-quality permits because they authorized too much pollution,<sup>19</sup> upheld the authority of the Montana Petroleum Tank Release Compensation Board to sue the owner of a petroleum tank for reimbursement of the costs of cleaning up an oil spill,<sup>20</sup> enforced pollution limits on water produced by coal-bed methane extraction,<sup>21</sup> allowed environmental groups to expand their

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<sup>16</sup> *Id.* at 1046.

<sup>17</sup> *Montana Environmental Information Center, Inc. v. Montana Dept. of Transp.*, 994 P.2d 676 (Mt. 2000) (holding that Department of Transportation violated the Montana Environmental Policy Act by failing to prepare a Supplemental Environmental Impact Statement for an interstate highway interchange project); *Friends of the Wild Swan v. Department of Natural Resources and Conservation*, 6 P.3d 972 (Mt. 2000) (holding Department of Natural Resources and Conservation Environmental Impact Statement on proposed timber sale inadequate).

<sup>18</sup> *American Cancer Society v. State*, 103 P.3d 1085 (Mt. 2004).

<sup>19</sup> *Montana Environmental Information Center v. Montana Dept. of Environmental Quality*, 112 P.3d 964 (Mt. 2005) (reversing District Court decision upholding Board of Environmental Review order approving decision by Department of Environmental Quality to issue air quality permit for power plant).

<sup>20</sup> *Montana Petroleum Tank Release Compensation Bd. v. Crumleys, Inc.*, 174 P.3d 948 (Mt. 2008). *But see Montana Petroleum Tank Release Compensation Bd. v. Empire Fire and Marine Ins. Co.*, 185 P.3d 1021 (Mt. 2008) (ruling that subrogation action brought by Board against insurer to obtain reimbursement of recovery costs was barred by applicable statute of limitations).

<sup>21</sup> *Northern Cheyenne Tribe v. Montana Dept. of Environmental Quality*, 234 P.3d 51 (Mt. 2010) (reversing the District Court grant of summary judgment to DEQ in a challenge to a decision to issue a permit allowing company to discharge groundwater derived from its coal bed methane extraction activities without applying pre-discharge treatment standards); *Pennaco Energy, Inc. v. Montana Bd. of Environmental Review*, 199 P.3d 191 (Mt. 2008) (rejecting industry challenge to Board of Environmental Review rules setting limits on two harmful components of coal bed methane-produced water).

administrative complaints in proceedings challenging permit decisions,<sup>22</sup> overturned local land use approvals on the ground that they provided inadequate protection for the environment,<sup>23</sup> and ruled that DEQ's issuance of a storm water discharge permit to a mining company was arbitrary and capricious because the stream receiving the discharge was an "area of unique ecological significance."<sup>24</sup>

However, in the last several years, environmental advocates have suffered several important losses in the Supreme Court, suggesting a shift in attitudes on the Court toward environmental cases. In 2008, in *Clark Fork Coalition v. Montana Dept. of Environmental Quality*,<sup>25</sup> the Court rejected the argument that the "strict scrutiny" normally called for by the constitutional right to a clean and healthful environment should apply in the context of addressing whether an environmental agency properly interpreted its own regulations. Instead, the Court applied the deferential standard of review that other courts normally apply to agency interpretations of their own rules in the absence of constitutionally-protected environmental rights. (While this ruling placed an important new limit on the scope of the constitutional right to a clean and healthful environment, the Court still ruled for the plaintiffs because, even applying a deferential standard of review, the Court ruled that the agency adopted an arbitrary reading of its regulations by concluding that an anti-degradation analysis was not required in connection with the review of a proposed mine.)

In 2011, the Court issued an important ruling limiting the procedural rights of a county under the Montana Environmental Policy Act in connection with a proposed electric transmission line.<sup>26</sup> Reversing a District Court decision, the Supreme Court ruled that the county was not entitled to injunction against release of a draft environmental impact statement, rejecting the argument that the agency had failed to conduct necessary consultations with the county.

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<sup>22</sup> *Citizens Awareness Network v. Montana Bd. of Environmental Review*, 227 P.3d 583 (Mt. 2010) (abrogating two prior decisions, and ruling that the Board of Environmental Review erred in refusing to allow an environmental group challenging the issuance of an air permit for a power plant to amend its administrative complaint).

<sup>23</sup> *Headapohl v. Missoula City-County Bd. of Health*, 260 P.3d 139 (Mt. 2011) (reversing District Court ruling that construction activity was carried out in accord with municipal health code); *Aspen Trails Ranch, LLC v. Simmons*, 230 P.3d 808 (Mt. 2010) (ruling that approval of preliminary plat without having adequate groundwater information was unlawful, and decision to approve preliminary plat without assessment of impacts on groundwater and creek from surface pollution was arbitrary and capricious).

<sup>24</sup> *Clark Fork Coalition v. Department of Environmental Quality*, 288 P.3d 183 (Mt. 2012)

<sup>25</sup> 197 P.3d 482 (Mt. 2008).

<sup>26</sup> *Jefferson County ex rel. Bd. of Com'rs v. Department of Environmental Quality*, 264 P.3d 715 (Mt. 2011).

In 2012, the Court issued two decisions adverse to environment plaintiffs. In *Montana Wildlife Federation v. Montana Bd. of Oil & Gas Conservation*,<sup>27</sup> the Court rejected wildlife groups' argument that the board had not complied with the Montana Environmental Policy Act before issuing several dozen permits for gas wells that would allegedly harm habitat for the greater sage grouse, a candidate for the federal threatened and endangered species list. Specifically, the Court ruled that the environmental assessments prepared for each well were appropriately tiered to two Environmental Impact Statements prepared many years earlier, the environmental assessments adequately considered cumulative environmental impacts; and plaintiffs failed to make a sufficient showing of cumulative environmental impact to demonstrate the need for a programmatic EIS covering all of the wells.

Also in 2012, in *Northern Plains Resource Council, Inc. v. Montana Bd. of Land Com'rs*,<sup>28</sup> the Court rejected a constitutional challenge to a statute exempting decisions by the State Land Board to lease state lands for coal mining purposes from the Montana Environmental Policy Act as long as development of the leased land was subject to "further permitting." Plaintiffs claimed that this exemption violated the constitutional right to a clean and healthful environment, but the Court rejected the argument. The Court ruled that the leasing decision did not directly implicate the constitutional right insofar as the state preserved the power to conduct environmental reviews and compel compliance with environmental laws at later stages of the development process. Therefore, the court reasoned, the constitutionality of the statute was subject to review under a rational basis standard of review and, under that standard, withstood the constitutional challenge. In reaching this result the Court arguably overlooked the point that once the state enters into leasing arrangements and makes budget plans based on the anticipated receipt of millions of dollars in coal royalties, state regulators will be hard pressed to impose meaningful environmental limits on future coal operations.

Finally, even when the environmental side of the case has prevailed in recent years, such as in a controversial stream access case, the Court's decision-making process appears to have become more conflicted than in years past. In the 2014 decision in *Public Lands Access Association, Inc. v. the Board of County Commissioners of Madison County*,<sup>29</sup> the Court, in rather technical 5 to 2 ruling, with an opinion for the court by Justice Michael Wheat, upheld a claim by the public to a right to gain access to a stream from a public roadway over the stream established by prescription. In dissent, Justice Laurie McKinnon described the majority opinion

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<sup>27</sup> 280 P.3d 877 (Mt. 2012).

<sup>28</sup> 288 P.3d 169 (Mt. 2012).

<sup>29</sup> 321 P.3d 38 (2014).

as “ignoring a century of precedent”<sup>30</sup> and Justice Jim Rice described it as “a sweeping departure from established law.”<sup>31</sup>

One can only draw so many conclusions from a review of the limited number of environmental decisions issued by the Montana Supreme Court. Even in the period immediately following adoption of the constitutional right to a clean and healthful environment, the environmental side did not prevail on every argument presented to the Supreme Court.<sup>32</sup> In addition, the court has continued to award environmentalists victories in certain cases in recent years.<sup>33</sup> Moreover, each case involves distinctive factual and legal issues that have their own strengths and weaknesses. Yet there is an unmistakable trend in the direction of the Court’s decision-making on environmental issues over the last fifteen years. Environmentalists are more likely to receive a cold should from the court today than they were a decade ago. Several members of the current court appear, based on their voting records, to be openly hostile to the goal of environmental protection. And the willingness of interest groups opposed to stringent environmental protections to vigorously attack candidates for seats on the court based on their environmental views, and to promote candidates who are perceived as less likely to support strong environmental protections, has likely had a chilling effect on the court as a whole in terms of its willingness to develop the state’s environmental jurisprudence.

Before examining in detail how the recent battles in Montana over judicial selection have affected the make-up of the Montana Supreme Court and the court’s environmental law decision-making it will be useful to review in detail the selection process for the Montana high court.

#### The Montana Judicial Selection Process

The Montana Supreme Court consists of a Chief Justice and six Associate Justices,<sup>34</sup> and each justice serves for a term of 8 years.<sup>35</sup> In its 1972 constitutional revisions Montana adopted a unique system of judicial selection under which the justices are either by appointed to the

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<sup>30</sup> *Id.* at 68.

<sup>31</sup> *Id.* at 69.

<sup>32</sup> *See, e.g., Kadillak v. Anaconda Co.*, 602 P.2d 147 (Mont. 1979).

<sup>33</sup> *See, e.g., Clark Fork Coalition v. Department of Environmental Quality*, 288 P.3d 183 (Mt. 2012)

<sup>34</sup> MCA § 3-2-101.

<sup>35</sup> Mont. Const., Art VII, sec 7

Supreme Court by the Governor or elected by popular vote.<sup>36</sup> Each of the justices, regardless of the method of appointment, serves on a statewide basis.<sup>37</sup>

If a justice retires during his or her term, creating a vacancy on the court, the Governor is authorized to appoint a new justice to fill the vacant seat, subject to Senate confirmation.<sup>38</sup> The Governor must select a candidate from a slate identified by a Judicial Nominations Commission,<sup>39</sup> which must send the Governor between three and five names for his or her consideration.<sup>40</sup> The Commission is composed of seven members: four lay members from different geographical areas of the state appointed by the Governor; two attorneys appointed by the Supreme Court; and one district judge elected by the district judges.<sup>41</sup>

At the next general election following a justice's appointment, if the appointee wishes to remain on the court, her or her name is placed on the ballot.<sup>42</sup> If other candidates file for the seat, there is a contested election. If no other candidate files, voters have the opportunity to cast a yes or no vote on whether to retain the appointed justice.<sup>43</sup>

When a justice retires at the end of his or her term, the open seat is filled through a popular election rather than by appointment.<sup>44</sup> At the end of an elected justice's term, if the justice wishes to serve for another term, other candidates can file against the justice seeking re-election. If the justice is running unopposed, voters again have the opportunity to cast a yes or no vote on whether to retain the justice.<sup>45</sup>

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<sup>36</sup> See Brief History of the Montana Judicial Branch, <http://courts.mt.gov/supreme/history.mcp>x (describing the Montana judicial selection process "as a unique hybrid of the Missouri process")

<sup>37</sup> Mont Const. Art. VII, sec. 9; MCA § 3-2-101.

<sup>38</sup> Mont Const, Art. VII, sec 8.

<sup>39</sup> MCA § 3-1-1011.

<sup>40</sup> MCA § 3-1-1010

<sup>41</sup> MCA § 3-1-1001

<sup>42</sup> Mont. Const. Art. VII, sec 8; MCA § 3-1-1014.

<sup>43</sup> Mont. Const., Art. VII, sec. 8.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

One aspect of the selection process that has been a matter of recent controversy is whether justices should continue to be selected on a statewide basis. In 2011, the Montana legislature passed Senate Bill 268, authorizing submission of a referendum to the voters to change the law so that the justices would be selected to serve in one of seven separate districts across the state. Critics of the measure contended that this district approach would tend to make justices beholden to parochial interests, and that it represented a thinly disguised effort to “gerrymander” the court for political purposes.<sup>46</sup>

In 2012, in *Reichert v. State of Montana*,<sup>47</sup> the Supreme Court enjoined submission of the referendum to the voters on the ground that it would modify the constitutionally prescribed procedure for the selection of justices. The court ruled that Article VII, section 9 of the Constitution prescribes three qualifications for a seat on the Supreme Court,<sup>48</sup> “no more, no less,”<sup>49</sup> and therefore the referendum improperly attempted to change the constitution by adding an additional qualification for a seat without going through the mandatory process for amending the constitution. As a result of this decision, the districting plan can only proceed if the proponents of the idea can overcome the substantial hurdle of securing an amendment to the constitution. So far, there has been no serious effort to proceed with the idea of establishing judicial districts through a constitutional amendment.

#### Judicial Rulings Affecting the Judicial Electoral Process

The rules governing state judicial election and state judges have been significantly affected by several recent U.S. Supreme Court decisions, and these rulings necessarily affected the Montana Supreme Court.<sup>50</sup> But in the last few years there have also been several cases

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<sup>46</sup> [Elderidge Nichols](http://electls.blogs.wm.edu/2012/04/11/montsc/), Montana to Vote on Supreme Court justice elections, State of Elections William and Mary Election Law Society, [HTTP://ELECTLS.BLOGS.WM.EDU/2012/04/11/MONTSC/](http://electls.blogs.wm.edu/2012/04/11/montsc/) (April 11, 2012).

<sup>47</sup> 278 P.3d 455 (MT 2012).

<sup>48</sup> To be eligible to sit on the Supreme Court, a person must (1) be a citizen of the United States, (2) have resided in Montana for two years immediately before taking office, and (3) have been admitted to the practice of law in Montana for at least five years prior to the date of appointment or election. Mont. Const, Article VII, Sec. 9.

<sup>49</sup> 278 P.3d at 475.

<sup>50</sup> See *Caperton v. Massey*, 556 U.S. 868 (2009) (ruling that a West Virginia Supreme Court justice was required to recuse himself from a case involving a coal company whose CEO had spent \$3 million to help elect him); *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) (striking down as unconstitutional Wisconsin’s “announce clause,” which barred candidates for judicial office from expressing their views on legal issues likely to come before the court).

directly involving the Montana Supreme Court that have the potential to dramatically influence Montana's judicial electoral politics. The history of these litigations illustrate the point that those seeking to influence environmental law in Montana by altering the composition of the Montana Supreme Court have sought to accomplish their goal not only by seeking to influence the outcomes of contests for specific seats on the court but also by engaging in litigation designed to alter the rules governing the judicial electoral system as a whole.

In one case, the U.S. Supreme Court, following the reasoning of its controversial 2010 ruling in *Citizens United v. FEC*,<sup>51</sup> struck down a Montana statute barring corporations from making political expenditures on behalf of or opposing candidates for public office.<sup>52</sup> The case was brought by American Tradition Partnership, which describes itself on its website as an anti-environmental, pro-property rights organization:

American Tradition Partnership (ATP) is a no-compromise grassroots organization dedicated to fighting the radical environmentalist agenda. We support responsible development of natural resources and rational land use and management policies. Only together can we protect access, private property rights, and affordable energy for all Americans!<sup>53</sup>

American Tradition Partnership, formerly known as Western Tradition Partnership, has been the target of widely publicized allegations that it engaged in election activities inconsistent with its section 501(c)(4) non-profit status.<sup>54</sup> Whether or not American Tradition Partnership crossed some legal boundary, it is apparent that one of the group's goals has been to influence, directly or indirectly, the composition and direction the Montana Supreme Court.

In the aftermath of *Citizens United*, which invalidated a federal prohibition on corporate contributions to candidates for federal office, many observers questioned whether Montana's century-old Corrupt Practices Act, barring corporate contributions to or expenditures in elections, was vulnerable to attack. However, the Montana Supreme Court, in a 5 to 2 decision, rejected the argument of American Tradition Partnership that the Montana statute violated the freedom of speech provisions of the United States and Montana Constitutions.<sup>55</sup> Distinguishing the U.S. Supreme Court decision in *Citizens United*, the Montana court ruled that the ban on

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<sup>51</sup> 558 U.S. 310 (2010).

<sup>52</sup> *American Tradition Partnership, Inc. v. Bullock*, 132 S.Ct. 2490 (2012).

<sup>53</sup> See American Tradition Partnership homepage, <http://americantradition.org/>

<sup>54</sup> Frontline, Big Sky Big Money <http://video.pbs.org/video/2298009584/> (October 30, 2012).

<sup>55</sup> *Western Tradition Partnership v. Attorney General*, 271 P.3d 1 (2011).

corporate contributions met the high bar for defeating a free speech challenge based on Montana's especially lurid history of political corruption.

Focusing on the judicial electoral process, the Montana court explained that one of the reasons the restriction on corporate contributions should survive constitutional challenge was that the state "has a compelling interest in protecting and preserving its system of elected judges." The court said:

The people of the State of Montana have a continuing and compelling interest in, and a constitutional right to, an independent, fair and impartial judiciary. The State has a concomitant interest in preserving the appearance of judicial propriety and independence so as to maintain the public's trust and confidence. In the present case, the free speech rights of the corporations are no more important than the due process rights of litigants in Montana courts to a fair and independent judiciary, and both are constitutionally protected. The Bill of Rights does not assign priorities as among the rights it guarantees.<sup>56</sup>

The court also expressed concern that the Montana judicial electoral process "would be particularly vulnerable to large levels of independent spending" because the level of campaign spending in state judicial races had traditionally been so modest in Montana.<sup>57</sup>

Justice Nelson, in dissent, argued, with regret, that the Court had no choice but to follow the precedent set in *Citizens United*. He also expressed concern that "judicial elections will become little better than the corporate bidding wars that elections for partisan offices have already become."<sup>58</sup> He suggested that "Montana's voters may—and probably should—amend the Montana Constitution to implement a merit system for selecting judges."<sup>59</sup>

The U.S. Supreme Court, in a brief *per curiam* ruling, reversed, observing that there was "no serious doubt" that "the holding in *Citizens United* applies to the Montana state law," and that "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case."<sup>60</sup> Four members of the Supreme Court dissented from this ruling, referencing their dissent from the 5 to 4 ruling in *Citizens United* two years earlier.<sup>61</sup>

American Tradition Partnership's victory in the Supreme Court arguably brings the State of Montana full-circle in its effort to regulate the role of natural resource industries in state

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<sup>56</sup> *Id.* at 12.

<sup>57</sup> *Id.* at 13

<sup>58</sup> *Id.* at 34.

<sup>59</sup> *Id.*

<sup>60</sup> *American Tradition Partnership, Inc. v. Bullock*, 132 S.Ct. 2490 (2012).

<sup>61</sup> *Id.* at 2491-92



politics. At the turn of the 20<sup>th</sup> century, Montana's political and judicial systems had been thoroughly corrupted by large moneyed interests.<sup>62</sup> William Clark, who amassed a fortune from mining operations in Butte, famously bribed the Montana Senate in order to obtain a seat in the U.S. Senate.<sup>63</sup> In general, business interests used their power to achieve "accomplishment of legislation and the execution of laws favorable to the absentee stockholders of the large corporations and inimical to the economic interests of the wage earning and farming classes who constitute[d] by far the larger percentage of the population in Montana."<sup>64</sup> Public concern about corporate domination of the political and legal systems led to adoption of the Corrupt Practices Act in 1912 by voter initiative.<sup>65</sup> Now, one hundred years later, American Tradition Partnership, a modern day advocate for Montana's natural resource industries, has succeeded in overturning the ban on corporate involvement in elections. Of course, 100 years ago the public concerns about the activities of mining firms and other corporations were somewhat different. Today, environmental injuries have become much more prominent in the mix of public concerns. But, even as the issues have evolved, the basic contest for power between natural resource companies and the general public has remained the same. The U.S. Supreme Court's decision has the potential to restore Montana's natural resource industries to the level of power and influence over the Montana electoral process that Montanans found so objectionable 100 years ago.

In another important case, the U.S. Court of Appeal for the Ninth Circuit recently overturned Montana's system of non-partisan judicial elections, in place since the 1930's, by striking down a ban on political party endorsements of judicial candidates as a violation of the First Amendment.<sup>66</sup> A county Republican Party organization sought to endorse two judicial candidates and to make expenditures to publicize those endorsements. Because these activities were barred by state law, the plaintiff filed suit seeking a declaration that the law was unconstitutional and an injunction against its enforcement. The Ninth Circuit ruled that the state law "on its face" restricted speech and therefore was subject to strict scrutiny, requiring a demonstration that the restriction furthered a compelling governmental interest and was "narrowly tailored" to achieve its objective. The court acknowledged that the state's goal of maintaining a fair and independent judiciary represented a compelling state interest. But it rejected the argument that preventing party endorsement of candidates was necessary to achieve

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<sup>62</sup> *Western Tradition Partnership*, 271 P.3d at 9-12.

<sup>63</sup> *Id.* at 10

<sup>64</sup> *Id.*, quoting Helen Fisk Sanders, *History of Montana*, Vol. 1, 429-30 (Lewis Pub. Co. 1913).

<sup>65</sup> *Id.* at 12.

<sup>66</sup> *Sanders County Republican Central Committee v. Bullock*, 698 F.3d 741 (9<sup>th</sup> Cir. 2012). *See also Sanders County Republican Central Committee v. Bullock*, 717 F.3d 1090 (9<sup>th</sup> Cir. 2013) (clarifying in a subsequent appeal that the Court struck down the provisions of the statute prohibiting endorsements and expenditures by a political party in a judicial election, but did not reach the issue of the constitutionality of the provision prohibiting political party contributions to a judicial candidate).

that objective. It said the state had offered no evidence to support that argument, and that the argument was contradicted by the fact that some other states that elect their judges permit endorsements and in some instances even require party nominations of the candidates for judicial office. The court also ruled that the state had not adopted a “narrowly tailored” solution to the challenge of maintaining a fair and independent court because the state could have adopted a system of appointing rather than electing judges. The U.S. Supreme Court declined the State of Montana’s request that it review the Ninth Circuit decision.<sup>67</sup>

Judge Mary Schroeder filed a vigorous dissent, describing the decision as “a big step backwards for the state of Montana,” and as “the first opinion to hold that even though a state has chosen a non-partisan judicial election process, political parties have a right to endorse candidates.”<sup>68</sup> She also described the ruling as an unwarranted extension of prior decisions that “will encourage a judiciary dependent upon political alliances.”<sup>69</sup> She criticized the majority’s less restrictive means analysis by pointing out the extreme difficulty states have encountered in attempting to reform long-established judicial selection procedures.<sup>70</sup>

Together, these two decisions have the potential to change the landscape for judicial elections in Montana. By eliminating restrictions on corporate expenditures supporting (or opposing) particular candidates, natural resource industries and other businesses subject to environmental regulation can support candidates they hope will improve their bottom line by not strictly enforcing environmental laws and invest in advertising and other election activity to help defeat judges and judicial candidates who may be less helpful to business interests. Party endorsements of judicial candidates may increase the risk that judges will feel beholden to advance the policy objectives of the particular party supporting them. Given the Republican Party’s relatively strong pro-business and anti-regulation stance, justices supported by the Republican Party might be less sympathetic to environmental protection laws. Conversely, justices supported by the Democratic Party might be more sympathetic to environmental protection laws. More generally, party endorsements and expenditures are likely to make the Court more polarized because in the future individual judges will be more readily identifiable as “Democratic” or “Republican” judges.

At the same time, it is also possible that the *Sanders County* decision will not have a major effect on the character of judicial election in Montana, at least in the near term. The Ninth Circuit ruling empowers political parties to endorse candidates for judicial official and to spend money publicizing an endorsement. But of course the decision does not compel political parties to exercise this option, and the strong tradition on non-partisan elections to the Supreme Court appears to be deterring the major political parties from speaking out in judicial elections in overly partisan fashion. The 2012 Montana Democratic Party Platform’s “Judiciary Plank”

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<sup>67</sup> *Fox v. Sanders County Republican Cent. Comm.*, 134 S.Ct. 1345 (2014).

<sup>68</sup> 698 F.3d at 749.

<sup>69</sup> *Id.* at 750.

<sup>70</sup> *Id.* at 751.

addresses judicial selection as follows, “We support a free and independent judiciary. The judiciary should not be influenced by or concerned with any personal prejudice, political or religious dogma, or personal agenda. We *oppose* political party endorsements of judicial candidates.”<sup>71</sup> Consistent with this position, the website supporting the reelection of Mike Wheat, widely regarded as having Democratic Party leanings, contains no indication that the candidate has been endorsed by the Democratic Party.<sup>72</sup> Nor is there any indication on the website of Justice Jim Rice, widely regarded as a justice with Republican leanings, that he is running as a Republican.<sup>73</sup> Nor does Rice’s name appear on the Montana Republican Party website.<sup>74</sup> As discussed below, however, even in the absence of overt political party endorsements, party affiliation has sometimes become an element of a candidate’s public appeal for election to the Supreme Court.

### The Ideological Struggle over the Montana Supreme Court

This section describes the present – and potentially more virulent future – ideological contest over the composition of the Montana Supreme Court and the scope and content of the state’s environmental legal protections. While environmental law is by no means the only issue driving these recent contests, it appears to have been the single most important issue in state judicial races, as evidenced in a number of different ways as discussed below.

Despite the seriousness and importance of the current ideological contest over the Montana Supreme Court, the state’s highest court has traditionally been blessed with an absence of obvious, acrimonious political divisions. The landmark *MEIC* case was decided by a unanimous court.<sup>75</sup> Since then the court has issued other unanimous rulings in the environmental arena, sometimes ruling in favor of environmental advocates<sup>76</sup> and sometimes ruling against them.<sup>77</sup> Some individual justices have voted in ways that might be regarded as counter to type. Former Justice Brian Morris has solid conservative legal credentials, including a clerkship with

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<sup>71</sup> Montana Democrats, <http://montanademocrats.org/sites/default/files/2012%20Full%20Platform%20and%20Resolutions.pdf> (emphasis added).

<sup>72</sup> See <http://courts.mt.gov/supreme/bios/wheat.mcp.x>.

<sup>73</sup> See <http://www.jimriceforjustice.com/>.

<sup>74</sup> See <http://www.mtgop.org/>.

<sup>75</sup> *Montana Environmental Information Center v. DEQ*, 988 P.2d 1236 (Mt. 1999).

<sup>76</sup> *State ex rel. Dept. of Environmental Quality v. BNSF Ry. Co.* 246 P.3d 1037 (Mt. 2010)

<sup>77</sup> *Northern Plains Resource Council, Inc. v. Montana Bd. of Land Com'rs.*, 288 P.3d 169 (Mt. 2012)

former U.S. Supreme Court Justice William Rehnquist, but was hardly anti-environmental in his voting pattern,<sup>78</sup> even to the point of joining in dissent in one environmental law case in which the majority ruled against the “pro-environment” side.<sup>79</sup> Justice Nelson was a strong supporter on environmental protections,<sup>80</sup> but was equally strong-minded in support of private property rights.<sup>81</sup>

The current Montana Supreme Court can fairly be described as moderate in orientation. Three of the current justices were appointed to office,<sup>82</sup> while four were elected.<sup>83</sup> The current moderation of the court may be explained in part by the fact that the most recent appointments to the Court have been made by Governors from both parties.<sup>84</sup> It also may be explained in part by the fact that all appointed justices must be nominated by the Judicial Nominations Commission, which is designed to be representative of diverse viewpoints.

But recent electoral contest for seats on the Montana Supreme Court have marked a new departure in terms of partisanship and the level of financial expenditures in judicial races.

#### The 2012 Judicial Race

In 2012, Laurie McKinnon was elected to fill a vacancy on the court created by the retirement of long-time Justice James Nelson, beating out two other contestants for the seat,

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<sup>78</sup> *Northern Cheyenne Tribe v. Montana Dept. of Environmental Quality*, 234 P.3d 51 (Mt. 2010) (opinion for the court by Morris, J.).

<sup>79</sup> *Montana Wildlife Federation v. Montana Bd. of Oil & Gas Conservation*, 280 P.3d 877, 894-95 (Mt. 2012) (dissenting opinion by Wheat J, joined by Morris, J)

<sup>80</sup> *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1098-1105 (Mt. 2007) (Nelson, J. concurring in part and dissenting in part) (objecting to court’s ruling vacating punitive damage award in favor of property owners based on contamination caused by oil company operation of a refinery).

<sup>81</sup> *Kafka v. Montana Dept of Fish and Parks*, 201 P.3d 8, 33-70 (Mont. 2008) (dissenting opinion Nelson, J.)

<sup>82</sup> Associate Justices Jim Rice, Mike Wheat, and Jim Shea. Montana Supreme Court, Justice biographies, <http://courts.mt.gov/supreme/bios/default.mcpix>

<sup>83</sup> Chief Justice Mike McGrath and Associate Justices Beth Baker. Laurie McKinnon, and Patricia Cotter. Montana Supreme Court, Justice biographies, <http://courts.mt.gov/supreme/bios/default.mcpix>

<sup>84</sup> Jim Rice was appointed by Republican Governor Judy Martz; Mike Wheat was appointed by Democratic Governor Brian Schweitzer; and Jim Shea was appointed by Democratic Governor Steve Bullock.

Elizabeth Best and Ed Sheehy. Before her election to the high court, McKinnon served for eight years as a District Court judge,<sup>85</sup> which made her an appealing candidate for the Supreme Court. Prior to becoming a judge she worked as a county prosecutor and was engaged in private law practice.<sup>86</sup> Nothing in her official resume identified her as a likely combatant in ideological warfare over the future direction of the Montana Supreme Court, on environmental law or any other issue. But she was perceived as the clear conservative choice because she was endorsed by the Montana Chamber of Commerce and the Montana Farm Bureau and, as discussed below, was the beneficiary of a major independent expenditure campaign organized by a Montana Tea Party leader.

Losing candidate Ed Sheehy was an attorney with the Montana Office of the Public Defender, and prior to that engaged in the private practice of law in Helena, Montana.<sup>87</sup> In the Office of the State Public Defender, he served as a regional defender in Missoula and later in a statewide unit representing defendants accused of major crimes such as homicide.<sup>88</sup> He served as a law clerk on the Montana Supreme Court in 1978,<sup>89</sup> and his uncle, John Sheehy, was a justice on the Montana Supreme Court.<sup>90</sup> He received the endorsement of the Montana AFL-CIO.<sup>91</sup>

The other losing candidate, Elizabeth Best, practiced law in a small private firm for many years, and had been appointed to various statewide legal committees indicative of a positive reputation in Montana legal circles.<sup>92</sup> According to her campaign website she received

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<sup>85</sup> <http://courts.mt.gov/supreme/bios/mckinnon.mcp>

<sup>86</sup> *Id.*

<sup>87</sup> Charles Johnson, “Missoula Lawyer Ed Sheehy to Run for Montana Supreme Court justice,” [http://missoulain.com/news/local/missoula-lawyer-ed-sheehy-to-run-for-montana-supreme-court/article\\_a3583b58-da8b-11e0-b608-001cc4c002e0.html](http://missoulain.com/news/local/missoula-lawyer-ed-sheehy-to-run-for-montana-supreme-court/article_a3583b58-da8b-11e0-b608-001cc4c002e0.html).

<sup>88</sup> *Id.*

<sup>89</sup> “Ed Sheehy,” [http://billingsgazette.com/elections/party/nonpartisan/ed-sheehy/candidate\\_a8352f76-6d54-11e1-ae34-0019bb2963f4.html](http://billingsgazette.com/elections/party/nonpartisan/ed-sheehy/candidate_a8352f76-6d54-11e1-ae34-0019bb2963f4.html)

<sup>90</sup> Steve Hamel, “Supreme Court candidate makes stop in Sidney.” [http://www.sidneyherald.com/news/supreme-court-candidate-makes-stop-in-sidney/article\\_be70a634-04c7-5ceb-812e-3caa04d12e6d.html?mode=jqm](http://www.sidneyherald.com/news/supreme-court-candidate-makes-stop-in-sidney/article_be70a634-04c7-5ceb-812e-3caa04d12e6d.html?mode=jqm) (January 17, 2012).

<sup>91</sup> See Michael Beckel, “Judicial candidate blames mystery nonprofit's attacks for defeat,” <http://www.publicintegrity.org/2013/05/16/12656/judicial-candidate-blames-mystery-nonprofits-attacks-defeat> May 16, 2013).

<sup>92</sup> Best campaign website, <http://bestformontana.org/>.

endorsements from, among other groups, Montana Conservation Voters and the Montana Education Association and the Montana Federation of Teachers.<sup>93</sup> In a notable environmental case, Best served as co-counsel for a group of children on a petition filed with the Montana Supreme Court asking the court to recognize that the State of Montana holds the atmosphere in trust for present and future generations and that the State has an affirmative duty to act to protect the trust from the adverse effects of greenhouse gas.<sup>94</sup> This petition, filed in May 2011, was part of a nationwide legal campaign to use the public trust doctrine to persuade the courts to become engaged in combatting climate change.<sup>95</sup>

The three candidates split the vote in the 2012 primary, with Sheehy receiving 67,682 (34.3%) of the votes, McKinnon 66,278 (33.6%), and Best 63,306 (32.1%).<sup>96</sup> In the general election, which pitted the two highest vote getters against each other, McKinnon received 255,461 votes (58.1%) and Sheehy received 184,135 (41.9%).<sup>97</sup>

The most notable feature of 2012 election contest was an aggressive, well-funded independent expenditure campaign supporting McKinnon and opposing the other two candidates.<sup>98</sup> The effort was orchestrated by Montana Growth Network, an advocacy group organized by Jason Priest, a controversial state senator affiliated with the Montana Tea Party.<sup>99</sup>

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<sup>93</sup> *Id.*

<sup>94</sup> <http://ourchildrenstrust.org/sites/default/files/MT.Petition.pdf>. The Supreme Court rejected the petition. See <http://ourchildrenstrust.org/sites/default/files/MontanaOrder.pdf>.

<sup>95</sup> See <http://ourchildrenstrust.org>

<sup>96</sup> [http://sos.mt.gov/elections/2012/Primary/2012\\_PRIMARY\\_STATEWIDE\\_CANVASS.PDF](http://sos.mt.gov/elections/2012/Primary/2012_PRIMARY_STATEWIDE_CANVASS.PDF)

<sup>97</sup> [http://sos.mt.gov/ELECTIONS/2012/2012\\_General\\_Canvass.pdf](http://sos.mt.gov/ELECTIONS/2012/2012_General_Canvass.pdf)

<sup>98</sup> Leaders of Montana Growth Network publicly contended that the group's effort was "not designed to influence elections" and its efforts during the 2012 election cycle involved "educating Montanans about the activist nature of the court." Michael Beckel, Conservative Montana Growth Network spent heavily during Supreme Court elections, Independent Record [http://helenair.com/news/local/conservative-montana-growth-network-spent-heavily-during-supreme-court-elections/article\\_dcde7e74-d339-11e3-bc09-0019bb2963f4.html](http://helenair.com/news/local/conservative-montana-growth-network-spent-heavily-during-supreme-court-elections/article_dcde7e74-d339-11e3-bc09-0019bb2963f4.html) (May 4, 2014) (quoting Jason Priest and Ed Walker).

<sup>99</sup> Montana Cowgirl Daily Kos, MT TEA Party Jumps into State Supreme Court Elections, <http://www.dailykos.com/story/2012/05/17/1092411/-MT-TEA-Party-Campaigns-for-Pro-Nullification-Supreme-Court> (May 17, 2012) (describing Priests' support for "nullification legislation and other tea party causes). Priest also has had problem in his personal life. See Associated Press, State Sen. Jason Priest arrested for partner or family assault, Missoulian (Feb. 2, 2014) (describing Priest's arrest "on suspicion of partner or family assault and resisting arrest").

Because Montana Growth Network was organized as a non-profit under section 501(c)(3) of the Internal Revenue Code, it was not required to disclose the identity of its donors and did not do so.<sup>100</sup> It is clear, however, that expenditures by the group in the 2012 race dwarfed those of the candidates themselves. McKinnon and Sheehy reportedly spent about \$65,000 and \$75,000 in the 2012 judicial race, respectively, including expenditures in both the primary and general elections.<sup>101</sup> By contrast, Montana Growth Network apparently spent about ten times these amounts to support McKinnon's election. (McKinnon denounced the independent expenditure effort on her behalf, asserting that "negative advertising has no place in a nonpartisan race").<sup>102</sup> The group's 2012 tax return indicates that it expended over \$829,000 on advocacy efforts in 2012, including \$690,000 on "mailings and advertising" related to "judicial fairness, energy and the environment, taxes and the economy and healthcare."<sup>103</sup> The precise amount it spent on the 2012 Montana Supreme Court race is unknowable; because most of its advertising represented so-called "issue advocacy," most of the group's expenditures were exempt from public reporting requirements.<sup>104</sup> Montana Growth Network reported spending \$42,000 on one mailing that explicitly advocated the election of McKinnon and the defeat of Sheehy and Best.<sup>105</sup> But this

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<sup>100</sup> See Michael Beckel, "Judicial candidate blames mystery nonprofit's attacks for defeat," <http://www.publicintegrity.org/2013/05/16/12656/judicial-candidate-blames-mystery-nonprofits-attacks-defeat> (May 16, 2013).

<sup>101</sup> *Id.* According to her campaign website, Elizabeth Best, who came in third in the primary, raised over \$100,000 to support her campaign. See <http://bestformontana.org/>.

<sup>102</sup> Michael Beckel, "Judicial candidate blames mystery nonprofit's attacks for defeat," <http://www.publicintegrity.org/2013/05/16/12656/judicial-candidate-blames-mystery-nonprofits-attacks-defeat> (May 16, 2013).

<sup>103</sup> Center for Public Integrity, "Montana Growth Network Filing," <http://www.publicintegrity.org/2014/05/03/14709/montana-growth-network-filing>

<sup>104</sup> Michael Beckel, Conservative Montana Growth Network spent heavily during Supreme Court elections, Independent Record [http://helenair.com/news/local/conservative-montana-growth-network-spent-heavily-during-supreme-court-elections/article\\_dcde7e74-d339-11e3-bc09-0019bb2963f4.html](http://helenair.com/news/local/conservative-montana-growth-network-spent-heavily-during-supreme-court-elections/article_dcde7e74-d339-11e3-bc09-0019bb2963f4.html) (May 4, 2014) ("[B]ecause the group operates as 'social welfare' nonprofit under Sec 501(c)(4) of the U.S. tax code, its donors remain secret.")

<sup>105</sup> See Sanjay Talwami, Dispute simmers over pricey Supreme Court race mailing, Independent Record, [http://helenair.com/news/state-and-regional/dispute-simmers-over-pricey-supreme-court-race-mailing/article\\_040b3fe6-a9e8-11e1-bafa-0019bb2963f4.html](http://helenair.com/news/state-and-regional/dispute-simmers-over-pricey-supreme-court-race-mailing/article_040b3fe6-a9e8-11e1-bafa-0019bb2963f4.html) (May 29, 2012) (describing Montana Growth Network's disclosure of \$42,000 expenditure in support of McKinnon to the Montana Commissioner of Political Practices).

explicitly acknowledged political expenditure represented only a small fraction of what the organization spent to influence the judicial race in 2012 through more indirect “issue education.”

The advertising by Montana Growth Network was hard hitting, especially in contrast with the anodyne public statements of the candidates themselves in support of their candidacies.<sup>106</sup> A Montana Growth Network mailer expressing opposition to Elizabeth Best’s candidacy contained the headline, “Environmentalism, Global Warming lawsuit,” and stated: “Sued the State of Montana on behalf of children of the future in an attempt to seize control of the state’s atmosphere. Best wanted to place our atmosphere under gov’t [sic] control to stop global warming.”<sup>107</sup> Another mailer attacked candidate Ed Sheehy for defending, in his capacity as a public defender, a client charged with murder, whom the Montana Growth Network dubbed “the Christmas Day Killer.”<sup>108</sup> It asserted that Sheehy “asked the Court to strike down Montana’s death penalty as unconstitutional.” Sheehy responded angrily to the charge contending that he was simply “doing his job” as a public defender.<sup>109</sup> According to press accounts, Sheehy blamed the mailer and similarly themed radio ads for his defeat in the 2012 election.<sup>110</sup>

Arguably the most alarming feature of this attack advocacy was that the identity of the persons backing Montana Growth Network was hidden from public view. Jason Priest, identified as Executive Director, President and Treasurer of the group, was strongly identified with conservative political causes.<sup>111</sup> But the major financial backers of Montana Growth Network remain hidden. In 2012, the year in which Montana Network for Growth invested so heavily in electing Laurie McKinnon to the Supreme Court, the organization recorded

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<sup>106</sup> See, e.g., Laurie McKinnon, Supreme Court justice candidate, [http://helenair.com/news/opinion/editorial/laurie-mckinnon-supreme-court-justice-candidate/article\\_d81d24ea-1228-11e2-b773-0019bb2963f4.html](http://helenair.com/news/opinion/editorial/laurie-mckinnon-supreme-court-justice-candidate/article_d81d24ea-1228-11e2-b773-0019bb2963f4.html) (October 9, 2012) (statement by the candidate).

<sup>107</sup> Center for Public Integrity, <http://www.documentcloud.org/documents/700890-montana-pdf-3.html>

<sup>108</sup> Center for Public Integrity, <http://www.documentcloud.org/documents/700892-montana-pdf-1.html>

<sup>109</sup> See Michael Beckel, “Judicial candidate blames mystery nonprofit's attacks for defeat,” <http://www.publicintegrity.org/2013/05/16/12656/judicial-candidate-blames-mystery-nonprofits-attacks-defeat> (May 16, 2013).

<sup>110</sup> *Id.*

<sup>111</sup> Center for Public Integrity, “Montana Growth Network Filing,” <http://www.publicintegrity.org/2014/05/03/14709/montana-growth-network-filing>



contributions of \$906,000.<sup>112</sup> The identity of none of the donors is public. The only public information available is the magnitude of contribution made by major donors (but not their identities) as reported on the group's 2012 tax return.<sup>113</sup> Over 90% of the individual contributions to Montana Growth Network in 2012 were in amounts of \$10,000 or more. Four of the donations were in the six figures and the largest contribution was \$200,000. These large contributions have given rise to inevitable speculation that the Koch brothers, who have a long record of investing their vast resources to influence state judicial elections, may have played a role in the 2012 Montana races. But none of the Kochs' critics apparently know if that is really the case.

Also in 2012, in a much quieter election, incumbent Brian Morris won a retention election with 328,601 out of 419,105 (78.4%) votes cast.<sup>114</sup> Initially, Hertha Lund, a private property rights advocate, launched a campaign against Morris.<sup>115</sup> But she withdrew from the race in April, two months before the June primary.<sup>116</sup> Justice Morris has since resigned from the court to take a seat on the federal District Court in Montana.

#### The 2014 Judicial Appointment

On May 5, 2014, Governor Steve Bullock appointed Jim Shea to fill the vacancy on the court created by the resignation of Justice Morris.<sup>117</sup> Bullock selected Shea from among four finalists forwarded to him by the Judicial Nomination Commission.<sup>118</sup> Shea had been appointed

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> [http://sos.mt.gov/ELECTIONS/2012/2012\\_General\\_Canvass.pdf](http://sos.mt.gov/ELECTIONS/2012/2012_General_Canvass.pdf).

<sup>115</sup> See Sanjay Talwani, "Bozeman's Hertha Lund exits Montana Supreme Court," [http://helenair.com/news/local/govt-and-politics/bozeman-s-hertha-lund-exits-montana-supreme-court-race/article\\_29937b8a-89e4-11e1-9a46-001a4bcf887a.html](http://helenair.com/news/local/govt-and-politics/bozeman-s-hertha-lund-exits-montana-supreme-court-race/article_29937b8a-89e4-11e1-9a46-001a4bcf887a.html).

<sup>116</sup> *Id.* Lund cited the Supreme Court decision blocking the voter initiative that would have provided for election of Supreme Court justices by district, rather than on a state wide basis, as the reason for pulling out of the race. She said she was prepared to run an election race in one district, but not statewide.

<sup>117</sup> Charles S. Johnson, Shea appointed to Montana Supreme Court, Missoulian, [http://missoulian.com/news/state-and-regional/she-a-appointed-to-montana-supreme-court/article\\_7288f718-d495-11e3-b10f-001a4bcf887a.html](http://missoulian.com/news/state-and-regional/she-a-appointed-to-montana-supreme-court/article_7288f718-d495-11e3-b10f-001a4bcf887a.html) (May 5, 2014).

<sup>118</sup> Associated Press, Gov. Bullock interviews Montana Supreme Court nominees, Billings Gazette, [http://billingsgazette.com/news/state-and-regional/montana/gov-bullock-interviews-montana-supreme-court-nominees/article\\_1eeafbe9-977b-5c56-afb3-a7c57269dada.html](http://billingsgazette.com/news/state-and-regional/montana/gov-bullock-interviews-montana-supreme-court-nominees/article_1eeafbe9-977b-5c56-afb3-a7c57269dada.html) (April 28, 2014).

state Workman's Compensation Judge by Democratic Governor Brian Schweitzer in 2005, and Governor Schweitzer reappointed him to that position in 2011.<sup>119</sup> Shea faces Senate confirmation to the Supreme Court next year and then will have the opportunity to run to retain the seat 2016. Prior to his appointment, Shea had been gearing up to be a candidate for election to the Supreme Court, as evidenced by the development of a campaign website.<sup>120</sup> But Morris's confirmation by the U.S. Senate was so delayed that the election for this seat could not be included on the 2014 ballot.<sup>121</sup>

### The 2014 Judicial Race

In 2014, two incumbent members of the court, Jim Rice and Michael Wheat, are running for election to the Court. Michael Wheat faces a challenge from Lawrence Van Dyke, the Montana Solicitor General. Jim Rice faces a challenge from W. David Herbert. Justice Rice previously served as a Republican state representative and Justice Wheat served as a Democratic State Senator. Montana Conservation Voters has endorsed Mike Wheat for reelection,<sup>122</sup> but has apparently taken no position in the race between Rice and Herbert.

Mike Wheat was appointed to the Supreme Court in 2009 by Democratic Governor Brian Schweitzer and is now seeking re-election to the Court. His campaign website includes the usual dry recitation of professional accomplishments, including references to a successful career as a private attorney and service as member of the Montana Senate.<sup>123</sup> While widely perceived to be a Democrat, Wheat's website includes no indication of party identification. Interestingly, the

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<sup>119</sup> Charles S. Johnson, Shea appointed to Montana Supreme Court, Missoulian, [http://missoulian.com/news/state-and-regional/she-a-appointed-to-montana-supreme-court/article\\_7288f718-d495-11e3-b10f-001a4bcf887a.html](http://missoulian.com/news/state-and-regional/she-a-appointed-to-montana-supreme-court/article_7288f718-d495-11e3-b10f-001a4bcf887a.html) (May 5, 2014).

<sup>120</sup> <http://www.sheaforjustice.com/>

<sup>121</sup> Charles S. Johnson, Shea appointed to Montana Supreme Court, Missoulian, [http://missoulian.com/news/state-and-regional/she-a-appointed-to-montana-supreme-court/article\\_7288f718-d495-11e3-b10f-001a4bcf887a.html](http://missoulian.com/news/state-and-regional/she-a-appointed-to-montana-supreme-court/article_7288f718-d495-11e3-b10f-001a4bcf887a.html) (May 5, 2014).

<sup>122</sup> The Montana Conservation Voters endorsement reads in part: "In supporting Justice Wheat's nomination in 2009, MCV wrote the following to Governor Schweitzer: Perhaps most important in our recommendation of Mike Wheat to the Supreme Court is that he values Montana's land mark constitution. He will uphold its unique, revered provisions, including our constitutional right to a clean and healthful environment. Justice Wheat served in the state Senate from Bozeman during the 2003 and 2005 legislative sessions and earned a 94 and 100 percent MCV voting score, respectively." <http://mtvoters.org/node/2161>

<sup>123</sup> <http://www.wheatforjustice.com/>

website alludes to only two substantive legal issues, both relating to the environment. First, the website describes Wheat as a “defender” of “Montana's Constitutional right to a clean and healthful environment.” Second, it describes him as a “guardian of laws protecting public access to Montana's rivers, streams, hunting and recreational areas.” The latter statement is apparently a reference to Justice Wheat’s authorship of the opinion for the Court in the controversial 5 to 2 decision favoring a public claim to fishing access.<sup>124</sup>

The contest for the seat now occupied by Justice Wheat was turned upside on April 25, 2014, when District Court Judge Mike Menahan issued an order declaring that Lawrence Van Dyke was ineligible to run for a set as a justice in the 2014 election.<sup>125</sup> The lawsuit was brought by five delegates to the 1972 Montana Constitutional Convention,<sup>126</sup> which led to the adoption of the current constitutional provision stating that candidates for the Supreme Court must be “admitted to the practice of law” in the state for at least five years prior to joining the Court.<sup>127</sup> Van Dyke was admitted to practice in Montana 2005, nine years prior to the election, but he placed his bar membership in inactive status from 2007 to 2012 while practicing law in another state.<sup>128</sup> He resumed active status in early 2013, but by the time of the November 2014 election, he will have only been an active member of the bar for three years and three months.<sup>129</sup> Thus, according to Judge Menahan’s ruling, Van Dyke was ineligible for election to a seat on the Supreme Court.<sup>130</sup>

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<sup>124</sup> See *Public Lands Access Association, Inc. v. the Board of County Commissioners of Madison County*, 321 P.3d 38 (2014).

<sup>125</sup> Charles S. Johnson, Judge orders Supreme Court candidate off the ballot, [http://billingsgazette.com/news/government-and-politics/judge-orders-supreme-court-candidate-off-the-ballot/article\\_4d1c64d3-d63b-57bf-8cfa-df9e037d2d8f.html#ixzz33D456VLz](http://billingsgazette.com/news/government-and-politics/judge-orders-supreme-court-candidate-off-the-ballot/article_4d1c64d3-d63b-57bf-8cfa-df9e037d2d8f.html#ixzz33D456VLz) (April 24, 2014).

<sup>126</sup> AP, Montana Supreme Court candidate struck from ballot, <http://www.washingtontimes.com/news/2014/apr/25/montana-supreme-court-candidate-struck-from-ballot/> (April 25, 2014).

<sup>127</sup> Montana Constitution, Article VII, section 9(1) (“A citizen of the United States who has resided in the state two years immediately before taking office is eligible to the office of supreme court justice or district court judge if admitted to the practice of law in Montana for at least five years prior to the date of appointment or election.”)

<sup>128</sup> See *Cross v. VanDyke*, 375 Mont. 535, 536 (2014)

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

Van Dyke filed an appeal,<sup>131</sup> and on July 22, 2014, the Court reversed Judge Menahan's order and, by a vote of 4 to 3, declared that Van Dyke was eligible to pursue election to the Supreme Court. Justice Wheat along with two other members of the Court recused themselves, with the result that 3 of the judges resolving the case were District Court judges. The case ultimately turned on a narrow dispute over how to interpret the pertinent language of the Constitution. Justice Baker wrote the opinion for the majority concluding that Van Dyke was "admitted" to the practice of law from 2005, even though, due to his inactive status, he had not been eligible to actually practice law in Montana. Justice Cotter, in dissent, argued that since the Constitution authorizes the Supreme Court to govern the practice of law in the state, and the Court delegated that authority to the State Bar, and the State Bar rules bar a lawyer on inactive status from practicing law, Van Dyke was not "admitted to the practice of law" for the requisite period.

While Van Dyke adopts a studiously nonpartisan stance on his campaign website,<sup>132</sup> his brief career biography reads like a playbook for success in conservative legal circles. In 2012 he was appointed Solicitor General of Montana by Tim Fox, the newly elected Republican Attorney General.<sup>133</sup> Before taking that position, Van Dyke served as Assistant Solicitor General in the Office of the Republican Texas Attorney General Greg Abbott.<sup>134</sup> Since his graduation from Harvard Law School, he has been an active member of the Federalist Society,<sup>135</sup> the leading national advocate of conservative legal causes, and is listed on the group's website as a member of the Executive Committee of the Society's Religious Liberties Practice Group.<sup>136</sup> He served as

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<sup>131</sup> In early May, Van Dyke resigned his position as Solicitor General effective May 30, based on his professed expectation that the Supreme Court would rule in his favor. Charles S. Johnson, VanDyke resigning as state solicitor general, [http://helenair.com/news/local/state-and-regional/vandyke-resigning-as-state-solicitor-general/article\\_88184036-d740-11e3-9c55-0019bb2963f4.html](http://helenair.com/news/local/state-and-regional/vandyke-resigning-as-state-solicitor-general/article_88184036-d740-11e3-9c55-0019bb2963f4.html) (May 9, 2014).

<sup>132</sup> Van Dyke for Justice, <http://www.vandykeforjustice.com/> See also Van Dyke seeks to bring appellate law background to Supreme Court, [http://helenair.com/news/local/vandyke-seeks-to-bring-appellate-law-background-to-supreme-court/article\\_e7f2f476-aa75-11e3-876e-0019bb2963f4.html](http://helenair.com/news/local/vandyke-seeks-to-bring-appellate-law-background-to-supreme-court/article_e7f2f476-aa75-11e3-876e-0019bb2963f4.html) (March 13, 2014) (identifying political party as "nonpartisan").

<sup>133</sup> Marnee Banks, ktvq.com, <http://www.ktvq.com/news/tim-fox-announces-mt-department-of-justice-appointments/> (December 7, 2012)

<sup>134</sup> See Montana Attorney general homepage, <https://doj.mt.gov/our-attorney-general/meet-our-team/>

<sup>135</sup> Above the Law, <http://abovethelaw.com/2006/11/atl-party-crash-the-final-fed-soc-photos/> (photo of Van Dyke attending Federalist Society National Lawyers Convention)

<sup>136</sup> See <http://www.fed-soc.org/publications/page/religious-liberties-practice-group-executive-committee-contact-information> (visited 5/30/2014)

law clerk to Judge Janice Rogers Brown,<sup>137</sup> a staunchly conservative, pro-property rights judge on the U.S. Court of Appeal for the D.C. Circuit Court.<sup>138</sup> Immediately after completing his clerkship he went to work for a national corporate law firm, Gibson Dunn & Crutcher, first in Washington, D.C. and late in Texas.<sup>139</sup>

Van Dyke has been a lightning rod for public criticism, based in part on a book review he wrote while a student at Harvard Law Review suggesting that requiring the teaching of “intelligent design” in public schools would not violate the Establishment Clause.<sup>140</sup> In another student piece published in 2004, focusing on whether homosexual relationships should receive constitutional protection, he lauded a bishop for advocating the view that homosexuals “can leave the homosexual lifestyle,” opined that the evidence he had seen “provide[d] ample reason for concern that same-sex marriage will hurt families, and consequentially children and society,” and indicated that it was “absurd” to deny that recognition of gay marriage “may impinge on religious freedom.”<sup>141</sup> Not surprisingly perhaps, when Tim Fox picked Van Dyke for Solicitor General, a conservative journal extolled the appointment.<sup>142</sup>

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<sup>137</sup> Lawrence Van Dyke, Linked in Profile, <http://www.linkedin.com/pub/lawrence-vandyke/6/b3/aa7>

<sup>138</sup> Editorial, Reject Justice Brown, The Washington Post, <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/06/AR2005060601734.html> (June 7, 2005). (“President Bush has nominated a judge to the U.S. Court of Appeals for the D.C. Circuit who has been more open about her enthusiasm for judicial adventurism than any nominee of either party in a long time. But Janice Rogers Brown's activism comes from the right, not the left; the rights she would write into the Constitution are economic, not social.”)

<sup>139</sup> Charles S. Johnson, State solicitor general wants to bring different background to Montana Supreme Court [http://missoulian.com/news/state-and-regional/state-solicitor-general-wants-to-bring-different-background-to-montana/article\\_7630efde-aa46-11e3-8d1b-001a4bcf887a.html](http://missoulian.com/news/state-and-regional/state-solicitor-general-wants-to-bring-different-background-to-montana/article_7630efde-aa46-11e3-8d1b-001a4bcf887a.html) (March 12, 2014).

<sup>140</sup> “Not Your Daddy’s Fundamentalism: Intelligent Design in the Classroom,” 117 Harv. L. Rev. 964 (2004). See Don Pogreba, “[A Creationist for the Montana Supreme Court? A Review of Lawrence VanDyke](http://intelligentdiscontent.com/2014/03/17/a-creationist-for-the-montana-supreme-court-a-review-of-lawrence-vandyke/),” <http://intelligentdiscontent.com/2014/03/17/a-creationist-for-the-montana-supreme-court-a-review-of-lawrence-vandyke/> (March 17, 2014) (criticizing Van Dyke’s views and describing other criticism).

<sup>141</sup> Lawrence Van Dyke, One Student’s Response to “a Response to Glendon,” The Harvard Law Record, <http://hlrecord.org/?p=10639> (March 11, 2004)

<sup>142</sup> Carrie Severino, “Congratulations to Elbert Lin and Lawrence VanDyke,” National Review Online, <http://www.nationalreview.com/bench-memos/337777/congratulations-elbert-lin-and-lawrence-vandyke-carrie-severino> (January 15, 2013) (“While conservatives may not be excited

During his brief stint as Montana Solicitor General, Van Dyke spent “a significant amount of his time” promoting a conservative legal agenda in different courts around the country.<sup>143</sup> He led an effort by a group of conservative attorneys general to persuade the U.S. Supreme Court to revisit *Roe v Wade* and allow Arizona greater latitude in restricting access to abortions.<sup>144</sup> On multiple occasions, Van Dyke recommended to Attorney General Fox that Montana join friend of the court briefs opposing efforts in other states to control the sales of semi-automatic rifles or handguns.<sup>145</sup> He also supported joining in briefs defending bans on same-sex marriage, and the constitutional right of a commercial photographer to refuse to work for a same sex couple in violation of a state anti-discrimination law.

Van Dyke dismisses all of this work as that of an “advocate,” and asserts that “simply because I worked on a specific case or made a specific recommendation obviously can't be taken as representative of my personal views.”<sup>146</sup> But, as the State’s Solicitor General, Van Dyke had considerable discretion over what issues to bring to the attention of the Attorney General and over how to allocate his limited time. His choices in his most recent job about what issues to focus on tells a good deal about what constitutional questions Van Dyke personally deems important and worthy of attention. Noticeably absent from this litany of cases is any environmental law case. However, based on his thorough-going conservative viewpoint, it seems unlikely that he would have much if any enthusiasm for enforcing Montanans’ right to “a clean and healthful environment.”

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about the president’s bevy of new cabinet picks, they can celebrate the great solicitor general picks by two newly elected state attorneys general.”)

<sup>143</sup> John S. Adams, Montana Supreme Court: VanDyke takes the spotlight, Great Falls Tribune, September 18, 2014, <http://www.greatfallstribune.com/story/news/local/2014/09/17/vandyke-politician-nature/15812491/>

<sup>144</sup> See Amicus Brief of Ohio, Montana and Fourteen Other States Supporting Petitioners, filed in *Horne v. Isaacson*, S. Ct. No. 13-402, <http://www.ohioattorneygeneral.gov/OhioAttorneyGeneral/files/e5/e5fa00ee-6a4b-45aa-b1db-0fc2549d08c9.pdf> (filed October 29, 2013). See Cowgirl Blog, <http://mtcowgirl.com/tag/lawrence-vandyke/>

<sup>145</sup> John S. Adams, Montana Supreme Court: Van Dyke takes the spotlight, Great Falls Tribune, September 18, 2014, <http://www.greatfallstribune.com/story/news/local/2014/09/17/vandyke-politician-nature/15812491/>

<sup>146</sup> John S. Adams, Montana Supreme Court: VanDyke takes the spotlight, Great Falls Tribune, September 18, 2014, <http://www.greatfallstribune.com/story/news/local/2014/09/17/vandyke-politician-nature/15812491/>

Justice Jim Rice was appointed to the Court by Republican Governor Judy Martz, and was elected to a full 8-year term on the Court in 2006.<sup>147</sup> The only notable substantive statement on the website is the following: “The ultimate duty of the courts is to protect the individual liberties and freedoms guaranteed by the constitution. I believe we have entered an era of increased government involvement in the lives of citizens at all levels, and that our courts will need to be increasingly vigilant in protecting individual liberties in the years ahead.” This statement can fairly be read as code for the fact that Justice Rice is a proponent of private property rights, a viewpoint consistent with his votes in property rights cases that have come before the court.<sup>148</sup> Rice’s website also includes a link to an article describing the popular Montana Supreme Court decision to overturn a District Court judge’s decision to impose a 1-month sentence on a teacher convicted of raping a student.<sup>149</sup>

David Herbert, Justice Rice’s opponent, appears to present a less than clear cut ideological choice. One of Herbert’s primary issues is jury independence, otherwise known as jury nullification. According to this theory, jurors should be recognized as having the power to disregard the instructions on the law they receive from a judge and render a verdict based on their own conception of justice.<sup>150</sup> In seeming contradiction to this stance, Herbert’s campaign website also criticizes judges who disregard the Constitution, singling out for criticism Chief Justice John Marshall’s decision in *Marbury v. Madison*, generally regarded as one of the cornerstones of the U.S. system of constitutional government.<sup>151</sup> Herbert ran unsuccessful races in Wyoming as a Libertarian Party candidate for the U.S. Senate in 1996 and for the U.S. House in 2008. In the first race he received 5289 votes,<sup>152</sup> and in the latter he received 187 votes.<sup>153</sup> He

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<sup>147</sup> <http://www.jimriceforjustice.com/>

<sup>148</sup> *Kafka v. Montana Dept of Fish and Parks*, 201 P.3d 8, 33-70 (Mt. 2008) (Nelson, J., dissenting opinion, concurred in by Rice, J.); *Buhmann v. State of Montana*, 201 P.3d 70, 95 (Mt. 2008) (Rice, J, concurring in part and dissenting in part).

<sup>149</sup> See Mathew Brown, Montana court overturns teacher's 1-month sentence for raping student, Missoulian, [http://missoulian.com/news/local/montana-supreme-court-overturns-teacher-s--month-sentence-for/article\\_2298bdee-d07e-11e3-a3f7-0019bb2963f4.html](http://missoulian.com/news/local/montana-supreme-court-overturns-teacher-s--month-sentence-for/article_2298bdee-d07e-11e3-a3f7-0019bb2963f4.html) (April 30, 2014).

<sup>150</sup> Charles S. Johnson, Billings attorney seeks vacant seat on Montana Supreme Court, [http://missoulian.com/news/state-and-regional/billings-attorney-seeks-vacant-seat-on-montana-supreme-court/article\\_32496dd6-a4c0-11e3-92da-001a4bcf887a.html](http://missoulian.com/news/state-and-regional/billings-attorney-seeks-vacant-seat-on-montana-supreme-court/article_32496dd6-a4c0-11e3-92da-001a4bcf887a.html) (march 5, 2014)

<sup>151</sup> <http://www.f4dave4justice.com/>

<sup>152</sup> [http://soswy.state.wy.us/Elections/Docs/1996/96Results/96General/96General\\_SW\\_Candidate\\_Judicial\\_Const.Amendments.pdf](http://soswy.state.wy.us/Elections/Docs/1996/96Results/96General/96General_SW_Candidate_Judicial_Const.Amendments.pdf)

<sup>153</sup> <http://soswy.state.wy.us/Elections/Docs/2008/08Results/L-SWCand.pdf>

moved to Montana in 2008. A licensed podiatrist, Herbert attended law school in the mid-1980s.<sup>154</sup> All in all, he seems very unlikely to mount a substantial threat the Justice Rice's reelection bid.

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<sup>154</sup> Charles S. Johnson, Billings attorney seeks vacant seat on Montana Supreme Court, [http://missoulian.com/news/state-and-regional/billings-attorney-seeks-vacant-seat-on-montana-supreme-court/article\\_32496dd6-a4c0-11e3-92da-001a4bcf887a.html](http://missoulian.com/news/state-and-regional/billings-attorney-seeks-vacant-seat-on-montana-supreme-court/article_32496dd6-a4c0-11e3-92da-001a4bcf887a.html) (March 5, 2014)



## **NORTH CAROLINA**

### The Dan River Ash Waste Spill

On Sunday, February 2, 2014, a security guard patrolling Duke Energy's retired electric generating station in Eden, North Carolina, noticed that a pond containing coal ash waste was unusually low.<sup>155</sup> Company officials determined that a pipe running beneath the pond had broken and that ash waste was flowing through the pipe into the adjacent Dan River.<sup>156</sup> Despite frantic efforts by hundreds of company and government employees to contain the spill,<sup>157</sup> an estimated 35 million gallons of water containing tens of thousands of tons of coal ash dumped into river.<sup>158</sup>

Coal ash waste is a dark, dense brew containing arsenic, selenium and other pollutants known to be hazardous to public health.<sup>159</sup> As a result of the spill, ash waste ended up coating 70 miles of the Dan River and produced elevated pollution levels downstream from the plant.<sup>160</sup> The North Carolina Department of Health issued a media advisory urging the public to avoid contact with the river or eating fish caught in the river.<sup>161</sup> The U.S. Environmental Protection

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<sup>155</sup> Gabe Rivin, Dan River Coal Ash Spill Timeline, North Carolina Health News , <http://www.northcarolinahealthnews.org/dan-river-coal-ash-spill-timeline/> (2014).

<sup>156</sup> *Id.*

<sup>157</sup> Associated Press, Power Plant Workers Try to Plug Coal Ash Leak in North Carolina, The New York Times, <http://www.nytimes.com/2014/02/06/us/power-plant-workers-try-to-plug-coal-ash-leak-in-north-carolina.html> (February 5, 2014).

<sup>158</sup> Jonathan M. Katz, Money, Politics and Pollution in North Carolina, The New Yorker (May 7, 2014).

<sup>159</sup> Sierra Club, Dirty Fuel Disasters In America <http://content.sierraclub.org/Coal/disposal-ash-waste>.

<sup>160</sup> Trip Gabriel, Ash Spill Shows How Watchdog Was Defanged, The New York Times, <http://www.nytimes.com/2014/03/01/us/coal-ash-spill-reveals-transformation-of-north-carolina-agency.html> (February 28, 2014); Gabe Rivin, Dan River Coal Ash Spill Timeline, North Carolina Health News , <http://www.northcarolinahealthnews.org/dan-river-coal-ash-spill-timeline/> (2014).

<sup>161</sup> North Carolina Department of Health and Human Services, Media Advisory: DHHS Issues Health Advisories for Dan River Area, [http://www.ncdhhs.gov/pressrel/2014/2014-02-12\\_dan\\_river\\_spill.htm](http://www.ncdhhs.gov/pressrel/2014/2014-02-12_dan_river_spill.htm) (February 12, 2104).

Agency reported no downstream violations of drinking water standards, but monitoring continues and the study of the long-term ecological effects is just beginning.<sup>162</sup> The spill at the Dan River plant raised concerns about similar problems at other, larger ash waste facilities, where, in the words of one environmental advocate, a similar event “would make the Dan River spill look like a mere prelude to a truly national disaster.”<sup>163</sup> Duke Energy has publicly apologized for the spill,<sup>164</sup> and has made an open-ended financial commitment to clean up the river.<sup>165</sup>

The spill has had widespread legal and political repercussions. The disaster led to the launch of a U.S. Department of Justice criminal investigation of the state agency charged with overseeing the Dan River waste pond.<sup>166</sup> It has also produced hurried efforts by the administration of Governor Pat McCrory to back pedal on previous plans to go easy on Duke Energy on past environmental violations,<sup>167</sup> and led to the initiation of new state environmental enforcement proceedings against the company.<sup>168</sup> The North Carolina legislature has debated whether the Dan River spill calls for a comprehensive legislative solution to the problems created

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<sup>162</sup> U.S. Environmental Protection Agency, Information Update – Sampling Results, Eden North Carolina Coal ash Spill, <http://www.epa.gov/region4/duke-energy/factsheets/info-update-2.pdf> (February 9, 2014).

<sup>163</sup> Derb Carter, Smoke in the Water, The New York Times, <http://www.nytimes.com/2014/06/03/opinion/smoke-in-the-water.html> (June 2, 2014)

<sup>164</sup> Michael Biesecker & Michael Weiss, Associated Press, Duke Energy issues apology for NC coal ash spill, <http://bigstory.ap.org/article/coal-ash-not-yet-fully-contained-nc-river> (February 8, 2014).

<sup>165</sup> Michael Biesecker, Associated Press, NC, Virginia sign deal with Duke Energy to cover cost of Dan River coal ash spill cleanup, <http://www.usnews.com/news/business/articles/2014/06/09/nc-va-sign-deal-with-duke-for-dan-river-cleanup> (June 9, 2014).

<sup>166</sup> Anne Blythe, Feds launch criminal probe of NC agency after coal ash spill, Newsobserver.com, <http://www.newsobserver.com/2014/02/13/3619273/feds-launch-investigation-into.html> (February 13, 2014).

<sup>167</sup> Michael Biesecker & Mitch Weiss, North Carolina Pulls Coal Ash Settlement With Duke Energy Huffington Post, [http://www.huffingtonpost.com/2014/03/22/north-carolina-coal-ash-settlement-duke\\_n\\_5012773.html](http://www.huffingtonpost.com/2014/03/22/north-carolina-coal-ash-settlement-duke_n_5012773.html) (March 22, 2014).

<sup>168</sup> Bruce Henderson, EPA to join NC’s coal ash probe, Charlotte Observer, <http://www.charlotteobserver.com/2014/03/21/4783809/epa-to-join-ncs-coal-ash-probe.html#.U6rm4NhOXIU> (March 21, 2014).

by ash waste ponds.<sup>169</sup> The political and policy fallout from the Dan River disaster will unquestionably be long-lasting.

But the Dan River disaster also highlights the importance of the judiciary in environmental law enforcement in North Carolina, and in particular the role the Supreme Court may play in resolving legal disputes relating to the disaster. One particularly important case involves a dispute about the state's responsibility for dealing with groundwater pollution caused by coal ash waste ponds.<sup>170</sup> About a year before the Dan River disaster, a coalition of environmental groups represented by the Southern Environmental Law Center filed a petition with the North Carolina Environmental Management Commission asking the Commission to define the clean-up responsibilities of plant operators with ash waste ponds.<sup>171</sup> All told, there are fourteen operating or retired Duke Energy power plants in the state with coal ash waste ponds.<sup>172</sup> Pollution monitoring has disclosed excessive levels of pollutants in the groundwater adjacent to all of these 14 plants.<sup>173</sup>

In their petition, the environmental groups contended that Duke Energy has a responsibility, once there is evidence that waste ponds are causing groundwater contamination in violation of water quality standards, to take "immediate action to eliminate sources of contamination."<sup>174</sup> According to the environmental groups, state regulations, properly interpreted, mandate that plant operators act immediately to eliminate a waste pond that is producing the pollution, which would probably entail removing all of the waste they has accumulated and placing it in a different, safer location. In an order issued on December 18,

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<sup>169</sup> Manuel Quiñones, Environment & Energy Daily, Spill upends N.C. politics -- but will substantive legislation be the result?, <http://www.eenews.net/eedaily/stories/1060000349> (May 29, 2014).

<sup>170</sup> Understanding the Court's Coal Ash Order, SmithEnvironment Blog, <http://www.smithenvironment.com/understanding-the-courts-coal-ash-order/> (March 12, 2014).

<sup>171</sup> Laura Leslie and Matthew Burns, Judge: Duke Energy must halt coal ash pond contamination, NC Capitol, <http://www.wral.com/judge-duke-energy-must-halt-coal-ash-pond-contamination/13456301/> (March 6, 2014).

<sup>172</sup> *Id.*

<sup>173</sup> Order on Petition for Judicial Review, Cape Fear River Watch v. North Carolina Environmental Management Commission, Superior Court, No 13 CVS 00093, at 3 (on file).

<sup>174</sup> Bruce Henderson, Duke must act on ash contamination, judge rules, <http://www.charlotteobserver.com/2014/03/06/4746141/duke-must-act-on-ash-contamination.html#.U6rSq9hOXIU> (March 6, 2014).

2012, the Commission rejected the petitioners' interpretation of the regulations.<sup>175</sup> Instead, the Commission declared that evidence of groundwater contaminant merely triggers an obligation, following a "reasonable schedule," for plant operators to prepare "site assessments" and develop "corrective action plans," which might eventually lead to clean-up efforts.<sup>176</sup>

The environmental groups went to court to challenge the Commission's ruling. In a 17-page order issued on March 6, 2014, about a month after the Dan River disaster, Superior Court Judge Paul Ridgeway sided with the environmental groups and ruled that the operators did have a duty to take "immediate action" to correct the pollution problems.<sup>177</sup> (However, the judge did not rule entirely for the environmental groups; siding with the Commission on one issue, the judge ruled that the operators only had a responsibility to take immediate action if groundwater pollution had been detected within the "compliance boundary" surrounding the waste facility.<sup>178</sup>) The petitioners' argument raises complex technical issues about the proper interpretation of the groundwater regulations. But it suffices for present purposes to observe that Judge Ridgeway, while acknowledging the judiciary's duty to defer to an agency's interpretation of its own regulations, concluded that in this instance it was "plainly erroneous and inconsistent with the regulation" for the Commission to read the regulation "to require or permit anything other than "immediate action to eliminate the source or sources of contamination.""<sup>179</sup>

The following month, Duke Power and the Commission each filed appeals from Judge Ridgeway's order to the North Carolina Court of Appeals.<sup>180</sup> Not surprisingly, environmentalist cried foul, castigating state officials, who have been vowing to address the problem of ash waste ponds, for seeking to block the single most important legal proceeding designed to do just that.<sup>181</sup>

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<sup>175</sup> John Murawski, N.C. board rejects coal-ash pit cleanup, Newsobserver.com, <http://www.newsobserver.com/2012/12/04/2524683/nc-board-rejects-coal-ash-pit.html> (December 4, 2012)

<sup>176</sup> See Order on Petition for Judicial Review, Cape Fear River Watch v. North Carolina Environmental Management Commission, Superior Court, No 13 CVS 00093 (on file).

<sup>177</sup> Order on Petition for Judicial Review, Cape Fear River Watch v. North Carolina Environmental Management Commission, Superior Court, No 13 CVS 00093 (on file).

<sup>178</sup> *Id.* at 5.

<sup>179</sup> *Id.* at 13.

<sup>180</sup> Craig Jarvis, Duke Energy appeals judge's order in coal-ash pollution case, Newsobserver.com, <http://www.newsobserver.com/2014/04/03/3755516/duke-appeals-judges-order-in-coal.html> (April 3, 2014); Michael Biesecker, Associated Press, NC sides with Duke in appeal of coal ash ruling, <http://bigstory.ap.org/article/nc-sides-duke-appeal-coal-ash-ruling> (April 9, 2014).

<sup>181</sup> See Michael Biesecker, Associated Press, NC sides with Duke in appeal of coal ash ruling, <http://bigstory.ap.org/article/nc-sides-duke-appeal-coal-ash-ruling> (April 9,

Depending upon the outcome of the appeal, the losing side might well try to take the case to the North Carolina Supreme Court, which would have the final say on what the regulations do or do not require. Enforcement of these regulations is not the only means available to force operators of coal plants to avoid polluting North Carolina's waters. The legislature, for example, has been debating in aftermath of the Dan River spill various measures to address the coal ash problem. But the fact remains that these groundwater regulations provide a crucial legal handle to address this serious environmental hazard and, at the end of the day, the North Carolina Supreme Court will decide what the regulations actually require and whether and how they will be enforced.

The North Carolina Supreme Court may have the opportunity to assert itself in the wake of the Dan River disaster in the other ways. Following the disaster, the Department of Environment and Natural Resources initiated enforcement actions in state court based on violations at the Dan River plant as well as at other electric generating plants in the state with ash waste ponds.<sup>182</sup> The Environmental Protection Agency and environmental groups have both intervened in these proceedings,<sup>183</sup> which are just getting underway. Ultimately, these cases may also end in front of the Supreme Court, which will have the opportunity to decide whether Duke Power is held to account for its legal violations and the harms it has caused to the public's resources.

In sum, the Dan River disaster provides a useful if tragic demonstration of how the North Carolina Supreme Court, and the identity of the justices who sit on the court, will determine how much the law protects citizens of North Carolina from environmental harms.

#### The North Carolina Supreme Court and Judicial Selection Process

The North Carolina Supreme Court consists of a Chief Justice and six Associate Justices.<sup>184</sup> The justices are selected through statewide elections for eight-year terms.<sup>185</sup> In the

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2014) (quoting D.J. Gerken, a lawyer for the Southern Environmental Law Center, as saying "We're disappointed that this administration remains so determined to delay through litigation rather than move forward to stop ongoing pollution of North Carolina's rivers, lakes and groundwater.").

<sup>182</sup> Bruce Henderson, EPA to join NC's coal ash probe, *Charlotte Observer*, <http://www.charlotteobserver.com/2014/03/21/4783809/epa-to-join-ncs-coal-ash-probe.html#.U6rm4NhOXIU> (March 21, 2014).

<sup>183</sup> *Id.*

<sup>184</sup> N.C. Const. Art IV, Sec. 6.

<sup>185</sup> N.C. Const. Art IV, Sec. 16.

event of a vacancy on the court due to retirement or death, the governor can appoint a new justice to fill the vacancy.<sup>186</sup>

In 2002, North Carolina enacted the Judicial Campaign Reform Act, putting in place a non-partisan election system for seats on the Supreme Court (as well as the Court of Appeals).<sup>187</sup> While advocates of judicial selection reform generally applaud non-partisan elections,<sup>188</sup> Republican commentators argue that the Democrat-controlled legislature approved the change from partisan to nonpartisan elections out of concern that, due to the changing political complexion of North Carolina, partisan elections had begun to work to the disadvantage of Democrats running for judicial seats.<sup>189</sup> The Act also created a system of public financing of statewide judicial candidate elections, the first of its kind in the nation.<sup>190</sup> The funds to support the public financing of elections came from a taxpayer check-off on tax returns, lawyer fees and private donations.<sup>191</sup> Candidates who qualified for public support received \$250,000 to finance their campaigns, in exchange for a commitment to limit how much they could raise and spend on their own campaigns.<sup>192</sup>

In 2013, following the 2010 Republican takeover of both houses of the North Carolina legislature, and the election of a Republican, Pat McCrory, as Governor, the state enacted new legislation charting a different course on judicial elections.<sup>193</sup> The legislation, dubbed the “monster elections bill” by its critics, eliminated public financing of election, and increased the amount that any individual donor could contribute to a judicial candidate to \$5,000. The

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<sup>186</sup> N.C. Const. Art IV, Sec. 19.

<sup>187</sup> An Act to Establish a Nonpartisan Method of Electing Supreme Court Justices and Court of Appeals Justices Beginning in 2004, SESSION LAW 2002-158, <http://www.ncga.state.nc.us/Sessions/2001/Bills/Senate/PDF/S1054v10.pdf>

<sup>188</sup> The Challenges of Judicial Elections Research, American Judicature Society, <https://www.ajs.org/judicature-journal/editorial/the-challenges-of-judicial-elections-research/>

<sup>189</sup> See, e.g., John Davis, NC Supreme Court: 4 of 7 Seats Up in 2014. Rule #5: Lose the courts, lose the war <http://www.johndavisconsulting.com/2013/02/10/nc-supreme-court-4-of-7-seats-up-in-2014-rule-5-lose-the-courts-lose-the-war/> (February 10, 2013).

<sup>190</sup> An Act to Establish a Nonpartisan Method of Electing Supreme Court Justices and Court of Appeals Justices Beginning in 2004, SESSION LAW 2002-158, <http://www.ncga.state.nc.us/Sessions/2001/Bills/Senate/PDF/S1054v10.pdf>

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Jeremy P. Jacobs, Conservatives, after dismantling public financing system, set sights on N.C. judiciary, Environment & Energy Daily <http://www.eenews.net/stories/1060001412> (June 17, 2014).

legislation also removed limits on the amounts individual could donate to independent organizations supporting particular candidates.

Notwithstanding the nominally non-artisan nature of the Court (since 2002), each of the current justices on the court is widely and openly recognized as a member of one or the other major political party. Currently, the court has four Republican members including Justices Robert Holt Edmunds, Jr., Barbara Jackson, Mark Martin, and Paul Newby. The Court has three Democrats, including Chief Justice Sarah Parker and Associate Justices Cheri Beasley and Robin Hudson.

### Background on North Carolina Judicial Elections

As in other states, judicial elections in North Carolina were at one time relatively low-key and inexpensive. In accord with the traditional Democratic Party control of North Carolina government as a whole, the State Supreme court was dominated by Democrats for many years. The partisan composition of the Supreme Court began to change as North Carolina changed from a firmly blue state to a purple state. From Reconstruction through 1964, the Democratic candidates for the presidency beat their Republican opponent in every election; since 1964, the Democratic candidates have prevailed only twice.<sup>194</sup> Political change has been slower in elections for state offices. Democrats have held the Governor's seat with only a few interruptions since Reconstruction, but elected a Republican in 2012. In 2010, both houses of the legislature swung Republican for this first time since Reconstruction. Republican domination of both executive and legislative branch marks a significant ideological shift in North Carolina. In accord with this trend, the Supreme Court also became increasingly Republican; as of 2002, the date of enactment of the Judicial Campaign Reform Act, 5 of 7 justices were reportedly Republicans.<sup>195</sup>

In this larger political context, the current, close partisan divide on the North Carolina Supreme Court is something of an anomaly. Chief Justice Parker, who is retiring this year after reaching the mandatory retirement age, was first elected to the court in 1992; since North Carolina held partisan judicial elections at the time, she was initially elected as a Democrat. Robin Hudson was elected to the court in 2006, in a non-partisan context, and is running for reelection this year. The third Democratic Justice, Cheri Beasley, was appointed to office in 2012, by Democratic Governor Perdue to replace retiring Justice Patricia Timmons-Goodson; Beasley is facing her first reelection contest this year. Thus, all three Democrat seats are up for grabs in this election cycle. At best, from their perspective, Democrats may retain their minority status. At worst, Democrats could be swept from the Supreme Court.

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<sup>194</sup> U.S. presidential Election Results, <http://uselectionatlas.org/RESULTS/>.

<sup>195</sup> John Davis, NC Supreme Court: 4 of 7 Seats Up in 2014. Rule #5: Lose the courts, lose the war <http://www.johndavisconsulting.com/2013/02/10/nc-supreme-court-4-of-7-seats-up-in-2014-rule-5-lose-the-courts-lose-the-war/> (February 10, 2013).

Justice Hudson's election to the court in 2006 involved the first significant appearance by independent groups seeking to influence the outcome of judicial elections in North Carolina. According to one Republican partisan, the recent flood of money into North Carolina judicial races, mostly supporting Republican candidates, can be traced to the Hudson race and in a sense "blamed" on her.<sup>196</sup> According to this account, Hudson and her Republican opponent were in a tight contest until FairJudges.net, a Democratic-leaning independent expenditure campaign, appeared on the scene and effectively doubled the amount of money Robin Hudson had raised for her campaign.<sup>197</sup> But for this infusion of outside financing, according to this account, Justice Hudson would not have been elected to the Supreme Court.

#### North Carolina Environmental Case Law

The North Carolina Supreme Court has compiled an extraordinary record of hostility to legal claims seeking to defend or advance protection for North Carolina's environment. Over the last fifteen years the Court has issued a total of seven environmental law decisions, and in *every* case the Court has come down on the side favoring less environmental protection. These cases have arisen in different factual settings, including disputes between neighbors in which one landowner claims a neighbor has taken some action on his land that allegedly harmed the owner's property, challenges by industry representatives about allegedly excessive government regulations, and complaints by environmental groups about regulations that are allegedly too lax. Regardless of the precise form of the litigation, however, the result is always the same: environmental protections are the loser before the North Carolina Supreme Court

These striking data do not, of course, tell the whole story of environmental law in North Carolina. Many legal and regulatory disputes are resolved in North Carolina without resort to the courts at all. Even among the disputes that turn into full-blown litigation, the cases can be resolved at the trial level or on appeal to the North Carolina Court of Appeals without ever involving the Supreme Court. Generally speaking, the Supreme Court's appellate jurisdiction is limited to cases in which a constitutional issue has been raised, there was a dissent in the Court of Appeals, or the Supreme Court chooses to exercise its discretion to review a case.<sup>198</sup> Thus, the paucity of environmental decisions by the Supreme Court may reflect not merely hostility to environmental law but a lack of interest in the issue. Finally, many environmental disputes give rise to federal legal claims, which can be pursued in federal court rather than state court.

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Routes of Appeal, the North Carolina Court System, <http://www.nccourts.org/Courts/Appellate/Supreme/Routes.asp>



Nonetheless, the North Carolina Supreme Court's record of hostility to environmental protection claims is striking. The following is a thumbnail sketch of the seven major environmental law decisions issued by the Supreme Court since the year 2000.

- Ruling that landowners lacked standing under the Sedimentation Pollution Control Act to sue for relief based on flooding of their property with mud, water and other debris caused by construction activity on a neighboring property, resting on the theory that the Act authorizes a private civil suit only when state or local officials have already formally cited a landowner for violating the Act;<sup>199</sup> two dissenting justices argued that the majority improperly vested government officials with a gatekeeper authority over private lawsuits “nowhere found or implied” in the Act.”<sup>200</sup>
- Holding that a developer was entitled to a variance from the provisions of Sedimentation Pollution Control Act protecting trout streams in order to clear the vegetation from thousands of feet along a stream to build a golf course, reasoning that the development would produce only “minimal and temporary” pollution of the stream with sediment;<sup>201</sup> a dissenting justice argued that the Act was intended to establish a permanent green buffer alongside the streams, and that a variance could only be issued for temporary construction activity in the buffer area that would produce minimal adverse effects.<sup>202</sup>
- Holding that neither an association of shellfish growers association nor an environmental group were entitled to intervene in a case brought by a developer seeking to contest civil penalties imposed for violations of the Sedimentation Pollution Control Act that allegedly harmed shellfish beds, ruling that neither proposed intervenor had a “direct interest” in the proceedings, notwithstanding the fact that the groups had members who used the shellfish grounds at issue and

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<sup>199</sup> LLC v New South Properties, LLC, 742 S.E.2d 776 (NC 2013).

<sup>200</sup> *Id.* at 781. (Edmunds, J., dissenting, joined by Hudson).

<sup>201</sup> Hensley v. North Carolina Department of Environment and Natural Resources, 698 S.E.2d 41 (NC 2010).

<sup>202</sup> *Id.* at 295-97 (Hudson, J., dissenting)

the developer was claiming to be exempt in from the Act's erosion control requirements.<sup>203</sup>

- In a *per curiam* order adopting the dissenting opinion of a judge of the Court of Appeals, the court reversed an assessment of a \$36,000 penalty for violations of a state open burning regulation; the Court ruled that the Department of Environment and Natural Resources exceeded its statutory authority by treating the company's use of nine open burning piles within 1,000 feet of the nearest residence as nine separate legal violations, rather than a single violation, for purposes of the statutory \$10,000 limit on civil penalties for violations of the state's air pollution control regulation.<sup>204</sup>
- In another *per curiam* decision adopting the opinion of a dissenting Court of Appeals judge, the Court held that a waste spill by the operator of hog production facility represented one violation of state water quality standards, rather than eight separate violations, for the purpose of calculating civil penalties.<sup>205</sup>
- Ruling that the forestry association had standing to challenge a modification of a water quality "general permit" to require those building new or expanded wood chip mills to obtain individual discharge permits, reasoning that (1) the association had standing as an "aggrieved person" within the meaning of the North Carolina Administrative Procedure Act and (2) the agency was involved in a "licensing" activity subject to challenge in a "contested case."<sup>206</sup>
- Concluding that county ordinances "regulating swine farms" and establishing "zoning" controls on swine farms, as well as a set of swine farm "operations rules" adopted by the county board of health, were all preempted by a

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<sup>203</sup> Holly Ridge Associates, LLC v. North Carolina Department of Environment and Natural Resources, 648 S.E.2d 830 (N.C. 2007).

<sup>204</sup> MW Clearing & Grading, Inc. v. North Carolina Department of Environment and Natural Resources, 628 S.E.2d 379 (N.C. 2006).

<sup>205</sup> Murphy Family Farms v. North Carolina Department of Environment and Natural Resources, 605 S.E.2d 636 (NC 2004).

<sup>206</sup> North Carolina Forestry Association v. North Carolina Department of Environment and Natural Resources, 588 S.E.2d 880 (N.C. 2003).

comprehensive set of state statutory measures governing swine farms which impliedly precluded duplicative and conflicting local regulations.<sup>207</sup>

The point is not that all of these rulings, based on some objective standard, were decided incorrectly, though a strong case can certainly be made that several of the decisions were decided incorrectly.<sup>208</sup> Rather the point is that, even with this limited sample size, it is apparent that the North Carolina Supreme is more likely to rule against environmental protections than in favor of environmental protections simply because the case involves the environment. The probability that the Court would come down on the anti-environmental side of every one of these disputes over fifteen years was 1 in 128, long odds indeed.<sup>209</sup>

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<sup>207</sup> Craig v. County of Chatham, 565 S.E.2d 172 (N.C. 2002).

<sup>208</sup> For example, in *Murphy Family Farms v. North Carolina Department of Environment and Natural Resources*, 605 S.E.2d 636 (NC 2004), the Court embraced a dissenting opinion of a Court of Appeals judge who said that a hog producer should be held liable for one, rather than eight, violations of state water standards based on the conclusion that word “or” in a statute should be interpreted to mean “and.” See *Murphy Family Farms v. North Carolina Dept. of Environment and Natural Resources*, 585 S.E.2d 446, 452 (NC App. 2003). In *Craig v. County of Chatham*, 565 S.E.2d 172, 176 (N.C. 2002), the Supreme Court ruled that state hog farming statute preempted a local health ordinance notwithstanding a state law expressly conferring on local boards of health the power to “adopt a more stringent rule in an area regulated by the Commission for Health Services or the Environmental Management Commission where, in the opinion of the local board of health, a more stringent rule is required to protect the public health.”

<sup>209</sup> This bleak survey of environmental law decisions in North Carolina is alleviated by several relatively recent cases involving administrative law and standing issues that reached favorable outcomes from an environmental advocate’s standpoint. In *Board of Pharmacy v. The Rules Review Commission*, 637 S.E.2d 515 (NC 2006), the Supreme Court ruled that Pharmacy Board had the statutory authority to issue regulations governing pharmacists’ working hours and conditions and that the North Carolina Rules Review Commission had erred in rejecting the regulations. The Southern Environmental Law Center filed an *amicus* brief urging the Supreme Court to uphold the Board’s rulemaking authority. In *State Employees Association of North Carolina, Inc. v. State of North Carolina*, 580 S.E.2d 693 (N.C. 2003), the Supreme Court, reversing a decision by the Court of Appeals, rejected the conclusion that an association of state employees lacked standing to challenge an executive order issued by the Governor directing that contribution to employee retirement funds be used to cover a state budget shortfall, allegedly in violation of the constitution. The Court of Appeals ruled that the plaintiff lacked standing on the theory that an association has standing only if each and every member of the association would have standing to sue individually. The Supreme Court adopted the position of the dissenting Court of Appeals judge who contended that it is sufficient to establish associational standing to show some of the association members would have had standing to sue. 573 S.E.2d 525 (2002). The Southern Environmental Law Center filed an *amicus* brief on behalf of itself and numerous other groups in this case, see 580 S.E.2d 693, the outcome of which had important implications for environmental litigation

To find a clear win for the environmental side in an environmental law case before the North Carolina Supreme Court one has to go back over fifteen years to the case of *In the Matter of Before the North Carolina Pesticide Board*,<sup>210</sup> rejecting a legal challenge to the revocation of an aerial pesticide applicator's license for violating various North Carolina regulations. The Court ruled that there was substantial evidence to support the board's determination that the violations were sufficiently serious to support license revocation, that the board properly interpreted its regulations, and that the regulations violated neither the Due Process Clause nor the Equal Protection Clause.

A few years before, in 1994, the Court issued an important ruling in *Empire Power Co. v. N.C. Department of Environment*,<sup>211</sup> upholding the right of citizens to go to court to protect themselves from polluters contributing to unhealthy air quality. Reversing a ruling by the Court of Appeals, the Supreme Court held that the owner of land adjacent to the site of a proposed electric generating plant who alleged that the plant would cause injury to the health of his family, to the value of their property, and the quality of life in their home and community, was a "person aggrieved" within the meaning of the North Carolina Administrative Procedure Act. Therefore, the court ruled, the plaintiff was entitled to initiate an administrative proceeding to challenge the Department's issuance of an air pollution control permit to Duke Energy pursuant to the N.C. Air Pollution Control Act.

Importantly, however, the rare pro-environment precedent set in *Empire Power* is itself now under attack and the current Supreme Court may well have an opportunity to reaffirm or jettison the holding in *Empire Power*. In a controversy quite similar to *Empire Power*, property owners and environmental groups are challenging the state's issuance of an air quality permit for a new cement manufacturing facility and limestone quarry in New Hanover County, North Carolina.<sup>212</sup> In a ruling issued in September 2013, an Administrative Law Judge, at the urging of the state Division of Air Quality, arrived at the novel conclusion that, in order for a person to proceed with a challenge an air permit, the person not only has to be a "aggrieved" within the meaning of *Empire Power*, but also has to be "substantially prejudiced" by the permitting action.<sup>213</sup> The ALJ's ruling was recently upheld by the North Carolina Environmental Management Commission.<sup>214</sup> This new standard apparently would require a quantitative

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<sup>210</sup> 509 SE2d 165 (N.C. 1998).

<sup>211</sup> 447 SE2d 768 (N.C. 1994).

<sup>212</sup> See Petitioners' Brief in Support of Exceptions with Citations to Paginated Record, before the North Carolina Environmental Management Commission, 12 EHR02850 (February 19, 2014) (on file).

<sup>213</sup> Decision Granting Summary Judgment in Favor of Respondent and Respondent-Intervenor, in the Office of Administrative Hearings, 12EHR02850 (September 23, 2013).

<sup>214</sup> Final Agency Decision, before the North Carolina Environmental Management Commission, 12 EHR02850,

demonstration of how much additional pollution will be produced by the legal violation and what specific injuries will result from the violation.<sup>215</sup> This new standard would be extremely difficult, if not impossible, for environmental advocates to meet, and would put them in the position of having to make a more specific factual showing of environmental injury than the State itself would have to make in setting permit limits in the first place. The plaintiffs have filed an appeal in Superior Court, and the case may eventually make its way to the Supreme Court, which will have the opportunity to reject this novel ruling and reaffirm *Empower Power*, or uphold the Environmental Management Commission and gut *Empower Power*.

The North Carolina Supreme Court clearly has not been hospitable to environmental law claims. The data make it hard to avoid the conclusion that a majority of the Court has shared an antipathy to the goals of environmental law. Recent and upcoming elections may make the situation even worse from an environmental law standpoint.

### Recent North Carolina elections

With the 2012 and 2014 election cycles, North Carolina's judicial elections have reached a new level in terms of the magnitude of campaign expenditures, negativity of political advertising, and raw partisanship. Publicly, environmental law has not been front and center as an issue in these judicial elections, though the outcomes of the elections in both years will surely have important implications for the strength of North Carolina's environmental protections.

The most important issue at the heart of the recent elections has been whether the Court would help retain a Republican majority, and possibly a strong Republican majority, in the state legislature when it resolves the constitutionality of the legislative redistricting plan based on 2010 census. North Carolina has a long history of bitter redistricting litigation.<sup>216</sup> When the Democrats developed a redistricting plan based on the 2000 census that helped their party, Republicans successfully challenged the plan in the North Carolina Supreme Court.<sup>217</sup> The redistricting plan adopted in the aftermath of the Supreme Court decision striking down the 2000

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<sup>215</sup> See Petitioners' Brief in Support of Exceptions with Citations to Paginated Record, before the North Carolina Environmental Management Commission, 12 EHR02850 (February 19, 2014) (on file), at 14.

<sup>216</sup> For example, the constitutionality of the redistricting plan based on the 1990 census was evaluated in three major U.S. Supreme Court decisions. See **Hunt v. Cromartie**, 526 U.S. 541 (1999); **Shaw v. Hunt**, 116 S. Ct. 1894 (1996); **Shaw v. Reno**, 509 U.S. 630 (1993).

<sup>217</sup> **Bartlett v. Stephenson**, 562 S.E.2d 377 (2002) (ruling that 2000 redistricting plan violated the "whole-county provisions" of the state constitution).

plan was more favorable to the Republicans than the previous plan, and helped set the stage for the Republicans' takeover of both houses of the legislature in the 2010 elections.<sup>218</sup>

The Republicans' success in gaining control of the legislature in 2010 gave the Republicans an historic opportunity to use the redistricting process based on the 2010 census to cement their political gains. The success of this strategy will ultimately depend, however, on whether or not the Republicans suffer the same fate with their 2010 redistricting plan that the Democrats suffered with their 2000 redistricting plan – invalidation of the plan by the Supreme Court.<sup>219</sup>

Following release of the 2010 census data, Republicans seized the opportunity offered by their new majorities to develop a redistricting plan that heavily favored Republican candidates.<sup>220</sup> In the 2012 elections, which were based on the Republicans' redrawn election districts, the Republicans gained strong majorities in both legislatures: after the 2010 elections Republicans held a 68-52 advantage on the House of Representatives and a 21-19 advantage in the Senate, but after the 2012 election the Republican advantage on the House had grown to 77-43 and in the Senate to 23-17.<sup>221</sup> With the election of Republican Pat McCrory as Governor in 2012, Republican control of North Carolina government was complete – except possibly on the Supreme Court.

As of this date, the state is still waiting to learn the outcome of the legal challenges to the 2010 plan. In November 2011, Democrats, the NAACP, other advocacy groups, and various voters challenged the redistricting plan under federal and state law, principally asserting that the new districts illegally cluster African-American voters in order to reduce their overall electoral

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<sup>218</sup> John Davis, NC Supreme Court: 4 of 7 Seats Up in 2014. Rule #5: Lose the courts, lose the war, <http://www.johndavisconsulting.com/2013/02/10/nc-supreme-court-4-of-7-seats-up-in-2014-rule-5-lose-the-courts-lose-the-war/> (February 10, 2013).

<sup>219</sup> *See id.* (“The Republican majority has a right to initiate radical reforms. Everyone else has a right to sue them. That’s why next year’s Supreme Court races are critical for long-term Republican political dominance.”). Given that the plaintiffs have raised federal as well as state law challenges to the redistricting plan, there is a possibility that the case could ultimately be resolved on the merits by the U.S. Supreme Court.

<sup>220</sup> Lynn Bonner, Protests are vehement, but N.C. lawmakers approve districts, Newsobserver.com, <http://www.newsobserver.com/2011/07/28/1374189/protests-are-vehement-but-districts.html> (July 28, 2011)

<sup>221</sup> Brentin Mock, Policyshop, Why Redistricting Matters in the Moral March to Justice in North Carolina, Demos, <http://www.demos.org/blog/2/10/14/why-redistricting-matters-moral-march-justice-north-carolina> (February 10, 2014)

power in the state.<sup>222</sup> In a ruling handed down on July 5, 2013, a three-judge state-court panel rejected the challenges to the district plan.<sup>223</sup> The plaintiffs appealed this ruling to the Supreme Court,<sup>224</sup> the Court heard oral argument on January 6, 2014,<sup>225</sup> and the case is still pending. In the view of many, the partisan breakdown on the Court could influence how the Court resolves this case.<sup>226</sup>

While the fate of the 2010 redistricting plan is the single most important issue for advocates on each side of recent judicial elections, it is by no means the only important issue at stake. The new Republican majority in both houses has moved swiftly to adopt legislation advancing a series of conservative policy positions. In September 2011, the legislature adopting a measure referring to the voters a proposed constitutional amendment defining marriage as a union between one man and one woman,<sup>227</sup> which the voters approved in May 2012.<sup>228</sup> The Republican-controlled legislature cut jobless benefits, repealed a tax credit that supplemented the wages of low-income persons, and voted against expanding Medicaid pursuant

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<sup>222</sup> Gary D. Robertson, Associated Press, Lawsuit filed to stop N.C. plan for redistricting, <http://www.newsobserver.com/2011/11/04/1616429/lawsuit-filed-to-stop-nc-plan.html>, [newsobserver.com](http://www.newsobserver.com) (November 4, 2011); Another NC redistricting lawsuit filed in Raleigh, NCCapitol.com, <http://www.wral.com/news/state/nccapitol/story/10335539/> (November 4, 2011).

<sup>223</sup> Anne Blythe and Lynn Bonner, NC three-judge panel lets GOP-drawn voting maps stand, Newsobserver, <http://www.newsobserver.com/2013/07/08/3016723/nc-three-judge-panel-lets-gop.html> (July 8, 2013).

<sup>224</sup> Brentin Mock, The Institute for Southern Studies, NAACP appealing North Carolina redistricting ruling <http://www.southernstudies.org/2013/07/naacp-appealing-north-carolina-redistricting-rulin.html> (July 30, 2013).

<sup>225</sup> Associated Press, NC Supreme Court ponders legality of redistricting, Salisburypost.com, <http://www.salisburypost.com/article/20140107/SP01/140109808/>, (January 7, 2014).

<sup>226</sup> See, e.g., John Davis, NC Supreme Court: 4 of 7 Seats Up in 2014. Rule #5: Lose the courts, lose the war <http://www.johndavisconsulting.com/2013/02/10/nc-supreme-court-4-of-7-seats-up-in-2014-rule-5-lose-the-courts-lose-the-war/> (February 10, 2013) (“Lady Justice may be blindfolded, and those scales she holds may be balanced, but if the case impacts the outcome of political races, Lady Justice will take that blindfold off to check the political party of the plaintiffs ... then she will adjust the balance of the scales accordingly.”)

<sup>227</sup> Anti-gay marriage amendment heads to N.C. ballot without public, The Washington Post, <http://www.wral.com/news/state/nccapitol/story/10115232/> (September 13, 2011).

<sup>228</sup> North Carolina passes same-sex marriage ban, CNN projects, <http://www.cnn.com/2012/05/08/politics/north-carolina-marriage/> (May 11, 2012)

to the Patient Protection and Affordable Care Act.<sup>229</sup> In June 2013, the legislature passed and Governor McCrory signed a measure repealing the Racial Justice Act, which gave African-American inmates on death row an opportunity to challenge their sentence on the ground that it was the result of discrimination.<sup>230</sup> The legislators also passed sweeping changes in voting rules, requiring voters to present government-issued photo identification at the polls, shortening the early voting period from 17 to 10 days, eliminating same day registration as well as pre-registration for 16- and 17-year-old voters who will be 18 on Election Day.<sup>231</sup> In addition, the legislature adopted a new “Opportunity Scholarships Program,” providing \$10 million in state funds to finance vouchers worth up to \$4,200 for families to use to send their children to private schools.<sup>232</sup> Finally, the legislators passed legislation weakening the job security of public school teachers.<sup>233</sup> Almost all of these measures have led to legal challenges, many filed in state court.<sup>234</sup> The cases filed in state court may eventually end up before the Supreme Court. Thus, in very direct sense, the Republicans’ ability to sustain their victories on various conservative

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<sup>229</sup> Michael Fletcher, In North Carolina, unimpeded GOP drives state hard to the right Washington Post, [http://www.washingtonpost.com/business/economy/in-north-carolina-unimpeded-gop-drives-state-hard-to-the-right/2013/05/25/a9c9ccd2-c3c7-11e2-914f-a7aba60512a7\\_story.html](http://www.washingtonpost.com/business/economy/in-north-carolina-unimpeded-gop-drives-state-hard-to-the-right/2013/05/25/a9c9ccd2-c3c7-11e2-914f-a7aba60512a7_story.html) (May 25, 2013).

<sup>230</sup> Matt Smith, CNN, 'Racial Justice Act' repealed in North Carolina, <http://www.cnn.com/2013/06/20/justice/north-carolina-death-penalty/> (June 21, 2013).

<sup>231</sup> Aaraon Blake, North Carolina governor signs extensive Voter ID law, The Washington Post, <http://www.washingtonpost.com/blogs/post-politics/wp/2013/08/12/north-carolina-governor-signs-extensive-voter-id-law/> (August 12, 2013).

<sup>232</sup> Lindsay Wagner, NC Policy Watch, School Vouchers Come to North Carolina, <http://www.ncpolicywatch.com/2013/09/04/school-vouchers-come-to-north-carolina/> (September 4, 2013).

<sup>233</sup> Associated Press, Judge invalidates teacher tenure law, hpe.com. <http://www.hpe.com/news/x1288223859/Judge-invalidates-teacher-tenure-law> (May 16, 2014)

<sup>234</sup> See Associated Press, Judge invalidates teacher tenure law, hpe.com. <http://www.hpe.com/news/x1288223859/Judge-invalidates-teacher-tenure-law> (May 16, 2014) (Superior Court Judge struck down teacher tenure law as unconstitutional, but legislative leaders have vowed an appeal); Sharon McCloskey, Institute for Southern Studies, What now for North Carolina's Racial Justice Act?, <http://www.southernstudies.org/2013/07/what-now-for-north-carolinas-racial-justice-act.html> (July 5, 2013) (describing potential legal challenges to application of repeal of racial Justice Act); Lynn Bonner, Judge puts N.C. school voucher program on hold, Newsobserver.com, <http://www.newsobserver.com/2014/02/21/3642947/judge-puts-nc-voucher-program-on.html> (February 21, 2014).



policy causes depends upon the inclinations of the Supreme Court, and hence the elections for seats on the Court.

### The 2012 Race

This political and policy background helps explain the ferociousness of the 2012 judicial election in which Paul Newby, the Republican incumbent, faced a challenge from Democrat Sam Ervin IV. With the Court split 4 to 3 in favor of the Republicans, the outcome of this election determined whether Democrats or Republicans would control the Court going forward. After a hard fought contest, Newby prevailed, receiving 51.9% of the vote to Ervin's 48.1%.<sup>235</sup>

Newby was initially elected in 2004, and was seeking a second term in office. Widely identified as a Republican and a supporter of conservative causes, Newby generated public controversy shortly after joining the Court by attending a public rally in support of a constitutional amendment to ban same-sex marriages.<sup>236</sup> Ervin was a prominent North Carolina lawyer, judge on the Court of Appeals and a grandson of the famous chairman of the Senate Watergate Committee of the same name.<sup>237</sup>

The total spending in the Newby-Ervin race exceeded \$3.5 million, easily making it the most expensive race for a seat on the Supreme Court in North Carolina history.<sup>238</sup> The vast

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<sup>235</sup> <http://results.enr.clarityelections.com/NC/42923/123365/Web01/en/summary.html>

<sup>236</sup> Josh Israel, Super PAC Trying To Buy NC Supreme Court Re-Election For Pro-Corporate Conservative Justice, Think Progress, <http://thinkprogress.org/justice/2012/06/04/494284/super-pac-trying-to-buy-nc-supreme-court-re-election-for-pro-corporate-conservative-justice/> (June 4, 2012).

<sup>237</sup> Craig Jarvis, Supreme Court candidates struggle with each other, lack of voter interest, Newsobserver.com, <http://www.newsobserver.com/2012/10/11/2406197/supreme-court-candidates-struggle.html> (October 11, 2012).

<sup>238</sup> Jeremy P. Jacobs, Conservatives, after dismantling public financing system, set sights on N.C. judiciary, Environment & Energy Daily, <http://www.eenews.net/stories/1060001412> (June 17, 2014) (in 2012, "\$3.5 million was spent on a single state Supreme Court race that featured nasty attack ads, including more than \$2.8 million from outside groups"). In a comprehensive report on the 2012 elections, "The New Politics of Judicial Elections," <http://newpoliticsreport.org/> published by a consortium of groups, the estimate of the total amount spent in the 2012 race is almost \$4.5 million. Almost all of the discrepancy between these two estimates is explained by divergent estimates of the amounts the North Carolina Judicial Coalition spent on the race. *Compare* The New Politics of Judicial Elections (stating that the coalition "spent an estimated \$2.9 million in TV advertisements") *with* Followthe Money.org <http://www.followncmoney.org/committee/north-carolina-judicial-coalition> (stating that the coalition's expenditures were less than \$2.1 million).

majority of the money spent in the 2012 race, over \$ 2.8 million, was in the form of independent expenditures. Almost all of these independent funds were spent in support of Paul Newby, mostly to pay for television advertising, including \$2,064,750.00 by the North Carolina Judicial Coalition,<sup>239</sup> 175,517.83 by Justice for All NC,<sup>240</sup> and \$250,000 by Americans for Prosperity (a group reportedly affiliated with the Koch brothers<sup>241</sup>), for a total of more than \$2.5 million in independent expenditures in support of Newby's reelection.<sup>242</sup> On the other hand, the independent expenditures in support of Ervin, mostly from a group representing public school teachers, North Carolina Citizens for Protecting Our Schools, totaled only \$331,446.93.<sup>243</sup> The NC League of Conservation Voters spent a meager \$4237 to support Judge Ervin.<sup>244</sup> The candidates raised \$170,000 in direct support for their campaigns, and public campaign spending (this was the last year in which state financing was available) totaled \$480,000.<sup>245</sup>

Corporations with an interest in legal and regulatory policies were prominent among the direct and indirect funders of the campaign efforts supporting Newby's reelection. Funders of the North Carolina Judicial Coalition included the NC Chamber of Commerce and the parent company of R.J. Reynolds Tobacco.<sup>246</sup> However, the single biggest donor to the North Carolina Judicial Coalition was Justice for All NC, which itself received most of its funding from

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<sup>239</sup> FollowNCMoney.org, <http://www.followncmoney.org/committee/north-carolina-judicial-coalition>

<sup>240</sup> FollowNCMoney.org, <http://www.followncmoney.org/committee/justice-all-nc>

<sup>241</sup> Center for American Progress, The Million Dollar Judges of 2012, <http://americanprogress.org/issues/civil-liberties/report/2013/01/15/49590/the-million-dollar-judges-of-2012/> (January 15, 2013).

<sup>242</sup> FollowNCMoney.org, <http://www.followncmoney.org/candidates/paul-newby>.

<sup>243</sup> FollowNCMoney.org, <http://www.followncmoney.org/candidates/sam-ervin>.

<sup>244</sup> FollowNCMoney.org, <http://www.followncmoney.org/races/nc-supreme-court-associate-justice-newby-seat>.

<sup>245</sup> Justice at Stake, Brennan Center for Justice at NYU School of Law, and the National Institute on Money in State Politics, The New Politics of Judicial Elections, Appendix A, <http://newpoliticsreport.org/report/2012-report/appendix/> (2013).

<sup>246</sup> Chris Kromm, The Institute for Southern Studies, Justice for sale? Backers of shadow groups pushing money into NC judicial election may have high stakes in outcome, <http://www.southernstudies.org/2012/10/justice-for-sale-backers-of-shadow-groups-pushing-money-into-nc-judicial-election-may-have-h> (October 30, 2012).

the Republican State Leadership Committee,<sup>247</sup> a Washington, D.C.-based national political organization focused on provided funding for conservative candidates in state races across the country.<sup>248</sup> The Committee, in turn, received funding from various North Carolina corporations, including the major tobacco companies, Duke, Energy, and others,<sup>249</sup> giving rise to the inference that these North Carolina entities were using the Republican State Leadership Committee as a conduit to influence the North Carolina Supreme Court race while making the expenditures as invisible as possible.<sup>250</sup> According to one account, Justice for All NC invested a grand total of \$1.7 million on the Newby-Ervin race, of which \$1.2 million, or 68%, came from the Republican State Leadership Committee.<sup>251</sup>

Most of the money poured into the 2012 election was spent on television advertising. The most widely discussed ad featuring a folksy banjo player and a pack of hounds chasing a criminal with a jingle featuring such lines as Pall Newby “he’s got the criminals on the run” and “he’ll take them down one by one.”<sup>252</sup> Apart from the fact that the ad does not relate to the economics interests of the corporations mostly financing it, the ad depicts the judge in a law enforcement role far removed from his actual responsibilities. A controversial attack ad directed at Judge Ervin asked rhetorically whether “we can trust Sam Ervin to be a fair judge,” and then sought to tie Ervin to controversial former Governor Mike Easley and to utility rate hikes during Ervin’s tenure on the state Utilities Commission.<sup>253</sup> Ervin decried the ad as the first attack ad in

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<sup>247</sup> *Id.*

<sup>248</sup> Republican State Leadership Committee website, <http://www.rslc.gop/>.

<sup>249</sup> Chris Kromm, The Institute for Southern Studies, 5 players behind the Big Money attacks in NC Supreme Court elections, <http://www.southernstudies.org/2014/05/5-players-behind-the-big-money-attacks-in-nc-supre.html> (May 2, 2014).

<sup>250</sup> *Id.*

<sup>251</sup> Alan Suderman & Ben Wieder, Secret Money Is Now Swaying State Judicial Elections, Mother Jones, <http://www.motherjones.com/politics/2013/06/state-supreme-court-election-spending> (June 13, 2013). “The U.S. Chamber of Commerce’s Institute for Legal Reform gave \$3.5 million to the RSLC in 2012, making it the largest single donor to the national Republican group last year.” *Id.*

<sup>252</sup> Brennan Center, for Justice, Buying Time, [http://www.brennancenter.org/sites/default/files/legacy/STSUPCT\\_NC\\_NCJUDICIALCOALITION\\_CRIMINALS\\_BEWARE.PDF](http://www.brennancenter.org/sites/default/files/legacy/STSUPCT_NC_NCJUDICIALCOALITION_CRIMINALS_BEWARE.PDF)

<sup>253</sup> Brennan Center for Justice, Buying Time, [http://www.brennancenter.org/sites/default/files/analysis/STSUPCT\\_NC\\_JUSTICEFORALL\\_CAN\\_WE\\_TRUST\\_ERVIN.PDF](http://www.brennancenter.org/sites/default/files/analysis/STSUPCT_NC_JUSTICEFORALL_CAN_WE_TRUST_ERVIN.PDF)

a North Carolina judicial race,<sup>254</sup> and some contend that that Ervin, who was slightly ahead in the polls prior to election day, lost the election because of this negative ad.<sup>255</sup>

### The 2014 Race

The 2014 judicial election will almost certainly turn out to be as expensive and nasty as the 2012 race. This is the first modern election in which there will be no public financing of the candidates' campaigns – and no limits on the amounts that candidates can raise to support their campaigns.<sup>256</sup> In addition, independent expenditures designed to influence the outcome of the elections are likely to match or exceed the level of independent expenditures in 2012.<sup>257</sup>

The 2014 election involves four separate contests for seats on the Supreme Court. Because three of the four seats being contested are currently held by Republicans, and it is a foregone conclusion that Republicans will win one of these contests, the Republicans face no danger of losing their 4-3 majority. On the other hand, the Democrats face the potential prospect of seeing their position on the Court further weakened.

Incumbent Republican Associate Justice Mark Martin is running for the Chief Justice's seat being vacated as a result of the retirement of longtime Chief Justice Sarah Parker.<sup>258</sup> Martin's opponent, Ola M. Lewis, is another Republican.<sup>259</sup> Because Parker is a Democrat, the outcome of the Martin-Lewis race will necessarily be a Republican win, ensuring that the

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<sup>254</sup> Alan Suderman & Ben Wieder, Secret Money Is Now Swaying State Judicial Elections, Mother Jones, <http://www.motherjones.com/politics/2013/06/state-supreme-court-election-spending> (June 13, 2013).

<sup>255</sup> *Id.*

<sup>256</sup> Mark Binker, Big business spends to unseat NC Supreme Court Justice Hudson, NC Capitol, [http://www.wral.com/big-business-spends-to-unseat-nc-supreme-court-justice-hudson/13603252/?comment\\_order=forward](http://www.wral.com/big-business-spends-to-unseat-nc-supreme-court-justice-hudson/13603252/?comment_order=forward) (April 30, 2014).

<sup>257</sup> Sharon McCloskey, Kicking off the state Supreme Court elections, <http://www.ncpolicywatch.com/2014/02/05/kicking-off-the-state-supreme-court-elections/> (February 5, 2014) (“Records set . . . [in 2012] are likely to be shattered in 2014, . . . as more candidates are running for more races and as more outside groups find the path to influencing the outcomes of those races eased by recent election law changes.”).

<sup>258</sup> North Carolina Board of Elections, <http://www.ncsbe.gov/ncsbe/Voting/voter-guide/candidates>.

<sup>259</sup> Justin Smith, Ola Lewis says ‘political gamesmanship’ influenced her decision to run for chief justice, <http://www.wect.com/story/25071711/ola-lewis-says-political-gamesmanship-influenced-her-decision-to-run-for-chief-justice> (March 25, 2013).

Republicans will retain their current 4 to 3 advantage. The race to fill the seat being vacated by Justice Martin pits Republican Court of Appeals Judge Robert N. Hunter, Jr. against Democrat Court of Appeals Judge Sam J. Ervin IV, who lost his 2012 bid to unseat Justice Newby.<sup>260</sup> In the third contest, Republican attorney Mike Robinson is challenging incumbent Democrat Justice Cheri Beasley, who was appointed to fill a vacancy on the Court by former Governor Bev Perdue.<sup>261</sup> And, based on the results of the May 2014 primary, the final contest pits trial judge Eric Levinson against incumbent Associate Justice Robin Hudson, a Democrat, who is seeking a second term on the Court.<sup>262</sup>

Unlike the other candidates, who will face only one opponent in the general election in November, Justice Hudson had two Republican opponents, Eric Levinson and Jeanette Doran, and therefore had to participate in a three-way primary contest in May 2014.<sup>263</sup> Given the flood of outside advertising opposing Hudson and supporting the other candidates, there was a serious question whether Hudson would be “primaried out” and not have an opportunity to compete in the general election.<sup>264</sup> Eric Levinson is a Superior Court Judge in Mecklenburg County and was formerly a Judge on the Court of Appeals and a local prosecutor.<sup>265</sup> The third candidate, Jeanette Doran, is the chair of the North Carolina Division of Employment Security Board of Review and served for eight years as a staff person for the North Carolina Institute for Constitutional Law,<sup>266</sup> an advocacy group promoting “limited government” supported by North Carolina’s leading funder of conservative causes, Art Pope.<sup>267</sup> In the end, Hudson and Levinson were the top vote

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<sup>260</sup> North Carolina Board of Elections, <http://www.ncsbe.gov/ncsbe/Voting/voter-guide/candidates>.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> North Carolina Board of Elections, <http://www.ncsbe.gov/ncsbe/Voting/voter-guide/candidates>.

<sup>264</sup> Eric Eckholm, Outside Spending Enters Arena of Judicial Races, *The New York Times*, <http://www.nytimes.com/2014/05/06/us/politics/outside-spending-transforms-supreme-court-election-in-north-carolina.html> (May 5, 2014).

<sup>265</sup> Judge Levinson, Supreme Court, <http://www.levinsonforjustice.com/about-eric-levinson/>

<sup>266</sup> See Jeanette for Justice, <http://jeanetteforjustice.com/>.

<sup>267</sup> Chris Kromm, The Art Pope empire: Media outlets, think tanks and election machines, *IndyWeek*, <http://www.indyweek.com/indyweek/the-art-pope-empire-media-outlets-think-tanks-and-election-machines/Content?oid=2140145> (March 9, 2011).

getters in the primary and will face off in the general elections in November; Hudson received 42.6 % of the vote, Levinson 36.6%, and Doran 20.9%.<sup>268</sup>

As in 2012, the 2014 election primary was dominated by television advertising, though with an increasingly negative flavor. The most controversial ad, sponsored by Justice for All NC, attacked Justice Hudson for being “soft on child molesters.”<sup>269</sup> The text of the ad read as follows:

“We want judges to protect us. When child molesters sued to stop electronic monitoring care centers, Supreme Court Justice Robin Hudson sided with the predators. Hudson cited a child molester’s right to privacy and took the side of the convicted molesters. Justice Robin Hudson: Not tough on child molesters, not fair to victims.”<sup>270</sup>

A political commentator described the ad as “perhaps the most despicable political advertisement ever aired in the state,”<sup>271</sup> and a group of former justices called it “disgusting.”<sup>272</sup>

The ad referred to Justice Hudson’s dissenting opinion, supported by two other justices, in the controversial case of *State of North Carolina v. Bowditch*.<sup>273</sup> The case involved the constitutionality of a new state requirement that probationers convicted of sex offenses involving children submit to a continuous satellite-based monitoring program. Participants in the program are required to wear a transmitter on their ankles and wear a miniature tracking device around their shoulder or at the waistline on a belt. Several probationers objected to the requirement, imposed after their conviction and sentencing, as a violation of the Ex Post Facto Clause. The Court majority rejected the argument, reasoning that the legislature’s purpose in adopting the program was to “create a civil, regulatory scheme to protect citizens of our state from the threat posed by the recidivist tendencies of convicted sex offenders,” and that the program had neither a

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<sup>268</sup> North Carolina Board of Elections, Official Primary Election Results, <http://enr.ncsbe.gov/ElectionResults/>.

<sup>269</sup> <http://www.eenews.net/stories/1060001412>.

<sup>270</sup> Brennan Center for Justice, [http://www.brennancenter.org/sites/default/files/analysis/Buying\\_Time/STSUPCT\\_NC\\_JUSTICEFORALLNC\\_PROTECT\\_US.pdf](http://www.brennancenter.org/sites/default/files/analysis/Buying_Time/STSUPCT_NC_JUSTICEFORALLNC_PROTECT_US.pdf)

<sup>271</sup> Scott Mooneyham, GOP-funded ad targeting Hudson undermines democracy, *The Daily Advance*, <https://www.dailyadvance.com/opinion/other-views/scott-mooneyham-gop-funded-ad-targeting-hudson-undermines-democracy-2463613> (April 29, 2014).

<sup>272</sup> Eric Eckholm, Outside Spending Enters Arena of Judicial Races, *The New York Times*, <http://www.nytimes.com/2014/05/06/us/politics/outside-spending-transforms-supreme-court-election-in-north-carolina.html> (May 5, 2014).

<sup>273</sup> 700 S.E.2d 1 (2010).

punitive purpose nor effect.<sup>274</sup> Justice Hudson, in dissent, argued that, in view of the paucity of evidence that the program was actually effective in protecting children from predators, the program was punitive in effect and could not be implemented in accord with the Constitution.<sup>275</sup>

The ad attacking Justice Hudson's dissent is obviously objectionable because it grossly oversimplifies the legal issue in the case and fails to acknowledge the importance of the constitutional protection against Ex Post Facto laws. It also reflects disrespect for the Court by ignoring its authority and responsibility to safeguard the constitutional rights of disfavored minorities.<sup>276</sup> From a judicial electoral perspective the ad is remarkable because it has so little to do with the types of concerns actually motivating the corporations that helped to finance the ad. Being soft on sex offenders apparently plays better with the electorate than criticizing judges for being too tough on insurance companies or polluters.

Justice for All NC sponsored the Hudson attack ad,<sup>277</sup> spending over \$700,000 to have it appear on television almost a 1200 times leading up to the election.<sup>278</sup> As in 2012, the Republican State Leadership Committee was the primary source of funding for Justice for All NC, contributing \$900,000 to the PAC in the months prior to the primary.<sup>279</sup> As discussed, the RSLC has received major contributions from large North Carolina corporations with important financial stakes in issues that may come before the Supreme Court. The tobacco companies Reynolds American and the Lorillard Tobacco Co. have been the RSLC's biggest donors from

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<sup>274</sup> *Id.* at 13.

<sup>275</sup> *Id.* at 21.

<sup>276</sup> *Cf. United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) ("prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

<sup>277</sup> Brennan Center for Justice, *Buying Time 2014 – North Carolina*, <http://www.brennancenter.org/analysis/buying-time-2014-north-carolina>

<sup>278</sup> See Jeremy P. Jacobs, *Conservatives, after dismantling public financing system, set sights on N.C. judiciary*, *Environment & Energy Daily* <http://www.eenews.net/stories/1060001412>. ("According to an analysis by the progressive Institute for Southern Studies, Justice for All NC spent almost \$800,000 airing the attack ad, which ran nearly 1,200 times in the two weeks before the primary.")

<sup>279</sup> Eric Eckholm, *Outside Spending Enters Arena of Judicial Races*, *The New York Times*, <http://www.nytimes.com/2014/05/06/us/politics/outside-spending-transforms-supreme-court-election-in-north-carolina.html> (May 5, 2014) (the Republican State Leadership Committee contributed a total of \$900,000 to Justice for All NC).

North Carolina, contributing more than \$2 million since 2011.<sup>280</sup> Duke Energy, which faces potentially serious environmental liabilities and is also involved in other matters that may come before the Supreme Court, has contributed \$235,000 since 2011.<sup>281</sup>

Complementing the attack ad sponsored by Justice for All NC and funded by national Republicans, the independent expenditure arm of the Chamber, NC Chamber IE, ran positive ads during the primary supporting Doran and Levinson.<sup>282</sup> All told, the chamber reportedly spent \$345,000 on this effort.<sup>283</sup> Funding to support the chamber effort came from various major corporations. According to one account “seven companies – Blue Cross Blue Shield of North Carolina, Captive-Aire Systems, Charlotte Pipe and Foundry Co., Glen Raven, Koch Industries, Reynolds American and Waste Industries – gave a total of \$320,000 to the chamber's independent expenditure PAC in 2014.”<sup>284</sup> Some of these companies, including Koch Industries, are also contributors to the Republican State Leadership Committee.<sup>285</sup>

By the time the primary was over, the candidates and independent groups had spent well over a million dollars, setting the table for what will almost certainly be a more ferocious contest in the general election. The Republican candidates and their supporters are likely to amass a much larger war chest than they had in 2012, when 90% of the independent expenditures favored their side.<sup>286</sup> The Democrats will be lucky to retain three seats on the Court.

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<sup>280</sup> Jeremy P. Jacobs, Conservatives, after dismantling public financing system, set sights on N.C. judiciary, *Environment & Energy Daily*, <http://www.eenews.net/stories/1060001412> (June 17, 2014).

<sup>281</sup> *Id.*

<sup>282</sup> Mark Binker, Big business spends to unseat NC Supreme Court Justice Hudson, NC Capitol, [http://www.wral.com/big-business-spends-to-unseat-nc-supreme-court-justice-hudson/13603252/?comment\\_order=forward](http://www.wral.com/big-business-spends-to-unseat-nc-supreme-court-justice-hudson/13603252/?comment_order=forward) (April 30, 2014).

<sup>283</sup> Alex Kotch, Institute for Southern Studies, Institute Index: A primary drenched in outside money, <http://www.southernstudies.org/2014/05/institute-index-a-primary-drenched-in-outside-mone.html> (May 9, 2014).

<sup>284</sup> Mark Binker, Big business spends to unseat NC Supreme Court Justice Hudson, NC Capitol, [http://www.wral.com/big-business-spends-to-unseat-nc-supreme-court-justice-hudson/13603252/?comment\\_order=forward](http://www.wral.com/big-business-spends-to-unseat-nc-supreme-court-justice-hudson/13603252/?comment_order=forward) (April 30, 2014).

<sup>285</sup> *Id.*

<sup>286</sup> Chirs Kromm, Institute for Southern Studies, Power and Justice: Duke Energy extends influence to NC courts, <http://www.southernstudies.org/2014/03/power-and-justice-duke-energy-extends-influence-to.html> (March 7, 2014).



An undisclosed subtext of the attacks on Justice Hudson is that she is the single justice on the Court on the present Court who has distinguished herself by voting in favor of environmental protections in the cases that have come before her. For example, in *LLC v New South Properties, LLC*,<sup>287</sup> in which the Court ruled that property owners could not proceed against their neighbor for flooding their property with mud, water and other debris, Justice Hudson joined with another justice in dissent, arguing that the Court had erected an unwarranted obstacle to proceeding with a lawsuit under the Sedimentation Pollution Control Act.<sup>288</sup> In another case, *Hensley v. North Carolina Department of Environment and Natural Resources*,<sup>289</sup> in which the Court (in an opinion by Justice Newby) ruled that a developer was entitled to build a golf course without preserving green buffers on the border of a trout stream, Justice Hudson filed a dissent,<sup>290</sup> arguing that “the trout water protection provisions were advanced by legislators from the western part of the state, where such waters are located, in order to provide enhanced protection for such waters,” and that the Court “majority has turned those protections upside down by its decision today.”<sup>291</sup> Given the current and likely future makeup of the Court, Justice Hudson would be unlikely to sway the Court in many environmental cases, but at least she can – if reelected – serve as a counterweight to the other justices on the Court who appear to have less sympathy for environmental protections.

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<sup>287</sup> 742 S.E.2d 776 (NC 2013).

<sup>288</sup> *Id.* at 781. (Edmunds, J., dissenting, joined by Hudson).

<sup>289</sup> 698 S.E.2d 41 (NC 2010).

<sup>290</sup> *Id.* at 48-49 (Hudson, J., dissenting)

<sup>291</sup> *Id.* at 48 (Hudson, J., dissenting)

## **WASHINGTON**

### **Introduction and Overview**

Washington State provides a rare example of environmental advocates banding together with various allies to defeat a concerted effort by a segment of the business community and its supporters to change the ideological make up the state Supreme Court and make it more supportive of an anti-regulatory agenda. Beginning in the mid- 2000's, portions of the business community invested significant resources and energy in an effort to gain a majority of the Court. That effort was roundly defeated. In addition, with the passage of time, the two most extreme right-leaning members of the Court were replaced, one as a result of retirement due to illness and another due to a defeat at the polls. As a result, Washington State has recently swung from a conservative court to a centrist to left-leaning court, on environmental law as well as other issues. The Court's recent decisions in environmental law cases demonstrate considerable balance, with equal numbers of decisions coming down on the pro-environmental protection side and on the anti-environmental protection side, which is what one would expect if the Court were deciding cases based on the merits of the legal arguments without any predisposition to favor or disfavor environmental protection.

The relative success of Washington environmental advocates in maintaining a balanced Supreme Court is attributable to a number of factors. One important factor has been the strength and sophistication of Washington Conservation Voters, which has invested considerable time and money in Supreme Court races while maintaining a firm public posture favoring fair and impartial courts rather than an environmentalist agenda. At the same time, Washington environmental advocates have benefited from flawed opponents, particularly Justice Richard Sanders, a strident libertarian who consistently voted against environmental protection measures in the cases that came before him. In 2010, Washington voters took the rare step of removing Sanders from his seat on the Court, little if at all because of his views on environmental issues, but largely because of his irresponsible professional behavior and some allegedly racist public comments. Last but not least, environmental advocates in Washington State have benefited in recent years from a succession of Democratic Governors, who had the opportunity to appoint left-leaning Democrats to fill vacancies on the Supreme Court, conferring the advantage of incumbency on these candidates when they ran for reelection.

In the context of a nationwide pattern in which the state judicial electoral process has generally been harmful to the cause of environmental protection, Washington State stands apart as a significant and instructive exception.

### **Washington Judicial Election Process**

The Washington Supreme Court consists of nine justices.<sup>292</sup> The justices are elected for six-year terms,<sup>293</sup> in nonpartisan, statewide elections.<sup>294</sup> Each justice is required to retire by the end of the calendar year in which he or she attains the age of 75.<sup>295</sup> In the event of a vacancy on the court, the Governor appoints a justice to fill the vacancy, and the appointee holds the office until the next general election; if the appointee is elected at the next general election, she or he holds the seat to which he or she was appointed for the remainder of the unexpired term.<sup>296</sup> Accordingly, at each general election in even-numbered years a minimum of three Supreme Court justices potentially face a contested election.<sup>297</sup>

As in many other states, reformers in Washington State have sought for many years to increase the transparency and reduce the influence of special interests in state judicial elections. In 1996, the so-called Walsh Commission issued a report with a series of recommendations designed to provide voters with more information about judicial candidates, increase judicial accountability, and insulate judicial candidates from political pressures.<sup>298</sup> One proposal was that judges should be appointed and then stand for retention, rather than be selected through contested elections, a proposal that went nowhere.<sup>299</sup> One achievement of these reform efforts was the State's establishment in 2006 of a \$1900 per election cap on contributions to candidates for seats on the Supreme Court.<sup>300</sup>

Another achievement of these reform efforts was the creation in 2006 of VotingforJudges.org, a nonpartisan website designed to provide comprehensive information to voters on candidates for judicial office.<sup>301</sup> "In summer 2004, a coalition of Washington State bar associations and good

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<sup>292</sup> RCWA 2.04.070. *See* Washington Constitution Article IV, section 2 (stating that the Supreme Court shall have a minimum of five justices and that the legislature "may increase the number of judges of the supreme court from time to time.")

<sup>293</sup> Washington Constitution Article IV, section 3.

<sup>294</sup> RCW 29A.52.231

<sup>295</sup> Washington Constitution Article IV, section 3(a)

<sup>296</sup> Washington Constitution Article IV, section 3.

<sup>297</sup> RCWA 2.04.071

<sup>298</sup> *See* Walsh Commission Final Report, <http://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.displayContent&theFile=content/walshReport#I5>.

<sup>299</sup> David Postman, Voters Face Big Increase In High-Court Candidates, *Seattle Times*, April 18, 1998, <http://community.seattletimes.nwsources.com/archive/?date=19980818&slug=2767185>

<sup>300</sup> *See* <http://www.pdc.wa.gov/public/contributionlimits.aspx>

<sup>301</sup> <http://www.votingforjudges.org/07gavel.pdf>

government groups was formed to improve Washington's judicial selection process. This led to a summit conference in late 2005, at which Rep. Shay Schual-Berke suggested the concept of a website that would provide voters with more complete and impartial information about judicial candidates."<sup>302</sup> Implementation of the effort was led by John Ruhl, then President of the King County Bar Association in Seattle; Paul Fjelstad, a lawyer and the site web designer; and Charlie Wiggins, an attorney associated with the American Adjudicature Society, who was subsequently elected to a seat on the Supreme Court.<sup>303</sup>

### **Environmental Law in the Washington Supreme Court**

At least as measured in terms of case outcomes, the Washington Supreme Court is a remarkably balanced court on environmental law issues. Using the westlaw keynote system, I reviewed 24 cases decided between 2000 and 2014 identified as "environmental law" cases. Of these 24 cases, 20 had either a discernably pro-environmental protection outcome or a discernably anti-environmental protection outcome. And of these 20 cases, exactly ten fell on the pro-environmental protection side of the ledger and ten fell on the anti-environmental protection side. Most of the justices have, on different occasions, voted for different outcomes depending on the facts and circumstances of different cases. While this sample size is admittedly limited, these data suggest that the Court as a whole is not driven by any clear ideological agenda on environmental law in one direction or another.

There is no obvious trend in the Supreme Court decision-making in environmental law based on my review of Court's environmental cases over this 14-year period. The Court reached pro-environmental protection and anti-environmental protection results in different cases through the period. If there is any trend to discern, it may be in the direction of greater sympathy and support for environmental protections over the course of this period: at the beginning of the period studied, the Court issued four decisions of which only one supported the environmental protection measure at issue; at the end of this period, the Court issued four decisions of which only one had an anti-environmental result.

However, within this larger pattern, the environmental jurisprudence of former Justice Richard Sanders stands out. Over the period studied, in the years while he served on the Court, Justice Sanders had an opportunity to cast a vote in 16 environmental cases with a discernably pro-environmental or anti-environment outcome. In every one of these cases, Justice Sanders voted against the environment. In every case (ten in all) in which the Court majority ruled against the environmental protection measure at issue, Justice Sanders joined the majority. In every case (six in all) in which the Court voted to uphold the environmental protection measure, Justice Sanders wrote or joined in a dissent.

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<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

So far as I can determine, no other current or recent former justice on the Washington Supreme Court has had a starkly ideologically voting pattern in environmental cases. The only justice who seemingly comes close is former Justice Phillip Talmadge, although his tenure on the court during the sample period was so limited that it is hard to draw firm conclusions. In three environmental cases he helped resolve, he joined the Court majority in a pro-environmental ruling, and filed dissents (solitary dissents at that) in two cases reaching anti-environmental cases. But Justice Talmadge falls short of Justice Sanders' standard of doctrinaire consistency because he joined in one majority opinion reaching an anti-environmental outcome.

Another issue that has divided the Washington Supreme Court is private property rights, specifically whether government regulations or other government actions constitute "takings" of private property under either the U.S. or Washington Constitutions. As discussed below, property rights has been the most prominent environment-related issue in the contests for seats on the Washington Supreme Court over the last decade. In addition, property rights has also been the focus of the two initiatives presented to the voters, in 1995 and 2006. Especially in view of the importance of the issue politically, the Washington Supreme Court has had relatively few occasions to address the takings question, particularly in the context of land use and environmental regulations. In the few cases before the Court potentially raising "takings" issues, the Court has generally avoided addressing the issue directly, with either Justice Sanders or Justice Jim Johnson (or both) arguing that the Court should address the merits of the claim and find a violation of private property rights.<sup>304</sup>

### **Modern Judicial Elections in Washington State**

As of 2004, ten years ago, the Washington Supreme Court was sharply divided along ideological lines, with a strong and growing "property rights" wing that was skeptical if not outright hostile to environmental regulation. Traditionally relative quiet affairs, judicial elections in Washington State had already begun to be expensive and contentious. But the electoral contests that led up to 2004 were but a prelude to the far more costly and contentious contests that were to follow in which ideological control of the Court was at stake. Following the elections of 2006, in which the property rights candidates lost across the board, the surprising defeat of conservative Richard Sanders in 2010, the several appointments to fill vacancies on the Court by

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<sup>304</sup> See *Lemire v. State, Dept. of Ecology, Pollution Control Hearings Bd.*, 309 P.3d 395 (Wash 2013) (administrative order requiring land owner to take steps to curb pollution of a creek did not effect a taking); *id.* at 404-410 (Johnson, J, dissenting); *Asarco Inc. v. Department of Ecology*, 43 P.3d 471 (Wash. 2002) (rejecting takings challenges to retroactive imposition of liability under state toxics clean-up law on ripeness grounds); *id.* at 477-488 (Sanders, J., dissenting). But see *Dickgieser v. State* (reversing grant of summary judgment to state on claim that state took private property by conducting logging operation on state-owned lands that resulted in flooding of plaintiffs' neighboring land).

a succession of Democratic Governors, the Court has now come under the overwhelming control of moderates and liberals. At the same time, races for the Washington Supreme Court have reverted to relatively quiet, humdrum affairs – at least for the time being.

To set the stage for discussion of the battles for ideological control of the Washington Supreme Court from 2006 to 2012, it is useful to describe the makeup of the Court as of 2004. The Chief Justice at the time was the moderately conservative Gerry Alexander, who served on the Court from 1994 until he reached the mandatory retirement age of 75 in 2011.<sup>305</sup> His judicial career began less than ten years after graduating from law school,<sup>306</sup> when Republican governor Daniel J. Evans appointed him to the Superior Court.<sup>307</sup> After serving on that court for 11 years, he was elected to fill an open seat on the Court of Appeals Division, and after 10 years on that court he ran successfully for an open seat on the Washington Supreme Court, and was reelected to that Court twice.<sup>308</sup> His colleagues selected him to serve as the Court's Chief Justice from 2001 to 2010, when he was succeeded as Chief by Barbara Madsen. In sum, Alexander was the quintessential judge's judge.

As of 2004, the longest serving justice on the Court was Charles Johnson who, remarkably enough, remains a member of the Court today. [Elected to the Supreme Court at the relatively young age of 39, Johnson's election has generally been attributed to the fact that he had a more appealing name than the incumbent he unseated, the Chief Justice Keith Callow.](#)<sup>309</sup> More generally, Johnson's surprising election has become a kind of cautionary tale in the national debate over judicial elections and spurred efforts in Washington State to improve voter education

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<sup>305</sup> Justice Alexander returning to private practice, Seattle Times, December 2, 2011, [http://seattletimes.com/html/localnews/2016975263\\_apwajusticegerryalexander.html](http://seattletimes.com/html/localnews/2016975263_apwajusticegerryalexander.html)

<sup>306</sup> After graduating from law school, Alexander practiced with the firm *Parr, Baker, Alexander and Cordes* in Olympia. See *judgedpedia*, [http://judgedpedia.org/Gerry\\_Alexander\\_](http://judgedpedia.org/Gerry_Alexander_).

<sup>307</sup> Transcript of speech before Washington Republicans, Seattle Times, [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=14&ved=0CIEBEBYwDQ&url=http%3A%2F%2Fseattletimes.com%2Fnews%2Flocal%2Fpolitics%2Ftranscripts.doc&ei=snuU5GaCc7LsAT6qYHYAw&usg=AFQjCNEYzkxDuLmd2x0v82Dh3teX40WEMg&sig2=eywoCPLiGg\\_gUW1XuOtR6A&bvm=bv.73231344,d.cWc](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=14&ved=0CIEBEBYwDQ&url=http%3A%2F%2Fseattletimes.com%2Fnews%2Flocal%2Fpolitics%2Ftranscripts.doc&ei=snuU5GaCc7LsAT6qYHYAw&usg=AFQjCNEYzkxDuLmd2x0v82Dh3teX40WEMg&sig2=eywoCPLiGg_gUW1XuOtR6A&bvm=bv.73231344,d.cWc).

<sup>308</sup> *Id.*

<sup>309</sup> Robb London, LAW: For Want of Recognition, Chief Justice Is Ousted, The New York Times, October 25, 2002, <http://www.nytimes.com/1990/09/28/us/law-for-want-of-recognition-chief-justice-is-ousted.html> ) “Informal polls and interviews with voters after the election suggested that many voters did not recognize the Chief Justice's name on the ballot, while Mr. Johnson benefited from the presence in the state of at least three well-known Charles Johnsons.”).

about candidates for judicial office. Despite this inauspicious start to his career on the Supreme Court, Justice Johnson has had a successful tenure on the Court and in 2014 is seeking election to a fifth term against only token opposition.

Barbara Madsen, the future Chief Justice, was elected to the Court in 1992. After graduating from law school, Madsen worked as a public defender, as a staff attorney with the Seattle City Attorney's Office, and then special prosecutor.<sup>310</sup> In 1988, Madsen received an appointment to the Seattle Municipal Court, and was elected to the Washington Supreme Court in 1992, making her the third woman to serve on the Court. She was reelected to the Court, each time over slight opposition, in 1998, 2004, and 2010. She was elected Chief Justice by the other members of the Court on November 5, 2009,<sup>311</sup> and continues to serve in that capacity.

The fourth and most colorful member of the Court as of 2004, was Richard Sanders, an avowed libertarian and property rights advocate. Sanders, whose particular specialty prior to joining the bench was land use law, was described by one journalist as having a "list of clients . . . [that] read[] like a roll call of the right's modern grievances: Property owners hampered by land-use laws. Affirmative-action opponents. Gun-rights fundamentalists. Parents battling state social workers."<sup>312</sup> He joined the Court in 1996, pulling off an unexpected win over incumbent Roselle Pekelis.<sup>313</sup> He was subsequently re-elected for two additional six-year terms in 1998 and 2004 and then defeated in 2010.

Pekelis had been appointed to the Supreme Court in April 1995, after previously serving as a judge on the King County Superior Court and the Washington Court of Appeals.<sup>314</sup> Sanders ran what one columnist called a "boorishly partisan" campaign by emphasizing the fact that Pekelis had been appointed to the Court by an unpopular Democratic Governor Mike Lowry, who was

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<sup>310</sup> See Washington Supreme Court, Justice Biographies, [http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/bios/?fa=scbios.display\\_file&fileID=madsen](http://www.courts.wa.gov/appellate_trial_courts/supreme/bios/?fa=scbios.display_file&fileID=madsen)

<sup>311</sup> <http://www.courts.wa.gov/newsinfo/?fa=newsinfo.pressdetail&newsid=1462>

<sup>312</sup> [Jim Simon](#), Surprise Justice -- Lawyer Richard Sanders Made A Career Battling Land-Use Rules, Gun Laws And Liberals. Few Expected He'd Win A Seat On The Other Side Of The Bench, Seattle Times, July 25, 1995, <http://community.seattletimes.nwsources.com/archive/?date=19960114&slug=2308767>.

<sup>313</sup> *Id.*

<sup>314</sup> [Lowry appoints Rosselle Pekelis to Supreme Court](#)", *Seattle Post-Intelligencer*, April 20, 1995.

then serving out his single term as the State's chief executive.<sup>315</sup> Sanders also highlighted his advocacy of private property rights, leading environmentalist critics to describe him as "the first property-rights justice." Sanders prevailed over Pekelis 54% to 46%.<sup>316</sup>

In the same year that Washington voters elected property rights advocate Richard Sanders to the Supreme Court, they also rejected Measure 48, a property rights measure that was vigorously opposed by environmentalists and many other interest groups. If it had passed, the measure would have subjected government to financial liability for adopting and enforcing land use measures that did not rise to the level of compensable takings under either the state or federal Constitution. Prior to his election, Sanders was a board member of the Northwest Legal Foundation, which drafted Measure 48, and a consultant to the Building Industry Association of Washington, a major supporter of the measure.<sup>317</sup> Sanders testified before the Washington legislature in support of the measure.<sup>318</sup> The measure failed with a vote of 544,788 for and 796,869 against.<sup>319</sup> Tom McCabe, a building industry advocate, was quoted as saying that Sanders' election to the Court "takes some of the sting" out of the defeat of Measure 48: "We

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<sup>315</sup> Terry Tang, Judicial Roulette: Is This Any Way To Pick A Judge?, Seattle Times, November 10, 1995, <http://community.seattletimes.nwsourc.com/archive/?date=19951110&slug=2151700>

<sup>316</sup> Supreme Court justice is ousted", *Lewiston Morning Tribune*, 1995-11-08, retrieved 2011-10-08 <http://news.google.com/newspapers?id=i8BeAAAAIBAJ&sjid=ajEMAAAAIBAJ&pg=2363,2052010>.

<sup>317</sup> [Jim Simon](#), Surprise Justice -- Lawyer Richard Sanders Made A Career Battling Land-Use Rules, Gun Laws And Liberals. Few Expected He'd Win A Seat On The Other Side Of The Bench, Seattle Times, July 25, 1995, <http://community.seattletimes.nwsourc.com/archive/?date=19960114&slug=2308767>.

<sup>318</sup> Terry Tang, Judicial Roulette: Is This Any Way To Pick A Judge?, The Seattle Times, November 10, 1995, <http://community.seattletimes.nwsourc.com/archive/?date=19951110&slug=2151700>

<sup>319</sup> History of Referendum Measures, [http://www.sos.wa.gov/elections/initiatives/statistics\\_referendummeasures.aspx](http://www.sos.wa.gov/elections/initiatives/statistics_referendummeasures.aspx). Measure 48 was one of numerous property rights initiatives or bills debated at the state level during the 1990's. See generally John Echeverria & Thekla Hansen-Young. The Track Record on Takings Legislation: Lessons from Democracy's Laboratories, 28 Stan. Envtl. L. J. 439 (2009). Following the Supreme Court's decision in *Kelo v. City of New London*, [545 U.S. 469](#) (2005), there was a renewed push for a property rights measure in the 2006 Washington elections in the form of Initiative 933. That initiative was rejected with 1,199,679 voters voting "no" and 839,992 voters voting "yes." See Initiatives to the People, [http://www.sos.wa.gov/elections/initiatives/statistics\\_initiatives.aspx](http://www.sos.wa.gov/elections/initiatives/statistics_initiatives.aspx).



never concerned ourselves with Supreme Court races before . . . . But this was an anomaly, like having a homebuilder run for governor."<sup>320</sup>

In 1998, Sanders was reelected to a full-term over Greg Canova, a criminal prosecutor who served as the head of the criminal division within the Washington Attorney General's Office.<sup>321</sup> In keeping with his professional background, Canova criticized Sanders' application of his libertarian philosophy in the context of law and order issues, focusing on Sanders' opposition to a voter-approved "three-strikes, you're out" measure and his advocacy of citizens' rights to forcibly resist arrest.<sup>322</sup> Sanders easily prevailed in the primary election, 64% to 36%, avoiding a contest in the general election.

In 2004, Sanders faced five opponents for reelection. In the primary election he received 31% of the vote, with Terry Sebring coming in second with 19% of the vote. In the general election, Sanders and Sebring faced off, with Sanders prevailing, 61% to 39%. Sebring, an Assistant Attorney General, as well as a former Superior Court Judge, again focused on Sanders' record in criminal cases, arguing that "The purpose of criminal law is accountability. . . It's not all about the individual rights of the defendant. The public has rights, too." Despite the strong support he received from prosecutors and victims' groups, Sebring's challenge to Sanders failed in much the same fashion as Canova's.

Justice Bobby Bridge was appointed to the Supreme Court in 1999 by Democratic [Governor Gary Locke](#), and prevailed in the following general election in 2000 and again in 2002. Before being appointed to the high court, Bridge served for ten years as Superior Court Judge in King County, and prior to that was a partner in a Seattle law firm.<sup>323</sup> In an embarrassing incident in February 2003, Justice Bridge was arrested for a hit and run accident and for drunk driving after she hit a parked car near her home and attempted to flee the scene while intoxicated; her blood alcohol level was later tested at .219 and .227.<sup>324</sup> In 2007, Justice Bridge resigned from the

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<sup>320</sup> [Jim Simon](#), Surprise Justice -- Lawyer Richard Sanders Made A Career Battling Land-Use Rules, Gun Laws And Liberals. Few Expected He'd Win A Seat On The Other Side Of The Bench, Seattle Times, July 25, 1995, <http://community.seattletimes.nwsourc.com/archive/?date=19960114&slug=2308767>.

<sup>321</sup> David Postman, Canova Runs As Anti-Sanders -- His Strategy For Winning High-Court Race: "I'm Not Richard," Seattle Times, September 4, 1998, <http://community.seattletimes.nwsourc.com/archive/?date=19980904&slug=2770176>.

<sup>322</sup> *Id.*

<sup>323</sup> <http://www.ccyj.org/WhoWeAre/staff/>

<sup>324</sup> Bridge arrested for drunken driving, Seattle-Post Intelligencer, March 1, 2003, <http://www.seattlepi.com/news/article/Bridge-arrested-for-drunken-driving-1108678.ph>.

Court to become Founding President/CEO of the Seattle-based Center for Children & Youth Justice, a non-profit group advocating for juvenile justice and child welfare.<sup>325</sup> Governor [Christine Gregoire](#) appointed [Debra Stephens](#) to replace Bridge in January 2008.

Tom Chambers was elected to the Court in 2000. He pursued a long and successful private legal career, primarily as a plaintiff-side torts litigator before joining the court.<sup>326</sup> In 1989, he was awarded the Trial Lawyer of the Year Award by the Washington State Trial Lawyers Association.<sup>327</sup> Chambers was a self-described champion of the “little guy,” a posture that sometimes led him to side with other justices who arrived at the same position based on a libertarian philosophy.<sup>328</sup>

Susan Owens was elected to a seat on the Supreme Court in 2000. Prior to her election she served for almost 20 years as a District Court Judge in western Clallam County as well as Chief Judge in several tribal courts.<sup>329</sup> She gained some notoriety for authoring the Court’s majority opinion in the case of *Barrett v. Lucky Seven Saloon, Inc.*,<sup>330</sup> addressing the liability of a tavern for an accident caused by an inebriated customer.<sup>331</sup> In an opinion she authored, the Court ruled that the tavern owner could be held liable for serving alcohol to a customer who caused a car crash if the customer was “apparently,” even if not “obviously,” intoxicated. In a dissent, Judge Richard Sanders said: “The majority goes where no court has gone before.”<sup>332</sup>

Mary Fairhurst, the next to the last most recent addition to the Court as of 2004, was elected in 2002, winning a razor-thin (50.12% to 49.88%) contest over Jim Johnson.<sup>333</sup> As discussed

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<sup>325</sup> State Justice Bobbe Bridge stepping down, The Seattle Times, June 1, 2007, [http://seattletimes.com/html/localnews/2003731035\\_webbridge01m.html](http://seattletimes.com/html/localnews/2003731035_webbridge01m.html).

<sup>326</sup> Washington Supreme Court, Justice Biographies, [http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/bios/?fa=scbios.display\\_file&fileID=chambers](http://www.courts.wa.gov/appellate_trial_courts/supreme/bios/?fa=scbios.display_file&fileID=chambers)

<sup>327</sup> *Id.*

<sup>328</sup> Tom Chambers, former state Supreme Court justice, dies, The Seattle Times, December 12, 2013, [http://seattletimes.com/html/localnews/2022452371\\_chambersobituaryxml.html](http://seattletimes.com/html/localnews/2022452371_chambersobituaryxml.html)

<sup>329</sup> <http://www.courts.wa.gov/newsinfo/?fa=newsinfo.pressdetail&newsid=1462>

<sup>330</sup> 96 P.3d 386 (Wash. 2004).

<sup>331</sup> 'Apparent' intoxication triggers tavern's liability, Washington court holds, <http://www.thefreelibrary.com/'Apparent'+intoxication+triggers+tavern's+liability%2c+Washing+ton+court...-a0127543910>.

<sup>332</sup> 96 P.3d at 396.

<sup>333</sup> [https://wei.sos.wa.gov/agency/osos/en/press\\_and\\_research/PreviousElections/Pre2004/](https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/Pre2004/)

below, Jim Johnson, a libertarian in the mold of Richard Sanders, succeeded in winning a seat on the Court two years later. Fairhurst started her legal career by serving as law clerk for two different justices on the Washington Supreme Court.<sup>334</sup> She then worked in a variety of positions in the Washington Attorney General's office before being elected to the Supreme Court.<sup>335</sup> Fairhurst received strong financial backing for her campaign from Indian Tribes and public employee unions, and Washington Conservation Voters.<sup>336</sup> Indian tribes and Washington Conservation Voters also spent significant sums to oppose Johnson's election.<sup>337</sup>

Fairhurst's opponent in 2002, James Johnson, made a striking contrast with Fairhurst. Johnson spent 20 years as an Assistant Attorney General in the Washington Attorney General's Office, serving as the head of the Fish and Wildlife Division and later as Counsel for the Environment.<sup>338</sup> This made him one of the few modern candidates for a seat on the Supreme Court with expertise in environmental law. However, this background hardly endeared him to environmentalists or other progressive groups. Under Republican Attorney General Slade Gorton, Johnson took the lead in a number of the State's legal battles with Indian tribes, and continued to oppose Indian tribes when he went into the private practice of law; for example, he represented private property owners trying to block tribes' access to fishing grounds.<sup>339</sup> As a result, "Johnson's legal work . . . branded him, among some, as anti-Indian, and prompted tribal groups to support his opponent."<sup>340</sup> Environmentalists also opposed Johnson, "pointing out that he's representing a group of builders, Realtors, farmers and cattlemen that is challenging the

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Documents/2002/2002Gen%20results.pdf.

<sup>334</sup> <http://www.courts.wa.gov/newsinfo/?fa=newsinfo.pressdetail&newsid=1462>.

<sup>335</sup> *Id.*

<sup>336</sup> Follow the Money, Money in State Politics, Mary Fairhurst 202, <http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=56617>

<sup>337</sup> Lynda Mapes, Tribes jointly opposing high-court candidate, The Seattle Times, October 25, 2002, <http://community.seattletimes.nwsourc.com/archive/?date=20021025&slug=tribes25m> (Washington Conservation Voters "chipped in \$20,000" to finance a negative television campaign targeting Johnson).

<sup>338</sup> [http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/bios/?fa=scbios.display\\_file&fileID=jmjohnson](http://www.courts.wa.gov/appellate_trial_courts/supreme/bios/?fa=scbios.display_file&fileID=jmjohnson)

<sup>339</sup> Maureen O'Hagan, State Supreme Court races lack usual mystery, The Seattle Times, October 23, 2004, <http://community.seattletimes.nwsourc.com/archive/?date=20041023&slug=supremes23m>

<sup>340</sup> *Id.*

listing of salmon as an endangered species.”<sup>341</sup> Indian Tribes, public employee unions, and Washington Conservation Voters invested in television advertising calling Johnson “too extreme for the Supreme Court.”<sup>342</sup> On the other hand, Johnson received major financial support “from groups that often oppose tougher environmental restrictions. Washington homebuilder groups . . . contributed \$160,000 [in 2002] — more than any of the three other Supreme Court candidates . . . raised in total.”<sup>343</sup>

In 2004, in his second attempt to gain a seat on the Supreme Court, Johnson won a race for an open seat on the Court created by the retirement of Justice Faith Ireland, prevailing over Mary Kay Becker by a margin 52% to 48%.<sup>344</sup> Becker was a judge on the Court of Appeals and a former Democratic legislator representing Bellingham.<sup>345</sup> Her campaign adopted the strategy of arguing that she was not an extreme ideologue, unlike her opponent Jim Johnson.<sup>346</sup> “We are supposed to stay above public clamor,” she stated in interview; “We’re supposed to stay on an even keel.”<sup>347</sup> This approach obviously was not successful in this instance. According to one calculation, Johnson won the race with the help of contributions from the Building Industry Association of Washington that exceeded the total raised by Mary Kay Becker from all her contributors.<sup>348</sup> All told, Becker raised just \$157,000, while Johnson raised \$539,000.<sup>349</sup>

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<sup>341</sup> *Id.*

<sup>342</sup> Lynda Mapes, Tribes jointly opposing high-court candidate, *The Seattle Times*, October 25, 2002, <http://community.seattletimes.nwsources.com/archive/?date=20021025&slug=tribes25m>

<sup>343</sup> Maureen O’Hagan, State Supreme Court races lack usual mystery, *The Seattle Times*, October 23, 2004, <http://community.seattletimes.nwsources.com/archive/?date=20041023&slug=supremes23m>.

<sup>344</sup> Washington Office of the Secretary of State, 2004 General Election, [https://wei.sos.wa.gov/agency/osos/en/press\\_and\\_research/PreviousElections/2004/Pages/default.aspx](https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/2004/Pages/default.aspx).

<sup>345</sup> **Attorney Jim Johnson to run again for state high court, *Seattle Post-Intelligencer*, March 23, 2004**, <http://www.citizenreviewonline.org/march2004/attorney.htm>.

<sup>346</sup> Maureen O’Hagan, State Supreme Court races lack usual mystery, *The Seattle Times*, October 23, 2004, <http://community.seattletimes.nwsources.com/archive/?date=20041023&slug=supremes23m>.

<sup>347</sup> *Id.*

<sup>348</sup> Steve Zemke, [www.reelectjudgebecker.com](http://www.reelectjudgebecker.com), Majority Rules, September 7, 2006, <http://www.majorityrules.org/2006/09/wwwreelectjudgebeckercom.html>.

Johnson quickly established himself as being on a par with, if not even more extreme, than Richard Sanders in terms of libertarian zeal. At one point he publicly declared, "I'm without a doubt conservative, libertarian conservative."<sup>350</sup> Like Justice Sanders, Justice Johnson used his election to the Court to champion the rights of private property owners, and usually sided with businesses against either the government or the general public.<sup>351</sup> As a further indication of his ideological orientation, when Johnson left the Court in 2012, Johnson accepted a position as a senior fellow with the Freedom Foundation, an Olympia-based nonprofit "think and action tank" that "promot[es] free markets, limited government and greater transparency."<sup>352</sup>

### The 2006 Election Contest

Based on the preceding description of the composition of the Court it is apparent that the Court had a relatively balanced conservative to centrist orientation in ideological terms after the 2004 election. Justice Sanders and James Johnson anchored the extreme right-wing of the Court. Chief Justice Alexander and Justice Chambers, though far less ideological than these other two, were relatively conservative and joined with Sanders and Johnson in some environmental cases. Because the remaining justices could reasonably be described as centrist, the ideological leanings of the Supreme Court were still sufficiently balanced that Sanders and Johnson were not in the majority in every environmental law case. But with the 2004 re-election of Richard Sanders for a second full term and the election of his ideological companion Jim Johnson, business interests, property rights advocates and their allies saw the next general election, in 2006, as a promising opportunity to decisively shift the balance of the Court in a conservative direction.

As the 2006 elections approached, three incumbents prepared to seek election to another full term on the Court: Chief Judge Gerry Alexander, Tom Chambers, and Susan Owens. While, as discussed, all three were regarded as conservative or centrist, the possibility of replacing all three justices with hard right candidates in the mold of Sanders and Johnson was a temptation too great to resist. The incumbents' opponents, if they had all been elected, certainly would have moved the Court in a far more conservative direction.

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<sup>349</sup> Northwest Progressive Institute, BIAW hoping to pack State Supreme Court with handpicked candidates this fall, July 12, 2006, <http://www.nwprogressive.org/weblog/2006/07/biaw-hoping-to-pack-state-supreme.html>.

<sup>350</sup> Jonathan Martin, Sharp ideological contrasts in state Supreme Court race. The Seattle Times, August 1, 2010, [http://seattletimes.com/html/localnews/2012509755\\_supremecourt02m.html](http://seattletimes.com/html/localnews/2012509755_supremecourt02m.html).

<sup>351</sup> *Id.*

<sup>352</sup> See <http://www.myfreedomfoundation.com/blogs/olympia-report/retired-justice-james-johnson-joins-freedom-foundation>.

The first clear indication that the 2006 judicial races would be different was the announcement of the formation of Washington State's first independent political action committee focused on judicial races, Constitutional Law PAC.<sup>353</sup> While ostensibly centrist in orientation, the group had a distinctly Republican and right-wing cast. Former Republican Attorney General and Senator Slade Gorton was the PAC's chairman. The board also included former state GOP chairmen and candidates for governor, as well as other "veterans of political and legal fights favoring property rights and opposing government regulation and taxation."<sup>354</sup> The Building Industry Association of Washington, which contributed to James Johnson's 2002 and 2004 races, provided significant financial support for the new PAC.<sup>355</sup> In the familiar language used by Republicans and their allies to support right-leaning judicial candidates, the new PAC's website declared that it "exists to support candidates who believe in judicial restraint, and deference to the state Constitution as written."<sup>356</sup>

Significantly, another ostensibly centrist, but clearly left-leaning political action committee, FairPac (later renamed Citizens to Uphold the Constitution) was formed to oppose Constitutional Law PAC.<sup>357</sup> This second PAC received financial support from various liberal organizations, including labor unions, pro-choice organization, the state trial lawyers' association and Washington Conservation Voters.<sup>358</sup>

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<sup>353</sup> Neil Modie, State PAC to push for right-wing judges, *Seattle-Post Intelligencer*, November 24, 2005, <http://www.seattlepi.com/local/article/State-PAC-to-push-for-right-wing-judges-1188373.php>.

<sup>354</sup> *Id.*

<sup>355</sup> Northwest Progressive Institute, BIAW hoping to pack State Supreme Court with handpicked candidates this fall, July 12, 2006, <http://www.nwprogressive.org/weblog/2006/07/biaw-hoping-to-pack-state-supreme.html>. See also National Institute on Money in State Politics, Independent Spending in Washington, 2006-2010 (June 21, 2012). ("The Building Industry Association of Washington (BIAW), which seeks to limit regulation of the building industry, was the largest spender [in 2004 elections in Washington State], focusing \$1.3 million primarily on state supreme court races.")

<sup>356</sup> *Id.*

<sup>357</sup> Northwest Progressive Institute, BIAW hoping to pack State Supreme Court with handpicked candidates this fall, July 12, 2006, <http://www.nwprogressive.org/weblog/2006/07/biaw-hoping-to-pack-state-supreme.html>.

<sup>358</sup> Washington Office of Secretary of State, 2006 Primary Election, [https://wei.sos.wa.gov/https://wei.sos.wa.gov/agency/osos/en/press\\_and\\_research/PreviousElections/2006/Primary/Pages/default.aspx](https://wei.sos.wa.gov/https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/2006/Primary/Pages/default.aspx).

Ron Ward, a member of Citizens to Uphold the Constitution and a past president of the Washington State Bar Association, framed the terms of the debate between these warring PACs in an editorial published in one of the State's leading newspapers.<sup>359</sup> In response to the criticism that the Supreme Court showed a "lack of judicial restraint," he said that the Court had been "a model of impartiality and a clear example of what democracy needs and requires to remain vibrant."<sup>360</sup> He continued,

So what is the real agenda here? To replace impartial appellate judges with hand-picked candidates who can be counted on to support BIAW's agenda to undermine growth-management and land-use laws and to prioritize the deregulation of our state's building industry over protecting our public health and natural resources. Its plan to dismantle these protections in the courts is less costly than a legislative strategy, which would require a far greater investment in state Senate and House campaigns, and stealthier, given that many voters feel they don't have enough information to cast votes at the judicial ballot level.<sup>361</sup>

He vowed that Citizens to Uphold the Constitution would "help hold BIAW and Constitutional Law PAC accountable to the people" and "focus on educating and turning out voters to support independent judicial candidates."<sup>362</sup>

**Ultimately, three very conservative candidates emerged to challenge the incumbents seeking reelection. Chief Judge Gerry Alexander was challenged by** John Groen, a leading private property rights litigator in Washington State. He began his legal career with the Pacific Legal Foundation, a public interest law firm focused on private property rights protection based in California, and remains a member of the organization's board of directors today.<sup>363</sup> He helped start the Pacific Northwest office of PLF, and also served for many years as a member of the Legal Trust Committee for the Building Industry Association of Washington.<sup>364</sup> In 1996, he left PLF to start a private law firm and work on land use issues related to government regulation of private property.<sup>365</sup> In his race for a seat on the Supreme Court, he received the explicit

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<sup>359</sup> Ron Ward, Preserving an independent judiciary, *Seattle Times*, July 11, 2006, [http://seattletimes.com/html/opinion/2003118486\\_judgespac11.html](http://seattletimes.com/html/opinion/2003118486_judgespac11.html)

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> See Board of Directors, Pacific Legal Foundation, PLF website, <http://www.pacificlegal.org/page.aspx?pid=3835>

<sup>364</sup> *Id.*

<sup>365</sup> See Groen, Stephens & Klinge website, <http://www.gsklegal.pro/#!/john-m-groen/criz>

endorsement of the Republican Party,<sup>366</sup> contrary to the traditionally nonpartisan character of judicial races in Washington State. At least in recent history, no other candidate for a seat on the Supreme Court has brought such a clear, pointed advocacy agenda to a Supreme Court campaign; during a debate with the Chief Justice Alexander he asserted that “the bottom line is that the current majority of the court has . . . repeatedly demonstrate[d] a willingness, to legislate from the bench and to disregard constitutional rights, especially private property rights.”<sup>367</sup>

In the second race in 2004, Justice Susan Owens faced a challenge from Stephen Johnson, an attorney in private practice throughout his career who emphasized the claim in his campaign materials that he would be “an independent voice for property rights,” and that he “would uphold the Washington Constitution’s strong Property Rights provisions.”<sup>368</sup> Johnson served as a Republican leader in the Washington State Senate, where he served for 12 years before running for a seat on the Supreme Court; he served at various times as the Majority Floor Leader, the Deputy Republican Leader, and the party's senior member on the Judiciary Committee.<sup>369</sup> Johnson’s campaign was “backed by the building industry, major business groups and social conservatives.”<sup>370</sup> By contrast, Owens “won numerous endorsements from labor unions, environmentalists, gay-rights groups and Democratic Party organizations.”<sup>371</sup> During the campaign, Owens was “criticized by builders and business groups for siding with government agencies in key public-disclosure and property-rights cases.”<sup>372</sup> Johnson, on the other hand, got

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<sup>366</sup> See Board of Directors, Pacific Legal Foundation, PLF website, <http://www.pacificlegal.org/page.aspx?pid=3835>

<sup>367</sup> Transcript of speech before Washington Republicans, Seattle Times, [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=14&ved=0CIEBEBYwDQ&url=http%3A%2F%2Fseattletimes.com%2Fnews%2Flocal%2Fpolitics%2Ftranscripts.doc&ei=snuU5GaCc7LsAT6qYHYAw&usg=AFQjCNEYzkxDuLmd2x0v82Dh3teX40WEMg&sig2=eywoCPlIGg\\_gUW1XuOtR6A&bvm=bv.73231344,d.cWc\\_](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=14&ved=0CIEBEBYwDQ&url=http%3A%2F%2Fseattletimes.com%2Fnews%2Flocal%2Fpolitics%2Ftranscripts.doc&ei=snuU5GaCc7LsAT6qYHYAw&usg=AFQjCNEYzkxDuLmd2x0v82Dh3teX40WEMg&sig2=eywoCPlIGg_gUW1XuOtR6A&bvm=bv.73231344,d.cWc_)

<sup>368</sup> See Stephen Johnson, Washington Supreme Court, <http://votingforjudges.org/06gen/sup/p-sj.html>.

<sup>369</sup> Senior GOP senator will quit after term, Seattle Post Intelligencer, December 14, 2005, <http://www.seattlepi.com/local/article/Senior-GOP-senator-will-quit-after-term-1190034.php>

<sup>370</sup> See Ralph Thomas, Supreme Court race: Candidates' views easy to tell apart, The Seattle Times, October 18, 2006, [http://community.seattletimes.nwsourc.com/archive/?date=20061018&slug=court18m\\_](http://community.seattletimes.nwsourc.com/archive/?date=20061018&slug=court18m_)

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*



“low marks from environmentalists and labor unions,” while Owens was endorsed by Washington Conservation Voters.<sup>373</sup>

In the third race, Jeanette Burrage challenged Justice Tom Chambers. Burrage had served on the board of Citizens to Save Puget Sound, which fought successfully to block a new sewer outlet into Puget Sound,<sup>374</sup> giving her at least a patina of an environmentalist credential. But her most notable credential was that she served as Executive Director of the Northwest Legal Foundation,<sup>375</sup> “a firm dedicated to protecting the rights of people when government has overstepped its authority,” suggesting her sympathy with the libertarian leanings of the other candidates.<sup>376</sup> According to her campaign materials in the Supreme Court race, she believes “our government is based on stable fundamental principles, such as protection of property rights and freedom for individual citizens.”<sup>377</sup> During a brief stint as a Superior Court Judge, she gained notoriety for telling two female attorneys to wear skirts to court, an action that earned her the label “the skirt judge.”<sup>378</sup>

The 2006 race involved unprecedented levels of campaign spending for seats on the Supreme Court and by the new political action committees. Candidate expenditures totaled \$1,770,821. Two of the candidates seeking to unseat incumbents raised the largest amounts, with John Groen reporting expenditures of 443,607 and Stephen Johnson spending \$354,115.<sup>379</sup> Each of the incumbents also spent considerable but slightly smaller sums to defend their seats, including, \$340,446 by Thomas Chambers, \$318,708 by Susan Owens, and \$271,547 by Gerry Alexander. Jeanette Burrage, the third challenger, expended a relatively paltry \$42,397.<sup>380</sup>

But these figures paled in comparison with the “independent” expenditures by the political action committees, which spent nearly twice as much on the races as the candidates themselves,

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<sup>373</sup> *Id.*

<sup>374</sup> Jeanette Burrage for State Representative website, <https://jeanetteburrage.com/#about>

<sup>375</sup> See Northwest Legal Foundation, <http://nwlegalonline.wordpress.com/>

<sup>376</sup> Jeanette Burrage, VotingforJudges. Org, <http://votingforjudges.org/06pri/sup/p-jb.html>

<sup>377</sup> Jeanette Burrage, VotingforJudges. Org, <http://votingforjudges.org/06pri/sup/p-jb.html>

<sup>378</sup> Nancy Bartley, 'Skirt judge' adds sizzle to appeals-court primary, The Seattle Times, September 4, 2002, <http://community.seattletimes.nwsources.com/archive/?date=20020904&slug=appeals04m0>

<sup>379</sup> Data compiled by Money in State Politics.

<sup>380</sup> *Id.*

“turn[ing] the nonpartisan judgeships into partisan battlegrounds over gay rights, property rights and business liability.”<sup>381</sup> The total independent expenditures in the 2006 judicial races were \$2,517,593.<sup>382</sup> Reported indirect expenditures targeted each of the six major candidates. In every race, more was spent to support the election of the challenger than on behalf of the incumbent, with the pro-Groen forces outspending the pro-Alexander forces nearly 4 to 1; the pro-Johnson forces outspending the pro-Owens forces nearly 2 to 1; and the pro-Burrage forces only outspending the pro-Chambers forces by a modest amount. The lion’s share of these expenditures were used to finance television advertising; the political action groups paid for all the television advertising related to the Supreme Court elections in 2004.<sup>383</sup> The Building Industry Association of Washington (largely through the Constitutional Law PAC), Citizens to Uphold the Constitution,<sup>384</sup> and the Washington Chapter of Americans Tired of Lawsuit<sup>385</sup> were among the leaders in making these independent expenditures.

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<sup>381</sup> Susan Kelleher, Owens wins another term after unusually costly race, *The Seattle Times*, November 7, 2006, [http://seattlehttp://seattletimes.com/html/localnews/2003364163\\_websupreme07.html](http://seattlehttp://seattletimes.com/html/localnews/2003364163_websupreme07.html)times.com/html/localnews/2003364163\_websupreme07.html

<sup>382</sup> Data compiled by Money in State Politics. *But see* Robin Parkinson, National Institute on Money in State Politics, *Independent Spending in Washington, 2006 to 2010* (June 21, 2012) (providing a figure of \$2,607,374).

<sup>383</sup> National Institute on Money in State Politics, *Independent Spending in Washington, 2006-2010* (June 21, 2012).

<sup>384</sup> *Id.* (“Citizens to Uphold the Constitution . . . was active in all three state supreme court races, independently spending a total of \$646,757 in support of all three incumbents’ successful bids for reelection, and in opposition to their challengers. Three donors alone provided almost half of the committee’s funds used to make these expenditures, each giving \$100,000 or more: the Puyallup Tribe of Indians, the Tulalip Tribes of Washington, and the Washington State Council of Service Employees.”)

<sup>385</sup> The Washington Chapter of Americans Tired of Lawsuit Abuse reportedly spent \$357,500 on the Alexander-Groen race. *See id.* The group spent \$89,375 on advertising in support of Groen and \$268,125.00 in opposition to Alexander. *See* Americans Tired of Lawsuit Abuse WA PAC, Voting for Judges.Org, <http://votingforjudges.org/06gen/finance/tired.html>. *See also* National Institute on Money in State Politics, Follow the Money, <http://www.followthemoney.org/database/StateGlance/iespender.phtml?ie=2393>. Americans Tired of Lawsuit Abuse is reportedly an arm of the Washington-DC based American Tort Reform Association, which seeks to limit defendants’ liability in tort litigation. *See* Douglas E. Schoen, *The Political Fix: Changing the Game of American Democracy, from the Grassroots to the White House* 133 (2010).

By far the largest independent expenditures were made in the Groen-Alexander contest, with \$771,485 spent in support of Groen's candidacy and \$298,863 spent in opposition to his candidacy; on the other hand, \$39,281 was spent in support of retaining Chief Justice Alexander, and a whopping \$476,592 was spent opposing him.<sup>386</sup> In the Johnson-Owen contest, \$382,736 [\$395,515] was spent in support of Johnson's candidacy with \$111,834 [118,933] spent in opposition; on the other side, \$147,586 [147,590 report] was spent in support of Owens' candidacy and \$110,525 spent in opposition.<sup>387</sup> Finally, in the Burrage-Chambers race, \$57,716 was spent in support of Burrage and \$38,495 in opposition to her; on the other side, \$39,172 was spent in support of Chambers and \$43,848 against.<sup>388</sup>

Despite the fact that the challengers and their supporters outspent the incumbents and their supporters by a considerable margin, the incumbents swept the field. Chief Justice Alexander beat off Groen's challenge in a head-to-head contest in the primary by a margin of 54% to 46%,<sup>389</sup> meaning that Alexander was reelected in the general election without opposition. Susan Owens, after prevailing over several primary opponents (but without capturing a majority of the vote),<sup>390</sup> faced Stephen Johnson in the general election and beat him by a margin of 60% to 40%.<sup>391</sup> Tom Chambers beat opponent Jeanette Burrage in the primary by a margin of 60% to 40%, with the result that he appeared unopposed on the general election ballot.<sup>392</sup>

Following the expensive and contentious 2006 elections, the 2008 Supreme Court elections were relatively low key. Prior to the election, in January, 2000, Democratic Governor Christine Gregoire appointed Debra Stephens to the Court; Stephens replaced Justice Bobby Bridge who

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<sup>386</sup> Money in State Politics Data. *But see* Robin Parkinson report (indicating that \$843,485 was spent in support of Groen's candidacy and \$39,180, was spent in support of retaining Chief Justice Alexander).

<sup>387</sup> Money on State Politics Data. *But see* Robin Parkinson report (indicating that in the Johnson-Owen contest, \$395,515 was spent in support of Johnson's candidacy with \$118,933 spent in opposition; and that \$147,590 report was spent in support of Owens' candidacy).

<sup>388</sup> Money in State Politics Data. *See also* VotingforJudges <http://www.votingforjudges.org/06gen/finance/uphold.html>

<sup>389</sup> Washington Office of Secretary of State, 2006 General Election, [https://wei.sos.wa.gov/agency/osos/en/press\\_and\\_research/PreviousElections/2006/2006GenPrecData/Documents/2006Gen-results.pdf](https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/2006/2006GenPrecData/Documents/2006Gen-results.pdf).

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

retired before the end of her term to become the head of a non-profit organization (and possibly to avoid a bruising reelection battle in the wake of her hit and run and drunk driving arrest).<sup>393</sup> Stephens' appointment maintained the gender balance on the Court and she became the first Justice in several years from eastern Washington.<sup>394</sup> She had only scant judicial experience, having been appointed by Gregoire to the Court of Appeals a year earlier.<sup>395</sup> Prior to becoming a judge, Stephens was an accomplished attorney, specializing in appellate work.<sup>396</sup> She worked for over a decade with the Amicus Curiae Program of the Washington State Trial Lawyers Association (renamed the Washington Association for Justice), marking her as an antagonist of corporations and their allies seeking to limit the scope of tort liability.<sup>397</sup> "GOP critics from outside her hometown [of Spokane] grouched about Stephens having given Gregoire a \$100 campaign donation and especially about her involvement with the trial lawyers' organization, known to be influential in Democratic politics."<sup>398</sup> Republican Slade Gorton, in a statement released by the right-leaning Justice for Washington Foundation, said that the selection of Stephens was "a disappointment as the appointee represents an extreme position within the legal profession. A more moderate appointment would have been preferable."<sup>399</sup>

In the 2008 elections, no opponent emerged to challenge Justice Stevens' bid for a full six-year term, which succeeded automatically.<sup>400</sup> The other two races that year, in which incumbents Johnson Mary Fairhurst and Charles Johnson were both reelected to new terms, were almost

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<sup>393</sup> Curt Woodward, Stephens sworn in on state's high court, *The Seattle Times*, January 8, 2008, [http://seattletimes.com/html/localnews/2004112944\\_newjustice08.html](http://seattletimes.com/html/localnews/2004112944_newjustice08.html)

<sup>394</sup> *Id.*

<sup>395</sup> *Press Release*, Governor Gregoire Appoints Debra L. Stephens to Division III Court of Appeals, April 24, 2007, <http://www.digitalarchives.wa.gov/GovernorGregoire/news/news-view.asp?pressRelease=557&newsType=1>

<sup>396</sup> Debra Stephens, [votingforjudges.org](http://www.votingforjudges.org), <http://www.votingforjudges.org/08gen/supreme/7ds.html>

<sup>397</sup> J. Kingston Pierce, *Supreme Thrill*, *Washington Law & Politics*, undated <http://www.lawandpolitics.com/washington/supreme-thrill/01f67613-5427-446f-8415-c604c3039243.html>

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

<sup>400</sup> See Washington Secretary of State, <http://vote.wa.gov/results/20081104/Judicial.html> (primaries); <http://vote.wa.gov/results/20081104/Supreme-Court-Justice-Position-7.html> (general election).

equally unexciting. In both races, the incumbents beat back primary challengers with more than 50% of the vote, meaning that they ran unopposed in the general election.<sup>401</sup> Justice Fairhurst prevailed 61% to 39%, besting Michael J. Bond in the primary; and Justice Johnson received 59% of the vote in the primary, beating James Beecher (30%) and Frank Vuillet (10%).<sup>402</sup>

Fairhurst's opponent, Michael Bond is an experienced military lawyer and private attorney, working with a small Seattle law firm.<sup>403</sup> He ran on a libertarian platform, saying, "My fundamental philosophy is that the role of the court is to protect the people from the power of government and vested interests,"<sup>404</sup> and criticized Justice Fairhurst for "tramp[ing] on our constitutional rights, overruling property rights, reducing privacy rights, and censoring free speech."<sup>405</sup>

In the second race, James Beecher, an experienced private litigator, took a quite different tack, arguing for modernization of the courts and not so subtly suggesting that Justice Johnson, then seeking his fourth term, had overstayed his welcome. He asserted that the Court rules

need to be modernized to make pretrial procedures more efficient and to provide for the economies of electronic technology. After 18 years it is time to elect a Justice who actually has had broad, first hand trial experience – someone with knowledge of present day litigation practices across Washington.<sup>406</sup>

Candidate Frank Vuillet brought less compelling credentials to the race; one paper urged the retention of Johnson, observing that "Frank Vulliet, of Mercer Island, appears to be winding down a long legal career; during three recent winters, he worked part time in a bike and ski shop."<sup>407</sup>

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<sup>401</sup> Washington Office of Secretary of State, 2012 General Elections, <http://vote.wa.gov/results/20081104/Judicial.html>

<sup>402</sup> Washington Office of Secretary of State, 2012 Primary Elections, <http://vote.wa.gov/results/20081104/Judicial.html>

<sup>403</sup> Michael Bond, voting for judges, <http://www.votingforjudges.org/08pri/supreme/3mb.html>

<sup>404</sup> Editorial, Bond, Johnson for Supreme Court, The Seattle Times, August 3, 2008, [http://seattletimes.com/html/editorialsopinion/2008086875\\_end03scotwaed.html](http://seattletimes.com/html/editorialsopinion/2008086875_end03scotwaed.html)

<sup>405</sup> Michael Bond, voting for judges, <http://www.votingforjudges.org/08pri/supreme/3mb.html>

<sup>406</sup> James Beecher, Votingforjudges, <http://www.votingforjudges.org/08pri/supreme/4jb.html>

<sup>407</sup> Retain Johnson: Our view: High court needs justice's populism, experience Spokane Spokesman-Review, July 26, 2008, <http://www.votingforjudges.org/08pri/rating/spokane.html>

In terms of campaign financing, the 2008 election was a bargain basement affair. Each of the incumbents only amassed small war chests,<sup>408</sup> and the challengers raised very little money at all, with Michael Bond leading the pack with \$28,155.<sup>409</sup> There were no expenditures by independent political action committees in 2008, in contrast with millions spent two years before.

The 2010 campaign represented a new ratcheting back up contentious and expensive campaigning, but this time with the progressive side taking the offensive, and achieving a major victory with the defeat of Richard Sanders, by then a 15-year veteran on the Court.

The first of the races in 2010 was a complete non-event, with popular Chief Justice Barbara Madsen running for reelection unopposed.<sup>410</sup>

In the second race, conservative Jim Johnson prevailed over a single challenger in the primary, Stan Rumbaugh, by a margin of 62% to 38%,<sup>411</sup> but not for lack of a serious effort by left-leaning groups to unseat him. Rumbaugh was at the time an attorney with a relatively small law firm in Tacoma, Washington, specializing in workers' compensation and plaintiff tort claims.<sup>412</sup> (Following his loss in the Supreme Court race, Rumbaugh was elected to the Superior Court.<sup>413</sup>) He had served on the boards of the Washington State Trial Lawyers Association, Planned Parenthood Northwest, the Tacoma Housing Authority; he also had donated widely to Democrat

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<sup>408</sup> Fairhurst raised \$191,990, Stephens \$101,350, Johnson \$85,114. Data from Money in State Politics

<sup>409</sup> *Id.*

<sup>410</sup> Washington Office of Secretary of State, General Election, <http://vote.wa.gov/results/20101102/Judicial.html>

<sup>411</sup> Washington Office of Secretary of State, Primary Election, <http://vote.wa.gov/results/20100817/Judicial.html>

<sup>412</sup> Rachel La Corte, Conservative WA Supreme Court justice targeted, The Seattle Times, July 30, 2010, [http://seattletimes.com/html/localnews/2012494783\\_apwaprimarysupremecourt1stldwrite thru.html](http://seattletimes.com/html/localnews/2012494783_apwaprimarysupremecourt1stldwrite thru.html); Pierce County Press Release, 3 Superior Court judges to be sworn in Jan. 4, January 3, 2013, <http://thesubtimes.com/2013/01/03/3-superior-court-judges-to-be-sworn-in-jan-4/>

<sup>413</sup> Pierce County Press Release, 3 Superior Court judges to be sworn in Jan. 4, January 3, 2013, <http://thesubtimes.com/2013/01/03/3-superior-court-judges-to-be-sworn-in-jan-4/>

candidates, and said he likely would have voted to approve gay marriage.<sup>414</sup> Promising “a more centrist and somewhat progressive evaluation of the law,”<sup>415</sup> Rumbaugh asserted that Washington State could not “afford 6 more years with a deeply ideological voice.”<sup>416</sup>

Like in Johnson’s first race for a seat on the Supreme Court, money poured into the race, but on a lesser scale, and in a fashion heavily weighted towards his opponents. As a result of the statutory cap on individual campaign contributions adopted in 2004,<sup>417</sup> Johnson was handicapped in his ability to do direct fundraising, raising only \$142,134, only slightly more than the \$137,890 raised by Rumbaugh.<sup>418</sup> Even more significantly, conservative political action groups decided to sit out the 2010 race entirely. A spokeswoman for BIAW was quoted during the campaign as being generally supportive of Johnson’s reelection, but also observing that the nearly \$1,000,000 BIAW spent in 2006 “didn’t keep [Groen] from losing to the incumbent Alexander.”<sup>419</sup> “I don’t think money buys votes by any stretch,” she said.<sup>420</sup> The left felt no similar hesitation about spending money on this race. *Citizens to Uphold the Constitution*, which was created in 2006 to counter Constitutional Law Pac, and Fuse Washington, which describes itself as “the state’s largest progressive organization,”<sup>421</sup> collectively spent \$256,115 opposing Johnson’s reelection. Some of these funds paid for ads depicting Johnson as a small cut out

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<sup>414</sup> Jonathan Martin, Sharp ideological contrasts in state Supreme Court race, *Seattle Times*, August 1, 2010, [http://seattletimes.com/html/localnews/2012509755\\_supremecourt02m.html](http://seattletimes.com/html/localnews/2012509755_supremecourt02m.html)

<sup>415</sup> Rachel La Corte, Conservative WA Supreme Court justice targeted, *The Seattle Times*, July 30, 2010, [http://seattletimes.com/html/localnews/2012494783\\_apwaprimarysupremecourt1stldwrite thru.html](http://seattletimes.com/html/localnews/2012494783_apwaprimarysupremecourt1stldwrite thru.html)

<sup>416</sup> Stan Rumbaugh, Voting for Judges, <http://www.votingforjudges.org/10pri/supreme/1sr.html>

<sup>417</sup> Judicial Selection in the States: Washington, [http://www.judicialselection.us/judicial\\_selection/index.cfm?state=WA](http://www.judicialselection.us/judicial_selection/index.cfm?state=WA)

<sup>418</sup> Money in State Politics Data

<sup>419</sup> Rachel La Corte, Conservative WA Supreme Court justice targeted, *The Seattle Times*, July 30, 2010, [http://seattletimes.com/html/localnews/2012494783\\_apwaprimarysupremecourt1stldwritethru.html](http://seattletimes.com/html/localnews/2012494783_apwaprimarysupremecourt1stldwritethru.html)

<sup>420</sup> *Id.*

<sup>421</sup> <http://fusewashington.org/about/>

figure inside a business-suit pocket, illustrating these groups' view of Johnson as the agent of the business community.<sup>422</sup>

Ultimately, just as one-sided expenditures (from the right) had failed to dislodge incumbents in 2006, so too one-sided expenditures (from the left) failed to dislodge Johnson in 2010 – perhaps illustrating the simple point that, everything else being equal, voters err heavily in the direction of retaining incumbents. Assuming this represents an accurate general rule, however, the surprising upset of Richard Sanders in 2010 illustrates that there is an exception to every rule.

In the third, and most significant race of 2010, attorney Charlie Wiggins pulled out an unexpected win over Richard Sanders, prevailing by a margin of 50.34% to 49.66% in the November general outcome.<sup>423</sup> Justice Sanders served a total of fifteen years on the Supreme Court and was elected or re-elected (always by reasonably healthy margins) on three separate occasions. Moreover, as discussed, it seems apparent that incumbency is a major advantage in a judicial election. Thus, the mystery presented by Justice Sanders' defeat in 2010 is why, after 15 years, the voters turned on him and rejected him. Certainly Justice Sanders authored a number of controversial opinions (both for Court majorities and in dissent) in such areas as criminal justice and property rights. But these opinions were entirely consistent with his longstanding libertarian platform and therefore could not have come as a surprise to the voters. One explanation for Sanders' defeat undoubtedly lies with Charlie Wiggins, who, from all appearances, ran a sober and responsible campaign for a seat on the Supreme Court.

But the most significant factor appears to be the accumulation, over Justice Sanders' long career, of a series of actions and statements that ultimately branded him as an intemperate and intolerant individual. This basic issue of Justice Sanders' character, rather than his legal views, appears to have been his undoing:

- On the day he was first sworn into office, January 26, 1996, Sanders attended and spoke at the Washington State March for Life at the State Capitol in Olympia. He offered brief remarks:  
I want to give all of you my best wishes in this celebration of human life. Nothing is, nor should be, more fundamental in our legal system than the preservation and protection of innocent human life. By coincidence, or perhaps by providence, my formal induction to the Washington State Supreme Court occurred about an hour ago. I owe my election to many of the people who are

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<sup>422</sup> Rachel La Corte, Conservative WA Supreme Court justice targeted, *The Seattle Times*, July 30, 2010, [http://seattletimes.com/html/localnews/2012494783\\_apwaprimarysupremecourt1stldwritethru.html](http://seattletimes.com/html/localnews/2012494783_apwaprimarysupremecourt1stldwritethru.html)

<sup>423</sup> Washington Office of Secretary of State, General Election, <http://vote.wa.gov/results/20101102/Judicial.html>



here today and I'm here to say thank you very much and good luck. Our mutual pursuit of justice requires a lifetime of dedication and courage.<sup>424</sup> On May 12, 1997, the Commission on Judicial Misconduct issued a "reprimand," stating "[b]y his presence, his act of carrying the pro-life symbol (a red rose), and his statements he aligned himself with a particular organization involved in pursuing a political agenda. . . . Respondent gave the appearance that he, a Justice of the Washington State Supreme Court, supported the agenda advocated by March for Life." On review, the Supreme Court reversed, concluding that Sanders's statement at the rally did "not clearly and convincingly lead to the conclusion that the words and actions call into question the integrity and impartiality of the judge."<sup>425</sup> Thus, no penalty was imposed, but the Supreme Court's resolution of the case was hardly a ringing endorsement of the propriety of Sander's action.

- On November 20, 2008, while U.S. Attorney General Michael Mukasey was giving a speech at the annual Federalist Society gathering at the Mayflower Hotel in Washington, D.C., Sanders stood up and yelled at him, "Tyrant. You are a tyrant."<sup>426</sup> Justice Sanders later acknowledged what had occurred: "I stood up, and said, 'tyrant,' and then left the meeting. No one else said anything. I believe we must speak our conscience in moments that demand it, even if we are but one voice."<sup>427</sup> Justice Sanders explained that the reason for his outburst was Mukasey's defense of "the Bush Administration's counter-terrorism policies – its detainment practices at Guantanamo Bay, its interpretation of the Geneva Convention's reach."<sup>428</sup> What made the incident particularly infamous was that after Sanders left the room and Mukasey continued his speech, Mukasey suddenly collapsed, though there was no obvious connection between Sanders' outburst and Mukasey's fainting spell.<sup>429</sup>

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<sup>424</sup> In re the Matter of Richard B. Sanders, No. 96-2173-F-63, Commission Decision, Before the Commission on Judicial Conduct of the State of Washington, May 12, 1997, <http://www.cjc.state.wa.us/Case%20Material/1997/2173%20Decision.pdf>

<sup>425</sup> In the Matter of the Disciplinary Proceeding Against Richard B. Sanders, in the Supreme Court of the State of Washington, April 28, 1998, <http://www.cjc.state.wa.us/Case%20Material/1997/2173%20Supreme%20Ct%20Opinion.pdf>

<sup>426</sup> James Taranto, Juvenile Jurist: Guess who heckled Attorney General Mukasey last week?, November 24, 2008, <http://online.wsj.com/news/articles/SB122749763440252431>

<sup>427</sup> *Id.*

<sup>428</sup> Ken Armstrong, State justice confirms he yelled "Tyrant!" at Mukasey before AG collapsed, The Seattle Times, November 25, 2008, [http://seattletimes.com/html/localnews/2008435605\\_websanders25m.html](http://seattletimes.com/html/localnews/2008435605_websanders25m.html)

<sup>429</sup> *Id.*

- On January 15, 2009, Sanders wrote the opinion for the Court in *Yousoufian v. Office of the King County Executive*,<sup>430</sup> holding that a lower court had not assessed a high enough fine on King County for violating the Public Records Act. A few months later King County asked the Court to re-hear the case, asserting that Sanders had an improper conflict when he authored the opinion because he had a similar lawsuit pending against Thurston County.<sup>431</sup> Sanders denied wrongdoing, pointing out that he would not financially benefit from any fines imposed in the Thurston County case. Thomas Fitzpatrick, an expert on judicial ethics, observed, "He's not a party or related to a party in the case. To me, this is the kind of situation where [a judge] may want to think long and hard about it. But I don't think it's a violation of the canons."<sup>432</sup> Subsequently, Justice Sanders recused himself from any further involvement in the matter and the Supreme Court agreed to rehear the case.<sup>433</sup>
- In 2003, Sanders visited a commitment center for sexually violent predators and asked questions of inmates who were litigants or potential litigants on issues in a case then pending before the Supreme Court.<sup>434</sup> In response to a complaint, the Commission on Judicial Conduct concluded that Sander's visit violated the Code of Judicial Conduct by creating an appearance of partiality as a result of *ex parte* conduct.<sup>435</sup> The Washington Supreme Court agreed and in a decision issued on October 16, 2006, upheld the recommended sanction of "admonishment."<sup>436</sup>
- Last but not least, in October 2010, at a judicial meeting to address fair treatment for minorities in the courts, Justice Sanders responded to an argument that minorities

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<sup>430</sup> *Yousoufian v. Office of the King County Executive*, 200 P.3d 232 (Wash. 2009)

<sup>431</sup> Mike Carter, King County asks state high court to void records ruling, *The Seattle Times*, April 2, 2009, [http://seattletimes.com/html/localnews/2008969420\\_sanders02m.html](http://seattletimes.com/html/localnews/2008969420_sanders02m.html)

<sup>432</sup> *Id.*

<sup>433</sup> *Yousoufian v. Office of the King County Executive*, 229 P.3d 735 (Wash. 2010).

<sup>434</sup> In re the Matter of Richard B. Sanders, No. 4072-F-109, Corrected Amended Commission Decision, before the Commission on Judicial Conduct of the State of Washington, July 13, 2005, <http://www.cjc.state.wa.us/Case%20Material/2004/4072/4072%20Corrected%20Amended%20Decision.pdf>

<sup>435</sup> *Id.*

<sup>436</sup> In the Matter of the Disciplinary Proceeding Against Richard B. Sanders, No. 200,271-4, in the Supreme Court of the State of Washington, October 26, 2006, <http://www.cjc.state.wa.us/Case%20Material/2004/4072/4072%20Supreme%20Ct%20Decision%2010-26-06.pdf>.

were disproportionately represented in the prison population due to racial discrimination by arguing that minorities were overrepresented in prison because they commit more crimes; Sanders reportedly said "certain minority groups" are "disproportionally represented in prison because they have a crime problem."<sup>437</sup> Whether the remark was intended to dispute the idea that discrimination explains why minorities are disproportionately represented in prison, or reflected the view that minorities have a predisposition to criminality, the comment drew a negative reaction from others in attendance and generated considerable controversy. (Justice James Johnson reportedly agreed with Sanders' remarks about incarceration rates, and also referred disparagingly to "poverty pimps" an apparent reference to lawyers who provide legal services for the poor.) As discussed below, this incident, probably more than any other, explains why Sanders failed in his reelection bid.

Sanders faced two opponents in the 2010 primary, Charlie Wiggins and Brian Chushcoff. Wiggins was an experienced litigator, primarily handling appellate matters, both civil and criminal.<sup>438</sup> He served as president of the Washington Chapter of the American Judicature Society, a national organization that works "to protect the integrity of the American justice system;"<sup>439</sup> in that capacity, he had worked with others to establish the website [votingforjudges.org](http://votingforjudges.org) in order to better educate voters about judicial candidates.<sup>440</sup> Wiggins was appointed to fill a vacancy on the Court of Appeals in the mid-1990s, but lost a special election less than a year later and returned to private practice.<sup>441</sup> The other candidate, Bryan Chushcoff, was (and is) a Superior Court Judge in Pierce County, and has served as Presiding Judge in that

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<sup>437</sup> Steve Miletech, Two state Supreme Court justices stun some listeners with race comments, October 21, 2010, The Seattle Times, [http://seattletimes.com/html/localnews/2013226310\\_justices22m.html](http://seattletimes.com/html/localnews/2013226310_justices22m.html)

<sup>438</sup> Justice Charles K. Wiggins, Justice Biographies, Washington Supreme Court, [https://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/bios/?fa=scbios.display\\_file&fileID=wiggins](https://www.courts.wa.gov/appellate_trial_courts/supreme/bios/?fa=scbios.display_file&fileID=wiggins)

<sup>439</sup> American Judicature Society website, <https://www.ajs.org/about/>.

<sup>440</sup> Justice Charles K. Wiggins, Justice Biographies, Washington Supreme Court, [https://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/bios/?fa=scbios.display\\_file&fileID=wiggins](https://www.courts.wa.gov/appellate_trial_courts/supreme/bios/?fa=scbios.display_file&fileID=wiggins)

<sup>441</sup> Gene Johnson, Incoming state Supreme Court Justice Charlie Wiggins enjoys legal rigor, The Seattle Times, January 6, 2011, [http://seattletimes.com/html/politics/2013867212\\_wiggins07.html](http://seattletimes.com/html/politics/2013867212_wiggins07.html)

court since 2009.<sup>442</sup> Before joining the judiciary he spent nearly two decades as a practicing attorney.<sup>443</sup>

In his campaign, Wiggins charged that Sanders “failed to uphold ethical standards” and that he “side[d] too often with criminals and disciplined lawyers.”<sup>444</sup> In support of the first charge he cited the Court’s disciplinary sanction against Sanders for *ex parte* contacts and his participation in the *Yousoufian* case.<sup>445</sup> He also cited figures which he said showed that, in rulings which divided the Court, Sanders voted in favor of criminal defendants more than 94 percent of the time and voted 90 percent of the time either in favor of no penalty or lighter discipline for attorneys sanctioned by the court.<sup>446</sup> In response, Sanders called Wiggins a “character assassin” and accused him of using “misleading statistics.”<sup>447</sup> Chushcoff chimed in on the criticism of Sanders, saying “I do think he makes calls on the basis of personal policy preferences,” and believes “government is rarely right about anything.”<sup>448</sup>

In terms of campaign expenditures, this was a relatively low key race, as compared to the 2006 elections or even the Johnson-Rumbaugh contest in 2010. Charlie Wiggins spent \$301,223 in direct expenditures on his campaign, and Sanders’ direct expenditures were almost the same, \$295,185.<sup>449</sup> Independent expenditures were almost completely absent from the campaign: there were no independent expenditures targeting Sanders, either pro or con; and only \$33,027 was spent in support of Wiggins’s campaign. Brian Chushcoff, who eschewed fundraising altogether,<sup>450</sup> spent a grand total of \$1592.

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<sup>442</sup> Steve Miletech, Justice Richard Sanders, as usual, draws fire from two election opponents, The Seattle Times, [http://seattletimes.com/html/localnews/2012475245\\_6\\_supremecourt29m.html](http://seattletimes.com/html/localnews/2012475245_6_supremecourt29m.html)

<sup>443</sup> *Id.*

<sup>444</sup> *Id.*

<sup>445</sup> *Id.*

<sup>446</sup> *Id.*

<sup>447</sup> *Id.*

<sup>448</sup> *Id.*

<sup>449</sup> Data from Money in State Politics.

<sup>450</sup> Steve Miletech, Justice Richard Sanders, as usual, draws fire from two election opponents, The Seattle Times, [http://seattletimes.com/html/localnews/2012475245\\_6\\_supremecourt29m.html](http://seattletimes.com/html/localnews/2012475245_6_supremecourt29m.html)

In the August 17 primary, Sanders received 47.16% of the vote, Wiggins received 40.39% of the vote, and Chushcoff received 12.45% of the vote.<sup>451</sup> Because no candidate secured more than 50% of the vote in the primary, the contest for the seat had to be resolved in the general election in a runoff between Sanders and Wiggins. Though Sanders obviously would have preferred to regain his seat in the primary, he had won the primary and had reason to be reasonably confident going into the general election.<sup>452</sup> Such confidence turned out to be misplaced.

The most dramatic, and arguably consequential, event in the race was the decision by the state's largest newspaper, The Seattle Times, one month prior to the general election, to reverse its endorsement for Sanders in the aftermath of his remarks about race and criminality described above. On August 4, 2010, in advance of the primary, the paper had published an editorial recommending the reelection of Richard Sanders to the Supreme Court.<sup>453</sup> While acknowledging that Wiggins was "fully qualified to be on the court," the paper nonetheless endorsed Sanders, stating that "The court's most fundamental job is to push back against the other two branches of government — the executive and the legislative — when they step on the rights of the people. No member of the court does that more consistently, and with greater gusto, than Sanders."<sup>454</sup>

But on October 24, 2010, a few days after Sanders made his controversial remarks about race, the Seattle Times rescinded its prior endorsement of Sanders and endorsed Wiggins instead.<sup>455</sup> The editorial accused Sanders (and Johnson) of "inflamm[ing] racial tensions" by stating that "African Americans are overrepresented in the state prison system because they commit more crimes."<sup>456</sup> Observing that "Sanders' latest remarks fall upon a trash heap of [prior] cringe-worthy conduct," the paper's editors said they were taking "the unusual step of withdrawing its endorsement of Sanders," and throwing their support behind Wiggins, "who was a close call in our primary endorsement."<sup>457</sup> As harmful as it was for Sanders not to have the Seattle Times'

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<sup>451</sup> Washington Office of the Secretary of State, 2010 Primary Election Results, <http://vote.wa.gov/results/20100817/Supreme-Court-Justice-Position-6.html>

<sup>452</sup> Eli Sanders, High Court Hypocrite, The Stranger, October 7, 2010, <http://www.thestranger.com/seattle/high-court-hypocrite/Content?oid=5062389>

<sup>453</sup> Editorial, The Times recommends re-election of Richard Sanders to the state Supreme Court, The Seattle Times, August 4, 2010, <http://seattletimes.com/html/editorials/2012536245edit05sanders.html>.

<sup>454</sup> *Id.*

<sup>455</sup> Editorial, Don't re-elect Justice Richard Sanders for state Supreme Court, The Seattle Times, October 24, 2010, [http://seattletimes.com/html/editorials/2013234733\\_edit25sanders.html](http://seattletimes.com/html/editorials/2013234733_edit25sanders.html)

<sup>456</sup> *Id.*

<sup>457</sup> *Id.*

endorsement, the paper's "unusual" step of rescinding its prior endorsement was undoubtedly even more harmful politically.<sup>458</sup> Moreover, the Seattle Times' reversal of position served to reinforce Wiggins' consistent campaign message about Sanders' intemperate behavior, and he criticized Sanders' comments about race at the judicial meeting as "amazing" and "naïve."<sup>459</sup>

Another apparently potent issue working against Sanders' reelection bid was that he failed to follow his professed libertarian ideals when it came to gay marriage, opening him to the charge of being a hypocrite. In a controversial 5 to 4 ruling in 2006, the Court upheld the constitutionality of the Washington Defense of Marriage Act insofar as it prohibited same sex marriage.<sup>460</sup> Justice Sanders was a decisive member of the 5-justice majority, joining in a concurring opinion authored by James Johnson.<sup>461</sup> One critic, Hugh Spitzer, an adjunct professor at the University of Washington School of Law, and a supporter of Wiggins, remarked "Richard Sanders often can't make up his mind as to whether he is a libertarian or a conservative."<sup>462</sup> The Stranger, Seattle's alternative newspaper, ran a lengthy piece a month before the general election, entitled "High Court Hypocrite," castigating Sanders for not following through on his libertarian ideals in the context of gay marriage.<sup>463</sup>

In one of the stranger turns in this judicial race, former Justice Phil Talmadge, a frequent antagonist of Sanders on property rights and other issues while they were on the Court,<sup>464</sup>

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<sup>458</sup> See Ryan Blethen, Pulling the Justice Sanders endorsement: You be the judge, The Seattle Times, October 29, 2010, [http://seattletimes.com/html/opinion/2013296384\\_ryan31.html](http://seattletimes.com/html/opinion/2013296384_ryan31.html)

<sup>459</sup> Eli Sander, Supreme Court Candidate Charlie Wiggins Says Justice Richard Sanders' Race Comments and Personal Life Raise Questions About His Judgment, The Stranger, October 25, 2010, <http://slog.thestranger.com/slog/archives/2010/10/25/supreme-court-candidate-charlie-wiggins-says-justice-richard-sanders-race-comments-and-personal-life-raise-questions-about-his-judgment>

<sup>460</sup> *Andersen v. King County*, 138 P.3d 963 (Wash. 2006).

<sup>461</sup> *Id.* at 991-1011.

<sup>462</sup> Lynda Mapes, Stark differences between State Supreme Court candidates Richard Sanders and Charlie Wiggins, The Seattle Times, October 14, 2010, [http://seattletimes.com/html/localnews/2013165500\\_court15m.html](http://seattletimes.com/html/localnews/2013165500_court15m.html)

<sup>463</sup> Eli Sanders, High Court Hypocrite, The Stranger, October 7, 2010, <http://www.thestranger.com/seattle/high-court-hypocrite/Content?oid=5062389>. This piece also leveled the more specific charge that in signing onto Justice Johnson's opinion Sanders embraced the view that gay couples should be denied marriage equality because they have "more sexual partners" and because other courts have found that monogamy is "the bedrock upon which our culture is built," while Sanders himself was twice divorced and at the time of his reelection contest had "multiple simultaneous girlfriends." *Id.*

<sup>464</sup> *Id.*

endorsed Sanders for reelection over Wiggins. "I don't think we'd want a Supreme Court of nine Richard Sanders," he said, "but it's healthy to have someone there who will be very careful on actions by government, and that is why I have endorsed him."<sup>465</sup>

In the end, Sanders lost the closest judicial election in Washington State in memory. In addition, he was the first sitting justice to be knocked off since he defeated appointed-incumbent Rosselle Pekelis; the last elected-incumbent justice to be defeated was former Chief Justice Keith Callow who lost to Charles Johnson in 1990.<sup>466</sup> Wiggins undoubtedly adopted a wise strategy by highlighting Sanders' ethical lapses and other missteps. Sanders was almost certainly correct in asserting that the Seattle Times editorial page was responsible for his defeat. He argued that the newspaper unfairly portrayed him as believing African Americans are more prone to commit crimes; "This cost me the election," he said.<sup>467</sup> In addition, Eli Sanders, the author of the *Stranger* piece on Sanders's hypocrisy, was probably entitled to his own self-congratulatory post claiming that his article might have cost Sanders the election as well.<sup>468</sup>

The defeat of Richard Sanders in 2010 was a very significant event in terms of the development of environmental law in Washington State because it removed not only a single anti-environmental vote from the Court, but a strident libertarian advocate who consistently challenged environmental laws. As it turned out, the defeat of Justice Sanders was only the first

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<sup>465</sup> Lynda Mapes, Stark differences between State Supreme Court candidates Richard Sanders and Charlie Wiggins, *The Seattle Times*, October 14, 2010, [http://seattletimes.com/html/localnews/2013165500\\_court15m.html](http://seattletimes.com/html/localnews/2013165500_court15m.html)

<sup>466</sup> Peter Callaghan, Supreme Court: For first time, Charlie Wiggins has lead over Richard Sanders; Morrell holds narrow lead over Zeiger in 25th House, *The Tacoma Times Tribune*, November 9, 2010, <http://blog.thenewstribune.com/politics/2010/11/09/supreme-court-for-first-time-charlie-wiggins-has-lead-over-richard-sanders-morrell-holds-narrow-lead-over-zeiger-in-25th-house/>

<sup>467</sup> Steve Miletich, Wiggins finally prevails in state Supreme Court race, unseating Sanders, *The Seattle Times*, November 12, 2010, [http://seattletimes.com/html/localnews/2013420236\\_supremecourt13m.html](http://seattletimes.com/html/localnews/2013420236_supremecourt13m.html). See also Richard B. Sanders, Justice Sanders explains his comments about race and criminality, *The Seattle Times*, December 2, 2010, [http://seattletimes.com/html/opinion/2013580631\\_guest03sanders.html](http://seattletimes.com/html/opinion/2013580631_guest03sanders.html) ("[T]he reporter allowed the impression that I believe African Americans are inclined to commit crimes because of their race. As if there is a criminality gene in African Americans! Of course I never said that and I don't believe it.")

<sup>468</sup> Eli Sanders, How Richard B. Sanders Lost It, *The Stranger*, November 10, 2010, <http://slog.thestranger.com/slog/archives/2010/11/10/how-justice-richard-b-sanders-lost-it> (asserting that Justice Sanders's gay marriage ruling . . . was a big issue here in liberal, gay-friendly King County, where more than 58-percent of voters have backed Wiggins).

shoe to drop in terms of the elimination of the extreme right wing from the Washington Supreme Court.

In 2012, Justice Susan Owens ran for reelection for a third term on the Court. In the second race Justice Steve Gonzalez ran for election for the first time; Governor Christine Gregoire, making her second appointment to the Court, had appointed Gonzalez to the Court in November 2011, to fill the seat of Justice Gerry Alexander, who was forced to retire prior to end of his six-year term due to the mandatory retirement age.<sup>469</sup> The third contest was for an open seat created by the retirement of Tom Chambers, and involved a failed effort by former Justice Richard Sanders to regain the seat he had lost two years earlier.

Susan Owens faced two competitors in the primary, Douglas McQuaid and Scott Stafne. Neither presented a significant challenge. McQuaid is a longtime private practitioner based in Seattle, and ran for office on the basis that his “long and varied legal career” made him “the best qualified candidate to hold the position of Supreme Court Justice;”<sup>470</sup> he declined to solicit donations or endorsements “from any organization with a special interest.”<sup>471</sup> Stafne was another long-time private attorney with particular expertise in maritime and marine resources law;<sup>472</sup> he represented fishermen and fish processing companies on issues relating to the Magnuson Fishery Conservation and Management Act.<sup>473</sup> Neither McQuaid nor Stafne made a significant effort; according to the Seattle Times, “Neither has been attending candidate interviews and, the last we checked, neither had raised a nickel, which says something about how seriously they take a statewide campaign for the high court.”<sup>474</sup> In the end, Owens easily

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<sup>469</sup> Rachel LaCorte, Steve Gonzalez appointed to Wash. Supreme Court, The Seattle Times, November 15, 2011, [http://seattletimes.com/html/localnews/2016775177\\_apwasupremecourtappointment4thldwritethru.html](http://seattletimes.com/html/localnews/2016775177_apwasupremecourtappointment4thldwritethru.html)

<sup>470</sup> Douglas McQuaid, Voting for Judges, <http://www.votingforjudges.org/12pri/supreme/2dm.html>

<sup>471</sup> *Id.*

<sup>472</sup> Scott Stafne, Voting for Judges, <http://www.votingforjudges.org/12pri/supreme/2ss.html>

<sup>473</sup> Stafne-Trumbull website, <http://stafnetrumbull.com/attorneys/scott-e-stafne/>

<sup>474</sup> Editorial, The Times recommends: Gonzalez and Owens for state Supreme Court, The Seattle Times, July 5, 2012, [http://seattletimes.com/html/editorials/2018613884\\_edit06supremes.html](http://seattletimes.com/html/editorials/2018613884_edit06supremes.html)



prevailed in the primary (with 63%), over McQuaid (24%) and Stafne (13%), avoiding the need for a general election contest.<sup>475</sup>

In the second race, Steve Gonzalez bested Bruce O. Danielson, 60% to 40%, in the primary, again avoiding the need for a general election contest.<sup>476</sup> Before being appointed to the Supreme Court Gonzalez had served as a judge on the Superior Court in King County. Prior to that he had worked on terrorism prosecutions as an Assistant U.S. Attorney, on domestic violence issues as an Assistant City Attorney, and as an associate with a private law firm.<sup>477</sup> He was broadly endorsed by the other justices and most of the rest of the legal establishment.<sup>478</sup>

Gonzalez's opponent was Bruce Danielson, a longtime private practitioner from Kitsap County who ran a very low key campaign and raised no money to support his candidacy.<sup>479</sup> Danielson had no significant endorsements and apparently little in his background to suggest that he was qualified to sit on the Supreme Court, leading the head of the Kitsap County Bar Association to go so far as to say that Danielson has "zero qualifications to be on the bench."<sup>480</sup> In addition, Gonzalez's campaign expended \$332,888 in support of his candidacy while Danielson made no expenditures in support of his candidacy.<sup>481</sup> Despite this apparent disparity in qualifications and expenditures, Danielson received 40% of the vote statewide, and prevailed in numerous counties

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<sup>475</sup> Washington Office of Secretary of State, 2012 Primary Elections, <http://vote.wa.gov/results/20120807/Supreme-Court-Justice-Position-2.html>

<sup>476</sup> Washington Office of Secretary of State, 2012 Primary Elections, <http://vote.wa.gov/results/20120807/Supreme-Court-Justice-Position-8.html>

<sup>477</sup> Steve Gonzalez, Voting for Judges, <http://www.votingforjudges.org/12pri/supreme/8sg.html>

<sup>478</sup> *Id.*

<sup>479</sup> Bruce Danielson, Voting for Judges, <http://www.votingforjudges.org/12pri/supreme/8bd.html>. See also Josh Farley, Criticism over Port Orchard attorney's quiet candidacy for Supreme Court, Kitsap Sun, July 28, 2012, <http://www.kitsapsun.com/news/local-news/criticism-over-port-orchard-attorneys-quiet-for>

<sup>480</sup> Eli Sanders, Bruce Danielson Can't Really Explain How He Got Over 276,000 Votes Last Night (But He Says I'm "Ill Informed or Malicious" for Asking), The Stranger, August 8, 2012, <http://slog.thestranger.com/slog/archives/2012/08/08/bruce-danielson-cant-really-expalin-how-he-got-over-276000-votes-last-night-but-he-says-im-ill-informed-or-malicious-for-asking>

<sup>481</sup> Data from Money in State Politics

in eastern Washington, leading to widespread speculation that racist attitudes depressed the Gonzalez vote total.<sup>482</sup> A rigorous academic analysis of the election results by a University of Washington political science professor supported this surmise.<sup>483</sup>

In the third and most hotly contested race in 2012, former Justice Sanders faced off against Sheryl Gordon McCloud, Bruce Hilyer and John Landenburg in the primary. Sanders obviously sought to capitalize on his widespread name recognition based on his prior service on the Court, and hoped to put the effect of the Seattle Times about face behind him. Significantly, he was endorsed by outgoing incumbent Tom Chambers.<sup>484</sup> But he stuck to his libertarian message. He explained that when he was on the Court,

[a]t every turn I was faced with the claim that the government is somehow special and we should presume it is right even when it is violating private rights. I never bought it. That's why I have been endorsed by the Association of Washington Business, the Realtors, the Farm Bureau, and the Washington State Libertarian and Republican Parties along with thousands of citizens throughout Washington."<sup>485</sup>

Sheryl Gordon McCloud was a very experienced appellate attorney, specializing in criminal defense work.<sup>486</sup> Like Sanders, she emphasized her commitment to individual constitutional rights, observing that some of her clients were the beneficiaries of unpopular Sanders' opinions favoring criminal defendants.<sup>487</sup> Apart from that overlap in outlook, McCloud presented a more

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<sup>482</sup> *Id.*

<sup>483</sup> Matt A. Barreto et al, Dissecting Voting Patterns in the González-Danielson Supreme Court Contest in Washington State, [http://faculty.washington.edu/mbarreto/papers/gonzalez\\_primary2012.pdf](http://faculty.washington.edu/mbarreto/papers/gonzalez_primary2012.pdf)

<sup>484</sup> Richard Sanders, VotingforJudges.Org, <http://www.votingforjudges.org/12gen/supreme/9rs.html> ("*Why has Justice Tom Chambers endorsed Richard Sanders to take his seat on the Court? Because he knows Richard is a person of unquestioned integrity, devoted to protecting the rights of all citizens.*") (emphasis in original).

<sup>485</sup> 2012 Washington State Video Voters' Guide, a Joint Presentation by the Washington State Secretary of State's Office and TVW, <http://www.votingforjudges.org/12gen/supreme/9sm.html>

<sup>486</sup> Washington Supreme Court, Justice Biographies, [http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/bios/?fa=scbios.display\\_file&fileID=gordon\\_mccloud](http://www.courts.wa.gov/appellate_trial_courts/supreme/bios/?fa=scbios.display_file&fileID=gordon_mccloud)

<sup>487</sup> SGN exclusive interview: WA Supreme Court candidate Sheryl McCloud: Meet the woman who's trying to keep Richard Sanders in retirement, September 14, 2012, [http://www.sgn.org/sgnnews40\\_37/page6.cfm](http://www.sgn.org/sgnnews40_37/page6.cfm) ("Many of those times [that Sanders voted in favor of a defendant], I was the advocate representing the defendant, so I don't criticize him for voting to uphold my

liberal profile, emphasizing her own personal history as a union member and highlighting her endorsement by the King County Democratic Central Committee and NARAL Pro-Choice Washington.<sup>488</sup>

Bruce Hilyer was appointed a Superior Court Judge for King County by Democratic Governor Locke, and served as Presiding Judge from 2008 to 2010.<sup>489</sup> Prior to that he was a deputy prosecutor in King County and served as counsel to Seattle's long-time mayor Charles Royer.<sup>490</sup> Between 1985 and 2000 he was in private practice, representing, according to his campaign website "individuals and small businesses in civil, environmental, and health care cases."<sup>491</sup> He also served on the board of directors of the Washington Environmental Council and as chair of the Washington State Parks and Recreation Commission.<sup>492</sup> Based on these credentials, it was perhaps inevitable that Hilyer would be the environmentalists' first choice for this seat on the Supreme Court.

The fourth candidate in this race was John W. Ladenburg, who had a length record of service as an attorney in private practice as well as in the public sector, including as elected Pierce County Prosecutor, elected Pierce County Executive, Chair of the Regional Council of Governments, Tacoma City Councilmember, and Chair of the Puget Sound Economic Development Board.<sup>493</sup> He presented himself as "the only candidate who started out as a storefront lawyer representing working class people."<sup>494</sup> He also said he was "the only candidate with an environmentalist record, successfully chairing Sound Transit and instituting numerous environmental programs as County Executive."<sup>495</sup> He ran unsuccessfully for Attorney General in 2008 and was considering another run at that position when he decided to run for the Supreme Court.<sup>496</sup>

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client's rights,' she smiled.")

<sup>488</sup> Sheryl Gordon McCloud, Voting for Judges, <http://www.votingforjudges.org/12gen/supreme/9sm.html>

<sup>489</sup> Bruce Hilyer, Voting for Judges, <http://www.votingforjudges.org/12pri/supreme/9bh.html>

<sup>490</sup> *Id.*

<sup>491</sup> *Id.*

<sup>492</sup> <http://www.digitalarchives.wa.gov/governorlocke/press/press-view.asp?pressRelease=311&newsType=1>

<sup>493</sup> John Ladenburg, Voting for Judges, <http://www.votingforjudges.org/12pri/supreme/9jl.html>

<sup>494</sup> *Id.*

<sup>495</sup> *Id.*

In the money race, Richard Sanders led the way by a modest amount, with expenditures of \$338,661. Sheryl McCloud followed with \$229,178, Bruce Hilyer with \$200,311, and John Ladenburg \$83,919.<sup>497</sup> The only independent expenditures targeted at this race were \$5420, spent in support of McCloud's candidacy. As in 2010, there were no expenditures targeting Sanders, either pro or con.

In the primary, Sheryl Gordon McCloud received 29% of the vote, Richard Sanders 28%, Bruce Hilyer 27%, and John W. Ladenburg 15.1%, setting up a general election matchup between McCloud and Sanders.<sup>498</sup> In the general election, McCloud received 55.24% of the vote and Sanders received 44.76 %.<sup>499</sup> Sanders, it is fair to say, had receded into Washington voters' rear view mirror. The (permanent) replacement of Alexander with Gonzalez and the replacement of Chambers with McCloud represented modest but still significant moves for the Court in a left-leaning direction on most legal issues.

The ongoing 2014 Supreme Court races appear to reflect a complete collapse of any effort by the business community and its ideological allies to influence the direction of the Supreme Court. On March 17, 2014, prior to the completion of his term, Jim Johnson announced his resignation from the Court, citing personal health issues.<sup>500</sup> On May 1, Governor Jay Inslee appointed Mary Yu to fill the vacancy created by Johnson's departure.<sup>501</sup> Prior to joining the Supreme Court, Yu spent 14 years on the King County Superior Court, and had previously served as Deputy Chief of Staff to King County Prosecutor Norm Maleng and as a Deputy in the Criminal and Civil Divisions. Before attending law school, Justice Yu worked in the Peace and Justice Office for the

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<sup>496</sup> Andrew Garber, John Ladenburg running for state Supreme Court, *The Seattle Times*, June 2011, [http://seattletimes.com/html/politicsnorthwest/2015460236\\_john\\_ladenburg\\_running\\_for\\_sta.html](http://seattletimes.com/html/politicsnorthwest/2015460236_john_ladenburg_running_for_sta.html)

<sup>497</sup> Data from Money in State Politics

<sup>498</sup> Washington Office of Secretary of State, 2012 Primary Elections, <http://vote.wa.gov/results/20120807/Judicial.html>

<sup>499</sup> Washington Office of Secretary of State, 2012 General Elections, <http://vote.wa.gov/results/20121106/Judicial.html>

<sup>500</sup> Jim Johnson, Washington Supreme Court justice, to retire, *The Spokesman Review*, March 18, 2014, <http://www.spokesman.com/stories/2014/mar/18/jim-johnson-washington-supreme-court-justice-to/>

<sup>501</sup> Governor names first openly gay, Asian American to state's high court, *The Seattle Times*, May 1, 2014, [http://seattletimes.com/html/localnews/2023508800\\_yuappointmentxml.html](http://seattletimes.com/html/localnews/2023508800_yuappointmentxml.html)

Catholic Archdiocese of Chicago.<sup>502</sup> Her appointment to the Court was especially notable because she was the first openly gay individual, and the first Asian-American appointed to the Washington Supreme Court.<sup>503</sup> Yu faces the voters in 2014, and if elected will serve out the remaining two years of Johnson's unexpired term. Johnson commented on her appointment, "I retain my concern ... that this court still is not balanced and does not represent all the people of the state. And I'm not sure that this is a positive step."<sup>504</sup>

As a result of Johnson's resignation and Yu's appointment, four incumbent justices will be seeking reelection this year. In addition to Yu, Justices Charles Johnson, Mary Fairhurst, and Debra Stephens are all seeking reelection. These judicial races promise to be the sleepiest in modern Washington history. Justice Fairhurst and Justice Yu have no challengers, so they will appear without opposition on the November ballot.<sup>505</sup> One candidate filed against Justice Charles Johnson, and another against Justice Debra Stephens, and these contests will be resolved in the November general election.<sup>506</sup> Charles Johnson faces a challenge from Eddie Yoon, a relatively low profile private practitioner in Pierce County who teaches part time at a university in Korea.<sup>507</sup> Stephens' opponent is John ("Zamboni") Scannell, who has been disbarred from the practice of law in Washington State and who is apparently best known as the former driver of Zamboni ice-making machine at the Thunderbirds hockey games at the Seattle Center.<sup>508</sup> There has been speculation that a voter petition might be filed in an effort to remove him from the ballot.<sup>509</sup>

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<sup>502</sup> Washington Supreme Court, Justice Biographies, [http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/bios/?fa=scbios.display\\_file&fileID=yu](http://www.courts.wa.gov/appellate_trial_courts/supreme/bios/?fa=scbios.display_file&fileID=yu)

<sup>503</sup> Governor names first openly gay, Asian American to state's high court, The Seattle Times, May 1, 2014, [http://seattletimes.com/html/localnews/2023508800\\_yuappointmentxml.html](http://seattletimes.com/html/localnews/2023508800_yuappointmentxml.html)

<sup>504</sup> Austin Jenkins, Inslee Appoints King County Judge Mary Yu To Washington Supreme Court, NW News Network, May 1, 2014, <http://nwnetwork.org/post/inslee-appoints-king-county-judge-mary-yu-washington-supreme-court>

<sup>505</sup> 2014 Elections, <http://www.votingforjudges.org/>

<sup>506</sup> *Id.* [This reflects a change in Washington State law.]

<sup>507</sup> Jordan Schrader and Adam Lynn, Supreme Court race tops list of early filing week matchups, The News Tribune, May 12, 2014, <http://www.thenewstribune.com/2014/05/12/3192542/supreme-court-race-tops-list-of.html>

<sup>508</sup> Jordan Schrader, Will disbarred lawyer 'Zamboni John' Scannell make it to the ballot?, The News Tribune, June 2, 2014, <http://www.thenewstribune.com/2014/06/02/3224225/disbarred-lawyer-zamboni-john.html>

<sup>509</sup> *Id.*

### **Environmental Protections as a Factor in Judicial Elections**

Washington Conservation Voters appears to have distinguished itself nationally among state conservation voter organizations in taking an especially active and effective role in promoting the election of justices who are sympathetic or at least not antagonistic to environmental protection objectives and, equally important, in defeating candidates (and one sitting justice) who were antagonistic to environmental goals.

WCV took a concertedly centrist approach on judicial elections. Rather than promote or oppose candidates based on their likely ability to “deliver votes” in important environmental cases, it publicly promoted justices who would be fair and impartial. In a typical endorsement for a judicial candidate, WCV stated,

Judges render decisions that have significant impact on environmental policy. In our endorsement process, we do not demand that judicial candidates have a particular ideological inclination. Washington Conservation Voters endorses those candidates that are fully committed to a fair and impartial judiciary, thereby ensuring that our friends and allies will receive a fair shot when arguing environmental cases before our appellate courts.<sup>510</sup>

Even if WCV may be assumed to favor candidates who, in general and over the long run, would be more favorable to candidates who would support environmental protection efforts, WCV’s moderate message probably resonated more with voters than the stridently ideological message of certain candidates, especially those with a libertarian agenda.

Washington Conservation Voters also invested money in the judicial electoral races, though the exact amounts are impossible to document from the publicly available data. According to press reports, WCV threw its financial support behind Mary Fairhurst in her 2002 contest against Jim Johnson. In addition, press accounts indicate that Washington Conservation Voters was a contributor to Citizens to Uphold the Constitution (originally Fairpac), the left-left independent expenditure organization formed to help defeat the property rights candidates in the 2006 election. In addition, during the Sanders-Wiggins race in 2010, Washington Conservation Voters hosted a fundraising event to help Wiggins race funds to support his election bid.<sup>511</sup>

WCV has also taken an active role in endorsing candidates for election to the Supreme Court for at least a decade. In 2002, WCV endorsed Fairhurst in her race against libertarian Jim

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<sup>510</sup> Washington Conservation Voters Fairhurst Endorsement, <http://wcvoters.org/news/supreme-court-endorsements?searchterm=fairhurst> (2008).

<sup>511</sup> <http://wcvoters.org/events/fundraiser-for-charlie-wiggins/?searchterm=fundraiser>

Johnson.<sup>512</sup> In 2004, when Johnson ran again for a seat on the Supreme Court, WCV endorsed his opponent Mary Joe Becker.<sup>513</sup> In the first contest, WCV ended up on the winning side, but failed in its second bid to keep Johnson off the Court. In 2006, WCV endorsed all of the incumbents (Justices Alexander, Chambers, and Owens) in their contests against out-spoken private property rights advocates.<sup>514</sup> On its website, WCV lists as one its most significant organizational achievements that it, “Beat back the Building Industry Association of Washington’s candidates in the race for the State Supreme Court.”<sup>515</sup> In 2008, a relatively low key election year for the state Supreme Court, WCV again endorsed all of the incumbents (Justices Fairhurst, Johnson and Stephens),<sup>516</sup> all of whom were reelected. In 2010, WCV endorsed Charlie Wiggins in his successful bid to unseat Justice Sanders,<sup>517</sup> and also endorsed Stan Rumbaugh,<sup>518</sup> who failed in his effort to unseat Justice Jim Johnson.

In 2012, WCV initially endorsed Washington Conservation Voters Bruce Hilyer in the primary election for the seating on the Court being vacated by retiring Justice Chambers.<sup>519</sup> After Cheryl Gordon McCloud and Richard Sanders emerged as the two top vote getters in the

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<sup>512</sup> Lynda Mapes, Tribes jointly opposing high-court candidate, The Seattle Times, October 25, 2002, <http://community.seattletimes.nwsources.com/archive/?date=20021025&slug=tribes25m>

<sup>513</sup> Editorial, The Seattle Times, September 30, 2004, [http://seattletimes.com/html/editorialsopinion/2002049685\\_becked30.html](http://seattletimes.com/html/editorialsopinion/2002049685_becked30.html)

<sup>514</sup> Washington Conservation Voters, <http://votingforjudges.org/06gen/rating/wcv.html>

<sup>515</sup> Washington Conservation Voters, <http://wcvoters.org/campaigns-elections/elections>

<sup>516</sup> Washington Conservation Voters, <http://wcvoters.org/news/supreme-court-endorsements?searchterm=charles+johnson>

<sup>517</sup> Washington Conservation Voters, <http://wcvoters.org/counties/pierce/2010-endorsements?searchterm=wiggins>

<sup>518</sup> A Battle for the Soul of WA Supreme Court?, Public News Service, August 12, 2010, <http://www.publicnewsservice.org/2010-08-12/citizenship-representative-democracy/a-battle-for-the-soul-of-wa-supreme-court/a15417-1>

<sup>519</sup> Washington Conservation Voters, <http://wcvoters.org/campaigns-elections/endorsements/2012-summaries/endorsed-judge-bruce-hilyer-for-washington-supreme-court-position-9?searchterm=hilyer>

primary, WCV endorsed McCloud in the general election.<sup>520</sup> Also in 2012, LCV endorsed Steve Gonzalez<sup>521</sup> and Susan Owens,<sup>522</sup> both of whom won their races.

It is unclear when or if WCV will endorse candidates in the 2014 judicial races.

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<sup>520</sup> Washington Conservation Voters, <http://wcvoters.org/campaigns-elections/endorsements/2012-summaries/endorsed-sheryl-gordon-mccloud-for-washington-supreme-court-position-9?searchterm=mccloud>

<sup>521</sup> Washington Conservation Voters, <http://wcvoters.org/campaigns-elections/endorsements/2012-summaries/endorsed-justice-steve-gonzalez-for-washington-supreme-court-position-8>

<sup>522</sup> Washington Conservation Voters, <http://wcvoters.org/campaigns-elections/endorsements/2012-summaries/endorsed-judge-susan-owens-for-washington-supreme-court-position-2>



## Wisconsin

### The *Thomas* and *Ferdon* Cases

A pair of Wisconsin Supreme Court decisions, each decided by a razor-thin margin, issued on successive days in July 2005, set in motion the forces that have led to the current extreme politicization of the state's judicial election process. On July 14, the Court issued a decision holding that a statute setting a \$350,000 cap on recoveries for "noneconomic" damages (i.e., "pain and suffering") in medical malpractice cases violated the Equal Protection Clause of Article I, Section I of the Wisconsin Constitution.<sup>523</sup> The Court concluded that the \$350,000 cap was not "rationally related" to the legislature's goal of improving health care.<sup>524</sup>

The following day the Court issued a decision extending the "risk contribution" theory of tort liability to claims based on the use of lead in the production of household paints.<sup>525</sup> As a result of this ruling, a 15-year-old boy who allegedly suffered neurological damage as a result of ingesting lead-tainted paint was allowed to proceed with a products liability claim against manufactures of lead pigment, even though his lawyers could not identify the *specific* manufacturer who produced the lead pigment he allegedly ingested in various different homes over the course of his childhood.<sup>526</sup>

The decision in *Thomas* built upon a prior Wisconsin Supreme Court case, involving claims based on medication of pregnant women with diethylstilbestrol ("DES"), in which the Court first adopted the risk contribution theory.<sup>527</sup> The Court reasoned in that case that even though plaintiff could not identify the specific manufacturer of the DES her mother had been prescribed, each defendant manufacturer of DES "contributed to the *risk* of injury to the public and, consequently, the risk of injury to individual plaintiffs,"<sup>528</sup> and in that sense "each shared

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<sup>523</sup> *Ferdon v. Wisconsin Patients Compensation Fund*, 701 N.W.2d 440 (Wis. 2005).

<sup>524</sup> *Id.* at 465-90 (concluding that denying recovery to the relatively small number of tort victims with very substantial damage claims did not rationally advance the legislature's stated goals of enabling insurers to charge lower malpractice insurance premiums, reducing overall health care costs, or encouraging health care providers to practice in Wisconsin).

<sup>525</sup> *Thomas ex rel. Gramling v. Mallett*, 701 N.W.2d 523 (Wis. 2005).

<sup>526</sup> *Id.* at 564-65.

<sup>527</sup> *Collins v. Eli Lilly Co.*, 342 N.W.2d 37 (Wis. 1984).

<sup>528</sup> 342 N.W.2d at 49 (emphasis is original).

some measure of culpability in producing or marketing the drug.”<sup>529</sup> “[B]ecause the drug companies were in a better position to absorb the cost of the injury (through either insurance, incorporation of the damage awards, or by passing the cost along to the public as a cost of doing business),<sup>530</sup> the Court concluded that “it is better to have drug companies or consumers share the cost of the injury than to place the burden solely on the innocent plaintiff.”<sup>531</sup> Finally, the Court reasoned that “the cost of damages awards will act as an incentive for drug companies to test adequately the drugs they place on the market for general medical use.”<sup>532</sup> In *Thomas*, the subsequent lead paint case, the Court concluded that claims arising from the manufacture of lead paint were sufficiently “factually similar” to the claims arising from the production of DES that the risk contribution theory should be expanded to apply to these other claims.<sup>533</sup>

In both *Ferdon* and *Thomas* the Supreme Court split along essentially the same ideological lines. In *Ferdon*, Chief Justice Shirley Abrahamson wrote the opinion for the Court, joined by Justice Ann Walsh Bradley, Justice Louis Butler, Jr., and Justice Patrick Crooks. The dissenters were Justice David Prosser, Justice Patience Roggensack, and Justice Jon Wilcox. This split reflected the relatively stark partisan divide on the Court, with Abramson and Butler having been initially appointed by Democratic Governors,<sup>534</sup> and Prosser and Wilcox having been initially appointed by Republican Governors.<sup>535</sup> In *Thomas*, Justice Butler, Jr. wrote the opinion for the Court, joined by Chief Justice Abramson, and Justices Crooks and Bradley. Justice Prosser and Justice Wilcox dissented; Justice Roggensack did not participate in the case.

The dissenters in both cases criticized the reasoning of the majority. In *Ferdon* Justice Prosser accused the majority of “utiliz[ing] several unacceptable tactics” to invalidate the cap on malpractice awards, including invoking the Wisconsin Constitution to avoid U.S. Supreme Court review of the Court’s decision, improperly modifying the test for review of legislation under the Equal Protection Clause, and “systematically minimiz[ing]” the significance of evidence that did not support the majority’s

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<sup>529</sup> *Thomas*, 701 N.W.2d at 549, citing *Collins*, 342 N.W.2d 49.

<sup>530</sup> *Id.*

<sup>531</sup> *Id.*

<sup>532</sup> *Id.*

<sup>533</sup> 701 N.W.2d at 301.

<sup>534</sup> See Wisconsin Supreme Court website, <http://wicourts.gov/courts/supreme/index.htm>. Chief Justice Abramson was appointed by Governor Patrick Lucey and Justice Butler was appointed by Governor Jim Doyle.

<sup>535</sup> See Wisconsin Supreme Court website, <http://wicourts.gov/courts/supreme/index.htm>. Chief Justice Abramson was appointed by Governor Tommy Thompson.

conclusions.<sup>536</sup> In *Thomas*, Justice Wilcox accused the majority of embracing “an unwarranted and unprecedented relaxation of the traditional rules governing tort liability,” and of “run[ning] roughshod over established principles of causation and the rights of each defendant to present a defense and to be judged based on its own actions.”<sup>537</sup> He also objected to the Court’s reliance on its precedent involving DES claims on the ground that the lead paint claims “were factually distinguishable [from the DES claims] . . . on several levels,”<sup>538</sup> including because the lead paint claims arose over a “much longer time frame” than the DES claims and the defendants’ products did not produce “signature injury.”<sup>539</sup>

The decisions in *Ferdon* and *Thomas* provided the impetus for business interests and right-leaning advocates to launch a major effort to tip the ideological balance on the Wisconsin Supreme Court in their favor.<sup>540</sup> Both decisions exposed business defendants to new and expanded financial liabilities and, therefore, affected business interests in a direct and substantial way. Paradoxically, the subsequent advertising attacking Justice Butler financed by the business community argued that Butler was soft on crime,<sup>541</sup> presumably because this law and order message was perceived to be more compelling with voters than the charge that he was unfriendly to business.<sup>542</sup>

These 2005 decisions did not represent the final resolutions of these cases. The ensuing legal as well as political battles launched by these two decisions help illustrates the sometimes complex

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<sup>536</sup> 701 N.W.2d at 494-95 (Prosser, J., dissenting).

<sup>537</sup> 701 N.W.2d. at 568 (Wilcox, J., dissenting)

<sup>538</sup> *Id.*

<sup>539</sup> *Id.* at 574-75.

<sup>540</sup> See Jim Pugh, “WMC: Big Stakes for Supreme Court Election,” Wisconsin Manufacturers & Commerce, January 7, 2013, available at <http://www.wmc.org/uncategorized/wmc-taking-on-personal-injury-lawyers/> (describing how “WMC sprang into action to defend the Wisconsin business community from the high court’s rulings” in *Thomas* and *Ferdon*).

<sup>541</sup> See *id.* (“In 2008, WMC spent \$2.25 million on issue ads about Justice Louis Butler and his opponent Judge Michael Gableman of Burnett County. One WMC ad — Loopholes — featured Justice Butler’s rulings that provided loopholes to protect criminal defendants. Butler had issued a news release embracing his nickname “Loophole Louie” and that became the centerpiece of the ad”).

<sup>542</sup> The use of crime as campaign issues in judicial elections has not been limited to the business community. See Wisconsin Democracy Campaign, “Justice For Just Us” (August 20, 2008), <http://www.wisdc.org/sp082008.php> (“Five special interest groups that spent an estimated \$7.7 million on mostly negative ads focusing chiefly on crime in the past two Wisconsin Supreme Court races had little or no interest in crime and public safety proposals being considered during the two-year legislative session that coincided with those races, a Wisconsin Democracy Campaign analysis shows.”).

interactions between judicial rulings and executive and legislative branch actions, as well as the potentially complex interactions between the state and federal courts.

Promptly after the decision in *Ferdon*, the Wisconsin legislature passed a bill placing a new, higher cap of \$550,000 on noneconomic damages for plaintiffs under the age of 18 and of 450,000 for adults.<sup>543</sup> Democratic Governor Jim Doyle vetoed the measure, arguing that the new cap was too similar to the old cap invalidated by the Supreme Court.<sup>544</sup> The legislature then passed a bill with a \$750,000 cap on noneconomic damages and the Governor signed that bill in March 2006.<sup>545</sup> There has been no subsequent litigation challenging the constitutionality of these higher caps. Thus, in the end the business community succeeded in capping liability in malpractice suits, although not at the level it initially hoped.<sup>546</sup>

The subsequent back and forth over the lead paint litigation has been more complicated and even today remains far from final resolution. Immediately following the 2005 decision in *Thomas* the Wisconsin legislature adopted legislation designed to limit the use of the risk contribution theory in tort cases.<sup>547</sup> However, Governor Doyle vetoed the legislation, leaving the *Thomas* decision in place.<sup>548</sup>

After this initial legislative skirmish, the action turned to the courts. As some had predicted,<sup>549</sup> the Wisconsin Supreme Court's expansive ruling in *Thomas* was followed by the filing of additional lawsuits in Wisconsin based on childhood exposure to lead paint.<sup>550</sup> Some of these cases were removed to federal court where the manufacturers argued that the Wisconsin Supreme Court's adoption of the risk-

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<sup>543</sup> Note, Non-Economic Damage Award Caps in Wisconsin: Why *Ferdon* Was (Almost) Right and the Law is Wrong, 2009 Wis. L. Rev. 105, 122.

<sup>544</sup> *Id.* at 122.

<sup>545</sup> *Id.* at 122-23.

<sup>546</sup> In 2011, as part of Governor Scott's Walker's omnibus tort reform legislation, introduced shortly after he was sworn into office, the legislature extended the cap on recovery of economic damages to "long-term health care provider," such as nursing homes. See 2011 Wisconsin Act 2, § 23.

<sup>547</sup> See Laura L. Worley, "The Iceberg Emerged: Wisconsin's Extension of Risk Contribution Theory Beyond DES, 90 Marquette L. Rev. 383, 387 (2006) (citing Wisconsin Jobs Preservation Act, S.B. 402, 97<sup>th</sup> Leg., Reg. Sess. (Wis. 2005)).

<sup>548</sup> Mark Johnson, Doyle Wields Veto on Lead Paint Bill, Milwaukee J. Sentinel (Jan 7, 2006).

<sup>549</sup> See *Clark v. American Cyanamid*, 2014 WL 1257118 at 5 (Wis. Cir. Mar. 25, 2014) (describing press commentary on *Thomas*).

<sup>550</sup> See Understanding Lead Paint Litigation: Wisconsin, <http://www.leadlawsuits.com/index.php?s=710&item=2040> (cataloguing lead paint claims filed in Wisconsin)

contribution theory violated their rights under the Due Process Clause of the federal Constitution.<sup>551</sup> In one case a Republican-appointed federal judge sided with the manufacturers, and in another case a Democrat-appointed federal judge sided with the victims of lead poisoning.

In the first case, *Gibson v. American Cyanamid Co.*,<sup>552</sup> Judge Rudolph Randa, appointed to the bench by President George W.H. Bush, ruled that the Wisconsin Supreme Court's adoption of the risk-contribution theory violated substantive due process.<sup>553</sup> First, he ruled that the insofar as the Court's decision imposed an increased risk of financial liability for actions that took place in the past, the ruling imposed "unfair" retroactive liability.<sup>554</sup> He cited no precedent directly supporting the idea that a state court's modification of a common law tort rule can support a federal due process claim, but nonetheless proceeded to address the claim based on the theory that the Due Process Clause applies to retroactive legislative enactments and modifications of a common law rule with "equal force."<sup>555</sup> Applying a *mélange* of factors derived from the Supreme Court's divided ruling in *Eastern Enterprises v. Apfel*,<sup>556</sup> he concluded that the risk contribution rule created "an arbitrary and irrational remedy" in violation of the Due Process Clause.

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<sup>551</sup> The defendant manufacturers initially raised the due process argument before the Wisconsin Supreme Court in the *Thomas* case, but Court declined to address the issue on the ground that it was not ripe for resolution. See 701 N.W.2d at 565.

<sup>552</sup> 719 F.Supp.2d 1031 (E.D.Wis. Jun 15, 2010).

<sup>553</sup> Judge Randa has been no stranger to controversy. In 2010, in *Figueroa v. United States*, 622 F.3d 739, the U.S. Court of Appeals for the Seventh Circuit vacated a sentence he imposed in a criminal case on the ground that the sentencing hearing was so infected with "inflammatory," "inappropriate" and "extraneous" comments (ranging from the immigration status of the defendant and other members of his family, to Iranian terrorists and President Hugo Chávez, to "Hitler's dog") that Judge Randa failed to accord the defendant a "fair process" and therefore the defendant was entitled to a new sentence before a new judge. In 1995, Judge Randa ruled that Congress' enactment of the 1994 Freedom of Access to Clinic Entrances Act banning "nonviolent, physical obstruction of reproductive health services clinics" exceeded Congress's power under the Commerce Clause, another ruling that led to a reversal by the Seventh Circuit. See *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995).

<sup>554</sup> *Id.* at 1041-51.

<sup>555</sup> *Id.* at 1044.

<sup>556</sup> 524 U.S. 498 (1998). There was no opinion for the Court supported by a majority of the justices.

In the second case, *Owens v. American Cyanamid Co.*,<sup>557</sup> Judge Lynn Adelman, appointed to the bench by President Bill Clinton, rejected the due process argument. In his view, whether the *Thomas* case was viewed as shifting the burden of proof in a tort case or as imposing retroactive liability, the decision passed constitutional muster:

[T]he Wisconsin Supreme Court explained in great detail in *Collins* why it adopted the risk contribution doctrine and in *Thomas* why it applied it to the lead paint context. Nothing about the court's reasoning is arbitrary and irrational.<sup>558</sup>

As to *Eastern Enterprises*, Judge Adelman distinguished that case on ground that the company raising the due process argument “had not played a part in causing the problem that the legislation was attempting to solve.”<sup>559</sup> By contrast, he said, in *Thomas* a majority of the Justices on the Wisconsin Supreme Court “concluded that the manufacturers of white lead carbonate pigment were the principal cause of the problem.”<sup>560</sup>

The losing side appealed the first of these two ruling to the U.S. Court of Appeals for the Seventh Circuit. The notice of appeal was filed in December, 2010,<sup>561</sup> oral argument before the Court was held in January 2012, and it took the Seventh Circuit nearly two and one-half additional years, until July 2014, to finally issue a decision.<sup>562</sup>

The delay in the Seventh Circuit may be explained in part by the legal complexities created by the shifting politics surrounding this litigation. As discussed above, immediately after the *Thomas* decision was issued, the legislature passed a measure to blunt the effect of the Court's decision, but Governor Doyle vetoed the measure. In January 2011, a few weeks after the installation of Republican Scott Walker as Governor, the legislature again passed a measure to restrict the application of the risk-contribution theory and the new Governor signed it, effectively barring future lawsuits based on the reasoning of *Thomas*.<sup>563</sup> A few years later, the legislature approved and Governor Walker signed another measure making the legislature's

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<sup>557</sup> 787 F.Supp.2d 828 (E.D. Wis. 2011).

<sup>558</sup> *Id.* at 833-34.

<sup>559</sup> *Id.* at 834.

<sup>560</sup> *Id.*

<sup>561</sup> *Gibson v. American Cyanamid Co.*, No. 10-3814 (filed December 6, 2010).

<sup>562</sup> *See Gibson v. American Cyanamid Co.*, --- F.3d ----2014 WL 3643353 (July 24, 2014).

<sup>563</sup> 2011 Act 2, § 30, eff. Feb. 1, 2011 (codified at Wis. Stat. § 895.046)

abrogation of the *Thomas* risk–contribution theory retroactive.<sup>564</sup> The legislative nullification of *Thomas* naturally raised the question whether it was still necessary for the Seventh Circuit to resolve the constitutionality of the *Thomas* ruling.<sup>565</sup> In addition, it raised the question whether the State of Wisconsin needed to wait upon the federal court to resolve that issue.

Accordingly, following the adoption of the 2013 legislation, the manufacturer defendants in one of the lead paint cases pending in the Wisconsin courts filed a motion to lift a stay that had been in place awaiting a ruling on the constitutionality of *Thomas* by the Seventh Circuit and asked that judgment be entered in their favor based on the legislature’s nullification of the *Thomas* decision.<sup>566</sup> The plaintiff responded by arguing that the 2013 legislation violated the Due Process Clause of the Wisconsin Constitution by depriving the plaintiff of a vested right of action under the common law.

On March 25, 2014, Wisconsin Circuit Court Judge David Hansher ruled in favor of the plaintiff.<sup>567</sup> Applying a test articulated by the Wisconsin Supreme Court in *Martin v. Richards*,<sup>568</sup> the Court evaluated whether the legislature had a “rational basis” for abrogating a vested legal claim by weighing the public interest served by applying the statute against the private interests application of the statute would affect.<sup>569</sup> The Court ruled that the interest served by permitting the claims of “innocent and injured” victims to proceed outweighed the “rather generic public purpose” of protecting manufacturers from liability for injuries they may or may not have caused.<sup>570</sup> The Wisconsin Court of Appeals granted the defendant leave to pursue an interlocutory appeal to that court, where the case is currently pending.<sup>571</sup> The case may eventually make its way up to the Wisconsin Supreme Court.

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<sup>564</sup> 2013 Act 20, §§ 2318e to 2318g, eff. July 2, 2013 (codified at Wis. Stat. § 895.046).

<sup>565</sup> See *Clark v. American Cyanamid Co.*, 2014 WL 1257118 (Wis. Cir. 2014).

<sup>566</sup> *Id.*

<sup>567</sup> *Id.*

<sup>568</sup> 531 N.W. 2d 70 (1995).

<sup>569</sup> *Clark*, 2014 WL 1257118.

<sup>570</sup> *Id.*

<sup>571</sup> The plaintiff did not oppose the interlocutory appeal, but argued that if the court agreed to hear the defendant’s appeal it should also consider plaintiff’s arguments that the repeal legislation was an attempt by the legislature to impose its own preferred reading of the Wisconsin Constitution in violation of the principle of separation of powers, and that the repeal legislation was unconstitutional “private” legislation. See Plaintiff-Respondent’s Response to

In the meantime, on July 24, 2014, the U.S. Court of Appeals for the Seventh Circuit finally ruled in the appeal from Judge Randa's ruling that the Wisconsin Supreme Court's adoption of the risk contribution theory in *Thomas* violated substantive due process under the federal Constitution. The Court issued a unanimous opinion, authored by Judge Edmond Chang of the Northern District of Illinois, sitting on the appeals court by designation. First, the Court decided that it had to address the threshold issue of the constitutionality of the repeal legislation under the Wisconsin Constitution before addressing whether the *Thomas* decision violated the federal Constitution. If the repeal was valid, the Court reasoned, the plaintiffs' claims had been terminated and the Court could avoid making an unnecessary ruling on a question of federal constitutional law. On the merits, the Seventh Circuit, agreeing with Wisconsin Circuit Judge Hansher, ruled that the repeal was invalid under the Wisconsin Constitution. Turning to the federal constitutional challenge to the *Thomas* decision, the Seventh Circuit reversed the District Court and concluded that the *Thomas* decision comported with due process. The Court rejected Judge Randa's argument that the due process claim should be evaluated using a stringent standard of review, ruled instead that a deferential "rational basis" standard applied, and upheld the constitutionality of the *Thomas* decision under that standard.

The only shoes left to drop now in this complex litigation are possible U.S. Supreme Court review of the Seventh Circuit decision, and the pending appeal from Judge Hansher's decision striking down the repeal legislation. The ultimate resolution of these issues may take several years, potentially finally clearing the way for individual plaintiffs to seek recovery for their alleged injuries due to lead paint exposure.

Due process is a notoriously recondite and flexible legal doctrine, variously criticized from the right as well as the left as unprincipled.<sup>572</sup> The irony of the situation in Wisconsin is that competing due process arguments are being advanced from each side of the ideological spectrum in an attempt to thwart, in one instance, a judicial innovation, and, in the other, a legislative innovation. While each claim rests on distinctive legal theories and precedents, both invite normative, arguably even political judgments, about whether the judiciary should thwart the judgments of another branch or level of government. Unfortunately, at this stage of this highly charged battle of lead paint litigation, some judges and court watchers might regard any exercise of judicial restraint as a kind of political surrender.

Meanwhile, while these judicial challenge and legislative actions proceeded, the electoral battles surrounding the Wisconsin Supreme Court heated up. In other words, while business interests pursued a variety of legislative and litigation strategies to reverse the outcomes in these

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Defendants' Petition for Leave to Appeal a Non-final Order, *Clark v. American Cyanamid, Bo*, 2014-AP-000775LV (April 22, 2014).

<sup>572</sup> See generally David A. Schwartz, "Why Was *Lochner* Wrong?" 70 **University of Chicago Law Review** 373 (2003).



particular cases, the business community and its allies used these decisions as springboards for more systematic, long-range change in the jurisprudence of the Wisconsin Supreme Court

### Judicial Elections in Wisconsin

Formally, Wisconsin holds non-partisan elections to fill seats on its Supreme Court and other courts.<sup>573</sup> But there is actually nothing nonpartisan about the Wisconsin judicial election process.

By general consensus, Wisconsin began to join the ranks of states with expensive, highly politicized judicial races with Chief Justice Shirley Abramson's run for reelection in 1999. As one report put it, this contest marked a "turning point for negativity and expense" in Wisconsin.<sup>574</sup> The two candidates raised a total of almost \$1.4 million combined.<sup>575</sup> The race was particularly notable for the fact that several conservative members of the Court were publicly identified as supporters of the challenger, Sharren Rose.<sup>576</sup> Ultimately, Chief Justice Abramson defeated her opponent by a comfortable 60 to 40 margin.<sup>577</sup>

Over the past decade, there have been three major elections battles for seats on the Wisconsin Supreme Court that had the potential to define the ideological direction of the Court. By the end of this period the business community and its allies had achieved a modest but decisive advantage in terms of Court membership. This long-range effort has apparently begun to pay off with more favorable environmental law decisions from a business community standpoint.<sup>578</sup>

The first major battle was a contest in 2007 to fill an open seat created by the retirement of Justice Jon P. Wilcox, an appointee of Republican Governor Tommy Thompson. Judge

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<sup>573</sup> See Wis. Const. Art. VII, § 4.

<sup>574</sup> Justice at Stake, The New Politics of Judicial Elections in the Great Lakes States, 2000-08, at 3.

<sup>575</sup> [http://host.madison.com/business/b2b/article\\_a4e6b6fa-bd79-5c0c-80fe-b576861420ef.html](http://host.madison.com/business/b2b/article_a4e6b6fa-bd79-5c0c-80fe-b576861420ef.html)

<sup>576</sup> See Cary Segall, Bablitch Leading Trio Working to Oust Abrahamson, The Wisconsin State Journal (Feb. 4, 1999), available at <http://www.highbeam.com/doc/1G1-69359735.html>.

<sup>577</sup> See <http://elections.state.wi.us/subcategory.asp?linksubcatid=2554&linkcatid=2675&linkid=155&locid=47>

<sup>578</sup> Also during this period, long-time Chief Justice Shirley Abramson won reelection fairly handily in, 2009, by defeating Jefferson County Circuit Court Judge Randy Koschnick. In 2013, incumbent Justice Patience Drake Roggensack easily beat back a challenge from Professor Ed Falone.

Wilcox was a relatively reliable conservative vote on the Court, and had joined the dissenters in both *Ferdon* and *Thomas*. Thus, from the perspective of left-leaning advocates, this electoral contest presented an opportunity to pick up a potential vote, and from the standpoint of conservatives, presented a risk of losing influence on the Court. The race pitted Annette Ziegler against Linda Clifford. Ziegler had worked as federal prosecutor and private attorney before being appointed by Governor Thompson to the Circuit Court, to which she was subsequently reelected two times. Linda Clifford, a private attorney, had not previously served on the bench. On April 3, 2007, Ziegler defeated Clifford in the election, 58% to 42%

This race set a new record for expenditures in a Wisconsin judicial election with the two candidates raising a combined total of \$2,662,903. But, in an important new development, major independent groups for the first time invested more heavily in the race than the candidates themselves. Expenditures on television ads by three major groups – the Club for Growth and the Wisconsin Commerce and Manufacturers Association supporting Ziegler, and the Greater Wisconsin Committee supporting Clifford – totaled about \$3,000,000, bringing the cost of the race to nearly \$6,000,000.<sup>579</sup>

The second major electoral battle, the following year, pitted conservative challenger Michael J. Gableman against Justice Louis Butler, the author of the *Thomas* decision. Justice Butler, the first and only African American to serve on the Wisconsin Supreme Court, was appointed by Democratic Governor Jim Doyle in 2004, replacing Justice Diane S. Sykes, who was appointed to the U.S. Court of Appeals for the Seventh Circuit by President George W. Bush. Butler had served as a public defender and as a municipal judge, and was elected to the Circuit Court prior to his appointment to the Supreme Court. Michael Gableman was appointed to the Circuit Court by Republican Governor Scott McCallum and subsequently elected to that court. He had previously had a private law practice and worked as a government attorney. On April 1, 2008, Gableman defeated Butler 51% to 49%, making him the first candidate since 1967 to defeat an incumbent justice.<sup>580</sup> Gableman's defeat of Justice Butler in 2008 effectively swung the Court in the conservatives' favor, reversing the swing in the Court's ideological make up brought about by Governor Doyle's appointment of Butler to replace the relatively conservative Sykes.

Though fundraising by the individual candidates was relatively modest, outside groups again spent millions of dollars on television advertising.<sup>581</sup> The business community and its

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<sup>579</sup> Justice at Stake, *The New Politics of Judicial Elections in the Great Lakes States, 2000-08*, at 28

<sup>580</sup> See Wisconsin Government Accountability Board, <http://elections.state.wi.us/docview.asp?docid=13679&locid=47>.

<sup>581</sup> Justice at Stake, *The New Politics of Judicial Elections in the Great Lakes States, 2000-08*, at 31.

right-leaning allies focused on Justice Butler's authorship of the *Thomas* decision as a reason to oppose his reelection, but most of the advertising by and in support of Judge Mike Gableman focused on law and order issues.<sup>582</sup> Gableman's campaign ran a controversial attack ad run that falsely accused Justice Butler of being responsible for freeing a rapist from jail.<sup>583</sup> One apparent effect of the campaign's exceedingly negative tone was to depress voter turn-out below 20%.<sup>584</sup>

The final significant election in Wisconsin during this period pitted Joanne Kloppenberg, a career environmental lawyer in the Wisconsin Attorney General's Office, against Justice Prosser, a long-time member of the Court appointed by Governor Thompson. This race was enlivened by the considerable controversy over Governor Scott Walker's advocacy of limitations on public employee bargaining rights, an issue that had the potential to become fodder for future litigation before the Supreme Court.<sup>585</sup> Prosser eventually won the 2011 reelection by a narrow 7000 vote margin out of nearly 1.5 million votes cast.<sup>586</sup>

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<sup>582</sup> See Factcheck.org, *Aftermath of a Court Race* (October 15, 2009), <http://www.factcheck.org/2009/10/aftermath-of-a-court-race/> ("Incumbent Justice Louis Butler went down to defeat after opponent Mike Gableman and business interests in the state ran slashing, misleading ads portraying him as soft on crime.").

<sup>583</sup> See Factcheck.org, *Wisconsin Judgment Day, the Sequel* (March 21, 2008) [www.factcheck.org/elections-2008/Wisconsin\\_judgment\\_day\\_the\\_sequel.html](http://www.factcheck.org/elections-2008/Wisconsin_judgment_day_the_sequel.html) ("This ad falsely implies that Butler was responsible for freeing the rapist and allowing him to commit another sexual assault. Actually, Butler failed to win the man's release (while representing him as a public defender). The rapist served his sentence and didn't commit his next crime until he had been paroled.") The Wisconsin Judicial Commission lodged a complaint against Justice Gableman for violating the code of judicial ethics by knowingly making a false statement in a campaign advertisement, but the charge was dropped after the Supreme Court deadlocked 3 to 3 on whether to permit further prosecution of the ethics charge. See Mary Spicuzza, "Politics Blog: Ethics Case Against Justice Gableman Dropped," *Wisconsin State Journal* (July 8, 2010).

<sup>584</sup> Justice at Stake, *The New Politics of Judicial Elections in the Great Lakes States, 2000-08*, at 31.

<sup>585</sup> See Jake Grovun, "Wisconsin Judicial Election Puts Voter ID Law, Collective Bargaining at Stake," *Huffington Post* (April 1, 2013)

<sup>586</sup> Wisconsin Government Accountability Board, <http://gab.wi.gov/node/1873>.

The Prosser-Kloppenbergs set yet another record for independent expenditures in judicial elections in Wisconsin with five groups spending almost \$3.6 million.<sup>587</sup> One left-leaning group spent approximately \$1.36 million, while four right-leaning groups spent a combined \$2.21 million.<sup>588</sup> According to one account, nearly half of the latter amount “came from a secretive group affiliated with Americans for Prosperity, the conservative group backed by billionaires Charles and David Koch.”<sup>589</sup> As in the prior elections in Wisconsin, the advertising largely focused on criminal justice issues rather than the civil liability issues that were apparently of greatest actual concern to those financing the advertising.<sup>590</sup>

Not surprisingly, the harsh political contests for seats on the Wisconsin Supreme Court have generated personal animosities between some of the justices. Justice Prosser was accused of physically choking one of his colleagues.<sup>591</sup> In addition, Justice Prosser reportedly called Chief Justice Abrahamson a “total bitch,” and declared that he would “destroy” her;<sup>592</sup> Justice Prosser reportedly admitted using this language.<sup>593</sup> The first incident occurred during the Supreme Court’s expedited consideration of a legal challenge to Governor Walker’s legislative agenda to reduce public employees’ collective bargaining rights. The Supreme Court derailed ethics investigation into these matters by a 3 to 3 vote reflecting the same partisan divide that separates the justices on environmental law and other topics.<sup>594</sup>

#### The Effects of Elections on Wisconsin’s Environmental Law

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<sup>587</sup> Brennan Center for Justice, *Buying Time 2011: Judicial Public Financing in Wisconsin*, April 5, 2011, <http://www.brennancenter.org/analysis/judicial-public-financing-wisconsin-%E2%80%94-2011>

<sup>588</sup> *Id.*

<sup>589</sup> *See* Center for American Progress & Legal Progress, *Fixing Wisconsin’s Dysfunctional Supreme Court Elections 2* (July 2013).

<sup>590</sup> Brennan Center for Justice, *One Week Later: What Happened in Wisconsin?* April 13, 2011, <http://www.brennancenter.org/blog/one-week-later-what-happened-wisconsin>. (describing the “Pedophile Priest” ad run by the Greater Wisconsin Committee against Prosser and an ad attacking Kloppenberg by urging voters to “tell her being weak on criminals is dangerous for Wisconsin families”).

<sup>591</sup> Center for American Progress & Legal Progress, *Fixing Wisconsin’s Dysfunctional Supreme Court Elections 2* (2013).

<sup>592</sup> *Id.*

<sup>593</sup> *Id.* at 5.

<sup>594</sup> *Id.* at 6.

The ultimate question for the purpose of this research project is whether the highly ideological character of Wisconsin's judicial elections has influenced the direction of the high court's decisions on environmental law. The evidence strongly suggests that the outcomes of judicial elections are having a profound effect on the direction of environmental law in Wisconsin

To address this question, I identified the ten most recent environmental law decisions issued by the Wisconsin Supreme Court, identified by each reported case's inclusion of at least one West "headnote" for "environmental law". These ten cases were decided between 2000 and 2013. This survey of Wisconsin environmental law is surely under-inclusive because it does not include cases catalogued under "water" or "planning and zoning" cases, for example, but which might nonetheless have serious environment implications. It also did not pick the *Thomas* case, which presented a tort law issue, but which also involves a serious public health hazard attributable to an environmental condition, broadly speaking. Nonetheless, this survey appears to have yielded a representative and manageable sampling of core environmental law cases decided by the Wisconsin Supreme Court over a certain period in which one can discern the effects of shifting ideological allegiances among the Justices on the outcome of environmental law cases,

The ten cases and their basic facts and holdings can be briefly summarized as follows (from most recent to oldest):

1. *Rock-Koshkonong Lake Dist. v. State Dept. of Natural Resources*:<sup>595</sup> Reversing denial by the Department of Natural Resources of a petition to raise water levels in an impounded lake in order to protect natural wetlands bordering the lake; majority extensively discussed why DNR jurisdiction to enforce the Public Trust Doctrine does not apply to private lands above mean high water.

2. *Andersen v. Department of Natural Resources*:<sup>596</sup> Holding that the Department of Natural Resources lacks the authority, in reviewing an administrative petition challenging a permit issued pursuant to Wisconsin's delegated authority to implement the federal Clean Water Act, to consider whether the permit terms and conditions comply with the Clean Water Act and EPA regulations.

3. *State v. Harenda Enterprises, Inc.*:<sup>597</sup> Holding that trial court properly granted judgment in favor of State in suit seeking civil penalties and other relief based on environmental

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<sup>595</sup> 833 N.W.2d 800 (Wis. 2013) (opinion by Prosser, J., joined by Gableman, Roggensack and Ziegler, JJ.) (dissenting opinion by Crooks, J., joined by Abrahamson, C.J., and Bradley, J.)

<sup>596</sup> 796 N.W.2d 1 (Wis. 2011) (opinion by Ziegler J., joined by Crooks, Gableman, Roggensack, and Prosser, J.) (dissenting opinion by Abrahamson, C.J., and Bradley J.).

<sup>597</sup> 746 N.W.2d 25 (Wis. 2008) (opinion by Bradley, J., joined by Abrahamson, C.J., Butler, J., and Crooks, J.) (dissenting opinion by Ziegler, J., joined by Prosser and Roggensack, JJ)

auditor's failure to follow regulations prescribing the method for testing for the presence of potentially dangerous levels of asbestos in building undergoing renovation.

4. *State v. Schweda*,<sup>598</sup> Affirming trial court order striking a demand for a jury trial by defendant operator of waste water treatment facility in a proceeding commenced by the State seeking penalties and other relief based on violations of conditions of permit and other regulatory requirements.

5. *Hilton ex rel. Pages Homeowners' Association v. Department of Natural Resources*:<sup>599</sup> Upholding a decision by the Department of Natural Resources requiring an association of lakefront homeowners to reduce the number of boat slips at an association-owned pier in order to reduce adverse effects on lake habitat and safety hazards.

6. *Clean Wisconsin, Inc. v. Public Service Com'n of Wisconsin*:<sup>600</sup> Upholding a Public Service Commission grant of an electric utility's application for a certificate of public convenience and necessity for the construction of a coal-fired electrical generating plant.

7. *Donaldson v. Bd. of Com'rs of Rock-Koshkonong Lake Dist.*:<sup>601</sup> Upholding a lower court decision striking down the decision of a lake district board to deny a landowner's application to "detach" his land from the district.

8. *Wisconsin Citizens Concerned for Cranes and Doves v. Wisconsin Dept. of Natural Resources*:<sup>602</sup> Upholding a decision by the Department of Natural Resources establishing an open hunting season for mourning doves.

9. *Johnson Controls, Inc. v. Employers Ins. of Wausau*,<sup>603</sup> Overruling the prior decision of the Court in *City of Edgerton v. General Casualty Co. of Wisconsin*,<sup>604</sup> and ruling in the

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<sup>598</sup> 736 N.W.2d 49 (Wis. 2007) (opinion by Bradley, J., joined by Abrahamson, C.J., Butler, J. and Crooks, J/) (opinion concurring in part and dissenting in part by Prosser, J., joined by Roggensack and Wilcox, JJ)

<sup>599</sup> 717 N.W.2d 166 (Wis. 2006) (opinion by Crooks, J., joined by Abrahamson, CJ, and Bradley and Butler, JJ) (concurring opinion filed by Prosser, J., joined by Roggensack and Wilcox, JJ).

<sup>600</sup> 700 N.W.2d 768 (Wis. 2005) (opinion by Wilcox, Prosser, Roggensack and Butler, JJ, joined by Crooks, J.) (concurring opinion by Butler, J.) (dissenting opinion by Bradley, J., joined by Abrahamson, CJ).

<sup>601</sup> 680 N.W.2d 762 (Wis. 2004) (opinion by Prosser, joined by Roggensack, Sykes, and Wilcox, JJ) (dissenting by Crooks, J, joined by Abrahamson, CJ and Bradley, J).

<sup>602</sup> 677 N.W.2d 612 (Wis. 2004) (unanimous opinion by Wilcox, J).

<sup>603</sup> 665 N.W.2d 257 (Wis. 2003) (opinion by Prosser, joined by Abrahamson CJ, and Babitch and Sykes, JJ) (concurring opinion by Crooks, J) (dissenting opinion by Wilcox, J, joined by Bradley, J.)

context of a superfund case that an insured can recover under a Comprehensive General Liability insurance policy the costs of restoring and remediating a superfund site, and that the receipt of a potentially responsible party letter triggers an insurer's duty to defend under an insurance policy.

10. *Responsible Use of Rural and Agr. Land (RURAL) v. Public Service Com'n of Wis.*:<sup>605</sup> Upholding an order of the Public Service Commission and related Department of Natural Resources ruling granting a certificate of public convenience for the construction and operation of a natural gas-fired electric generation power plant.

These cases say a lot about the state of the Wisconsin Supreme Court's environmental law jurisprudence. First, this set of cases illustrates the sharp divisions on the Wisconsin Supreme Court over environmental law.<sup>606</sup> Dissents or at least separate concurrences were filed in nine of the ten cases. The only case in which the Court issued a unanimous decision was *Wisconsin Citizens Concerned for Cranes and Doves*, involving the question whether the Department of Natural Resources had the statutory authority to establish an open season for hunting of mourning doves.<sup>607</sup> In the other nine cases there were at least two justices, and in five of the cases (half of the cases) there were three justices, who wrote or joined in opinions departing from the opinion for the Court,<sup>608</sup> indicating that very modest differences in the composition of the Court might have produced a different outcome in many if not most of the Court's cases over this period.

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<sup>604</sup> 17 N.W.2d 463 (1994).

<sup>605</sup> 619 N.W.2d 888 (Wis. 2000) (opinion by Crooks, J., joined by Babitch, Prosser and Sykes, JJ) (dissenting opinion by Abrahamson, CJ, joined by Bradley, J).

<sup>606</sup> Professor Alan Ball of Marquette University has assembled a data base on all of the Court's decisions between 2004 and 2013, indicating that over the past decade the percentage of unanimous decision each year has varied from a low of 38% to a high of 63%, see [www.scotustats.org](http://www.scotustats.org), indicating that environmental law is an area of particular disagreement among the justices.

<sup>607</sup> See *Wisconsin Citizens Concerned for Cranes and Doves v. Wisconsin Dept. of Natural Resources*, 677 N.W.2d 612 (Wis. 2004).

<sup>608</sup> In eight of these nine cases the justices writing separately filed opinion dissenting in whole or in part from the opinion for the Court. In *Hilton ex rel. Pages Homeowners' Association v. Department of Natural Resources*, 717 N.W.2d 166 (WI 2006), three conservative justices (Prosser, Roggensack and Wilcox, JJ) filed a concurring opinion, agreeing with the Court's decision to uphold, under "current law," a decision of the Department of Natural Resources requiring an association of lakefront homeowners to reduce the number of boat slips at a private pier, but lamenting that the case "epitomizes the growth of agency power, the decline of judicial power, and the tenuous state of property rights in the 21<sup>st</sup> century." *Id.* at 178-79.

These cases also demonstrate that the justices disagree in environmental cases along highly predictable ideological lines. In this group of ten cases, the so-called conservative justices almost always voted for less stringent environmental protection while the so-called liberal side almost always voted for more stringent protection.<sup>609</sup> The only significant exceptions to this pattern are the case involving the hunting season for mourning doves (in which the Court was unanimous) and a second case, *Johnson Controls*, involving the issue of whether companies can recover from their insurers the cost of restoring and remediating contaminated superfund sites (in which the Justices broke dramatically from the usual ideological voting pattern).<sup>610</sup> The voting in the latter case might be explained by the fact that there was no clear “pro-“ or “anti-environmental” side to the case, given that the basic issue was which of two private parties would bear the financial cost of cleaning up a contaminated site.<sup>611</sup>

Finally, even with this limited set of cases spanning a limited period of time, one can clearly discern the effect of changes in the ideological composition of the Court on the outcomes of the Court’s environmental decisions. For this purpose, there were two pivotal events in the Court’s recent history. First, in 2004, President George W. Bush nominated Justice Sykes, a relative conservative, to the U.S. Court of Appeals for the Seventh Circuit, creating a vacancy on the Court; Democratic Governor Jim Doyle appointed relatively liberal Judge Butler to fill the vacancy. Second, in 2008, after a very contentious and close race, conservative Justice Gableman beat liberal Justice Butler. In the four cases decided before Justice Sykes left the bench, the side favoring less stringent environmental controls prevailed three times, while in the fourth cases (*Johnson Controls*) there was no clear “pro-” or “anti-environmental” side. In the four cases decided while Butler sat on the Court, three of the four cases came out in favor of the side favoring more stringent environmental controls. Finally, both of the cases decided since Gableman won election and the Court swung back in a more conservative agenda, came out in favor of the side favoring less stringent environmental protection. These data appear to provide

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<sup>609</sup> For these purposes, over the thirteen years examined, the “conservative” justices include Babitch, Gableman, Prosser, Roggensack, Sykes, Wilcox and Ziegler. The “liberals” include Abrahamson, Bradley, and Butler. These designations are primarily based on the party affiliation of the Governor that elected some of the justices (others were elected in non-partisan elections). Justice Crooks is the most difficult to categorize, switching between the “conservative” to “liberal” sides from case to case. One nonconsequential departure from this pattern was Justice Butler’s vote with the conservative majority in *Clean Wisconsin, Inc.*

<sup>610</sup> See *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 665 N.W.2d 257 (Wis. 2003). The majority opinion was authored by Justice Prosser (a “conservative,” and his opinion was joined by Chief Justice Abrahamson (a “liberal”), and Justice Babitch and Sykes (both “conservatives”). Justice Crooks (a “moderate conservative”) wrote a concurring opinion. Justice Wilcox (a “conservative”) filed a dissenting opinion, joined by Justice Bradley (a “liberal”).

<sup>611</sup> See *Id.* at n. 16 (“[T]he focus of our analysis in this case is on interpretation of the insurance policies and not on environmental law. . . . The parties and amici curiae have extensively argued, in varying forms, how competing interpretations of the CGL policy will impact on the efficient and effective remediation of pollution. While we are sensitive to these issues, these discussions are not probative of whether coverage obtains under Johnson Controls’ policies.”),



clear and unmistakable evidence that the personnel on Wisconsin's highest court, and the outcome of judicial elections in this state, have determined the substantive content and enforceability of environmental law.

The Wisconsin Supreme Court's two most recent environmental law cases help illustrate what is at stake in Wisconsin's judicial elections. First, in *Andersen v. Department of Natural Resources*,<sup>612</sup> the Supreme Court, by a 4 to 3 vote, ruled in 2011 that the Department of Natural Resources, in an administrative challenge to a water pollution discharge permit, lacks the statutory authority to determine whether the terms of the permit meet the requirements of the federal Clean Water Act (CWA) and U.S. EPA regulations. The case involved a very important question not only for Wisconsin but for the many other states that work in cooperation with the U.S. EPA to administer the CWA. The Act vests the U.S. Environmental Protection Agency with authority to implement the so-called National Pollution Discharge Elimination System (NPDES), but authorizes the EPA to delegate this permitting authority to EPA. Wisconsin, like most states, has obtained delegated authority to administer the NPDES permitting program.

The question presented in *Anderson* was whether a coalition of citizens and advocacy groups could challenge a permitting decision by the Wisconsin Department of Natural Resources administratively (and subsequently in state court) on the ground that the permit violated the requirements of federal law. The majority ruled that DNR lacked the authority to consider such a challenge.<sup>613</sup> The Court recognized, as a general matter, that a state is required to exercise delegated CWA-permitting authority in accordance federal requirements,<sup>614</sup> and that the EPA retains the authority to review and overturn individual state permitting actions if they are contrary to federal law.<sup>615</sup> But it does not follow, according to the majority, that individual state permitting actions are subject to challenge under federal law in a state forum.<sup>616</sup> Citizens' only recourse for state permitting actions that allegedly violate federal law, the majority said, is a potential legal challenge to an EPA decision not to challenge the state permit.<sup>617</sup>

Chief Justice Abrahamson filed a dissenting opinion, joined by two of her colleagues.<sup>618</sup> She read both federal and state law to authorize the Department to consider whether DNR permitting actions complied with federal law. Any other conclusion, she argued, "invert[ed] the

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<sup>612</sup> 796 N.W.2d 1 (Wis. 2011).

<sup>613</sup> *Id.* at 16.

<sup>614</sup> *Id.* at 12.

<sup>615</sup> *Id.*

<sup>616</sup> *Id.* at 17.

<sup>617</sup> *Id.* at 18.

<sup>618</sup> *Id.* at 19-22.

federal-state partnership” the CWA was designed to implement.<sup>619</sup> Furthermore, she said, the majority’s potential remedy of suing the EPA was hollow because EPA’s “discretionary decision not to object to permit terms cannot effectively be challenged in federal court.”<sup>620</sup> Thus, Chief Justice Abrahamson wrote, the majority opinion . . . leaves the petitioners in the present case, and all future challengers of Wisconsin-issued water pollution permits, without a forum to bring an effective challenge that the terms of a permit are unreasonable based on a violation of federal law.”<sup>621</sup>

The *Anderson* decision is unquestionably problematic as a matter of federal statutory interpretation.<sup>622</sup> But it is also significant because it essentially shuts off all avenues of appeal for citizens concerned that individual permitting actions violate federal standards. The U.S. EPA retains the authority to review and overturn individual state permitting actions,<sup>623</sup> and, if permitting violations remain persistent, EPA has the ultimate authority to withdraw the delegation of permitting authority from the state.<sup>624</sup> But EPA cannot effectively oversee every state permitting action. Thus, Congress included citizen-enforcement mechanisms in the CWA to help ensure that States continue to implement the Act effectively. To the extent citizen enforcement to help ensure State compliance with the CWA is today a dead letter in Wisconsin, the goals of the CWA itself have been compromised.

The environmental consequences of the Wisconsin’s judicial elections also came home to roost in the case of *Rock-Koshkonong Lake District v. State of Wisconsin*, decided by the Wisconsin Supreme Court in 2013.<sup>625</sup> The central issue in the case was whether the Department of Natural Resources (“DNR”) had the authority, in deciding whether to grant a petition to raise water levels in an impounded lake, to consider the impact of higher water levels on natural wetlands adjacent to the lake. All of the justices ultimately agreed that the DNR possessed the

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<sup>619</sup> *Id.* at 22.

<sup>620</sup> 796 N.W.2d at 22, citing *District of Columbia v. Schramm*, 631 F.2d 854 (D.C.Cir.1980).

<sup>621</sup> *Id.* at 22.

<sup>622</sup> **[Insert what EPA has had to say about the decision]** See also Adam Babich, “The Supremacy Clause, Cooperative Federalism, and the Full Federal Regulatory Purpose,” 64 Admin. L. Rev. 1, 43 n. 205 (2012) (observing that the *Anderson* decision “arguably means that Wisconsin’s Clean Water Act program is now out of compliance with 40 C.F.R. §123.30 (2011), which requires that state water quality programs provide for an opportunity for ‘judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit (see §509 of the Clean Water Act)’”).

<sup>623</sup> 33 U.S.C. § 1342(d)(2).

<sup>624</sup> 33 U.S.C. § 1342(c)(3).

authority to consider these impacts pursuant to a Wisconsin statute. What principally divided the Court, however, was whether the statute was based on the state's general police power authority or whether it rested on the constitutionally-based Wisconsin public trust doctrine. Justice Prosser, joined by Justices Gableman, Roggensack and Ziegler, ruled that the statute was supported by the police power and the public trust doctrine did not apply in this instance. Justice Crooks filed a dissent, joined by Chief Justice Abrahamson and Justice Bradley, arguing that the statute was based on the public trust doctrine as well as the police power.

The majority's extended discussion of the public trust issue is arguably *dictum* because the Court's consensus conclusion that the statute represented a valid exercise of State authority on some basis made it unnecessary to consider whether the statute was supported by the public trust doctrine.<sup>626</sup> Thus, the Wisconsin Supreme Court probably has no obligation to follow the logic of the majority in this case in future cases. But the resolution of this seemingly technical issue was obviously hard fought and the 4 to 3 loss for the public trust argument appears to reflect a major reversal in direction on one of Wisconsin's signature contributions to U.S. environmental law.

The significance of the majority's *Rock-Koshkonong* opinion lies in the fact that it appears to undermine the Court's landmark 1972 decision in *Just v. Marinette County*, in which the Court unanimously rejected a claim that a county's shoreland zoning ordinance adopted pursuant to state guidelines constituted a "taking" of private property.<sup>627</sup> In rejecting the taking claim the Court reasoned that the zoning ordinance implemented the state's public trust doctrine by protecting public navigable waters from harm.<sup>628</sup> Consistent with the reasoning of *Just*, the Wisconsin Supreme Court ruled in a subsequent case that the public trust doctrine supported state regulation of high capacity wells that could adversely affect the flows of adjacent navigable waters.<sup>629</sup> While the *Rock-Koshkonong* is potentially distinguishable on its facts,<sup>630</sup> the majority

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<sup>626</sup> Melissa Scanlan, "It's Not Open Season on Wetlands: A Lot of Verbiage But Not Much Changes for the public Trust Doctrine," Milwaukee-Wisconsin Journal Sentinel, <http://www.jsonline.com/news/opinion/its-not-open-season-on-wetlands-b9959581z1-216520241.html?page=1> (July 22, 2013).

<sup>627</sup> 201 N.W.2d 761 (Wis. 1972).

<sup>628</sup> See *id.* at 768 (describing the zoning regulation as an exercise of "power to prevent harm to public rights by limiting the use of private property to its natural uses").

<sup>629</sup> See, e.g., *Beulah Management District v. Department of Natural Resources*, 799 N.W. 73 (Wis. 2011) (recognizing that state statute authorizing DNR to regulate high capacity wells that could adversely affect the flows of adjacent navigable waters implemented the public trust doctrine). See also *City of Milwaukee v. State*, 214 N.W. 820 (Wis. 1927) ("The trust reposed in the state is not a passive trust; it is governmental, active, and administrative. Representing the state in its legislative capacity, the Legislature is fully vested with the power of control and regulation. The equitable title to these submerged lands vests in the public at large, while the legal title vests in the state, restricted only by the trust, and the trust, being both active and

opinion purports to draw a new bright line rule, which is patently inconsistent with the spirit and letter of *Just*, barring the state from invoking the public trust doctrine to justify the exercise the regulatory authority above the mean high water line.

As the justices contrasting arguments make clear, the seemingly technical legal debate in the *Rock-Koshkonong* case could have important resource management implications. First, because the public trust doctrine not only confers power on the state to protect trust resources but imposes a duty to do so, a ruling that public trust authority does not extend above the mean high water line could mean that the state legislature will have broader authority to pass legislation in the future weakening protections for public trust waters from the potentially harmful effects of land use activities adjacent to navigable waters. Second, because the public trust doctrine provides a broad immunity from takings claims of the kind asserted in *Just*,<sup>631</sup> such a ruling could also expose state and local government to greater takings liability and, in turn, undermine effective regulatory authority.

Already there is concern about what might come next from the Supreme Court. In 2013, after extensive public debate, the legislature passed and Governor Scott Walker approved new mining legislation designed to promote the creation of a major new iron mine in Wisconsin's Penoque Hills, upstream of the Bad River Indian reservation and Lake Superior.<sup>632</sup> A Florida-based company has purchased mineral rights covering a large area in northwestern Wisconsin

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administrative, requires the lawmaking body to act in all cases where action is necessary, not only to preserve the trust, but to promote it.”).

<sup>630</sup> The *Rock-Koshkonong* case arguably presented the narrow question of whether the public trust doctrine could be invoked to protect wetlands adjacent to navigable activities from activities harmful to the wetlands, in this instance flooding. Adopting this narrow reading of the Court's opinion, the case would not necessarily preclude continued reliance on the public trust doctrine to regulate activities on lands adjacent to navigable waters that threat public trust uses and values.

<sup>631</sup> See generally John D. Echeverria, “The Public Trust Doctrine as a Background Principles Defense in Takings Litigation,” 45 UC Davis Law Review 931 (2012).

<sup>632</sup> Associated Press, “Wisconsin: Walker Signs Republicans' contentious mining bill,” Pioneer Press (March 11, 2013). See also Dan Kaufman, The Fight for Wisconsin's Soul, *The New York Times* (March 29, 2014) (“To facilitate the construction of the mine and the company's promise of 700 long-term jobs, Gov. Scott Walker signed legislation last year granting GTac astonishing latitude. The new law allows the company to fill in pristine streams and ponds with mine waste. It eliminates a public hearing that had been mandated before the issuing of a permit, which required the company to testify, under oath, that the project had complied with all environmental standards. It allows GTac to pay taxes solely on profit, not on the amount of ore removed, raising the possibility that the communities affected by the mine's impact on the area's roads and schools would receive only token compensation.”)

and proposes what critics describe as potentially the largest open-pit iron-ore mine in the world.<sup>633</sup> Because the mine could have serious water quality impacts downstream, and critics contend that recent legislation fails to adequately protect public trust waters from the potential impacts, there has been widespread speculation that mine opponents could challenge the recently-enacted legislation under the public trust doctrine.<sup>634</sup> Given the politicization of the Wisconsin Supreme Court and recent *Rock-Koshkonong* opinion, there is natural trepidation about how a legal clash between the public trust doctrine and the proposed mine would turn out in the current Supreme Court.

Wisconsin voters will be spared another electoral battle for a seat on the Supreme Court in the November 2014 elections. However, Justice Ann Walsh Bradley's second term expires on July 31, 2015, meaning that the next Supreme Court election will be held in spring 2015. Justice Bradley has not announced whether she will run for another term, but Republican Attorney General J.B. Van Hollen has indicated that he is considering running for a seat on the Court.<sup>635</sup> It seems inevitable that the races for the Wisconsin Supreme Court will remain contentious as well as consequential for the state of Wisconsin's environmental law.

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<sup>633</sup> See Sierra Club, Proposed Taconite Mine in the Penokee Range, <http://wisconsin.sierraclub.org/Penokeemine.asp>

<sup>634</sup> Ron Seely, "Mine opponents: 'This fight is just getting started,'" Wisconsin State Journal (March 2, 2013), [http://host.madison.com/news/local/govt-and-politics/mine-opponents-this-fight-is-just-getting-started/article\\_e2f66d24-82e2-11e2-a67a-0019bb2963f4.html](http://host.madison.com/news/local/govt-and-politics/mine-opponents-this-fight-is-just-getting-started/article_e2f66d24-82e2-11e2-a67a-0019bb2963f4.html).

<sup>635</sup> Jason Stein & Patrick Marley, Wisconsin Attorney General Van Hollen won't rule out high court run, Milwaukee Wisconsin-Journal Sentinel, December 18, 2013, <http://www.jsonline.com/news/statepolitics/wisconsin-attorney-general-van-hollen-wont-rule-out-high-court-run-b99166207z1-236384751.html>

