

WISCONSIN BUSINESS VOICE

SPECIAL EDITION

Wisconsin Manufacturers & Commerce

March 2013: Special Edition

Supreme Court Election Why April 2 is Crucial to Business

Inside:

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Supreme Court Election Preview

WISCONSIN BUSINESS VOICE



From the Editor

Wisconsin Business Voice is the flagship publication of Wisconsin Manufacturers & Commerce, the statewide chamber of commerce. This special edition of the normally quarterly publication focuses on the April 2 Wisconsin State Supreme Court election and how the outcome will impact all businesses from all sectors of the economy. This election is important to the citizens and businesses in the state because the outcome is critical to keeping or losing a conservative majority on the Court. The Wisconsin Supreme Court consists of seven Justices who determine the fate of many matters which affect all the people of our state.

In addition to our own columnists, we are fortunate to have an authority on the Supreme Court as a contributor to this special edition. Former editor of the Harvard Law Review, Rick Esenberg is the Founder, President and General Counsel of the Wisconsin Institute for Law & Liberty. Justice Annette Ziegler, elected to the Wisconsin Supreme Court in 2007, is also a guest columnist.

As you will read in Esenberg's column, "conservative" or "liberal" does not mean the same thing for judges as it does for legislators. The conservative judicial philosophy refers to judges who follow the law as it is written whereas an activist judge is sometimes thought to legislate from the bench.

We usually send this magazine to 4,100 members and local chambers of commerce. In order to stress the importance of this election, this edition is going to more than 15,000 business leaders statewide. So if you haven't seen it before, your company may not be a member of WMC. If that is the case, please consider joining. We are here to keep an eye on issues such as this so you can focus on running your business. If you believe... belong! And be sure to vote April 2!

Thanks,

Katy Ryder Pettersen
Editor, *Wisconsin Business Voice*

P.S. Earlier this month, the Wisconsin Legislature passed and Governor Walker signed mining reform legislation. Wisconsin's state seal includes four references to our mining heritage,



including the badger (in homage to early lead miners who built make-shift homes in the ground like badgers), a pick ax and shovel, lead ingots and - most conspicuously - a miner. When the iron ore mine permitting bill failed last session, WMC recreated the seal with the miner lying dead and with the other three mining symbols removed. We are pleased to revise our original spoof now that the mining reform has passed.

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Justice Pat Roggensack faces law professor Ed Fallone April 2. Study this side-by-side comparison and know your candidates!

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SUPREME COURT ELECTION IS REFERENDUM ON PAST AND FUTURE REFORMS

Kurt R. Bauer, WMC President/CEO



I had lunch with the CEO of a major Wisconsin business several months ago. It was a membership meeting. Specifically, I was hoping to convince him to rejoin WMC. His company dropped its membership some years earlier because he didn't like WMC's involvement in state Supreme Court races.

He isn't alone. Since joining WMC two years ago, the number one criticism I have heard revolves around our past efforts to elect so-called "strict constructionist" judges to the high court.

For the record, WMC first got involved in Supreme Court races in 2007 after an activist majority handed down several decisions that exposed businesses, especially manufacturers and health care professionals, to far greater legal liability. Two particularly egregious rulings led *The Wall Street Journal* to editorialize that the "four-person judicial legislature" used "highly creative" judgments to rig "the [legal] system in favor of the trial lawyers (August 9, 2005)."

Most business leaders want the judiciary to be independent, objective and fair. As a result, they are offended when officially nonpartisan Supreme Court elections become overtly political. That was the complaint my lunch companion had.

So why did he agree to break bread with me? Act 10 - Governor Scott Walker's landmark reform that curbed the power public sector unions have wielded over local, county and state budgets since Wisconsin became the first state in the U.S. to allow government employees to bargain collectively.

Act 10 transformed Wisconsin's fiscal condition and business climate for the better, which is why it is so popular among business leaders who see it as a common sense reform. But since Act 10's enactment, two Dane County circuit court judges have attempted to overturn it.

Judge Maryann Sumi's injunction was struck down on a 4-3 ruling by the now conservative-led Supreme Court. Judge Juan Colas' decision is under appeal and destined to be reviewed by the high court sometime after the April 2 Spring Election.

That's why this CEO agreed to meet with me and - I am happy to say - rejoin WMC. He saw the Dane County judges' action as politically driven. To him, the rulings handed down by Sumi and Colas vindicated WMC's involvement in Supreme Court races. It also became clear to him that an activist high court becomes another policymaking branch of government and one that is usually hostile to business interests.

Indeed, the choice voters make on April 2 will have a profound impact on Wisconsin's current and future business climate. Act 10 is in the balance. So is a law enacted last session that requires people to show a valid government-issued identification card to prove they are eligible to vote in Wisconsin.

Conservatives like Act 10 and Voter ID as checks on government spending and voter fraud. Liberals don't.

An activist high court becomes another policymaking branch of government and one that is usually hostile to business interests.

Given that Republicans control the Legislature and the Governor's Office, activist judges have become the Democrats' last line of defense. In other words, if you don't win on Election Day or in the Legislature, you can still win in the courts as long as you have judges willing to legislate from the bench.

Democrats have that "judicial veto" in place at the circuit and appeals levels in Dane County where most left-leaning legal challenges are filed. But activists haven't held the majority on the Supreme Court since 2008, thanks in no small part to WMC.

Future reforms are also at stake on April 2. For example, one of WMC's top priorities for the 2013-14 legislative session is the recently enacted iron ore mine permitting bill that hopefully will attract a \$1.5 billion investment in northern Wisconsin, creating thousands of statewide jobs.

But if incumbent conservative Justice Pat Roggensack is defeated and the majority flips on the Supreme Court, mining and all future business-friendly reforms will be vulnerable to the personal ideology of activist judges. **BV**

Follow Kurt on Twitter @Kurt_R_Bauer



BUSINESS DAY IN MADISON

More than 1,000 business leaders from every corner of the state converged on the Monona Terrace Community & Convention Center February 13 for Business Day in Madison. The event focused on what this past November's election results meant for your business, your employees, your families and our nation and whether or not our leaders will be dedicated to economic growth and opportunity.

The program emcee was Charlie Sykes, the state's most listened to talk show host from WTMJ Radio in Milwaukee. The featured speakers were General Michael Hayden, Former Director of Central Intelligence Agency and the National Security Agency; Stephen Hayes, Political Analyst, Media Personality, and Author; and Dr. Barry Asmus, Economist and Best-Selling Author. Supreme Court Justice Pat Roggensack also spoke and Governor Scott Walker delivered the closing address.



Business Day is the largest annual gathering of state business leaders.



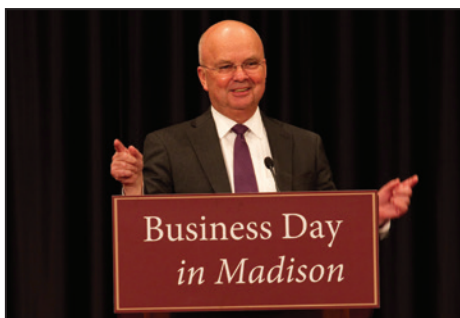
Justice Pat Roggensack talking about the role of the Wisconsin Supreme Court.



Governor Scott Walker closed the 2013 Business Day in Madison event.



Justice Roggensack with Governor Walker.



General Michael Hayden spoke to more than 1,000 business leaders during lunch.



Business Day in Madison attracts media from across the state.



(L-R) Stephen Hayes, political analyst, media personality and author; Scott Manley, WMC Vice President; Michael Hayden, former Director of the Central Intelligence Agency and the National Security Agency; and Dr. Barry Asmus, economist and best-selling author.



Justice Roggensack was introduced by Emcee Charlie Sykes, talk show host for WTMJ Radio Milwaukee.



(L-R) Dan Ariens, President & CEO of Ariens Company; Governor Walker; Todd Teske, Chairman, President & CEO of Briggs & Stratton Corporation; and Kurt Bauer, President/CEO of WMC.

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EXPERIENCE MATTERS

By Annette Ziegler, Wisconsin Supreme Court Justice

We Packer fans learned the hard way at the end of the Seahawks game last year; there is no substitute for a good referee. That maxim applies not only to sports, but also to our judicial system. Good judges, as Chief Justice Roberts so famously noted, are evenhanded umpires who call balls and strikes – not players who try to influence an outcome.

Justice Pat Roggensack, who ascribes to the same judicial philosophy as Chief Justice Roberts, is the only candidate who has demonstrated her judicial philosophy through judicial decision-making. Justice Roggensack knows that it is not the role of a judge to make law or impose her own personal wants and beliefs on society – those roles are reserved for the Legislature and Governor. Experience matters.

Recent history serves as a reminder of how a change in the composition of the Court can profoundly impact the legal landscape in Wisconsin. By way of example, when Justice Diane Sykes, who has a judicial philosophy similar to that of Justice Roggensack and Chief Justice Roberts, ascended to the federal bench, Governor Doyle appointed Justice Louis Butler to fill the vacancy. Shortly thereafter, the court rendered a series of decisions that caused some to label Wisconsin “Alabama North.” The Court’s rulings were considered activist in nature and detrimental to the Legislature’s past efforts to make Wisconsin a better state for business development.

Judge Sykes later remarked the then new majority on the Wisconsin Supreme Court was “quite willing to devise and impose its own solutions to what it perceives to be important public policy

problems—civil and criminal—rather than deferring to the political process.”

Presenting at the prestigious Hallows Lecture at Marquette University Law School, Judge Sykes commented on the “dramatic shift in the court’s jurisprudence, departing from some familiar and long-accepted principles that normally operate as constraints on the Court’s use of power.”

In that same lecture, Judge Sykes reflected upon the Court’s 2004-05 term, which, in her words “... was, by any measure, a watershed. In a series of landmark decisions, the court: rewrote the rational basis test for evaluating challenges to state statutes under the Wisconsin Constitution, striking down the statutory limit on noneconomic damages in medical malpractice cases; eliminated the individual causation requirement for tort liability in lawsuits against manufacturers of lead-based paint pigment,

expanding the risk contribution theory, a form of collective industry liability;

expanded the exclusionary rule under the state constitution to require suppression of physical evidence obtained as a result of law enforcement’s failure to administer Miranda warnings; declared a common

police procedure inherently suggestive

and the resulting identification evidence inadmissible in criminal prosecutions under the state constitution’s due process clause; and invoked the court’s supervisory authority over the court system to impose a new rule on law enforcement that all juvenile custodial interrogations be electronically recorded.”

Clearly, elections have consequences, and the ramifications can be quick and difficult to reverse.

The election on April 2 is of great importance. Justice Roggensack has 16 years of experience as a judge, and given her past body of work, we can expect her to continue to play the role of an impartial umpire.

With a low turnout likely, please do not take the election for granted. Make sure that you vote, and urge your friends and relatives to head to the polls. Justice Roggensack’s role as a fair and impartial umpire on the court is not something we want to lose.

**Clearly, elections
have consequences, and
the ramifications can be quick
and difficult to reverse.**



Annette Ziegler, Wisconsin Supreme Court Justice, was elected to the Court in 2007. Her term runs through 2017.

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**Carl T. Camden, President & CEO,
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2013 FOCUS ON MANUFACTURING BREAKFAST

Nearly 200 people attended the second annual Focus on Manufacturing Breakfast on March 1 at The Pfister Hotel in Milwaukee the morning after the Manufacturer of the Year Awards Banquet. After allowing some time for networking and breakfast, Lieutenant Governor Rebecca Kleefisch welcomed the crowd. Jay Timmons, President and CEO of the National Association of Manufacturers spoke regarding the current state of U.S. manufacturing. Timmons' remarks were followed by an all-star panel of state, national and international manufacturing experts including Jay Timmons; Aaron Jagdfeld, Chief Executive Officer of Generac Corporation; Alan Petelinsek, President and Owner of Power Test, Inc.; and Ulice Payne, Jr., Managing Member of Addison-Clifton, LLC; discussed the future of manufacturing. Kurt Bauer, President/CEO of WMC, was the panel's moderator.



Photo by David Bohrer / National Assoc. of Manufacturers

Jay Timmons, President & CEO of National Association of Manufacturers, talks with Lt. Governor Rebecca Kleefisch.



A sell-out crowd attended the Focus on Manufacturing breakfast at The Pfister Hotel in Milwaukee.



Photo by David Bohrer / National Assoc. of Manufacturers

Lt. Governor Rebecca Kleefisch welcomed attendees and talked about the importance of manufacturing to Wisconsin's economy.



Photo by David Bohrer / National Assoc. of Manufacturers

Jay Timmons, President & CEO, National Association of Manufacturers, addressed the national issues affecting Wisconsin's manufacturers.



Panelists included (L-R) Al Petelinsek, President & Owner, Power Test, Inc.; Ulice Payne Jr., Managing Director, Addison-Clifton, LLC; Aaron Jagdfeld, Chief Executive Officer, Generac Corporation; and Jay Timmons, President & CEO, National Association of Manufacturers. WMC's Kurt Bauer moderated the panel.

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WMC: WINNING FOR YOUR BUSINESS IN THE COURT OF PUBLIC OPINION

MAINTAINING A RULE-OF-LAW SUPREME COURT

In the 1990s, the Wisconsin Legislature passed significant lawsuit reform, including caps on medical malpractice awards and punitive damage awards. These were duly passed acts of the Legislature, signed by Governor Tommy G. Thompson, and presumed to be the law of the land.

But, in 2004, Governor Jim Doyle appointed activist Judge Louis Butler to the Wisconsin Supreme Court to replace conservative Justice Diane Sykes, who had been appointed to the federal appeals court in Chicago. Doyle and Butler both had close ties to personal injury lawyers and Butler made a career as a public defender.

The Butler appointment created a 4-3 activist majority on the seven-member court and it set about derailing lawsuit reforms and creating new laws such as a guilty-until-proven-innocent standard for lead paint manufacturers.

It was a shocking development that drew rebukes from Main Street to Wall Street.

The Wall Street Journal (9/9/2005) warned: "The four judges toppled what had been a highly successful medical liability reform passed by the state Legislature in 1995... A day after this disaster, the court doubled its damage with its 4-2 lead paint ruling... The

decision is the first of its kind in the country and establishes a dangerous precedent." The Wisconsin high court ruled that all lead paint manufacturers were responsible for any harm caused by lead paint in Wisconsin. "The decision gives defendants every incentive to settle rather than risk a trial, rigging the system in favor of trial lawyers."

WMC sprang into action to defend the Wisconsin business community from the high court's rulings. We worked with lawmakers to pass bills to overturn the court's rulings, including restoring caps on malpractice awards, limits on punitive damages and setting aside the guilty until innocent lead paint ruling. WMC ran an award-winning media and grassroots campaign to promote the legislation and urge Doyle to sign the bills.

But, Doyle sided with personal injury lawyers and vetoed the legislation. So, WMC set out to make sure this dark episode in our judicial history was not repeated.

In 2007, WMC spent \$2.5 million on issue ads educating the public about Justice Annette Ziegler and lawyer Linda Clifford. One WMC ad, titled "Zero," highlighted the fact that Clifford had "zero" experience as a judge, while Ziegler was a judge and former

THE FALLONE FILES: "STICKING IT TO THE CONSTITUTION"*

PROFESSOR ED FALLONE VERBATIM

Marquette Assistant Law Professor Ed Fallon wants to be on the Wisconsin Supreme Court.

He has never been a judge, so if you want insight into his legal reasoning perhaps the best source of information are his writings posted online in his blog on the Marquette University web page.

If elected, Mr. Fallon is widely expected to provide the activists with a majority on the high court. Here are some of his blog entries.

"Sticking it to the Constitution"

"...the existing constitutional framework should be interpreted to encompass 'new' Constitutional rights." (9/18/12)

"Moreover, while both originalism and the 'living Constitution' are subject to abuse, one can argue that originalism is the more dangerous of the two – it purports to be objective and in so doing it hides its subjective biases and assumptions from public scrutiny. At least advocates of a 'living Constitution' require judges to put their reasoning in front of the public." (9/18/12)

"The Constitutional Challenge to Act 10 is Serious"

"Judge Juan Colas issued a ruling that struck down Act 10, the 'Budget Repair Bill,' on the grounds that the law violates the Wisconsin and U.S. Constitutions. In essence, he held that the law differentiates between entities that represent public employees in collective bargaining – imposing conditions on certain bargaining entities but not others – and that the State had failed to advance a sufficient justification for this disparate treatment. According to Judge Colas, the differential treatment of bargaining entities violated the



federal prosecutor. Ziegler won handily. But, that only preserved the 4-3 activist majority because Ziegler replaced conservative Justice Jon Wilcox.

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. Gableman won, and established a new conservative majority on the high court. Butler was the first incumbent Supreme Court Justice to lose since 1967 and only the fourth in state history.

The historic defeat of Butler, who played an integral role in the activist majority, was in large measure a testament to the steadfast fortitude of the Wisconsin business community to re-establish a rule-of-law high court. In 2009, WMC successfully waged a grassroots, public relations and lobbying campaign to defeat Doyle's plan to re-establish joint and several liability.

The new 4-3 majority has served to preserve new laws passed by the Legislature, such as the Act 10 collective bargaining reforms passed by the Legislature and signed by Governor Scott Walker. The court has also deferred to the Legislature on many issues, refusing to serve as a policymaking body as was the case in 2005 during the Butler era.

In 2011, conservative Justice David Prosser was challenged by liberal lawyer JoAnne Kloppenburg, an environmental lawyer. Unions and trial lawyers spent millions of dollars trying to defeat Prosser to re-establish an activist high court majority, largely in the hopes of overturning Walker's collective bargaining reforms. WMC spent \$2 million on issue ads to fight back against the unions and trial lawyers to explain Prosser's record.

Prosser narrowly won the election which was viewed by many as a referendum on Walker.

In 2011, WMC worked to pass historic lawsuit reforms that overturned the 2005 Supreme Court rulings - re-establishing limits on medical malpractice awards, punitive damage awards and repealing the lead paint ruling; all major victories for our business climate.

Now, union activists are pulling out all the stops to create a 4-3 activist majority by defeating conservative Justice Pat Roggensack. In fact, the unions already have a case in the works from the liberal Dane County Circuit Appeals Courts that would overturn the collective bargaining reforms.

The Wall Street Journal (9/26/2012) reported: "The case also provides a stalking horse for the fight over the future of the Wisconsin Supreme Court. Liberals tried and failed last year to defeat conservative Justice David Prosser in the closely divided court. But in April they will get another chance to lock in a four-liberal majority when conservative Justice Pat Roggensack is up for electoral retention."

"The left has lost every electoral attempt to roll back Mr. Walker's reforms, which have saved taxpayers a bundle and prevented teacher layoffs throughout the state. What an offense against democracy it would be if the clear will of Wisconsin's people were overturned by partisan liberal judges."

Roggensack faces Marquette University Law Professor Edward A. Fallon. If Fallon is elected to the high court, he would establish an activist majority. And all of the reforms of Governor Scott Walker and the business community would hang in the balance. The stakes are high this spring. WMC intends to be fully engaged educating the public about the Wisconsin Supreme Court, continuing our winning tradition. **BV**

First Amendment right of the affected unions to association and expression, and it also violated the Equal Protection Clause. Judge Colas also held that the law violates the Home Rule provisions of the Wisconsin Constitution by dictating rules for Milwaukee that the law did not apply to other municipalities. (9/16/2012)

"Anyone who has been following the nationwide litigation concerning public employee bargaining rights must recognize that Judge Colas was correct to take the plaintiff's constitutional arguments seriously." (9/16/2012)

"Victory for ObamaCare!"

"The decision in National Federation of Independent Business v. Sebelius is a victory for

the supporters of the Affordable Care Act, and a fairly broad vindication for the constitutionality of the law." (6/28/2012)

"ObamaCare is Still Constitutional"

"We know that Congress can regulate potential future actions under the Commerce Clause. It is well settled that Congress can prohibit future activity under the Clause. Does it make a difference if, instead of prohibiting future acts, Congress mandates that future acts take place?"

"The case of Wickard v. Filburn (1942) is the closest precedent to the individual mandate. The law upheld in Wickard forced farmers to enter the market and purchase wheat that they might otherwise prefer to grow themselves. The decision

to forego health insurance is similar to the decision of the farmers to forego the wheat market." (5/1/2012)



*The headlines and quotes are actual excerpts from the blog of Assistant Prof. Ed Fallon of the Marquette University Law School.

<http://law.marquette.edu/facultyblog/author/edward-fallone/>

JUSTICE





JUDICIAL VETO

The Ultimate Disenfranchisement

By Scott Manley, WMC Vice President of Government Relations

More than two-hundred years ago, Alexander Hamilton warned of the danger associated with an activist judiciary attempting to substitute its judgment for that of the Legislature.

In *The Federalist No. 78*, Hamilton echoed Montesquieu's belief that "there is no liberty, if the power of judging be not separated from the legislative and executive powers," and articulated the proper role of courts as follows:

"The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body."

Hamilton's concerns about activist courts and their threat to liberty would prove prophetic.

Today, we are witnessing what could only be described as an ongoing judicial veto of the reforms enacted by the Legislature and Governor Scott Walker.

The collective voices of millions of Wisconsinites who exercised their right to vote to elect Senators, State Representatives and the Governor are being invalidated by a handful of activist judges in Dane County who simply do not agree with the reform agenda. It is a massive-scale disenfranchisement perpetrated by loyal foot soldiers to the liberal cause.

The big question is whether the Supreme Court will let them get away with it.

The Wisconsin Supreme Court currently has a 4-3 traditionalist majority, meaning they typically uphold the rule of law as the Legislature articulated it - without attempting to rewrite laws from the bench.

Justice Pat Roggensack is a leading voice on the Court's traditionalist wing, having received the highest rating for judicial restraint by the Wisconsin Civil Justice Council. As such, she is likely to hold the misguided decisions of activist judges accountable to the law.

Without Justice Roggensack on the Supreme Court, the effort to implement a judicial veto of Governor Walker's agenda is likely to succeed.

The election on April 2 represents the best opportunity for labor unions and others to flip the Court to a 4-3 activist majority, and thereby overturn the legislative will of voters.

Activists on the Court, led by Chief Justice Shirley Abrahamson, have a history of ignoring the Legislature's prerogative, and rewriting laws to fit their own personal agenda.

In 2005, the activist wing of the Court overturned a number of laws they simply disagreed with, including legislatively enacted limits on punitive damages and limits on noneconomic damages in medical malpractice cases.

An activist majority on the Court could do considerable damage to key reforms whose status remains in limbo as legal challenges are pending.

ACT 10 COLLECTIVE BARGAINING REFORMS

The signature reform that propelled Governor Walker into the national spotlight, the public employee collective bargaining law, remains squarely in the

Without Justice Roggensack on the Supreme Court, the effort to implement a judicial veto of Governor Walker's agenda is likely to succeed.

unions' bull's-eye. These reforms transformed public employee benefits, helped balance a \$3.6 billion deficit without raising taxes and provided economic liberty for thousands of public employees who preferred not to pay union dues.

Although the law was upheld as constitutional in its entirety in federal court, an activist Dane County judge ruled key portions of the law were unconstitutional last year in state court. A judicial review of *Madison Teachers, Inc. v. Scott Walker* is likely to reach the Wisconsin Supreme Court in the near future. Justice Roggensack's opponent, law professor Ed Fallone, has been highly critical of these reforms.

VOTER ID REQUIREMENTS

The Legislature passed a law last session requiring voters to present picture identification when voting as a means to prevent voter fraud and ensure the integrity of our elections and the "one person-one vote" principle. Despite voter ID laws being upheld as constitutional in other states and by the U.S. Supreme Court, an activist Dane County judge largely overturned this law in *League of Women Voters Education Network, Inc. v. Scott Walker*. Similarly, an activist Supreme Court could permanently block this important good-government reform.

REGULATORY REFORMS

WMC fought hard to enact comprehensive regulatory reforms last session, which includes requirements for cost/benefit analyses of all new rules and a requirement that the Governor must approve or veto new rules. Last year, a Dane County judge overturned a portion of these reforms in *Peggy Z. Coyne, et al v. Scott Walker*. It would be unfortunate if an activist Supreme Court chose to further erode these reforms and wipe out important checks and balances on the authority of state agencies to regulate.

The cases above are a few examples of the havoc an activist Supreme Court could wreak on the laws duly elected by our Legislature. Going forward, other important reforms like iron mining laws could face a similar fate.

The framers of the U.S. Constitution understood the importance of separation of powers, and they correctly reserved lawmaking for the Legislative branch of government – not the judicial branch. Justice Roggensack has demonstrated her adherence to this important tenet of our system of governance.

April 2 will provide voters with an opportunity to reelect Justice Roggensack, reaffirm the rule of law and push back against disenfranchisement by the fiat of activist judges.

Judicial restraint is on the ballot. **BV**

Follow Scott on Twitter @ManleyWMC



Justice Roggensack visited WMC in January to address the broad-based "business coalition," which includes representatives from sector specific trade associations and individual businesses.



Jason Culotta, WMC
Director of Tax &
Transportation Policy

IN REVIEW: 2013 JUDICIAL EVALUATION

In January, the Wisconsin Civil Justice Council issued its biennial guide to the Supreme Court and Judicial Evaluation. The report sheds light on how the court functions and reveals how each justice voted on the various issues presented before the court that impact Wisconsin's business climate.

The mission of the Wisconsin Civil Justice Council (WCJC), a broad coalition of organizations with an interest in civil liability issues, is to make Wisconsin a better place to work and live by supporting a fair and equitable civil justice system.

The Wisconsin Supreme Court consists of seven elected justices. Each justice serves ten-year terms, although vacancies can be filled by gubernatorial appointment for a shorter period of time. The Court has jurisdiction over all state courts for appeals, chooses which appeals it decides to hear, and may accept cases which have not been heard in a lower court, known as "original actions." The Court's term begins in September and lasts until June, though opinions are often issued well into July.

Decisions rendered by the Court impact every business in the state. The judicial branch can have a dramatic impact on the actions of the executive and legislative branches, as the Court has the authority to interpret or strike down laws passed by the Legislature or rules approved by state agencies.

The WCJC Judicial Evaluation provided a ranking to each justice based on two dozen decisions rendered during the 2010-11 and 2011-12 terms that impact the state's business climate, listed below:

- Chief Justice Shirley Abrahamson 17%
- Justice Ann Walsh Bradley 27%
- Justice Patrick Crooks 54%
- Justice Michael Gableman 70%
- Justice David Prosser 71%
- **Justice Pat Roggensack 74%**
- Justice Annette Ziegler 70%

The justice with the highest percentage based on the decisions issued by the court over the past two years was Justice Roggensack, who received a 74 percent rating from the Judicial Evaluation.

Among the two dozen decisions reviewed in the Judicial Evaluation, the justices ruled unanimously in favor of a position supporting the business climate four times. In four other decisions, the Court ruled unanimously against a position favorable to the business climate. But most of the highlighted decisions were split votes among the justices.

Justice Roggensack was the lone dissenter in two cases where a majority on the Court ruled contrary to a favorable business climate. In *Marquez v. Mercedes-Benz*, a jury found that a vehicle owner and his attorney had intentionally thwarted Mercedes-Benz's attempts to provide a refund according to Wisconsin's lemon law. The circuit court judge overturned the jury and the Supreme Court affirmed that judge's decision.

In the other dissent, *Aurora Consolidated Health Care v. Labor & Industry Review Commission* (LIRC), Aurora was not allowed the ability to cross-examine a physician appointed by LIRC (a state agency to which employee-related issues are appealed). Aurora wanted to challenge the physician's opinion but was denied by LIRC. That denial was upheld by the lower courts and the Supreme Court's majority.

A further example of Justice Roggensack's jurisprudence was in the dissent she authored in *Jandre v. Wisconsin Injured Patients and Families Compensation Fund*. The court's majority ruled that a physician's duty of informed consent is determined using a "reasonable patient" standard that asks what a reasonable person in the patient's position would want to know to make a decision about the choices of treatment. Justice Roggensack's dissent noted that state statute does not allow a physician to be held strictly liable for a missed diagnosis.

These decisions help demonstrate why Justice Roggensack earned the highest score in the evaluation, and illustrate her support of an environment favorable to business. **BV**

To read the full report, visit WCJC's website: <http://www.wisciviljusticecouncil.org/judicial-evaluation/>

Follow Jason on Twitter @JGCullota

Celebrating 25 Years!

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2012 Winners



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THE DEMOCRATIC PROCESS IS AT STAKE

By Rick Esenberg, Founder, President and General Counsel, Wisconsin Institute for Law & Liberty

I am fond of suggesting that races for the Wisconsin Supreme Court are almost as important as those for Governor. For better or worse, the Court makes extremely important decisions about our common lives, occasionally countermanding the democratic process.

Don't believe me? Here are a few Court decisions back before there was, for lack of a better term, a "conservative" majority. Each was decided by a 4-3 vote.

In 1994, the people of the state of Wisconsin voted to amend the State

Constitution to prohibit casino-type gambling. In 2006, the Court decided that not only could casino games that were permitted before 1994 on Indian reservations could continue, but new games could be added. Many years ago, the state legislature passed a system for compensating victims of medical malpractice that placed a limit on the "noneconomic" damages that could be awarded to plaintiffs. Plaintiffs could recover all of their medical expenses and lost earnings but were subject to a maximum of \$450,000 for pain and suffering. In 2005, the Wisconsin Supreme Court held this legislative policy choice invalid.

During the same year, a majority of the justices (this time by a 4-2 vote) infamously held that manufacturers of lead paint pigment – a product removed from the market decades earlier – could be held liable even if a plaintiff was unable to show the defendants had manufactured the pigment which caused injury. Our Supreme Court was the only one in the country to make such a ruling.

I could go on. Following the passage of Wisconsin's collective bargaining reform, a Dane County judge, contrary to well-settled law, blocked publication of the new law. While the Supreme Court reversed that decision – it did so by a 4-3 vote with a minority of the justices calling for further proceedings. One vote might have delayed, and perhaps permanently derailed the law.

The Court will be no less important in the coming years as much of Governor Walker's reform agenda may come before it. The constitutionality of Act 10, voter identification and regulatory reform (all struck down, in whole or in part, by Dane County judges) are headed to the Court as are a variety of cases involving the comprehensive tort reform passed in January 2011. In a country where legislation is almost always a prelude to litigation and, with apologies to Nancy Pelosi, we must pass the bill so that a court can tell us whether it will be allowed to go into effect,



current legislative initiatives, including a mining bill and the expansion of school choice, are likely to come before these seven men and women.

In addressing these issues, the composition of the Supreme Court is likely to matter. The current justices are certainly divided. It is commonly supposed

that there is a “conservative”

majority

consisting of

Justices David

Prosser, Pat

Roggensack,

Annette

Ziegler and

Michael Gableman,

with Chief Justice Shirley

Abrahamson and Justices Ann Walsh

Bradley and Pat Crooks forming a liberal

minority.

Of course, the Court is not always sharply divided. Nor will the “conservative” majority and “liberal” minority always rule in ways that advance the policies of a particular political faction. It is important to recognize that “conservative” and “liberal” does not mean quite the same thing for judges as it does for legislators.

We often speak of “liberal” judges as “activists” and conservatives as practicing “judicial restraint.” Much of the public conversation regarding these terms presumes either a sharp dichotomy (activist judges do whatever they want, while “restraintists” simply follow clear legal instructions) or a complete absence of standards (all judges are activists). The full story is more complex.

During his confirmation hearing, U.S. Chief Justice John Roberts told the U.S. Senate Judiciary Committee that “[j]udges are like umpires. Umpires don’t make the rules; they apply them . . .” He had a point, but I prefer the story of three umpires (perhaps they were at a bar) who had very different views of their roles.

The first umpire claimed to call them as he sees them. The second said that he calls them as they are. The third, who may have held down a day job as a law professor at Yale, went one step further. “They are,” he said, “nothing until I call them.”

In attempting to understand judicial restraint, the first umpire has it right. Just as there are many pitches on which an umpire must make a judgment call, even judges practicing judicial restraint may differ on what the law means. But just as not all pitches can be either strikes or balls depending upon the whim of the umpire, the Constitution and statutes cannot

mean anything and ought not to be made to mean whatever

we think is a good idea this morning. A good judge, like a good umpire, needs to believe there is a strike zone and that it must be honored.

Judges who practice judicial restraint – call them conservatives

if you wish – are more likely to regard statutory and constitutional text as authoritative and to engage the text, structure and history of the written law in a way that seeks to determine what it means rather than to dismiss it as “ambiguous” and to proceed to resolve cases based on what a majority believes to be the “best” policy. They are more likely to adhere to certain interpretive methods that limit, rather than expand, judicial discretion. For example, they are less inclined to resolve legal issues through multi-pronged tests that permit courts to consider many different factors in deciding cases that lower courts and litigants have little guidance and outcomes are difficult, if not impossible, to predict. They are more likely to frame constitutional analysis in a way that defers to the judgment of the legislative and executive branches.

Few lawyers or judges would actually advocate judicial activism in the sense of explicitly urging that judges ignore the law and do whatever they want. Yet much of the popular criticism of “conservative” judges is based not on a claim that they get the law wrong, but that they are “unfeeling” or hand down decisions that are not “good” policy. These critics are likely to sympathize with that third umpire. For them, the strike zone is elastic. Perhaps laws cannot mean anything, but they can mean many things – so many things, it seems, that there is little to prevent judges from doing whatever they believe to be right.

Of course, there will be areas where the law is unclear and where even judges practicing judicial restraint are forced to make judgments about the ways in which the world works and even resort, in limited ways, to their own philosophical perspectives. But judges differ about the circumstances in which this is so and the frequency with which it must be done. These differences in approach will affect how cases are decided.

Two years ago, opponents of the Walker reform poured substantial resources into the attempt by Madison lawyer Joanne Kloppenburg to unseat incumbent Justice David Prosser and just missed. While it is unclear whether the same level of resources will be deployed this spring, the same interests are lining up behind Marquette law professor Ed Fallon in his challenge to Justice Pat Roggensack, a former Court of Appeals judge, first elected to the Court in 2003. Although Roggensack beat Fallon handily in the February primary, Prosser also rolled up a substantial margin in February, only to find himself in a horse race in April.

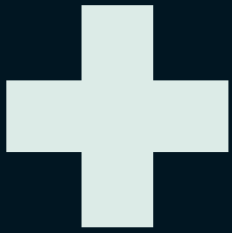
It is unclear whether the same resources and energy will be put into this effort to change the composition of the Court. What is certain is that the outcome will matter – for the Court and for all of us in Wisconsin.

Don’t expect any judicial candidate to claim that he or she is an “activist” or even a “liberal.” Even where the labels fit, they won’t help win judicial elections. Evaluating judicial candidates requires a careful examination of his or her record and legal philosophy. The effort is worthwhile.

If past is prologue, one vote on the Court can make all the difference on issues critical to the future of our state. You should vote for the Court as if your business depended on it. **BV**



Rick Esenberg is Founder, President and General Counsel of Wisconsin Institute for Law & Liberty. Learn more at www.will-law.org



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Briggs & Stratton Corporation,
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ISSUES & BACKGROUND	ED FALLONE 	JUSTICE PAT ROGGENSACK 
CURRENT POSITION	Associate Law Professor, Marquette University, 20 years	Wisconsin Supreme Court Justice, elected 2003
JUDICIAL EXPERIENCE	None	Wisconsin Appeals Court, two terms
OTHER EXPERIENCE	Private practice attorney, Gonzalez Saggio & Harlan LLP Civil litigation	Private practice attorney, De Witt Ross & Stevens S.C. 16 years.
PHILOSOPHY	Activist. "The existing constitutional framework should be interpreted to encompass 'new' constitutional rights." (Fallone blog, 9/18/2012)	Traditionalist. Scored an 83 percent record on the Wisconsin Civil Justice Council review of court rulings of the past four years.
BUSINESS ISSUES	Favored constitutionality of federal healthcare law. Wrote state collective bargaining reforms may be unconstitutional. (Fallone blog, 5/1/2012 and 9/16/2012)	Supports allowing the Legislature to establish caps on medical malpractice, punitive damage awards and other civil liability limits. Upheld Act 10 collective bargaining reforms, and opposed expanded liability for lead paint manufacturers.
SUPPORTERS	AFL-CIO, WEAC, United Wisconsin, AFSCME Local 48 & 40, Madison Teachers, Inc., Democrat lawmakers, Milwaukee area business executives, two sheriffs, 17 judges and one former district attorney.	Endorsed by more than 100 judges including four former Supreme Court justices, 53 Sheriffs, 23 District Attorneys, Milwaukee police supervisors, Milwaukee Professional Firefighters and Milwaukee Police union and business groups.
COMMUNITY	Founding president of Centro Legal, a service that helps working families gain access to legal counsel they could not otherwise afford. Past president of the Latino Community Center focusing on programs to keep kids in school, off the streets and out of gangs. He and his wife Heidi founded Wisconsin Stem Cell Now, an advocacy and education group dedicated to the promotion of life-saving medical research.	Commissioner on the Uniform Laws Commission, Fellow of the American Bar Foundation, past president and a current member of the Wisconsin Judicial Council, and numerous other local bar associations. Member of the International Women's Forum and a past president of the Wisconsin chapter. Board YWCA of Madison, the Wisconsin Center for Academically Talented Youth, and the Olbrich Botanical Gardens.
EDUCATION	B.A., summa cum laude, Boston University, Spanish Language & Literature J.D., magna cum laude, Boston University	B.A., Drake University, 1962 J.D., University of Wisconsin Law School, 1980

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