Partial Justice: The Partisan Attack on Fair Courts in Wisconsin

The American ideal of “Equal Justice Under Law” depends on a justice system fully staffed with fair-minded and impartial jurists. For those who are politically unpopular, or who cannot match the political influence of big-spending special interest groups, an independent judiciary holds the promise of equal treatment—a branch of government, free from the influence of wealth and power, where decisions are made solely on the relevant law and facts.

Wisconsin, in particular, has long shown a commitment to government that is open and accessible to all, serving as a model for the rest of the Nation. But now, in Wisconsin, Republicans are mounting a partisan attack on the state and federal courts to advance a conservative agenda at the expense of everyday people. At the federal level, Senator Ron Johnson has for years obstructed and delayed filling a Wisconsin seat on the Seventh Circuit Court of Appeals. That vacancy is now more than five years old and is the oldest circuit court vacancy in the country.

In the state government, Republican lawmakers and Governor Scott Walker have embarked on a brazen power grab of the state’s judiciary, angling for more control in whatever way they can. As he ramps up for a potential presidential run in 2016, Walker is using his executive budget to take control of judicial salaries; disband the independent council that advises all branches of state government on court practice and procedure; and weaken the Wisconsin Judicial Commission, the state body charged with investigating judicial ethics violations and recommending discipline. In the state legislature, Republicans are pushing measures that would directly undermine the will of Wisconsin voters who elected the current supreme court. GOP proposals would disrupt the court’s current composition by setting a mandatory retirement age for the justices, and changing how the court appoints its chief justice.

What’s more, these political forays into the courts, pernicious in their own right, come as the state’s supreme court is already losing the public’s trust over controversial decisions that appear to be influenced by wealthy special interests and campaign donors.

In each case—Senator Johnson’s obstinacy on the Seventh Circuit and state officials’ meddling with the supreme court—both the intent and effect are clear: To use the justice system as another political tool to advance a partisan agenda, thereby undermining the choices made by Wisconsin’s voters, and diminishing the courts’ central role as protectors of equal justice.

Partisan Intrusions into the Wisconsin Supreme Court

If there is a question about the political motivations behind the proposed supreme court changes, it is answered by looking to the immediate impact of these changes on Chief Justice Shirley Abrahamson.
Known nationally as a prolific writer and a brilliant jurist, Chief Justice Abrahamson became the first woman on Wisconsin’s high court when Governor Patrick Lucey appointed her in 1976. She was elected to a ten-year term in 1979, and has been reelected four times, most recently in 2009. She has been the court’s chief justice since 1996, and is the longest-serving justice in state history.

Abrahamson also leads the court’s minority progressive wing, and conservative state lawmakers, frustrated that she has not bent to their political will, want to minimize her role on the court or remove her entirely. Republican legislators have proposed two changes directed at Chief Justice Abrahamson. One is a state constitutional amendment that would change how the chief justice is selected. For the last 126 years, Wisconsin’s chief justice has been appointed based on seniority; the proposed amendment, which will ultimately go to Wisconsin voters as a ballot initiative on April 7, would call for the court’s justices to elect the chief justice. 1 Given the court’s current composition, this is an election Abrahamson would inevitably lose to a more conservative judge. 2 The second proposal would set a mandatory retirement age for the court’s justices, reportedly at 75 years old. 3 Abrahamson is 81.

Constitutional amendment threatens judicial independence

Supporters of the amendment changing chief justice selection say it is targeted at the court as an institution rather than Abrahamson herself, and that electing the chief justice will make the court more democratic and collegial. But Republicans’ insistence that the change take immediate effect, rather than at the end of Abrahamson’s current term, betrays their ideological motivations. Legislative court reforms typically contain a “grandfather” provision that preserves the status quo until a future election, lest the majority will of the political branches erode judicial independence. 4 In Wisconsin, though, judicial independence is of little concern to conservative politicians intent on controlling the court.

There is also great irony in invoking “democratic process” as a virtue of the amendment. Republicans could have delayed the measure until the November 2016 presidential election, when voter turnout would be higher, and maximum democratic participation would be ensured. Instead, as former Wisconsin Attorney General Peg Lautenschlager pointed out, they rushed to get it on the ballot during an off-year election when turnout is far lower and “people on the far extremes have a better chance of getting what they want done at the ballot box.” 5 Keep in mind, also, that in 2011 conservative Wisconsin legislators made an extra effort to keep turnout down—particularly among

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1 Last month, both the State Assembly and Senate passed the chief justice constitutional amendment with party line votes. Having passed in both chambers for the second consecutive legislative session, the amendment now goes to voters as a statewide referendum on April 7.
those likely to oppose their agenda. They trampled democracy with one of the most restrictive voter identification laws in the country. That law, which one federal judge found “results in the denial or abridgment of the right . . . to vote on account of race or color,” was later enjoined by the United States Supreme Court.7

Proposed age limit would undermine will of Wisconsin’s voters

The age-limit bill has not yet been introduced, but Republican State Rep. Dean Knudson has promised to push for it this year. Knudson has already rejected delaying its effective date beyond Abrahamson’s current term, saying “that this really isn’t about any individual.”8 But that response gets it exactly backward; the only reason not to delay the rule’s effective date is if it is targeted to unseat a particular justice. If the new rule is about the court as an institution, and not its current composition, then it should apply only to justices elected or appointed after the rule is enacted. Instead, Rep. Knudson wants to cast aside the will of Wisconsin’s voters, who just six years ago reelected Chief Justice Abrahamson, at the age of 75, to serve a full 10-year term.

Governor Walker seeks executive control over judiciary through budget proposals

Not to be outdone, Republican Governor Scott Walker has made his own insidious attacks on judicial independence in his 2015-2017 executive budget. One provision would modify the statute that requires the chief justice to earn a different salary from the court’s associate justices.9 Chief Justice Abrahamson’s current salary is about $8,000 higher than that of her colleagues’. Walker’s budget would strike that provision, likely resulting in a pay cut for Abrahamson if she retains her position as chief.

As a matter of law, Walker’s salary proposal is of doubtful constitutionality. Wisconsin’s state constitution provides that “the compensation of a public officer,” including supreme court justices, “may not be increased or diminished during the term of office.”10 This provision exists to prevent precisely what Walker is trying to accomplish: Using a salary decrease to punish judges who are—and should be—acting independently. Thus, Walker’s attempt to cut Abrahamson’s salary is simply another among several improper, and perhaps even illegal, attempts to interfere with judicial independence in pursuit of a partisan agenda.

Another budget item is aimed at Wisconsin’s ethics-regulating Judicial Commission. The Judicial Commission oversees judicial conduct, and has the authority to investigate ethics complaints and recommend disciplinary action. Since its creation in 1971, the commission has operated as an independent agency with nonpartisan appointees. Now Governor Walker wants to move the commission under the control of the supreme court, meaning that the same justices who might face investigation by the commission would also have control over its staff and funding.

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10 Wisconsin Constitution Art. IV, § 26(2).
This proposal has been denounced even by conservative Justice Annette Ziegler, who in 2008 faced a judicial reprimand after the commission found that she failed to disclose a conflict of interest. “I’m not convinced the Supreme Court budget is the best place for the commission,” Ziegler said, “It looks like the commission is under our authority and control when frankly it shouldn’t be.”

Despite the obvious conflict inherent in this proposal, Walker’s office told the Milwaukee Journal Sentinel that it is merely administrative.  

Finally, Walker’s budget would also eliminate the Wisconsin Judicial Council. The council, created by statute in 1951, is a 21 member panel that makes recommendations on court practice and procedure, and the organization, jurisdiction, and administration of Wisconsin courts. The council maintains a diverse membership, pulling from the general public, state government, and a broad swath of Wisconsin’s legal community, including judges, the Attorney General, the State Public Defender, and law school deans. This session, the state legislature is expected to consider changes to the state’s rules of criminal procedure that the council has spent years developing. But if the council disbands, these new reforms will die along with it. 

An Already Politicized Court

These partisan efforts come when the court is already under scrutiny for its ties to conservative special interests, and facing the perception that its decisions are dictated more by lavish campaign contributions than impartial legal reasoning. 

Over the last 15 years, Wisconsin Supreme Court elections have been highly contentious and expensive affairs, replete with personal attack ads and massive outside spending. Spending on TV ads alone topped $3 million in both the 2008 and 2011 elections. In 2008, the Wisconsin Supreme Court race cost $5.96 million, including $1.2 million in campaign spending and $4.8 million spent by outside interest groups. Similarly, in 2011, the election’s total cost was $5.4 million, with much of that—about $4.5 million—spent by outside special interests.

The most prolific spender has been Wisconsin Manufacturers and Commerce (WMC), the state’s largest business group. Since 2007, WMC has spent at least $5.56 million to elect the court’s current four-justice conservative majority. It spent $2.2 million in 2007 to support Justice Annette Ziegler; $1.8 million in 2008 to support Justice Michael Gableman and defeat incumbent Louis Butler; $1.1

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12 Id.
14 See Marley, n. 11, supra.
million in 2011 to support Justice David Prosser; and $500,000 in 2013 to support Justice Pat Roggensack.\textsuperscript{17}

WMC’s substantial investments in the state’s high court have paid off.

In 2010, WMC, joined by the Wisconsin Realtors Association, successfully petitioned the court to make it easier for campaign donors to benefit from buying judicial elections. WMC asked the court to change the “recusal” rule that governs when a judge has to remove herself or himself from a case. WMC proposed a change stating that a “judge shall not be required to recuse himself or herself in a proceeding based solely on . . . the judge’s campaign committee’s receipt of a lawful campaign contribution . . . from an individual or entity involved in the proceeding.”\textsuperscript{18} WMC also proposed that judges’ campaign committees be permitted to solicit donations from groups and individuals “involved in a proceeding in which the judge, candidate for judicial office, or judge-elect is likely to participate.”\textsuperscript{19} In other words, WMC covered all its bases: It asked for permission to appear before judges to whom it already gave money, and to pay judges presiding over matters in which it is already a party.

The court’s four-justice conservative bloc adopted both proposals verbatim.

The rules changes were also adopted with injudicious alacrity. WMC’s petition was granted less than two weeks after it was filed, and without, as Justice Anne Bradley wrote in her dissenting opinion, “study, discussion, or further input.”\textsuperscript{20} Justice Bradley said that in her 15 years on the court, she had never seen a major rules petition adopted so expeditiously—“[n]ever,” she wrote, “until now.”\textsuperscript{21}

And now Governor Walker—another official that WMC’s largesse has helped to elect and keep in office—is trying to further insulate the justices from ethics complaints by moving the Judicial Commission under supreme court control.

As it happens, these changes to the recusal rules and their enforcement are well-timed for a politically charged case that the court will decide this year.

In December 2014, the court announced that it would hear challenges to the so-called “John Doe” criminal investigation into Wisconsin Governor Scott Walker’s campaign when he faced an effort to recall him from office. The probe is examining whether Walker’s campaign illegally coordinated with outside groups. Three groups that are targets of the investigation are now asking the court to step in and block it. Those same three groups collectively spent millions of dollars to elect the court’s four conservative justices. Chief among them is WMC, whose 2010 rules petition will allow the recipients

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\textsuperscript{17} The Wisconsin Democracy Campaign obtained an internal 2013 WMC memo that reports even higher spending. According to the memo, WMC spent $2.5 million in 2007, $2.25 million in 2008, and $2 million in 2011. The memo is dated before the 2013 election, and does not include the group’s spending for that year. See id.
\textsuperscript{18} In re amendment of the Code of Judicial Conduct’s rules on recusal, Nos. 08-16, 08-25, 09-10, 09-11, 2010 WI 73, 2 (July 7, 2010).
\textsuperscript{19} Id. at 5.
\textsuperscript{20} Id. ¶ 37 at 11 (Bradley, J., dissenting).
\textsuperscript{21} Id. ¶ 39 at 12 (Bradley, J., dissenting).
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of WMC’s generous campaign spending to decide whether a criminal investigation against it should proceed.\textsuperscript{22}

In light of this history and the pending John Doe cases, politically-motivated court “reforms” will only inject more politics into an already tainted court. According to a 2011 survey by Justice at Stake, only 33 percent of Wisconsin voters had confidence in their state supreme court, and a full 88 percent were “concerned that campaign spending and the deteriorating tenor of judicial elections [had] tarnish[ed] the reputation” of the court.\textsuperscript{23} At stake, then, is not just the fate of one judge, but the legitimacy of the court itself, and the public’s waning confidence in the court’s ability to provide justice without regard to a partisan agenda.

The Nation’s Longest Federal Circuit Court Vacancy

Wisconsin Republicans have not limited their political gamesmanship to the state courts. Because of Senator Ron Johnson’s unilateral obstruction, the Seventh Circuit Court of Appeals is now home to the oldest circuit court vacancy in the country and the second \textit{oldest federal judicial vacancy without a nominee}.

More than five years ago, in January 2010, Judge Terence T. Evans assumed senior status and left an empty Wisconsin seat on the Seventh Circuit. President Obama moved quickly to fill it, and in July 2010 he nominated University of Wisconsin law professor Victoria Nourse. Nourse came at the recommendation of then-Senators Herb Kohl and Russ Feingold and their merit-based selection commission. But after Senator Feingold left office, Senator Johnson, elected in November 2010, objected to Nourse’s nomination. Johnson never provided a substantive reason for his disapproval, saying only that Nourse, who had been with the University of Wisconsin for 16 years before her nomination, “really has very little connection to the state of Wisconsin, and nobody in the legal community in Wisconsin knows anything about her.”\textsuperscript{24}

Because of Johnson’s objection, the nomination stalled in the Senate Judiciary Committee. Then 53 law professors from around the country wrote to committee leadership, and argued that Senator Johnson should not be able to single-handedly defeat a nomination that had been made by the president and approved by both Wisconsin senators before Johnson was even elected. “For a single Senator from one state within the Circuit to assert a hold, months after the nomination was complete, undermines Wisconsin’s merit-based selection system, blocking highly qualified nominees from a hearing and a vote,” they wrote.\textsuperscript{25} But without Johnson’s support, Nourse never received a confirmation hearing, and the White House ultimately withdrew her nomination in December 2011.

For conservatives in Wisconsin, Senator Johnson’s one-man filibuster of Victoria Nourse nearly paid off in a major voting rights case before the 2014 mid-term elections.

\textsuperscript{22} See Holmes, n. 2, \textit{supra}.


On September 12, 2014, a three-judge panel of the Seventh Circuit reinstated Wisconsin’s voter ID requirement, reversing a district court decision that had enjoined the law. The district court had found that the law discriminated on the basis of race and was, in any event, wholly unnecessary, since defenders of the law “could not point to a single instance of known voter impersonation occurring in Wisconsin at any time in the recent past.”

Plaintiffs challenging the law then turned to the full Seventh Circuit, asking the court to review the panel decision “en banc,” with all 10 of its active judges. En banc review is granted only when a majority of the court’s active judges agree to hear the case. Had Judge Evans still been active, he almost certainly would have voted to grant review. In 2007, he described a similar (though less restrictive) voter ID law in Indiana as “a not-too-thinly-veiled attempt to discourage election-day turnout by folks believed to skew Democratic.” But Judge Evans was not there, and neither was Victoria Nourse, another likely candidate for granting review. With the Wisconsin seat empty, the full court divided evenly, five to five, and denied the plaintiffs’ request to review the panel decision. But for the U.S. Supreme Court’s eleventh-hour decision to reinstate the district court’s injunction, the Seventh Circuit would have effectively ordered the disenfranchisement of hundreds of thousands eligible Wisconsin voters unable to obtain ID before the November mid-terms.

The voter ID cases show the profound, real-world effects of a persisting vacancy. Yet Senator Johnson has done more than block a single nominee. He also pushed for structural changes to Wisconsin’s decades-old Federal Nominating Commission. The commission had been used to fill every federal judicial vacancy in Wisconsin since 1983, when Democratic Senator William Proxmire and Republican Senator Bob Kasten used it to fill a trial court vacancy in the Eastern District. For those 30 years, the commission consisted of 11 members appointed by Wisconsin’s two senators and the Wisconsin State Bar. If one senator was a member of the president’s political party, then he or she would appoint five commissioners, and the other senator would appoint three. If both senators were members of the president’s party—as was the case with Kohl, Feingold, and President Obama—each senator appointed four commissioners. The remaining commissioners were appointed by the state bar.

With a Democrat in the White House, Senator Johnson objected to this format and called for “equal representation” on the commission for each senator, regardless of party. In April 2013, Senators Johnson and Tammy Baldwin, who had replaced Senator Kohl, announced a new six-member commission with three members appointed by each senator.

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27 Crawford v. Marion Cnty Election Bd., 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting).
28 On October 9, 2014, the Supreme Court reinstated the district court’s injunction pending final disposition of a petition for a writ of certiorari. Frank v. Walker, 135 S. Ct. 7 (2014).
The senators opened the process for the Seventh Circuit vacancy last summer, calling for applications to the commission by September 8, 2014. As of this writing, there have been no reports of recommendations from either the commission to the senators, or from the senators to the president.

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Our courts, and the judges who serve on them, play a very different role in our democracy from the politicians we elect to legislative and executive office. This is true even of judges who are elected. Unlike lawmakers who shape policy, judges must resolve disputes based not on popular opinion, but on the law and facts before them. They are impartial arbiters, not proxies for the whims of political bosses. Which is why for courts to work properly—to truly serve as protectors of Equal Justice Under Law—judicial independence from the political branches must be preserved.

In Wisconsin, long an exemplar of fair and open government, judicial independence is being cast aside. Judges who do not fall in line are punished. Powerful special interests and wealthy campaign donors are rewarded. Longstanding judicial vacancies are left open to preserve a more politically advantageous court. And the people who depend most on fair courts to protect their rights are left out in the cold.

The people of Wisconsin deserve better. They should vote down the chief justice ballot initiative on April 7, and demand an end to the partisan takeover of Wisconsin’s courts.