ARTICLE

John D. Echeverria.............................................................................................................................363

WHITE RIVER ENVIRONMENTAL LAW WRITING
COMPETITION WINNER

Locomotives v. Local Motives: The Coming Conflict, Statutory Void, and Legal Uncertainties Riding with Reactivated Rails-to-Trails
Matthew J. McGowan.........................................................................................................................482

NOTES

Settling Environmental Disasters: Three Judicial Factors to Consider and Application to the Mayflower, Arkansas Oil Spill
Michael S. Campinell........................................................................................................................519

Engaging Farmworkers in Enforcement of Environmental Policy: The Case for a New Cooperative Visa
Sarah Zelcer........................................................................................................................................542
VERMONT JOURNAL OF ENVIRONMENTAL LAW
Vermont Law School
P.O. Box 96
South Royalton, Vermont 05068
(802) 831-1024
vjel@vermontlaw.edu
vjel.vermontlaw.edu

Cite to this Journal as: 16 VT. J. ENVTL. L. (2015).

The views expressed in this issue are those of the authors and do not represent the position or views of VJEL or Vermont Law School.

Submissions: VJEL welcomes the submission of unsolicited articles, comments, essays, and book reviews. Manuscripts can be submitted to the above addresses.

Subscriptions: You can subscribe directly to our Journal online at vjel.vermontlaw.edu.

Copyright: © Copyright 2015 by Vermont Law School. All rights reserved. Except as otherwise provided, the author of each article in this issue has granted permission for copies of that article to be made for classroom use, provided that: (1) the author and Vermont Journal of Environmental Law are identified on the copied materials; (2) each copy bears the proper notice of copyright; and (3) Vermont Journal of Environmental Law is notified in writing of the use of the material(s).

This Journal is available exclusively in electronic format.
STATE JUDICIAL ELECTIONS AND ENVIRONMENTAL LAW:
CASE STUDIES OF MONTANA, NORTH CAROLINA,
WASHINGTON, AND WISCONSIN

By John D. Echeverria*

Introduction and Overview ................................................................. 364
I. Montana .......................................................................................... 372
   A. Montanans’ Right to a Clean and Healthful Environment .......... 372
   B. The Montana Judicial Electoral Process ................................. 378
   C. Judicial Rulings Affecting the Judicial Electoral Process ........ 380
   D. The Ideological Struggle for Control of the Supreme Court ..... 386
   E. The 2012 Election ................................................................. 387
   F. The 2014 Appointment ......................................................... 392
   G. The 2014 Election ................................................................. 392
II. North Carolina .............................................................................. 398
   A. The Dan River Ash Waste Spill ............................................ 398
   C. North Carolina Environmental Case Law ............................ 405
   D. Judicial Elections and State Politics .................................... 411
   E. The 2012 Election ................................................................. 414
   F. The 2014 Election ................................................................. 417
III. Washington ............................................................................... 422
   A. The Environmentalists’ Success Story ................................. 422
   C. Environmental Law in the Supreme Court ......................... 425
   D. Modern Judicial Elections in Washington ....................... 427
   E. The 2006 Election ................................................................. 435
   F. The 2008 Election ................................................................. 441
   G. The 2010 Elections .............................................................. 443
   H. The 2012 Election ................................................................. 452

* The author is a Professor of Law at Vermont Law School. He received a J.D. degree from Yale Law School in 1981. He would like to gratefully acknowledge the help and support of the Piper Fund on this research project.
This article presents case studies of the judicial electoral process and its implications for environmental legal protections in four states: Montana, North Carolina, Washington, and Wisconsin. Academics and other researchers have documented the growing partisan competition and increasingly high levels of expenditures in state judicial elections. Prior research has also documented the efforts by various special interests to influence the ideological complexion of the state courts by supporting or opposing specific candidates for judicial office. This article builds upon this prior work by attempting to determine whether successful efforts to change the personnel sitting on specific state courts have influenced subsequent rulings by these courts in cases, involving environmental law questions.

The importance of the state courts in the development of environmental law, standing alone, makes it worthwhile to study how the outcomes of elections to the States’ highest courts may affect the content of environmental law. The federal courts and the United States Supreme Court in particular, play a more visible role than the state courts in the development of environmental law. But state courts play an important role in the development of environmental law, by virtue of the breadth of their jurisdiction in cases involving environmental issues, the States’ adoption of pollution control and other environmental laws that parallel similar federal


2. See, e.g., G. Alan Tarr, Rethinking the Selection of State Supreme Court Justices, 39 WILLAMETTE L. REV. 1445, 1458–59 (2003); see also Lawrence Baum, Judicial Elections and Judicial Independence: The Voters’ Perspective, 64 OHIO ST. L.J. 13, 32–34 (2003) (noting that the interest groups involved are those with economic stakes in court decisions).
statutes, and the States’ exercise of extensive environmental law enforcement responsibilities delegated to them by the federal government.\(^3\)

In addition, environmental law rulings by the elected state courts are worthy of attention because various special interests have invested substantial resources in state judicial elections for the explicit purpose of affecting the outcomes of environmental law cases before these courts.\(^4\) The natural question raised by this political activity is whether the effort has been worthwhile, as measured by actual changes in case outcomes. As I have described in a prior article, starting in the mid-1990s, advocacy groups and consulting firms financed by Charles and David Koch initiated a nationwide effort to change the direction of state environmental law (and law on other topics) by organizing political efforts to elect conservative candidates to the state courts.\(^5\) Around the same time, the U.S. Chamber of Commerce created its Institute for Legal Reform, which seeks to promote the election of business friendly judges to the state courts,\(^6\) and business groups in individual states mounted similar efforts.\(^7\) These business groups and their conservative allies publicly justified these initiatives as necessary, from their perspective, to respond to prior efforts by trial lawyers to secure the election of judges sympathetic to personal injury claims.\(^8\) However, the conservative counter-offensive has plainly been broader and more intense than anything that came before.\(^9\) The Kochs and allied groups focused on state judicial elections in part because they have traditionally been “sleepy,” “low-key” contests in which relatively modest investments in campaign contributions and independent advocacy yield significant political rewards.\(^10\)

The States vary in their approaches to selecting judges to their highest courts and some states do not rely on elections at all. In twelve states, judges are appointed (and reappointed) to office for life or for some defined

---

4. Id. at 223.
5. Id. at 231–34.
7. Id. at 255, 290.
8. Id. at 226.
In six states judges are elected in partisan elections, and in fifteen states they are elected in nonpartisan elections. In the remaining seventeen states, judges are selected through some form of appointment process and then face “retention” elections following their appointment.

This research focuses only on Montana, North Carolina, Washington, and Wisconsin. Each of these states uses either a partisan or nominally nonpartisan method for selecting judges for their high courts. The study was confined to states with direct partisan or nonpartisan elections on the premise that these states were the most likely to have experienced the kind of vigorously contested judicial elections that might produce identifiable changes in the ideological direction of their courts’ decision-making. These four states were selected after a survey of a larger number of candidate states, based on their geographic distribution and the likelihood that they would reflect varying levels of success by industry opponents of environmental regulations, on the one hand, and environmental advocates, on the other, in the judicial electoral process. The results in these four states are not necessarily representative of the consequences of judicial elections for environmental law in all states with elected supreme courts. Nonetheless, this sample of states appears to be instructive and provides a foundation for potential future research.

One methodological challenge in conducting this research has been determining how to define the scope of the environmental case law to be examined for the purpose of evaluating whether the outcomes of judicial elections influence a state’s environmental legal protections. Environmental law, especially at the state level, is a wide-ranging field. It can be defined to include not only cases involving traditional pollution control and natural resource issues, but also cases involving state and local land use regulation, water resource management, consumer protection, and public health and safety measures. To make matters more complicated, state court cases not directly involving an environmental dispute may produce rulings with important environmental law implications. Cases involving standing to sue or claims of constitutional takings represent two obvious examples. To narrow the universe of potentially relevant cases to a manageable core, I generally relied on the West keynote system to identify the cases in each state that generated an “environmental law” headnote over a ten- to fifteen-
year period. This approach unquestionably misses important environmental law cases. But the selected cases are likely to be reasonably representative of a state court’s general tendencies in environmental law.\(^{16}\) A more intensive effort involving examination of a larger number of state cases would yield more robust results.

Another complicating factor is that the scope of the states’ high court jurisdictions varies from state to state. The Montana Supreme Court hears appeals as of right from the District Courts and other inferior courts, and therefore lacks discretion to choose the appeals it wishes to hear.\(^ {17}\) By contrast, the Supreme Courts in North Carolina, Washington, and Wisconsin each exercise appellate jurisdiction that is at least in part discretionary.\(^ {18}\) This difference between the jurisdictions of the states’ high courts may confound the analysis in ways that are hard to discern. It is possible that if a court tends to rule in favor of environmental advocates it will tend to disproportionately grant leave to appeal in cases in which environmental advocates present compelling arguments for reversing lower court decisions. On the other hand, it is possible that if a court tends to rule in favor of opponents of environmental regulation it will tend to disproportionately grant leave to appeal in cases in which opponents of regulation present compelling arguments for reversal. Unfortunately, the data and analysis conducted as part of this research project provide no useful insights into this potentially important issue.

In brief, the major state-by-state conclusions of this study are as follows:

Montana’s Supreme Court has 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

---

\(^ {16}\) Unfortunately for my purposes, West Publishing is not very forthcoming in describing the parameters used by classifiers to assign different headnotes to specific categories in the Westlaw keynote system. The Key Number link on the WestlawNext home page provides only the most basic information: “West attorney editors have read, summarized and classified case law by topic and subtopics that represent specific points of law. Each specific point of law is assigned a unique number, called a Key Number.” Key Number Information, WESTLAWNEXT, http://www.westlawnext.com (last visited Jan. 23, 2015). See also Robin Gemandt, The Westlaw Editorial Process for Patient Protection and Affordable Care Act, Part 4 (Key Numbers), LEGAL SOLUTIONS BLOG (Sept. 20, 2012), http://blog.legalsolutions.thomsonreuters.com/legal-research/the-westlaw-editorial-process-for-patient-protection-affordable-care-act-part-4-key-numbers/#hash.nH59R7L7.dpuf (describing the work of West keynote “classifiers”).


healthful environment.” In recent years, however, environmental advocates have suffered some notable losses before the Supreme Court. For example, the Court declined to apply the Montana Environmental Policy Act to a major lease of state lands for coal mining, and in another case the court declined 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, for example in an important stream access case, the Court has split sharply along ideological lines. This change in results and atmosphere can be explained, at least in part, by the results of recent judicial elections. In 2012, the Montana Growth Network, led by a Montana Tea Party activist and funded by a handful of wealthy but anonymous donors, helped secure the election of conservative Laurie McKinnon by running harsh attack ads directed at both of McKinnon’s liberal opponents. In 2014, a long-time incumbent, who had generally voted to uphold environmental protections, was challenged by a hard-right ideologue whose election could have swung the Court further to the right.

In sum, conservative forces have made considerable progress and are continuing in their efforts to change the direction of environmental law in Montana by changing the personnel on the Supreme Court.

The North Carolina Supreme Court has become a virtual sinkhole for environmental law. Over the last 15 years, in every instance in which the Court has reviewed a major environmental law issue, the Court has sided with the anti-environmental protection side of the dispute. Throughout this period, the Court (which is nominally nonpartisan) has been dominated by conservative justices generally aligned with the Republican Party. In 2012, in a hard fought contest for control of the Court, Republican Paul

19. MONT. CONST. art. II, § 3.
21. Bitterroot River Protective Ass’n, Inc. v. Bitterroot Conservation Dist., 198 P.3d 219, 242 (Mont. 2008) (observing that the District Court’s “definition of ‘natural’ was too narrow and inconsistent with the purposes of [the Stream Access Law]”).
24. Id.
Newby narrowly prevailed over Democrat Sam Ervin IV. Independent expenditures in support of Newby outpaced those in support of Ervin by a margin of eight to one; with Newby’s support coming from Americans for Prosperity (a recipient of Koch brothers 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 the parent company of R.J. Reynolds Tobacco). In 2014, the three Democrats on the Court faced stiff challenges for reelection. Robin Hudson, today the sole consistent dissenter from the Court’s pattern of weakening environmental protections, survived a bitterly contested primary challenge. In that race, Justice for All NC ran a television ad attacking Hudson for being “soft on child molesters.” In the 2014 general election, Justice Hudson and the two other Democratic candidates all prevailed in their races. Nonetheless, the situation in North Carolina remains bleak for environmental advocates.

Washington State offers an apparently rare example of a state in which the voters have selected a centrist-to-liberal 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 14 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 logically expect if the Court were deciding cases on
the merits without any particular ideological predisposition.30 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 additional conservative justices.31 As a result of a determined and well-funded (if still out-matched) effort by environmental advocates, labor unions, and other liberal groups, voters rejected all three of these right-leaning candidates. In 2010, Justice Richard Sanders, dubbed the Court’s “property rights justice,” after serving 15 years on the Court, was ousted from his seat by a liberal opponent.32 In 2012, Sanders failed in a bid to regain a seat on the Court in a race to fill a vacancy. Following this recent 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.33

Wisconsin also illustrates the effect of partisanship on judicial decision making, despite the nominally nonpartisan 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 changed, 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 very partisan and very expensive. Since 2007, there have been millions of dollars in independent expenditures supporting and attacking candidates for seats on the Court. In 2007, Joanne Kloppenburg, a long-time environmental attorney with the Attorney General’s Office, failed in a bid to unseat Justice David Prosser by a scant 7,000 votes; Prosser benefited from a $2.2 million independent expenditure.
expenditure campaign, with half of this amount provided by the “Koch-backed Americans for Prosperity.” The ideology of the Wisconsin Supreme Court, and its environmental jurisprudence, will apparently continue to be contested at the ballot box for the foreseeable future.

Even though this sampling of state judicial politics is limited, it is possible to offer some general conclusions. First, as common sense might suggest, the identities of the persons elected to the state supreme courts have a significant influence on the character and direction of a state’s environmental law jurisprudence. Some state courts issue decisions that tend to support the goals of environmental law and other state courts issue decisions that tend to undermine them. The ideological orientation shared by a majority of the justices on a state high court significantly influences the direction in which the case law is heading in that state.

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 whom they perceive as extremist in either direction. But sober and objective judging is a relative abstraction and voters have little basis for making discerning judgments about whether judges are actually centrist in their decision making, much less making such judgments about candidates for judicial office. As a result, negative campaigning, both by candidates themselves and by independent expenditure groups, plays an outsize role in judicial elections. Those candidates who adopt an explicitly ideological posture, such as Richard Sanders of Washington State, tend to pay the price at the polls. By the same token, “environmentalist” candidates have not fared well in judicial elections either. As a result, most judicial candidates claim—sometimes legitimately, sometimes not—that they embrace centrist positions. For better or for worse, many judicial elections largely involve efforts to rebut such claims of moderation.

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 induce voters to vote for the opposing candidate, and will generally alienate voters who seek to elect a judge without a political agenda. Washington Conservation


35. Steve Miletich, Justice Richard Sanders, As Usual, Draws Fire From Two Election Opponents, SEATTLE TIMES (July 30, 2010), http://seattletimes.com/html/localnews/2012475245_6supremecourt29m.html.
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.”

I. MONTANA

A. 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.” 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. 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


37. MONT. CONST. art. II, § 3; art. IX. See also Sylvia Ewald, State Court Adjudication of Environmental Rights: Lessons from the Adjudication of the Right to Education and the Right to Welfare, 36 COLUM. J. ENVTL. L. 413, 420–21 (2011) (describing the half dozen other states with constitutions establishing environmental rights).

38. 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 Ewald, supra note 37, at 426–38 (discussing the varying judicial interpretations given by states’ constitutional environmental rights provisions).
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.”

But the truly remarkable 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 “[i]nalienable rights,” that “[a]ll 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 “[e]nvironment and [n]atural [r]esources,” and includes the statement that, “[t]he 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, in 1999, in *Montana Environmental Information Center v. Department of Environmental Quality* (“M.E.I.C.”), the Court held 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 this provision 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 Court explained that the Department of Environmental Quality’s (“DEQ’s”) grant of an exemption from the anti-degradation policy could be upheld 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.

In 2001, in *Cape-France Enterprises v. Estate of Peed*, the Court extended the ruling in *M.E.I.C.* by holding that the constitutional right to a

---

40. *MONT. CONST.* art. II, § 3.
41. *MONT. CONST.* art. IX, § 1.
42. Kadillak v. Anaconda Co., 602 P.2d 147, 154 (Mont. 1979) (ruling that State Board of Land Commissioners was not required under the Montana Environmental Policy Act (“MEPA”) to prepare an Environmental Impact Statement 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 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 ENVTL. L.J. 311, 313–15 (2007) (discussing the history of judicial implementation of the Montana right to a clean and healthful environment).
43. 988 P.2d 1236, 1246 (Mont. 1999).
44. *Id.* at 1249.
45. *Id.* at 1246.
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 DEQ 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 of liability for pumping in connection with 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*, 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. The Court observed 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.”

In 2010, in the most recent environmental-side win involving Montana’s constitutionally-based environmental rights, the Court ruled in *State ex rel. Department of Environmental Quality v. Burlington Northern Santa Fe Railway Company*, 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 United States Supreme Court had determined that the federal superfund law did not support the theory of “arranger” liability, 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

---

46. 29 P.3d 1011, 1017 (Mont. 2001).
47. *Id.* at 1021.
48. *Id.* at 1017.
49. 47 P.3d 847, 854 (Mont. 2002).
50. *Id.*
51. The Montana Supreme Court did not invariably rule in favor of a broad reading of the constitutional right to a clean and healthful environment. *Merlin Meyers Revocable Trust v. Yellowstone Cnty.*, 53 P.3d 1268 (Mont. 2002) (ruling 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 statute); *See also Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079 (Mont. 2007) (ruling that landowner could recover damages for groundwater contamination due to refinery operation on a common law tort theory, but pretermining issue of whether a constitutional tort claim could be brought under Article II, section 3 of the Montana Constitution).
52. 246 P.3d 1037 (Mont. 2010).
53. *Id.* at 1044.
that, “[a] broad scope of arranger liability best serves CECRA’s stated purpose to protect the public health and welfare of all Montana citizens against the dangers arising from releases of hazardous or deleterious substances.”

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”). The Court has also: upheld municipal bans on smoking in video gaming establishments; reversed DEQ air-quality permits because they authorized too much pollution; 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; enforced pollution limits on water produced by coal-bed methane extraction; allowed environmental groups to expand their administrative complaints in proceedings challenging permit decisions; overturned local land use approvals on the ground that they provided inadequate protection for the environment; and ruled that DEQ’s issuance of a storm water discharge

54. Id. at 1046.
60. Citizens Awareness Network v. Mont. Bd. of Envtl. Review, 227 P.3d 583, 589–90 (Mont. 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).
61. Headapohl v. Missoula City-Cnty. Bd. of Health, 260 P.3d 139, 143 (Mont. 2011) (reversing District Court ruling that construction activity was carried out in accord with municipal health
permit to a mining company was arbitrary and capricious because the stream receiving the discharge was an “area of unique ecological significance.”

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 Department of Environmental Quality*, 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.

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

In 2012, the Court issued two decisions adverse to environmental plaintiffs. In *Montana Wildlife Federation v. Montana Board of Oil & Gas Conservation*, 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

---

63. 197 P.3d 482 (Mont. 2008).
64. *Id.* 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. *Id.*
66. *Id.* at 722.

---
to two Environmental Impact Statements ("EISs") 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.\textsuperscript{68}

Also in 2012, in \textit{Northern Plains Resource Council, Inc. v. Montana Board of Land Commissioners}, 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."\textsuperscript{69} Plaintiffs claimed that this exemption violated the constitutional right to a clean and healthful environment, but the Court rejected the argument.\textsuperscript{70} 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.\textsuperscript{71} 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.\textsuperscript{72} 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 \textit{Public Lands Access Association, Inc. v. Board of County Commissioners of Madison County}, the Court, in a rather technical five to two ruling, with an opinion for the court by Justice Michael Wheat, upheld a claim by the public to a right based on prescription to gain access to a stream from a public roadway passing over the stream.\textsuperscript{73} In dissent, Justice Laurie McKinnon described the majority opinion as “ignoring a century of precedent,”\textsuperscript{74} and Justice Jim Rice described it as “a sweeping departure from established law.”\textsuperscript{75}

\begin{itemize}
  \item \textsuperscript{68} \textit{Id.} at 891.
  \item \textsuperscript{69} \textit{N. Plains Res. Council, Inc.}, 288 P.3d at 172.
  \item \textsuperscript{70} \textit{Id.}
  \item \textsuperscript{71} \textit{Id.} at 175.
  \item \textsuperscript{72} \textit{Id.}
  \item \textsuperscript{73} Public Land Access Ass’n v. Bd. of Cnty. Comm’rs, 321 P.3d 38, 46 (Mont. 2014).
  \item \textsuperscript{74} \textit{Id.} at 68.
  \item \textsuperscript{75} \textit{Id.} at 69.
\end{itemize}
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. In addition, the court has continued to award environmentalists victories in certain cases in recent years. Moreover, each case involves distinct 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 15 years. Environmentalists are more likely to receive a cold shoulder 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. 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 over judicial selection in Montana 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.

**B. The Montana Judicial Electoral Process**

The Montana Supreme Court consists of a Chief Justice and six Associate Justices. Each justice serves for a term of 8 years. In its 1972 constitutional revisions, Montana adopted a unique system of judicial selection under which the justices are either appointed to the Supreme Court by the Governor or elected by popular vote. Each of the justices, regardless of the method of appointment, serves on a statewide basis.

---

76. See, e.g., Kadillak, 602 P.2d at 154 (ruling against environmental proponent).
77. See, e.g., Clark Fork Coal., 288 P.3d at 188 (ruling that creek receiving stormwater runoff from construction activities relating to proposed mine was an “area of unique ecological significance” barring issuance of a general discharge permit by regulation).
78. MONT. CODE ANN. §3-2-101 (2014).
79. MONT. CONST. art. VII, § 7, cl. 2.
81. See MONT. CONST. art. VII, § 1 (conferring the state’s judicial power on one supreme court).
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. 82 The Governor must select a candidate from a slate identified by a Judicial Nominations Commission, 83 which must send the Governor between three and five names for his or her consideration. 84 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 state’s district judges. 85

At the next general election following a justice’s appointment, if the appointee wishes to remain on the court, his or her name is placed on the ballot. 86 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. 87

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. 88 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. 89 If the justice is running unopposed, voters again have the opportunity to cast a yes or no vote on whether to retain the justice. 90

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. 91 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. 92

---

82. MONT. CONST. art. VII, § 8, cl. 1.
83. MONT. CODE ANN. §3-1-1011 (2014).
84. Id. §3-1-1010.
85. Id. §3-1-1001.
86. MONT. CONST. art. VII, § 8, cl. 2.
87. Id.
88. Id.
89. Id.
90. Id.
In 2012, in *Reichert v. State of Montana* 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. 93 The Court ruled that Article VII, section 9 of the Constitution prescribes three qualifications for a seat on the Supreme Court, 94 “no more, no less,” 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. 95 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.

**C. Judicial Rulings Affecting the Judicial Electoral Process**

The rules governing state judicial elections and state judges have been significantly affected by several recent United States Supreme Court decisions, and these rulings necessarily affected the Montana Supreme Court. 96 However, in the last few years there have also been several cases 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 United States Supreme Court, following the reasoning of its controversial 2010 ruling in *Citizens United v. Federal Election Commission*, 97 struck down a Montana statute barring corporations from

---

94. MONT. CONST. art. VII, § 9. 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.
95. Reichert, 278 P.3d at 475.
96. See Caperton v. A.T. Massey Coal Co., 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); see also Republican Party of Minn. v. White, 536 U.S. 765, 788 (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).
making political expenditures on behalf of or opposing candidates for public office.\footnote{98} 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!

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.\footnote{100} 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 of the Montana Supreme Court.

In the aftermath of \textit{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.\footnote{101} However, the Montana Supreme Court, in a five to two 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.\footnote{102} Distinguishing the United States Supreme Court decision in \textit{Citizens United}, the Montana Court ruled that the ban on corporate contributions met the high bar for defeating a free speech challenge based on Montana’s especially lurid history of political corruption.\footnote{103}

Focusing on the judicial electoral process, the Montana Court explained that one of the reasons the restriction on corporate contributions should

\begin{itemize}
  \item \footnote{98}{Am. Tradition P’ship, Inc. v. Bullock, 132 S.Ct. 2490, 2491 (2012).}
  \item \footnote{99}{AM. TRADITION P’SHP, http://americantradition.org/ (last visited Jan. 20, 2015).}
  \item \footnote{100}{See Frontline: Big Sky, Big Money (PBS television broadcast Oct. 30, 2012), http://video.pbs.org/video/2298009584/ (discussing allegations that the Western Trade Partnership had participated in campaign activities, prohibited by its 501(c)(4) status).}
  \item \footnote{101}{\textit{Citizens United}, 558 U.S. 310 at 313.}
  \item \footnote{102}{W. Tradition P’ship v. Att’y Gen., 271 P.3d 1, 3 (Mont. 2011).}
  \item \footnote{103}{\textit{Id.} at 5–13.}
\end{itemize}
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.

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.

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.” He suggested that, “Montana’s voters may—and probably should—amend the Montana Constitution to implement a merit system for selecting judges.”

The United States 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.” Four members of the Supreme Court dissented from this ruling, referencing their dissent from the five to four ruling in *Citizens United* two years earlier.

American Tradition Partnership’s victory in the Supreme Court arguably brings the State of Montana full circle in its effort to regulate the

104. *Id.* at 11–12.
105. *Id.* at 12 (citing *Neb. Press Assoc. v. Stuart*, 428 U.S. 539 (1976)).
106. *Id.*
108. *Id.* at 34.
109. *Id.*
111. *Id.* at 2491–92.
role of natural resource industries in state politics. At the turn of the
twentieth century, Montana’s political and judicial systems had been
thoroughly corrupted by large moneyed interests.112 William Clark, who
amassed a fortune from mining operations in Butte, famously bribed the
Montana Senate in order to obtain a seat in the United States Senate.113 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.”114 Public concern about corporate
domination of the political and legal systems led to adoption of the Corrupt
Practices Act in 1912 by voter initiative.115 Now, 100 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 United States Supreme
Court’s decision threatens 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, Saunders County v. Bullock, the United
States Court of Appeals for the Ninth Circuit recently overturned
Montana’s system of nonpartisan judicial elections, in place since the
1930s, by striking down a ban on political party endorsements of judicial
candidates as a violation of the First Amendment.116 A county Republican
Party organization sought to endorse two judicial candidates and to make
expenditures to publicize those endorsements.117 The plaintiff filed suit
seeking a declaration that the law was unconstitutional and an injunction
against its enforcement, because it barred the activities it sought to

113. Id. at 8.
114. Id. at 9 (quoting HELEN FISK SANDERS, HISTORY OF MONTANA, Vol. 1, 429–30 (Lewis
Pub. Co. 1913)).
115. Id. at 11.
(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).
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 that objective. The court 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 United States Supreme Court declined Montana’s request that it review the Ninth Circuit decision.

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 nonpartisan judicial election process, political parties have a right to endorse candidates.” She also described the ruling as an unwarranted extension of prior decisions that “will encourage a judiciary dependent upon political alliances.” She criticized the majority’s least restrictive means analysis by pointing out the extreme difficulty states have encountered in attempting to reform long-established judicial selection procedures.

Together, these two decisions have the potential to change the landscape for judicial elections in Montana. Following the elimination of 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. Businesses and industries can also 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 positions as judicial officials and to spend money publicizing an endorsement. Of course the decision does not compel political parties to exercise this option, and the strong tradition on nonpartisan 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’s Platform “Judiciary Plank” addressed 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.”

127. Consistent with this position, the website that supported the reelection of Mike Wheat, widely regarded as having Democratic Party leanings, contained no indication that the candidate had been endorsed by the Democratic Party. Nor was there any indication on the now discontinued website of Justice Jim Rice—widely regarded as a justice with Republican leanings—that he was running as a Republican. Nor did Rice’s name appear on the Montana Republican Party website, also now discontinued. Nonetheless, 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.

129. See http://www.jimriceforjustice.com/ (site discontinued as of the date of this publication).
130. See http://www.mtgop.org/ (site discontinued as of the date of this publication).
D. The Ideological Struggle for Control of the Supreme Court

The balance of 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. A unanimous court decided the landmark *M.E.I.C.* case.131 Since then, the court has issued other unanimous rulings in the environmental arena, sometimes ruling in favor of environmental advocates,132 and sometimes ruling against them.133 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 former United States Supreme Court Justice William Rehnquist, but was hardly anti-environmental in his voting pattern,134 even to the point of joining in dissent in one environmental law case in which the majority ruled against the “pro-environment” side.135 Justice Nelson was a strong supporter on environmental protections,136 but was equally strong-minded in support of private property rights.137

The current Montana Supreme Court can fairly be described as moderate in orientation. Three of the current justices were appointed to

---

131. *Mont. Envtl. Info. Ctr.*, 988 P.2d at 1236 (holding that the right to a clean and healthful environment was a fundamental right guaranteed by the state constitution).

132. See, e.g., *Mont. Dep’t of Envtl. Quality v. Burlington N. Santa Fe*, 246 P.3d 1037 (Mont. 2010) (ruling unanimously that BNSF was liable for environmental contamination under the CECRA).

133. *See N. Plains Res. Council, Inc.*, 288 P.3d at 170 (holding that a state’s lease of mineral interests was not a major government action requiring an environmental impact statement).


office, while four were elected. The current moderation of the court may be explained in part by the fact that the most recent appointees have been made by Governors from both parties. The moderation of the court may also be explained, in part, by the fact that the Judicial Nominations Commission, which is designed to be representative of diverse viewpoints, must nominate all appointed justices.

But recent electoral contests 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.

E. The 2012 Election

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, Elizabeth Best and Ed Sheehy. Before her election to the high court, McKinnon served for eight years as a District Court judge, 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. 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. 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

139. Id.
140. See id. (stating 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).
142. Id.
law in Helena, Montana. He served as a regional defender in Missoula and later in a statewide unit representing defendants accused of major crimes, such as homicide. He served as a law clerk on the Montana Supreme Court in 1978 and his uncle, John Sheehy, was a justice on the Montana Supreme Court. He received the endorsement of the Montana AFL-CIO.

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. According to her campaign website she received endorsements from, among other groups, Montana Conservation Voters, the Montana Education Association, and the Montana Federation of Teachers. 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 emissions. 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.

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

---

145. Id.
149. *About Beth*, ELIZABETH BEST FOR MONT. SUPREME COURT, http://bestformontana.org/about-beth (site discontinued as of the date of this publication).
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%).

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

---


154. Id.


156. MT TEA Party Jumps into State Supreme Court Elections, DAILY KOS (May 17, 2012), http://www.dailykos.com/story/2012/05/17/1092411/-MT-TEA-Party-Campaigns-for-Pro-Nullification-Supreme-Court (describing Priest’s support for “nullification legislation and other tea party causes”). Priest also has had problems in his personal life. See Associated Press, State Sen. Jason Priest Arrested for Partner or Family Assault, MISSOULIAN (Feb. 2, 2014, 7:00 PM) (describing Priest’s arrest “on suspicion of partner or family assault and resisting arrest”).


158. Id. According to her now discontinued campaign website, Elizabeth Best, who came in third in the primary, raised over $100,000 to support her campaign. About Beth, ELIZABETH BEST FOR MONT. SUPREME COURT, http://bestformontana.org/about-beth (site discontinued as of the date of this publication).

159. About Beth, ELIZABETH BEST FOR MONT. SUPREME COURT, http://bestformontana.org/about-beth (site discontinued as of the date of this publication).
environment, taxes and the economy and healthcare." The precise amount it spent on the 2012 Montana Supreme Court race is impossible to know because most of its advertising represented so-called “issue advocacy;” accordingly, the majority of the group’s expenditures were exempt from public reporting requirements. Montana Growth Network reported spending $42,000 on one mailing that explicitly advocated the election of McKinnon and the defeat of Sheehy and Best. This explicitly acknowledged political expenditure probably 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. A Montana Growth Network mailer expressing opposition to Elizabeth Best’s candidacy contained the headline, “Environmentalist, 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 govt’ [sic] control to stop global warming.” 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.” The mailer asserted that Sheehy “asked the Court to strike down Montana’s death penalty as unconstitutional.” Sheehy responded angrily to the charge contending


165. *Id.*

166. *Id.*
that he was simply “doing his job” as a public defender.\footnote{167} According to press accounts, Sheehy blamed the mailer and similarly themed radio ads for his defeat in the 2012 election.\footnote{168}

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, but the major financial backers of Montana Growth Network remain hidden.\footnote{169} In 2012, the year in which Montana Growth Network invested so heavily in electing Laurie McKinnon to the Supreme Court, the organization recorded contributions of $906,000.\footnote{170} None of the donors’ identities are 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.\footnote{171} Over 90% of the individual contributions to Montana Growth Network in 2012 were in amounts of $10,000 or more.\footnote{172} Four of the donations were in the six figures and the largest contribution was $200,000.\footnote{173} 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. Apparently, none of the Kochs’ critics knows 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.\footnote{174} Initially Hertha Lund, a private property rights advocate, launched a campaign against Morris.\footnote{175} She withdrew from the race in April, two
months before the June primary. Justice Morris has since resigned from the court to take a seat on the federal District Court in Montana.

F. The 2014 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. Bullock selected Shea from among four finalists forwarded to him by the Judicial Nomination Commission. Shea had been appointed state Workman’s Compensation Judge by Democratic Governor Brian Schweitzer in 2005, and Governor Schweitzer reappointed him to that position in 2011. Shea faces Senate confirmation to the Supreme Court in 2015 and then will have the opportunity to run to retain the seat in 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. But, Morris’s confirmation by the United States Senate was so delayed that the election for this seat could not be included on the 2014 ballot.

G. The 2014 Election

In 2014, two incumbent members of the court, Jim Rice and Michael Wheat, ran for election to the Court. Michael Wheat faced a challenge from Lawrence VanDyke, the former Montana Solicitor General. Jim Rice faced a challenge from W. David Herbert. Justice Rice previously served as a Republican state representative and Justice Wheat had served as a Democratic State Senator. Montana Conservation Voters endorsed Mike

---

176. 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 statewide 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. Id.


180. Johnson, supra note 178.


182. Johnson, supra note 178.
Wheat for reelection, but apparently took no position in the race between Rice and Herbert.\textsuperscript{183}

Mike Wheat was appointed to the Supreme Court in 2009 by Democratic Governor Brian Schweitzer and sought re-election to the Court.\textsuperscript{184} His campaign website, now discontinued, included the usual dry recitation of professional accomplishments, including references to a successful career as a private attorney and service as a member of the Montana Senate.\textsuperscript{185} While widely perceived to be a Democrat, Wheat’s website included no indication of party affiliation.\textsuperscript{186} Interestingly, the website alluded to only two substantive legal issues, both relating to the environment. First, the website described Wheat as a “defender” of “Montana’s Constitutional right to a clean and healthful environment.”\textsuperscript{187} Second, it described him as a “guardian of laws protecting public access to Montana’s rivers, streams, hunting and recreational areas.”\textsuperscript{188} The latter statement was an unmistakable reference to Justice Wheat’s authorship of the opinion for the Court in the controversial five to two decision favoring a public claim to fishing access.\textsuperscript{189}

The contest for the seat occupied by Justice Wheat was turned upside down on April 25, 2014, when District Court Judge Mike Menahan issued an order declaring that Lawrence Van Dyke was ineligible to run for a seat as a justice in the 2014 election.\textsuperscript{190} The lawsuit was brought by five delegates to the 1972 Montana Constitutional Convention\textsuperscript{191} which led to the adoption of the current constitutional provision stating that candidates

\begin{itemize}
\item \textsuperscript{183} 2014 MCV Endorsed Candidates, MONT. CONSERVATION VOTERS, http://mtvoters.org/node/2161 (last visited Feb. 27, 2015) (“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 landmark 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% MCV voting score, respectively.”).
\item \textsuperscript{185} Id.
\item \textsuperscript{186} Id.
\item \textsuperscript{187} Id.
\item \textsuperscript{188} Id.
\item \textsuperscript{189} Pub. Lands Access Assoc., Inc., 321 P.3d 38.
\item \textsuperscript{190} Charles S. Johnson, Judge Orders Supreme Court Candidate Off the Ballot, BILLINGS GAZETTE (Apr. 25, 2014, 4:45 PM) http://billingsgazette.com/news/government-and-politics/judge-orders-supreme-court-candidate-off-the-ballot/article_4d1c64d3-d63b-57bf-8cfafdf9e037d2d8f.html#ixzz33D456VLz.
\end{itemize}
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.\footnote{\textit{MONT. CONST.} art VII, § 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.").} VanDyke was admitted to practice in Montana in 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.\footnote{Cross v. VanDyke, 332 P.3d 215, 216 (Mont. 2014).} He resumed active status in early 2013, but by the time of the November 2014 election, he would only have been an active member of the bar for three years and three months.\footnote{Id. at 215.} Thus, according to Judge Menahan’s ruling, VanDyke was ineligible for election to a seat on the Supreme Court.\footnote{Id.}

VanDyke filed an appeal and on July 22, 2014 the Supreme Court, by a vote of four to three, reversed Judge Menahan’s order and declared that VanDyke was eligible to pursue election to the Supreme Court.\footnote{Charles S. Johnson, \textit{VanDyke Back on Ballot for Montana Supreme Court}, BILLINGS GAZETTE (July 22, 2014, 2:32 PM), http://billingsgazette.com/news/government-and-politics/vandyke-back-on-ballot-for-montana-supreme-court/article_2eb5573-3841-583e-a117-875db2ec6f95.html.} Justice Wheat along with two other members of the Court recused themselves, with the result that three 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 VanDyke 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.\footnote{VanDyke, 332 P.3d at 216.} 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 prohibits a lawyer on inactive status from practicing law, VanDyke was not “admitted to the practice of law” for the requisite period.\footnote{Id. at 223–24 (Cotter, J. dissenting).}

While VanDyke adopted a studiously nonpartisan stance on his campaign website, his brief career biography read like a playbook for success in conservative legal circles.\footnote{Charles S. Johnson, \textit{VanDyke Seeks to Bring Appellate Law Background to Supreme Court}, INDEP. REC. (Mar. 13, 2014, 11:00 AM), http://helenair.com/news/local/vandyke-seeks-to-bring-appellate-law-background-to-supreme-court/article_e7f2f476-aa73-11e3-876e-0019bb2963f4.html (identifying political party as “nonpartisan”).} In 2012, Tim Fox, the newly elected Republican Attorney General, appointed VanDyke as Solicitor General of
Montana. Before taking that position, VanDyke served as Assistant Solicitor General in the Office of the Republican Texas Attorney General, Greg Abbott. Since his graduation from Harvard Law School, he had been an active member of the Federalist Society, the leading national advocate of conservative legal causes, and was listed on the group’s website as a member of the Executive Committee of the Society’s Religious Liberties Practice Group. He served as law clerk to Judge Janice Rogers Brown, a staunchly conservative, pro-property rights judge on the United States Court of Appeals for the D.C Circuit. Immediately after completing his clerkship he went to work for a national corporate law firm, Gibson, Dunn & Crutcher, first in Washington, D.C. and later in Texas.

VanDyke was a lightning rod for public criticism, based in part on a book review he wrote while a student at Harvard Law School suggesting that requiring the teaching of “intelligent design” in public schools did not violate the Establishment Clause. 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

205. Editorial, Reject Justice Brown, WASH. POST (June 7, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/06/06/AR2005060601734.html (“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.”).
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.”\footnote{208} Not surprisingly perhaps, when Tim Fox picked VanDyke for Solicitor General, a conservative journal extolled the appointment.\footnote{209}

During his brief stint as Montana Solicitor General, VanDyke spent a significant amount of his time“promoting a conservative legal agenda in different courts around the country.”\footnote{210} He led an effort by a group of conservative attorneys general to persuade the United States Supreme Court to revisit\textit{Roe v. Wade} and allow Arizona greater latitude in restricting access to abortions.\footnote{211} On multiple occasions, VanDyke recommended to Attorney General Fox that Montana join amicus briefs opposing efforts in other states to control the sales of semi-automatic rifles or handguns.\footnote{212} 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.\footnote{213}

VanDyke dismissed all of this work as that of an “advocate,” and asserted 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.”\footnote{214} But, as the state’s Solicitor General, VanDyke 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 told a good deal about what constitutional questions VanDyke personally deemed important and worthy of attention.

\begin{thebibliography}{99}

\footnotetext{209} Carrie Severino, \textit{Congratulations to Elbert Lin and Lawrence VanDyke}, NAT’L REV. ONLINE (Jan. 15, 2013), http://www.nationalreview.com/bench-memos/337777/congratulations-elbert-lin-and-lawrence-vandyke-carrie-severino (“While conservatives may not be excited about the president’s bevy of new cabinet picks, they can celebrate the great solicitor general picks by two newly elected state attorneys general.”).


\footnotetext{212} Adams, \textit{supra} note 210.

\footnotetext{213} \textit{Id.}

\footnotetext{214} \textit{Id.}
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.”

Justice Jim Rice was appointed to the Court by Republican Governor Judy Martz, and was elected to a full eight-year term on the Court in 2006. 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. Rice’s website also includes a link to an article describing the popular Montana Supreme Court decision to overturn a District Court judge’s ruling imposing a one-month sentence on a teacher convicted of raping a student.

David Herbert, Justice Rice’s opponent, presented a less than clear-cut ideological choice. One of Herbert’s primary issues was 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. 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 American Constitution.
system of constitutional government. Herbert ran unsuccessful races in Wyoming as a Libertarian Party candidate for the United States Senate in 1996 and for the United States House in 2008. In the first race, he received 5,289 votes, and in the latter, he received 187 votes. He moved to Montana in 2008. A licensed podiatrist, Herbert attended law school in the mid-1980s. All in all, he presented only a very mild threat to Justice Rice’s re-election bid.

In the end, both incumbents prevailed. Justice Wheat beat challenger Lawrence VanDyke by a margin of 59% to 41%, and Justice Rice prevailed by a margin of 78% to 22%. Thus, the results of this election left the ideological balance on the Supreme Court unchanged, but with the promise of additional hard-fought contests for control of the Court to come.

## II. NORTH CAROLINA

### A. 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. 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. Despite frantic efforts by hundreds of company and government employees

---


224. Id.

225. Johnson, supra note 216.


to contain the spill, an estimated 35 million gallons of water containing
tens of thousands of tons of coal ash dumped into the river.

Coal ash waste is a dark, dense mixture containing arsenic, selenium
and other pollutants known to be hazardous to public health. 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. 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. The United
States Environmental Protection Agency reported no downstream violations
of drinking water standards, but monitoring continues and the study of the
long-term ecological effects is just beginning. 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.” Duke Energy has publicly apologized for the spill and
has made an open-ended financial commitment to clean up the river.

The spill has had widespread legal and political repercussions. The
disaster led to the launch of a United States Department of Justice criminal
investigation of the state agency charged with overseeing the Dan River


waste pond.\textsuperscript{238} The spill 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,\textsuperscript{239} and led to the initiation of new state environmental enforcement proceedings against the company.\textsuperscript{240} The North Carolina legislature debated whether the Dan River spill called for a comprehensive legislative solution to the problems created by ash waste ponds.\textsuperscript{241} The political and policy fallout from the Dan River disaster will unquestionably be long lasting.

The Dan River disaster also highlighted 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.\textsuperscript{242} 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.\textsuperscript{243} All told, there are 14 operating or retired Duke Energy power plants in the state with coal ash waste ponds.\textsuperscript{244} Pollution monitoring has disclosed excessive levels of pollutants in the groundwater adjacent to all of these fourteen plants.\textsuperscript{245}

In their petition, the environmental groups contended that Duke Energy has a responsibility to take “immediate action to eliminate sources of contamination” once there is evidence that waste ponds are causing


\textsuperscript{242} See Understanding the Court’s Coal Ash Order, SMITHENVIRONMENT BLOG (Mar. 12, 2014), http://www.smithenvironment.com/understanding-the-courts-coal-ash-order/ (describing a North Carolina Superior Court order regarding the regulation of coal ash ponds under state groundwater rules).


\textsuperscript{244} Id.

groundwater contamination in violation of water quality standards. According to the environmental groups, state regulations properly interpreted the 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 that had accumulated and placing it in a different, safer location. In an order issued on December 18, 2012, the Commission rejected the petitioners’ interpretation of the regulations. Instead, the Commission declared that evidence of groundwater contaminants 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.

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. 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. The petitioners’ argument raises complex technical issues about the proper interpretation of the groundwater regulations. 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.’”

The following month, Duke Power and the Commission each filed appeals from Judge Ridgeway’s order to the North Carolina Court of Appeals. Not surprisingly, environmentalists cried foul, criticizing state
officials, who had vowed to address the problem of ash waste ponds, for seeking to block the single most important legal proceeding designed to do just that. 253 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. For example, the North Carolina Legislature debated various measures to address the coal ash problem in the aftermath of the Dan River spill. 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 also have the opportunity to address the Dan River disaster in 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. 254 The Environmental Protection Agency and environmental groups both intervened in these proceedings. 255 Ultimately, these cases may also end in front of the Supreme Court, which will have the opportunity to decide whether Duke Power is held accountable 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.

B. The North Carolina Judicial Electoral Process

The North Carolina Supreme Court consists of a Chief Justice and six Associate Justices. 256 The justices are selected through statewide elections for eight-year terms. 257 In the event of a vacancy on the court due to


253. Biesecker, supra note 252 (quoting D.J. Gerken, a lawyer for the Southern Environmental Law Center, stating “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”).

254. Henderson, supra note 240.

255. Id.

256. N.C. CONST. art. IV, § 6.

257. Id. § 16.
In 2002, North Carolina enacted the Judicial Campaign Reform Act, putting in place a nonpartisan election system for seats on the Supreme Court (as well as the Court of Appeals). While advocates of judicial selection reform generally applaud nonpartisan elections, 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. The Act also created a system of public financing of statewide judicial candidate elections, the first of its kind in the nation. The funds to support the public financing of elections came from a taxpayer check-off on tax returns, lawyer fees, and private donations. 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.

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. The legislation, dubbed the “monster elections bill” by its critics, eliminated public financing of elections, and increased the amount that any individual donor could contribute to a judicial candidate to $5,000. The legislation also removed limits on the amount individuals

---

258. Id. § 19.
261. See, e.g., John Davis, NC Supreme Court: 4 of 7 Seats Up in 2014; Rule #5: Lose the Courts, Lose the War, JOHN DAVIS CONSULTING (Feb. 10, 2014), 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/ (explaining that Democrats acted to “stop the era of Republican dominance”).
263. Id.
264. Id.
could donate to independent organizations supporting particular candidates.\textsuperscript{267}

Notwithstanding the nominally nonpartisan 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.\textsuperscript{268} The Court has three Democrats, including Chief Justice Sarah Parker and Associate Justices Cheri Beasley and Robin Hudson.\textsuperscript{269}

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 opponents in every election; since 1964, the Democratic candidates have prevailed only twice.\textsuperscript{270} 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 the first time since Reconstruction. Republican domination of both executive and legislative branches 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—five of seven justices were reportedly Republicans.\textsuperscript{271}

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 decided to retire after reaching the mandatory retirement age, was first elected to the court in 1992. Since North Carolina held partisan judicial elections at that time, she was initially elected as a Democrat. Robin Hudson was elected to the court in 2006, in a nonpartisan context, and ran for reelection in 2014. The third Democratic Justice, Cheri Beasley,

\begin{itemize}
\item \textsuperscript{267} Id.
\item \textsuperscript{269} Id.
\item \textsuperscript{270} Dave Leip, \textit{United States Presidential Election Results}, USELECTIONATLAS.ORG http://www.uselectionatlas.org/RESULTS/ (last visited Feb. 28, 2015).
\item \textsuperscript{271} Davis, supra note 261.
\end{itemize}
was appointed to office in 2012, by Democratic Governor Perdue to replace retiring Justice Patricia Timmons-Goodson. Beasley faced her first reelection contest in 2014. Thus, all three Democratic seats were up for grabs in the 2014 election cycle. Though they maintained their minority status, Democrats could have been swept from the Supreme Court.

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.272 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.273 But for this infusion of outside financing, according to this account, Justice Hudson would not have been elected to the Supreme Court.274

C. 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 15 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.275 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.276 Regardless of the precise form of

---

272. Id.
273. Id.
274. Id.
276. Id.
the litigation, however, the result is always the same: environmental protections are the loser before the North Carolina Supreme Court.\footnote{Id.}

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.\footnote{Routes of Appeal, NC CT. SYSTEM, http://www.nccourts.org/courts/appellate/supreme/routes.asp (last visited Feb. 1, 2015).} 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.

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:

- **Applewood Properties, LLC v. New South Properties, LLC**: 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;\footnote{Applewood Props., LLC, 742 S.E.2d at 777.} two dissenting justices argued that the majority improperly vested government officials with a gatekeeper authority “nowhere found or implied” in the Act.\footnote{Id. at 781. (Edmunds, J., dissenting joined by Hudson, J.).}

- **Hensley v. N.C. Department of Environment & Natural Resources**: holding that a developer was entitled to a variance from the provisions of the 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; 281 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. 282

- **Holly Ridge Associates, LLC v. N.C. Department of Environment & Natural Resources**: holding that neither a 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 the developer was claiming to be exempt from the Act’s erosion control requirements. 283

- **MW Clearing & Grading, Inc., v. N.C. Department of Environment & Natural Resources**: 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 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 $10,000 statutory limit on civil penalties for violations of the state’s air pollution control regulation. 284

281. *Hensley*, 698 S.E.2d at 41 (internal quotations omitted).
282. *Id.* at 295–97 (Hudson, J., dissenting).
284. *MW Clearing & Grading, Inc.*, 628 S.E.2d at 379.
- **Murphy Family Farms v. N.C. Department of Environment & Natural Resources**: 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 a hog production facility represented one violation of state water quality standards, rather than eight separate violations, for the purpose of calculating civil penalties.285

- **N.C. Forestry Association v. N.C. Department of Environment & Natural Resources**: 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.”286

- **Craig v. County of Chatham**: 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 comprehensive set of state statutory measures governing swine farms which impliedly precluded duplicative and conflicting local regulations.287

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.288 Rather, the point is that, even with this limited sample size, it is apparent that the North

---

288. For example, in *Murphy Family Farms*, 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.” 605 S.E.2d at 636. In *Craig v. County of Chatham*, the Supreme Court ruled that a state hog farming statute preempted a local health ordinance not withstanding 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.” 565 S.E.2d 172 at 176.
Carolina Supreme Court 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 15 years was one in 128—long odds, indeed.289

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 15 years to the case of In the Matter of Before the North Carolina Pesticide Board, rejecting a legal challenge to the revocation of an aerial pesticide applicator’s license for violating various North Carolina regulations.290 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.291

A few years earlier, in 1994, the Court issued an important ruling in Empire Power Company v. N.C. Department of Environment, upholding the right of citizens to go to court to protect themselves from polluters contributing to unhealthy air quality conditions.292 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 his property, 289. 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, 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. 637 S.E.2d 515 (N.C. 2006). 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, 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 contributions to employee retirement funds be used to cover a state budget shortfall, allegedly in violation of the constitution. 580 S.E.2d 693 (N.C. 2003). 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. Id. 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 that some of the association members would have had standing to sue. State Employees Ass’n v. North Carolina, 573 S.E.2d 525, 533 (N.C. App. 2002). The Southern Environmental Law Center filed an amicus brief on behalf of itself and numerous other groups in State Employees, the outcome of which had important implications for environmental litigation. 573 S.E.2d at 693.

291. Id. at 178.
and the quality of life in his 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 North Carolina 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. In a ruling issued in September 2013, an Administrative Law Judge (“ALJ”), 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 to 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. The ALJ’s ruling was recently upheld by the North Carolina Environmental Management Commission. This new standard apparently would require a quantitative demonstration of how much additional pollution will be produced by the legal violation and what specific injuries will result from the violation. This 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 Empire Power, or uphold the Environmental Management Commission and gut Empire Power.

293. Id. at 783.
294 Id.
297. See id. (affirming the decision of the ALJ in the administrative proceeding below).
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.

D. Judicial Elections and State Politics

With the 2012 and 2014 election cycles, North Carolina’s judicial elections reached a new level in terms of the magnitude of campaign expenditures, negativity of political advertising, and raw partisanship.\(^{299}\) 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 retain a Republican majority, and possibly a strong Republican majority, when it resolves the constitutionality of the legislative redistricting plan based on the 2010 census.\(^{300}\) North Carolina has a long history of bitter redistricting litigation.\(^{301}\) 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.\(^{302}\) The redistricting plan adopted in the aftermath of the Supreme Court decision striking down the 2000 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.\(^{303}\)

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


\(^{300}\) Davis, supra note 261.

\(^{301}\) For example, the constitutionality of the redistricting plan based on the 1990 census was evaluated in three major United States Supreme Court decisions. Hunt v. Cromartie, 526 U.S. 541 (1999) (discussing North Carolina’s redistricting as a constitutional example of political gerrymandering); Shaw v. Hunt, 517 U.S. 899, 901–02 (1996) (discussing whether North Carolina’s redistricting after the 1990 census violated the Fourteenth Amendment as deliberate segregation); Shaw v. Reno, 509 U.S. 630, 633–34 (1993) (discussing a potentially unconstitutional “racial gerrymander” in North Carolina following the 1990 census).


\(^{303}\) Davis, supra note 261.
strategy ultimately will 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. 304

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. 305 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 in the House of Representatives and a 21–19 advantage in the Senate, but after the 2012 election the Republican advantage in the House had grown to 77–43 and in the Senate to 23–17. 306 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.

In November 2011, Democrats, the National Association for Advancement of Colored People (“NAACP”), other advocacy groups, and various voters challenged the redistricting plan under federal and state law, principally asserting that the new districts illegally clustered African-American voters in order to reduce their overall electoral power in the state. 307 In a ruling handed down on July 5, 2013, a three-judge state-court panel rejected the challenges to the district plan. 308 The plaintiffs appealed this ruling to the Supreme Court, 309 and the Court heard oral argument on January 6, 2014. 310 On December 18, 2014, shortly after the 2014 elections,

304. 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 risen 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 United States Supreme Court.


306. Id.


the Supreme Court affirmed the lower court ruling along predictable partisan lines, with Justices Beasley and Hudson dissenting.311

While the fate of the 2010 redistricting plan was the single most important issue for advocates on each side of recent judicial elections, it was 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 adopted a measure referring to the voters a proposed constitutional amendment defining marriage as a union between one man and one woman,312 which the voters approved in May 2012.313 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 to the Patient Protection and Affordable Care Act.314 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.315 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 ten days, eliminating same day registration, as well as eliminating pre-registration for 16- and 17-year-old voters who will be 18 on Election Day.316 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.317 Finally, the legislators passed legislation

---


weakening the job security of public school teachers. Almost all of these measures have led to legal challenges, many filed in state court. The cases filed in state court may eventually end up before the Supreme Court. Thus, in a very direct sense, the Republicans’ ability to sustain their victories on various conservative policy causes depends upon the inclinations of the Supreme Court, and hence the elections for seats on the Court.

E. The 2012 Election

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 four to three 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%.

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. 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.

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. The vast 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 $1,944,919 by the North Carolina Judicial Coalition, $175,517.83 by Justice for All NC, and $250,000 by Americans for Prosperity (a group reportedly affiliated with the Koch brothers), for a total of more than $2.5 million in independent expenditures in support of Newby’s reelection. 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. The NC League of Conservation Voters spent a meager $4,237 to support Judge Ervin. The candidates raised $170,000 in direct support for their campaigns, and public campaign spending totaled $480,000 (this was the last year in which state financing was available).

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.332 Funders of the North Carolina Judicial Coalition included the NC Chamber of Commerce and the parent company of R.J. Reynolds Tobacco.333 However, the single biggest donor to the North Carolina Judicial Coalition was Justice for All NC, which itself received most of its funding from the Republican State Leadership Committee (“RSLC”),334 a Washington, D.C.-based national political organization focused on providing funding for conservative candidates in state races across the country.335 The Committee, in turn, received funding from various North Carolina corporations, including the major tobacco companies, Duke Energy, and others.336 This gave rise to the inference that these North Carolina entities were using the RSLC as a conduit to influence the North Carolina Supreme Court race while making the expenditures as invisible as possible.337 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 RSLC.338

Most of the money poured into the 2012 election was spent on television advertising.339 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 Paul Newby “he’s got the criminals on the run” and “he’ll take them down one by one.”340 Apart from the fact that the ad does not relate to the economic 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


333. Id.

334. Id.


337. Id.

338. Id.; see also Alan Suderman & Ben Wieder, Secret Money Is Now Swaying State Judicial Elections, MOTHER JONES (June 13, 2013, 5:40 AM), http://www.motherjones.com/politics/2013/06/state-supreme-court-election-spending (”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.”).


sought to tie Ervin to controversial former Governor Mike Easley and to utility rate hikes during Ervin’s tenure on the State Utilities Commission. Ervin decried the ad as the first attack ad in a North Carolina judicial race, and some contend that Ervin—who was slightly ahead in the polls prior to Election Day—lost the election because of this negative ad.

F. The 2014 Election

The 2014 race was the first modern judicial election in which there was no public financing of the candidates’ campaigns—and no limits on the amounts that candidates could raise to support their campaigns. In addition, independent expenditures designed to influence the outcome of the elections likely matched or exceeded the level of independent expenditures in 2012.

The 2014 election involved four separate contests for seats on the Supreme Court. Because three of the four contested seats were held by Democrats and represented the only seats on the Court held by Democrats—and it was a foregone conclusion that Republicans would win one of these contests—the Republicans faced no danger of losing their four to three majority on the Court. On the other hand, the Democrats faced the potential prospect of seeing their position on the Court weakened.

Incumbent Republican Associate Justice Mark Martin ran for the Chief Justice’s seat being vacated as a result of the retirement of longtime Chief Justice Sarah Parker. Martin’s opponent, Ola M. Lewis, was another Republican. Because Parker is a Democrat, the outcome of the Martin-Lewis race necessarily produced a Republican win, ensuring that the Republicans retained their current four to three advantage. The race to fill the seat being vacated by Justice Martin pitted Republican Court of Appeals

341. Id.
342. See Suderman & Wieder, supra note 338.
343. Id.
345. Sharon McCloskey, Kicking Off the State Supreme Court Elections, INST. FOR S. STUDIES (Feb. 5, 2014), http://www.ncpolicywatch.com/2014/02/05/kicking-off-the-state-supreme-court-elections/ (“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.”).
Judge Robert N. Hunter, Jr. against Democrat Court of Appeals Judge Sam J. Ervin IV, who lost his 2012 bid to unseat Justice Newby. 348 In the third contest, Republican attorney Mike Robinson challenged incumbent Democrat Justice Cheri Beasley, who was appointed to fill a vacancy on the Court by former Governor Bev Perdue. 349 And, based on the results of the May 2014 primary, the final contest pitted trial judge Eric Levinson against incumbent Associate Justice Robin Hudson, a Democrat seeking a second term on the Court. 350

Unlike the other candidates, who faced 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. 351 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. 352 Eric Levinson is a Superior Court Judge in Mecklenburg County and was formerly a Judge on the Court of Appeals and a local prosecutor. 353 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, 354 an advocacy group promoting “limited government” supported by North Carolina’s leading funder of conservative causes, Art Pope. 355 In the end, Hudson and Levinson were the top vote-getters in the primary and faced off in the general elections in November; in the primary election, Hudson received 42.6% of the vote, Levinson 36.6%, and Doran 20.9%. 356

348. Candidates, supra note 346.
349. Id.
350. Id.
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.”  

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.

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

The ad referred to Justice Hudson’s dissenting opinion, supported by two other justices, in the controversial case of *North Carolina v. Bowditch*. 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 their 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 punitive purpose nor effect. 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.\textsuperscript{366}

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.\textsuperscript{367} 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,\textsuperscript{368} spending over $700,000 to have it appear on television almost 1,200 times leading up to the election.\textsuperscript{369} As in 2012, the RSLC was the primary source of funding for Justice for All NC, contributing $900,000 to the PAC in the months prior to the primary.\textsuperscript{370} As discussed, the RSLC 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 North Carolina, contributing more than $2 million since 2011.\textsuperscript{371} 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.\textsuperscript{372}

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.\textsuperscript{373} All told, the chamber reportedly spent $345,000 on

\textsuperscript{366.} Id. at 21.
\textsuperscript{367.} Cf. United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938) (“[P]rejudice 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.”).
\textsuperscript{369.} See Jacobs, supra note 265 (“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.”).
\textsuperscript{370.} Eckholm, supra note 352 (noting that the RSLC contributed a total of $900,000 to Justice for All NC).
\textsuperscript{371.} Jacobs supra note 265.
\textsuperscript{372.} Id.
\textsuperscript{373.} Binker, supra note 344.
this effort. 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.” Some of these companies, including Koch Industries, are also contributors to the RSLC. By the time the primary was over, the candidates and independent groups had spent well over a million dollars, setting the table for a more ferocious contest in the general election.

An undisclosed subtext of the attacks on Justice Hudson is that she is the single justice 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 Applewood Properties, LLC v. New South Properties, LLC, 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. In another case, Hensley v. NC Department of Environment & Natural Resources, 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. She argued 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.” 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 serve as a counterweight to the other justices on the Court who appear to have less sympathy for environmental protections.

\[374. \text{Alex Kotch, Institute Index: A Primary Drenched in Outside Money, INST. FOR S. STUDIES (May 9, 2014, 1:56 PM), http://www.southernstudies.org/2014/05/institute-index-a-primary-drenched-in-outside-mone.html.}\]
\[375. \text{Binker, supra note 344.}\]
\[376. \text{Id.}\]
\[377. \text{742 S.E.2d at 777.}\]
\[378. \text{Id. at 781 (Edmunds, J., dissenting, joined by Hudson, J.).}\]
\[379. \text{Hensley, 698 S.E.2d at 42–43.}\]
\[380. \text{Id. at 48 (Hudson, J., dissenting).}\]
\[381. \text{Id. (Hudson, J., dissenting).}\]
In the November general election, the Democratic candidates swept the table, albeit by a narrow margin. Sam Ervin beat Robert Hunter by a margin of 53% to 47%; Justice Hudson beat challenger Eric Levinson 52% to 48%; and Justice Beasely prevailed over Mike Robinson 50.11% to 49.89%. Thus, the election left the court with a four to three partisan split, setting up the state for future vigorous contests for control of the Court.

III. WASHINGTON

A. The Environmentalists’ Success Story

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 of a state supreme court in order to 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 on the Washington Supreme Court. That effort was roundly defeated. In addition, with the passage of time, the two most extreme right-leaning members on 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 explanation is the strength and sophistication of

384. Id.
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, an incumbent, from his seat on the Court, largely because of his irresponsible professional behavior and some allegedly racist public comments, rather than his views on environmental issues. 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.

B. The Washington Judicial Electoral Process

The Washington Supreme Court consists of nine justices. The justices are elected for six-year terms, in nonpartisan, statewide elections. Each justice is required to retire by the end of the calendar year in which he or she attains the age of 75. 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.

388. Id.
390. WASH. REV. CODE § 2.04.070 (2010); See WASH. CONST. art. IV, § 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”).
391. WASH. CONST. art. IV, § 3; WASH. REV. CODE § 2.04.071 (2010).
392. WASH. CONST. art. IV, § 3(a).
for the remainder of the unexpired term. Accordingly, at each general election in even-numbered years a minimum of three Supreme Court justices potentially face a contested election.

As in many other states, reformers in Washington State have sought for many years to increase the transparency of, 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. One proposal, that went nowhere, was that judges should be appointed and then stand for retention, rather than be selected through contested elections. One achievement of these reform efforts was the State’s establishment in 2006 of a $1,900 per election cap on contributions to candidates for seats on the Supreme Court.

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.

In summer 2004, a coalition of Washington State bar associations and good 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.

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’s web designer; and Charlie Wiggins, an attorney associated with the American Adjudicature Society, who was subsequently elected to a seat on the Supreme Court.

393. Id. § 3.
394. WASH. REV. CODE § 2.04.100 (2010).
396. David Postman, Voters Face Big Increase in High-Court Candidates, SEATTLE TIMES (April 18, 1998, 12:00 AM), http://community.seattletimes.nwsource.com/archive/?date=19980818&slug=2767185.
399. Id.
400. Id.
C. Environmental Law in the 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 the 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 growing 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-environmental 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.

So far as I can determine, no other current or recent former justice on the Washington Supreme Court has had a starkly ideological 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 of the 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’s 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 United States or Washington Constitutions. As discussed below, property rights have 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 have also been the focus of two initiatives presented to the voters in 1995 and 2006.403 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.404

404. See *Lemire v. Dep’t of Ecology*, 309 P.3d 395, 403–04 (Wash. 2013) (holding an administrative order requiring land owner to take steps to curb pollution of a creek did not effect a taking); id. at 404 (Johnson, J., dissenting); *see also Asarco Inc. v. Dep’t of Ecology*, 43 P.3d 471 (Wash. 2002) (rejecting takings challenges to retroactive imposition of liability under state toxics cleanup law on ripeness grounds); id. at 477–80 (Sanders, J., dissenting). *But see* *Dickgieser v. State*, 105 P.3d 36 (Wash. 2005) (reversing grant of summary judgment to state on claim that state took private
D. Modern Judicial Elections in Washington

As of 2004, 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 relatively quiet affairs, judicial elections in Washington State had begun to become 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, and the several appointments to fill vacancies on the Court by 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.


408. Gerry Alexander, supra note 407.

405. See generally DEBORAH GOLDBERG ET AL., NEW POLITICS OF JUDICIAL ELECTIONS 2004 (Jesse Rutledge, ed. 2004) (discussing the rise in television advertisements and cost of a campaign in Washington along with other states in 2004).


Court’s Chief Justice from 2001 to 2010, when Barbara Madsen succeeded him as Chief.\footnote{Rachel La Corte, \textit{Madsen Chosen Chief Justice of Wash. Supreme Court}, \textit{Seattle Times} (Nov. 5, 2009), http://seattletimes.com/html/localnews/2010212393_apwascomadsenchief2ndIdwritethru.html#_ga=1.188472488.1471516701.1421531755.} 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.\footnote{Associate Chief Justice Charles W. Johnson, \textit{Wash. Courts}, https://www.courts.wa.gov/appellate_trial_courts/supreme/bios/?fa=sbios.display_file&fileID=johnson (last visited Jan. 21, 2015).} 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.\footnote{Robb London, \textit{LAW: For Want of Recognition, Chief Justice Is Ousted}, \textit{N.Y. Times} (Sept. 28, 1990), 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.”).} More generally, Johnson’s surprising election became a kind of cautionary tale in the national debate over judicial elections, and spurred efforts in Washington State to improve voter education about candidates for judicial office.\footnote{Id.} Despite this inauspicious start to his career on the Supreme Court, Justice Johnson has had a successful tenure on the Court and in 2014 was seeking election to a fifth term against only token opposition.\footnote{Peter Callaghan, \textit{Justice Charles Johnson Announces Campaign for 5th Term on Washington Supreme Court}, \textit{Tacoma News Trib.} (Mar. 21, 2014), http://www.courts.wa.gov/content/publicupload/eclips/2014%2003%2024%20Justice%20Charles%20Johnson%20announces%20campaign%20for%205th%20term%20on%20Washington%20Supreme%20Court.pdf.}

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.\footnote{See Chief Justice Barbara A. Madsen, \textit{Wash. Courts}, http://www.courts.wa.gov/appellate_trial_courts/supreme/bios/?fa=sbios.display_file&fileID=madsen (last visited Jan. 20, 2015) (discussing Chief Justice Madsen’s career after completing law school).} 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.\footnote{Id.} 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, and continues to serve in that capacity.\footnote{Press Release, Wash. Courts, Washington Supreme Court Elects New Chief Justice, (Nov. 5, 2009), available at http://www.courts.wa.gov/newsinfo/?fa=newsinfo.pressdetail&newsid=1462.}

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[s] 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.”\footnote{Jim Simon, \textit{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}, \textit{SEATTLE TIMES} (Jan. 14, 1996, 12:00 AM), http://community.seattletimes.nwsource.com/archive/?date=19960114&slug=2308767.}

He joined the Court in 1996, pulling off an unexpected win over incumbent Roselle Pekelis.\footnote{Id.} He was subsequently re-elected for two additional six-year terms in 1998 and 2004 and then defeated in 2010.\footnote{See \textit{Jordan Schrader, Richard Sanders Announces Run for State Supreme Court}, NEWS TRIB, (Mar. 22, 2012), http://blog.thenewstribune.com/politics/2012/03/22/richard-sanders-announces-run-for-state-supreme-court/.}

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.\footnote{Barbara A. Serrano, \textit{Bruising Battle for Judicial Seat—Supreme Court Contest has Sharp Political Edge}, \textit{SEATTLE TIMES} (Oct. 22, 1995, 12:00 AM), http://community.seattletimes.nwsource.com/archive/?date=19951022&slug=2411978957.} Sanders ran what one columnist called a “boorishly partisan” campaign by emphasizing the fact that Pekelis had been appointed to the Court by unpopular Democratic Governor Mike Lowry, who was then serving out his single term as the State’s chief executive.\footnote{Terry Tang, \textit{Judicial Roulette: Is This Any Way To Pick A Judge?}, \textit{SEATTLE TIMES} (Nov. 10, 1995, 12:00 AM), http://community.seattletimes.nwsource.com/archive/?date=19951110&slug=2151700.} Sanders also highlighted his advocacy of private property rights, leading environmentalist critics to describe him as “the first property-rights justice.”\footnote{Simon, supra note 417.} Sanders prevailed over Pekelis 54\% to 46\%.\footnote{\textit{Supreme Court Justice is Ousted}, \textit{LEWISTON MORNING TRIB.}, Nov. 8, 1995, at A7.}

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 the 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. Sanders testified before the Washington legislature in support of the measure. The measure failed with a vote of 544,788 for and 796,869 against.

Tom McCabe, a building industry advocate, was quoted as saying that Sanders’s election to the Court “takes some of the sting” out of the defeat of Measure 48: “We never concerned ourselves with Supreme Court races before . . . But this was an anomaly, like having a homebuilder run for governor.”

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. In keeping with his professional background, Canova criticized Sanders’s application of his libertarian philosophy in the context of law and order issues, focusing on Sanders’s opposition to a voter-approved “three-strikes, you’re out” measure and his advocacy of citizens’ rights to forcibly resist arrest.

425. Id.
426. Simon, supra note 417.
427. Tang, supra note 421.
429. Simon, supra note 417.
431. Id.
Sanders easily prevailed in the primary election, 64% to 36%, avoiding a contest in the general election. 432 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. 433 In the general election, Sanders and Sebring faced off, with Sanders prevailing, 61% to 39%. 434 Sebring, an Assistant Attorney General, as well as a former Superior Court Judge, again focused on Sanders’s 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.” 435 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. 436

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. 437 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. 438 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 0.219 and 0.227. 439 In 2007, Justice Bridge resigned from the 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. 440 Governor Christine Gregoire appointed Debra Stephens to replace Bridge in January 2008.

Tom Chambers was elected to the Court in 2000. 441 He pursued a long and successful private legal career, primarily as a plaintiff-side torts
litigator before joining the court. In 1989, he was awarded the Trial Lawyer of the Year Award by the Washington State Trial Lawyers Association. 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.

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. She gained some notoriety for writing the Court’s majority opinion in the case of Barrett v. Lucky Seven Saloon, Inc., addressing the liability of a tavern for an accident caused by an inebriated customer. In the opinion she authored, the Court ruled that a 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.”

Mary Fairhurst, the second 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. As discussed 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. She then worked in a variety of positions in the Washington Attorney General’s office before being elected to the Supreme Court. Fairhurst received strong financial

443. Justice Tom Chambers, supra note 440.
444. Lewis Kamb, supra note 441.
446. Id.
449. Lucky Seven Saloon, 96 P.3d at 390.
450. Id. at 396 (Sanders, J., dissenting).
453. Id.
backing for her campaign from Indian tribes, public employee unions, and Washington Conservation Voters. Indian tribes and Washington Conservation Voters also spent significant sums to oppose Johnson’s election.

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. 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. As a result, “Johnson’s legal work . . . branded him, among some, as anti-Indian, and prompted tribal groups to support his opponent.” Environmentalists also opposed Johnson, “pointing out that he’s representing a group of builders, Realtors, farmers and cattlemen that is challenging the listing of salmon as an endangered species.” Indian Tribes, public employee unions, and Washington Conservation Voters invested in television advertising calling Johnson “too extreme for the Supreme Court.” 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.”

455. Lynda Mapes, Tribes Jointly Opposing High-Court Candidate, SEATTLE TIMES (Oct. 25, 2002, 12:00 AM), http://community.seattletimes.nwsource.com/archive/?date=20021025&slug=tribes25m (stating Washington Conservation Voters “chipped in $20,000” to finance a negative television campaign targeting Johnson).
458. Id.
459. Id.
460. Mapes, supra note 455.
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%.\(^{462}\) Becker was a judge on the Court of Appeals and a former Democratic legislator representing Bellingham.\(^{463}\) Her campaign adopted the strategy of arguing that she was not an extreme ideologue, unlike her opponent Jim Johnson.\(^{464}\) “We are supposed to stay above public clamor . . . We’re supposed to stay on an even keel,” she stated in an interview.\(^{465}\) 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.\(^{466}\) All told, Becker raised just $157,000, while Johnson raised $539,000.\(^{467}\)

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.”\(^{468}\) 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.\(^{469}\) As a further indication of his ideological orientation, when Johnson left the Court in 2012, he 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.”\(^{470}\)

---


\(^{464}\) O’Hagan, supra note 457.

\(^{465}\) Id.

\(^{466}\) See Ralph Thomas, Interest Groups Targeting State Supreme Court Races, SEATTLE TIMES (May 23, 2006), http://seattletimes.com/html/politics/2003012582_court23m.html (analyzing the effect of interest groups’, such as the Building Industry Association of Washington, on elections and the size of their contributions).

\(^{467}\) BIAW Hoping to Pack State Supreme Court with Handpicked Candidates this Fall, NW PROGRESSIVE INST. (July 12, 2006), http://www.nwprogressive.org/ weblog/2006/07/biaw-hoping-to-pack-state-supreme.html.


\(^{469}\) Id.

E. The 2006 Election

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, 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.

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. 471 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. 472 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.” 473 The Building Industry Association of Washington (“BIAW”), which contributed to James Johnson’s 2002 and 2004 races, provided significant financial

473. Modie, supra note 471.
support for the new PAC.474 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.”475

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.476 This second PAC received financial support from various liberal organizations, including labor unions, pro-choice organizations, the state trial lawyers’ association, and Washington Conservation Voters.477

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.478 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.”479 He continued:

[S]o 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.480

474.  BIAW Hoping to Pack State Supreme Court with Handpicked Candidates this Fall, supra note 467; see also Robin Parkinson, Independent Spending in Washington, 2006-2010, NAT’L INST. ON MONEY IN ST. POLS. (June 21, 2012), http://classic.followthemoney.org/press/ReportView.phtml?r=461 (“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.”).
475.  Modie, supra note 471.
476.  BIAW Hoping to Pack State Supreme Court with Handpicked Candidates this Fall, supra note 467.
479.  Id.
480.  Id.
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.”

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 (“PLF”), a public interest law firm focused on private property rights protection based in California, and remained a member of the organization’s board of directors. 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 BIAW. In 1996, he left PLF to start a private law firm and work on land use issues related to government regulation of private property. In his race for a seat on the Supreme Court, he received the explicit endorsement of the Republican Party, 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 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.”

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.” Johnson served as a Republican leader in the Washington State Senate, where he

---

481. Id.
484. Id.
485. Id.
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. Johnson’s campaign was “backed by the building industry, major business groups and social conservatives.” By contrast, Owens “won numerous endorsements from labor unions, environmentalists, gay-rights groups and Democratic Party organizations.” During the campaign, Owens was “criticized by builders and business groups for siding with government agencies in key public-disclosure and property-rights cases.” Johnson, on the other hand, got “low marks from environmentalists and labor unions,” while Owens was endorsed by Washington Conservation Voters.

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, 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 “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. 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.” 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.”

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. 497 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. 498 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. 499

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, “turn[ing] the nonpartisan judgeships into partisan battlegrounds over gay rights, property rights and business liability.” 500 The total independent expenditures in the 2006 judicial races were $2,517,593. 501 Reported indirect expenditures targeted each of the six major candidates. 502 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. 503 The lion’s share of these expenditures was used to finance television advertising. The political action groups paid for all of the television advertising related to the Supreme Court elections in 2004. 504 The BIAW (largely through the Constitutional Law PAC), Citizens to Uphold the Constitution, and the Washington Chapter of Americans Tired of Lawsuit Abuse were among the leaders in making these independent expenditures. 505

498.  Id.
499.  Id.
501.  Showing Contributions to State Supreme Court Candidates in Elections in Washington in 2006, supra note 497; But see Parkinson, supra note 474 (providing a figure of $2,607,374).
502.  Parkinson, supra note 474.
503.  Id.
504.  Parkinson, supra note 474.
505.  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.”); The Washington Chapter of Americans Tired of Lawsuit Abuse reportedly spent
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. 506 In the Johnson-Owen contest, $395,515 was spent in support of Johnson’s candidacy with $118,933 spent in opposition; on the other side, $147,590 was spent in support of Owen’s candidacy with $110,525 spent in opposition. 507 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. 508

Despite the fact that the challengers and their supporters outspent the incumbents and their supporters by a considerable margin, the incumbents swept the field. 509 Chief Justice Alexander beat off Groen’s challenge in a head-to-head contest in the primary by a margin of 54% to 46%, 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), faced Stephen Johnson in the general election and beat him by a margin of 60% to 40%. 510 Tom Chambers beat opponent Jeannette Burrage in the primary by a margin of 60% to 40%, with the result that he appeared unopposed on the general election ballot. 511


506. Data from Money in State Politics, NAT‘L INST. ON MONEY IN ST. POLS. (on file). But see Parkinson, supra note 474 (indicating that $843,485 was spent in support of Groen’s candidacy and $39,180 was spent in support of retaining Chief Justice Alexander).

507. Data from Money in State Politics, NAT‘L INST. ON MONEY IN ST. POLS. (on file); But see Parkinson, supra note 474 (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 was spent in support of Owens’ candidacy).


510. Id.

511. See id.
Following the expensive and contentious 2006 elections, the 2008 Supreme Court elections were relatively low-key. Prior to the election, in January 2008, Democratic Governor Christine Gregoire appointed Debra Stephens to the Court. 512 Stephens replaced Justice Bobby Bridge who retired before the end of her term to become the head of a nonprofit organization (and possibly to avoid a bruising reelection battle in the wake of her hit and run and drunk driving arrest). Stephens’s appointment maintained the gender balance on the Court and she became the first Justice in several years from eastern Washington. 513 She had only scant judicial experience, having been appointed by Gregoire to the Court of Appeals a year earlier. 514 Prior to becoming a judge, Stephens was an accomplished attorney, specializing in appellate work. 515 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. 516 “GOP critics from outside her hometown [of Spokane] groused 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.” 517 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.” 518

In the 2008 elections, no opponent emerged to challenge Justice Stephens’s bid for a full six-year term, which succeeded automatically. 519 The other two races that year, in which incumbents Mary Fairhurst and

---

513. Id.
517. Id.
518. Id.
519 See General Election Results, WASH. SEC’Y OF ST., (Nov. 4, 2008), http://results.vote.wa.gov/results/20081104/Judicial-All.html (dispalying that Stephens received 100% of the votes).
Charles Johnson were both reelected to new terms, were almost 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. 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%).

Fairhurst’s opponent, Michael Bond is an experienced military lawyer and private attorney working with a small Seattle law firm. He ran on a libertarian platform, saying “[m]y fundamental philosophy is that the role of the court is to protect the people from the power of government and vested interests,” and criticized Justice Fairhurst for “trampling on our constitutional rights, overruling property rights, reducing privacy rights, and censoring free speech.”

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:

[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.

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.

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

G. The 2010 Elections

The 2010 campaign represented a new ratcheting back up of 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. In the second race, conservative Jim Johnson prevailed over a single challenger in the primary, Stan Rumbaugh, by a margin of 62% to 38%, 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. (Following his loss in the Supreme Court race, Rumbaugh was elected to the Superior Court.) He served on the boards of the Washington State Trial Lawyers Association, Planned Parenthood Northwest, the Tacoma Housing Authority; he also donated widely to Democrat candidates, and said he likely would have voted to approve gay marriage.


526. Fairhurst raised $191,990, Stephens raised $101,350, and Johnson raised $85,114. Data from Money in State Politics, NAT’L INST. ON MONEY IN ST. POL. (on file).


530. Sclair, supra note 529.
marriage. Promising “a more centrist and somewhat progressive evaluation of the law,” Rumbaugh asserted that Washington State could not “afford 6 more years with a deeply ideological voice.”

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, Johnson was handicapped in his ability to do direct fundraising, raising only $142,134, only slightly more than the $137,890 raised by Rumbaugh. 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.” “I don’t think money buys votes by any stretch,” she said. The left felt no similar hesitation about spending money on this race. Citizens to Uphold the Constitution and Fuse Washington, which describes itself as “the state’s largest progressive organization,” collectively spent $256,115 opposing Johnson’s reelection. Some of these funds paid for ads depicting Johnson as a small cut out figure inside a business-suit pocket, illustrating these groups’ view of Johnson as the agent of the business community.

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. However, assuming this represents an accurate general rule the surprising upset of Richard Sanders in 2010 illustrates that there is an exception to every rule.

534. Id.
535. Id.
537. Id.
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. Justice Sanders served a total of 15 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’s 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’s 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’s long career—of a series of actions and statements that ultimately branded him as an intemperate and intolerant individual. The basic issue of Justice Sanders’s 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 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.

---

538. 2010 General Results, supra note 528.
541. Michelle Malkin, Pro-Life State Court Justices Have Free-Speech Right, Too, SEATTLE TIMES (Dec. 10, 1996, 12:00 AM), http://community.seattletimes.nwsource.com/archive/?date=19961210&slug=2364143.
On May 12, 1997, the Commission on Judicial Misconduct issued a “reprimand” to Justice Sanders, 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.” Thus, no penalty was imposed, but the Supreme Court’s resolution of the case was hardly a ringing endorsement of the propriety of Sanders’s action.

On November 20, 2008, while United States 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.” 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.”

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’s outburst and Mukasey’s fainting spell.

On January 15, 2009, Sanders wrote the opinion for the Court in Yousoufian v. Office of the King County Executive, 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 rehear the case, asserting that Sanders had an improper conflict when he

543. Id.
547. Id.
authored the opinion because he had a similar lawsuit pending against Thurston County. 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.” Subsequently, Justice Sanders recused himself from any further involvement in the matter and the Supreme Court agreed to rehear the case.

In 2003, Sanders visited a commitment center for sexually violent predators and asked questions of inmates who were litigants or potential litigants about issues in a case then pending before the Supreme Court. In response to a complaint, the Commission on Judicial Conduct concluded that Sanders’s visit violated the Code of Judicial Conduct by creating an appearance of partiality as a result of ex parte conduct. On October 16, 2006, the Washington Supreme Court agreed and upheld the recommended sanction of “admonishment.”

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 were disproportionally represented in the prison population due to racial discrimination by arguing that minorities were overrepresented in prison because they commit more crimes: “Certain minority groups are ‘disproportionally represented in prison because they have a crime problem.’” 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...

549. Mike Carter, King County Asks State High Court to Void Records Ruling, SEATTLE TIMES (Apr. 2, 2009, 12:00 AM), http://seattletimes.com/html/localnews/2008969420_sanders02m.html.
551. Carter, supra note 549.
552. Yousoufian, 229 P.3d at 743.
554. Id.
others in attendance and generated considerable controversy. Justice James Johnson reportedly agreed with Sanders’s 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. He served as president of the Washington Chapter of the American Judicature Society, a national organization that worked “to protect the integrity of the American justice system.” In that capacity, he had worked with others to establish the website VotingForJudges.org in order to better educate voters about judicial candidates. 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. The other candidate, Bryan Chushcoff, was (and is) a Superior Court Judge in Pierce County, and has served as Presiding Judge in that court since 2009. Before joining the judiciary he spent nearly two decades as a practicing attorney.

In his campaign, Wiggins charged that Sanders “failed to uphold ethical standards” and that he “side[d] too often with criminals and disciplined lawyers.” 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. 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% of the time and voted 90% of the time either in favor of no penalty or lighter discipline for attorneys sanctioned by the court. In response, Sanders called Wiggins a “character assassin” and

---

557. Id.
559. Id.
561. Steve Miletich, Justice Richard Sanders, as Usual, Draws Fire from Two Election Opponents, SEATTLE TIMES (July 28, 2010), http://seattletimes.com/html/localnews/2012475245_6supremecourt29m.html.
563. Miletich, supra note 561.
564. Id.
565. Id.
accused him of using “misleading statistics.”\footnote{Id.} 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.”\footnote{Id.}

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’s direct expenditures were almost the same, $295,185.\footnote{Data from Money in State Politics, NAT’L INST. ON MONEY IN ST. POL. (on file).} 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.\footnote{Candidates, NAT’L INST. ON MONEY IN ST. POLS., http://ns.followthemoney.org/database/StateGlance/state_candidates.phtml?s=WA&y=2010 (last visited Feb. 16, 2015).} Brian Chushcoff, who eschewed fundraising altogether,\footnote{Miletich, supra note 561.} spent a grand total of $1,592.\footnote{Id.}

In the August 17th, primary, Sanders received 47.16% of the vote, Wiggins received 40.39% of the vote, and Chushcoff received 12.45% of the vote.\footnote{2010 Primary Results, supra note 529.} 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.\footnote{Eli Sanders, High Court Hypocrite, SLOG.THESTRANGER.COM (Oct. 7, 2010), http://www.thestranger.com/seattle/high-court-hypocrite/Content?oid=5062389.} 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, \textit{The Seattle Times}, one month prior to the general election, to reverse its endorsement of 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.\footnote{The Times Recommends Re-election of Richard Sanders to the State Supreme Court, SEATTLE TIMES (Aug. 4, 2010, 4:36 PM), http://seattletimes.com/html/editorials/2012536245_edit05sanders.html.} While acknowledging that Wiggins was “fully qualified to be on the court,” the paper nonetheless endorsed Sanders, stating that “[t]he 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.\textsuperscript{575}

But on October 24, 2010, a few days after Sanders made his controversial remarks about race, \textit{The Seattle Times} rescinded its prior endorsement of Sanders and endorsed Wiggins instead.\textsuperscript{576} The editorial accused Sanders (and Johnson) of “inflam[ing] racial tensions” by stating that “African Americans are overrepresented in the state prison system because they commit more crimes.”\textsuperscript{577} Observing that “Sanders’s 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.”\textsuperscript{578} As harmful as it was for Sanders not to have \textit{The Seattle Times}’ endorsement, the paper’s unusual step of rescinding its prior endorsement was undoubtedly even more harmful politically.\textsuperscript{579} Moreover, \textit{The Seattle Times}’ reversal of position served to reinforce Wiggins’s consistent campaign message about Sanders’s intemperate behavior, and he criticized Sanders’s comments about race at the judicial meeting as “‘amazing’ and ‘ naïve.’”\textsuperscript{580}

Another apparently potent issue working against Sanders’s 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 five to four ruling in 2006, the Court upheld the constitutionality of the Washington Defense of Marriage Act insofar as it prohibited same sex marriage.\textsuperscript{581} Justice Sanders was a decisive member of the five-justice majority, joining in a concurring opinion authored by James Johnson.\textsuperscript{582} One critic, Hugh Spitzer, an adjunct professor at the University

\textsuperscript{575} Id.
\textsuperscript{577} Id.
\textsuperscript{578} Id.
\textsuperscript{581} Andersen v. King Cnty., 138 P.3d 963, 990 (Wash. 2006).
\textsuperscript{582} Id. at 1010.
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.” 583 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. 584

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, endorsed Sanders for reelection over Wiggins. 585 “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.” 586

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 prior elected-incumbent justice to be defeated was former Chief Justice Keith Callow who lost to Charles Johnson in 1990. 587 Wiggins undoubtedly adopted a wise strategy by highlighting Sanders’s 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 saying, “[t]his cost me the election.” 588 In addition, Eli Sanders, the author of the Stranger piece on Sanders’s hypocrisy, was


584. Sanders, supra note 573. 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.

585. Id.

586. Id.


588. Steve Miletich, Wiggins Finally Prevails in State Supreme Court Race, Unseating Sanders, SEATTLE TIMES (Nov. 12, 2010, 4:14 PM), http://seattletimes.com/html/localnews/2013420236_supremecourt13m.html; Richard B. Sanders, Justice Sanders Explains His Comments About Race and Criminality, SEATTLE TIMES (Dec. 2, 2010, 3:42 PM), 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.”).
probably entitled to his own self-congratulatory post, claiming that his article might have cost Sanders the election as well.589

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

H. The 2012 Election

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.590 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.591

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; he declined to solicit donations or endorsements “from any organization with a special interest.”592 Stafne was another long-time private attorney with particular expertise in maritime and marine resources law. He represented fishermen and fish processing companies on issues relating to the Magnuson Fishery

---

589. Eli Sanders, How Richard B. Sanders Lost It, SLOG.THESTRANGER.COM (Nov. 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 in liberal, gay-friendly King County, where more than 58% of voters backed Wiggins).


Conservation and Management Act.\textsuperscript{593} Neither McQuaid nor Stafne made a significant effort. According to the \textit{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.”\textsuperscript{594} In the end, Owens easily prevailed in the primary (with 63\%), over McQuaid (24\%) and Stafne (13\%), avoiding the need for a general election contest.\textsuperscript{595}

In the second race, in the primary, Steve Gonzalez bested Bruce O. Danielson, 60\% to 40\%, again avoiding the need for a general election contest.\textsuperscript{596} Before being appointed to the Supreme Court, Gonzalez served as a judge on the Superior Court in King County.\textsuperscript{597} Prior to that, he worked on terrorism prosecutions as an Assistant United States Attorney, on domestic violence issues as an Assistant City Attorney, and as an associate with a private law firm.\textsuperscript{598} The other justices and most of the rest of the legal establishment broadly endorsed him.\textsuperscript{599}

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.\textsuperscript{600} 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.”\textsuperscript{601} In addition, Gonzalez’s campaign expended $332,888 in support of his candidacy, while Danielson made no expenditures in support of his candidacy.\textsuperscript{602} Despite this apparent disparity

\begin{thebibliography}{9}
\item \textsuperscript{594} The \textit{Times Recommends: Gonzalez and Owens for State Supreme Court}, \textit{SEATTLE TIMES} (July 5, 2012), http://seattletimes.com/html/editorials/2018613884_edit06supremes.html.
\item \textsuperscript{596} Id.
\item \textsuperscript{598} Id.
\item \textsuperscript{599} Id.
\item \textsuperscript{601} Eli Sanders, \textit{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)}, \textit{STRANGER.COM} (Aug. 8, 2012), http://slog.thestranger.com/slog/archives/2012/08/08/bruce-danielson-cant-really-explain-how-he-got-over-276000-votes-last-night-but-he-says-im-ill-informed-or-malicious-for-asking.
\item \textsuperscript{602} Data from Money in State Politics, \textit{NAT’L INST. ON MONEY IN ST. POL.} (on file).
\end{thebibliography}
in qualifications and expenditures, Danielson received 40% of the vote statewide, and he prevailed in numerous counties in eastern Washington, leading to widespread speculation that racist attitudes depressed the Gonzalez vote total.\footnote{Id.\footnote{Matt A. Barreto et al., Dissecting Voting Patterns in the González-Danielson Supreme Court Contest in Washington State, available at http://faculty.washington.edu/mbarreto/papers/gonzalez_primary2012.pdf.}} A rigorous academic analysis of the election results by a University of Washington political science professor supported this surmise.\footnote{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.").}

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 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’s about face behind him. Significantly, outgoing incumbent Tom Chambers endorsed him.\footnote{2012 Washington State Video Voters’ Guide, a Joint Presentation by the Washington State Secretary of State’s Office and TVW, VotingForJudges.Org, http://www.votingforjudges.org/12gen/supreme/9sm.html (last visited Feb. 11, 2015).} But Sanders stuck to his libertarian message. He explained that when he was on the Court:

> At 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.\footnote{Justice Sheryl Gordon McCloud, WASH. COURTS, https://www.courts.wa.gov/appellate_trial_courts/supreme/bios?fa=schios.display_file&fileID=gordon_meccloud (last visited Jan. 20, 2014).}

Sheryl Gordon McCloud was a very experienced appellate attorney, specializing in criminal defense work.\footnote{Mike Andrew, SGN Exclusive Interview: WA Supreme Court Candidate Sheryl McCloud, SEATTLE GAY NEWS (Sept. 14, 2012), http://www.sgn.org/sgnnews40_37/page6.cfm.} 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.\footnote{Sheryl Gordon McCloud, WASH. COURTS, https://www.courts.wa.gov/appellate_trial_courts/supreme/bios?fa=schios.display_file&fileID=gordon_meccloud (last visited Jan. 20, 2014).} Apart from that overlap, McCloud presented a more 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.609

Bruce Hilyer was appointed a Superior Court Judge for King County by Democratic Governor Locke, and served as Presiding Judge from 2008 to 2010.610 Prior to that he was a deputy prosecutor in King County and served as counsel to Seattle’s long-time major Charles Royer.611 According to his campaign website, between 1985 and 2000 he was in private practice representing “individuals and small businesses in civil, environmental, and health care cases.”612 He also served on the board of directors of the Washington Environmental Council and as chair of the Washington State Parks and Recreation Commission.613 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 lengthy 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.614 He presented himself as “the only candidate who started out as a storefront lawyer representing working class people.”615 He also said he was “the only candidate with an environmentalist record, successfully chairing Sound Transit and instituting numerous environmental programs as County Executive.”616 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.617

In the money race, Richard Sanders led the way by a modest amount, with expenditures of $338,661.618 Sheryl McCloud followed with $229,178, 618 Judicial Candidates, PUB. DISCLOSURE COMM’N, http://www.pdc.wa.gov/MvcQuerySystem/Candidate/jud_candidates?year=2012 (last visited Jan. 21,
Bruce Hilyer with $200,311, and John Ladenburg $83,919. The only independent expenditures targeted at this race were $5,420, 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. In the general election, McCloud received 55.24% of the vote and Sanders received 44.76%. 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.

I. The 2014 Election

The 2014 Supreme Court election reflected the complete collapse of 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. On May 1, Governor Jay Inslee appointed Mary Yu to fill the vacancy created by Johnson’s departure. 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 as well as a Deputy in the Criminal and Civil Divisions.

---

619. Data from Money in State Politics, NAT’L INST. ON MONEY IN ST. POL. (on file).
621. Id. (reporting two independent expenditures in support of Sanders that totaled $762.15 and one independent expenditure of $211.31).
622. 2012 Primary Results, supra note 595.
Before attending law school, Justice Yu worked in the Peace and Justice Office for the Catholic Archdiocese of Chicago.627 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.628 Yu faced the voters in 2014, and if elected, would 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.”629

As a result of Johnson’s resignation and Yu’s appointment, four incumbent justices sought reelection in 2014. In addition to Yu, Justices Charles Johnson, Mary Fairhurst, and Debra Stephens all sought reelection. These judicial races were the sleepiest in modern Washington history. Justice Fairhurst and Justice Yu had no challengers, so they appeared without opposition on the November ballot.630 One candidate filed against Justice Charles Johnson, and another against Justice Debra Stephens, and these contests were resolved in the November general election.631 Charles Johnson faced a challenge from Eddie Yoon, a relatively low profile private practitioner in Pierce County who teaches part time at a university in Korea.632 Stephens’s opponent was John (“Zamboni”) Scannell, who had been disbarred from the practice of law in Washington State and was best known as the former driver of the Zamboni ice-making machine at the Thunderbirds hockey games at the Seattle Center.633 There was speculation that a voter petition might be filed in an effort to remove him from the ballot.634

In the end, the 2014 election results were entirely predictable. Justices Fairhurst and Yu were reelected and elected, respectively, without

---

627. Id.
629. Austin Jenkins, Inslee Appoints King County Judge Mary Yu to Washington Supreme Court, NW NEWS NETWORK (May 1, 2014) http://wnwnewsnetwork.org/post/inslee-appoints-king-county-judge-mary-yu-washington-supreme-court.
631. Id.
634. Id.
opposition. Justice Johnson defeated Eddie Yoon 73% to 27%, and Justice Stephens defeated John Scannell 78% to 22%.636

J. Environmental Protections as a Factor in Judicial Elections

Washington Conservation Voters (“WCV”) 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.637

Even if WCV may be assumed to favor candidates who, in general and over the long run, 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.

WCV 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.638 In addition, press accounts indicate that WCV was a contributor to Citizens to Uphold the

636. Id.
638. King County Rules Again in Statewide Tally, CHRONICLE (Nov. 22, 2002), http://www.chronline.com/editorial/article_905db5a6-468a-5297-8ff1-ee5db7db5498.html.
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, WCV hosted an event to help Wiggins raise funds to support his election bid.

WCV also has 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 Johnson. In 2004, when Johnson ran again for a seat on the Supreme Court, WCV endorsed his opponent Mary Kay Becker. 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. 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.” In 2008, a relatively low-key election year for the Supreme Court, WCV again endorsed all of the incumbents (Justices Fairhurst, Johnson, and Stephens), all of whom were reelected. In 2010, WCV endorsed Charlie Wiggins in his successful bid to unseat Justice Sanders, and also endorsed Stan Rumbaugh, who failed in his effort to unseat Justice Jim Johnson.

In 2012, WCV initially endorsed Bruce Hilyer in the primary election for the seat on the Court being vacated by retiring Justice Chambers.

641. Mapes, supra note 455.
646. Endorsed: Judge Bruce Hilyer for Washington Supreme Court (Position 9), WASH. CONSERVATION VOTERS, http://wcvoters.org/campaigns-elections/endorsements/2012-
After Cheryl Gordon McCloud and Richard Sanders emerged as the two top vote getters in the primary, WCV endorsed McCloud in the general election.\(^{647}\) Also in 2012, WCV endorsed Steve Gonzalez and Susan Owens, both of whom won their races.\(^{648}\)

WCV apparently did not bother to endorse candidates in the 2014 judicial races.

**IV. WISCONSIN**

**A. 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, 2005, in the *Ferdon* case, 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.\(^{649}\) The Court concluded that the $350,000 cap was not “rationally related” to the legislature’s goal of improving health care.\(^{650}\)

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.\(^{651}\) As a result of this ruling, a 15-year-old boy who allegedly suffered neurological damage as a result of ingesting

---


\(^{649}\). *Ferdon ex rel Petrucelli v. Wis. Patients Compensation Fund*, 701 N.W.2d 440 (Wis. 2005).

\(^{650}\). *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).

\(^{651}\). *Thomas ex rel. Gramling v. Mallett*, 701 N.W.2d 523 (Wis. 2005).
lead-tainted paint was allowed to proceed with a products liability claim against manufacturers 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.\footnote{Id. at 564–65.}

The decision in \textit{Thomas}, the lead paint case, built upon a prior Wisconsin Supreme Court case involving claims based on medication of pregnant women with diethylstilbestrol (\textquotedblleft DES\textquotedblright), in which the Court first adopted the risk contribution theory.\footnote{See \textit{Collins v. Eli Lilly \\& Co.}, 342 N.W.2d 37 (Wis. 1984).} The Court reasoned in that case that even though the 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,” and in that sense, “each shared some measure of culpability in producing or marketing the drug.”\footnote{\textit{Collins}, 342 N.W.2d at 49 (emphasis is original); \textit{Thomas}, 701 N.W.2d at 549 (citing \textit{Collins}, 342 N.W.2d at 49).} 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.”\footnote{\textit{Thomas}, 701 N.W.2d at 549 (citing \textit{Collins}, 342 N.W.2d at 49).} In \textit{Thomas}, the Court concluded that claims arising from the manufacture of lead paint were sufficiently “factually similar”\footnote{Id. at 549–50.} to the claims arising from the production of DES that the risk contribution theory should be expanded to apply to these other claims.\footnote{See \textit{id.} at 557 (concluding that \textquotedblleft although this case is not identical to \textit{Collins}, we conclude that it is factually similar such that the risk-contribution theory applies").}

In both \textit{Ferdon} and \textit{Thomas}, the Supreme Court split along essentially the same ideological lines. In \textit{Ferdon}, Chief Justice Shirley Abrahamson wrote the opinion for the Court, joined by Justices Ann Walsh Bradley, Louis Butler, Jr., and Patrick Crooks.\footnote{\textit{Ferdon}, 701 N.W.2d 445.} The dissenters were Justices David Prosser, Patience Roggensack, and Jon Wilcox.\footnote{Id. at 494, 524.} This split reflected the relatively stark partisan divide on the Court, with Abramson and Butler...
having been initially appointed by Democratic Governors, and Prosser and Wilcox having been initially appointed by Republican Governors. 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 United States 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 conclusions. 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.” 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,” 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.”

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. 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

---

660. Chief Justice Abrahamson was appointed by Governor Patrick Lucey and Justice Butler was appointed by Governor Jim Doyle. Supreme Court Justices, WIS. CT. SYSTEM, http://wicourts.gov/courts/supreme/justices/index.htm (last updated April 24, 2012). Justices Prosser and Wilcox were appointed by Governor Tommy Thompson. Id.
661. Thomas, 701 N.W.2d at 523.
662. Id.
663. Ferdon, 701 N.W.2d at 494–95 (Prosser, J., dissenting).
664. Thomas, 701 N.W.2d at 568 (Wilcox, J., dissenting).
665. Id. at 568, 574–75 (Wilcox, J., dissenting).
crime, presumably because this law and order message was perceived to be more compelling with voters than the charge that he was unfriendly to business.667

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 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 $450,000 for adults.668 Democratic Governor Jim Doyle vetoed the measure, arguing that the new cap was too similar to the old cap invalidated by the Supreme Court.669 The legislature then passed a bill with a $750,000 cap on noneconomic damages and the Governor signed that bill in March 2006.670 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.671

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

667. 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."). The use of crime as campaign issues in judicial elections has not been limited to the business community. See Justice For Just Us, Wis. Democracy Campaign (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.").


669. Id. (citation omitted).

670. Id. at 123 (citation omitted).

671. In 2011, as part of Governor Scott 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. 2011 Wisconsin Act 2 § 23, Wis. Stat. § 893.555 (2013–2014) (effective Feb. 1, 2011).
contribution theory in tort cases. However, Governor Doyle vetoed the legislation, leaving the *Thomas* decision in place.

After this initial legislative skirmish, the action turned to the courts. As some had predicted, 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. Some of these cases were removed to federal court where the manufacturers argued that the Wisconsin Supreme Court’s adoption of the risk contribution theory violated their rights under the Due Process Clause of the federal Constitution. 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 Company*, Judge Rudolph Randa, appointed to the bench by President George H.W. Bush, ruled that the Wisconsin Supreme Court’s adoption of the risk contribution theory violated substantive due process. First, he ruled that 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. 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

---


675. The defendant manufacturers initially raised the due process argument before the Wisconsin Supreme Court in the *Thomas* case, but the Court declined to address the issue on the ground that it was not ripe for resolution. See *Thomas*, 701 N.W.2d at 565 (outlining the due process issues raised by manufacturers).

676. Gibson v. Am. Cyanamid Co., 719 F. Supp. 2d 1031 (E.D. Wis. 2010); Judge Randa has been no stranger to controversy. In 2010, in *Figueroa v. United States*, the United States 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. 622 F.3d 739, 743 (7th Cir. 2013). In 1995, Judge Randa ruled that Congress’ enactment of the 1994 Freedom of Access to Clinics 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, 690 (7th Cir. 1995).

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.” Applying a mélange of factors derived from the Supreme Court’s divided ruling in *Eastern Enterprises v. Apfel*, he concluded that the risk contribution rule created “an arbitrary and irrational remedy” in violation of the Due Process Clause.

In the second case, *Owens v. American Cyanamid Company*, 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.”

As to *Eastern Enterprises*, Judge Adelman distinguished that case on grounds that the company raising the due process argument “had not played a part in causing the problem that the legislation was attempting to solve.” 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.”

The losing side appealed the first of these two rulings to the United States Court of Appeals for the Seventh Circuit. The notice of appeal was filed in December 2010, 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.

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*. 687 A few years later, the legislature approved, and
Governor Walker signed, another measure making the legislature’s
abrogation of the *Thomas* risk contribution theory retroactive. 688 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. 689 In addition, it raised the question whether 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. 690 The plaintiff responded by arguing
that the 2013 legislation itself violated the Due Process Clause of the
Wisconsin Constitution by depriving the plaintiff of a vested right of action
under the common law. 691

On March 25, 2014, Wisconsin Circuit Court Judge David Hansher
ruled in favor of the plaintiff. 692 Applying a test articulated by the
Wisconsin Supreme Court in *Martin v. Richards*, 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 the statute would affect. 693 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. 694 The Wisconsin Court of Appeals granted the defendant leave to
pursue an interlocutory appeal to that court. 695 The case may eventually
make its way up to the Wisconsin Supreme Court.

---

2011).
688. 2013 Wisconsin Act 20 §§ 2318(e)–(g), WIS. STAT. § 895.046 (2013–2014) (effective
July 2, 2013).
689. See *Clark*, 2014 WL 1257118, at *7.
690. Id.
691. Id. at *5 (discussing the three separate grounds supporting the plaintiff’s argument).
692. Id. at *25.
693. 531 N.W. 2d 70 (1995); id. at *24.
695. 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
In the meantime, on July 24, 2014, the United States Court of Appeals for the Seventh Circuit finally ruled on 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. The irony of the situation in Wisconsin is that competing due process 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. Plaintiff-Respondent’s Response to Defendants’ Petition for Leave to Appeal a Non-final Order, Clark v. Am. Cyanamid Co., 2014-AP-000775LV (April 22, 2014).

696. *Gibson*, 760 F.3d 600.
697. *Id.*
698. *Id.* at 606.
699. *Id.* at 610.
700. *Id.* at 625.
701. *Id.* at 627.
702 See generally David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373 (2003) (discussing the relevance of the landmark Supreme Court decision of *Lochner v. New York*, a case that held that the “freedom to contract” is implicit in the Due Process clause of the Fourteenth Amendment).
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 challenges 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 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.

B. Judicial Elections in Wisconsin

Formally, Wisconsin holds nonpartisan elections to fill seats on its Supreme Court and other courts. 703 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 Abrahamson’s run for reelection in 1999. As one report put it, this contest marked a “turning point for negativity and expense” in Wisconsin. 704 The two candidates raised a total of almost $1.4 million combined. 705 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. 706 Ultimately, Chief Justice Abrahamson defeated her opponent by a comfortable 60% to 40% margin. 707

703. WIS. CONST. art. VII, § 4.
705. Unseating Abrahamson from State Supreme Court a Daunting Challenge the Feisty Chief Justice is Tough Campaigner, MADISON.COM (June 1, 2008, 12:00 AM), http://host.madison.com/business/b2b/unseating-abrahamson-from-state-supreme-court-a-daunting-challenge-the/article_a4e6b6fa-bd79-5c0c-80fe-b576861420ef.html.
Over the past decade, there have been three major election 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.\(^708\)

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 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.\(^709\) Ziegler had worked as a federal prosecutor and private attorney before being appointed by Governor Thompson to the Circuit Court, to which she was subsequently reelected two times.\(^710\) 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%.\(^711\)

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.\(^712\) 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 million, bringing the cost of the race to nearly $6 million.\(^713\)

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

---

708. Also during this period, long-time Chief Justice Shirley Abrahamson 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.


710. Id.

711. Id.


713. JESSE RUTLEDGE, supra note 704, at 28.
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 United States 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. 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. The business community and its 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. Gableman’s campaign ran a controversial attack ad that falsely accused Justice Butler of being responsible for freeing a rapist from jail. One apparent effect of the

---

716. Id.
720. See Wisconsin Judgment Day: The Sequel, FACTCHECK.ORG (March 21, 2008), http://www.factcheck.org/2008/03/wisconsin-judgment-day-the-sequel/ (“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 three to three on whether to permit further prosecution of the ethics charge. Mary Spicuzza, Politics Blog: Ethics Case Against Justice Gableman Dropped, WIS. ST. J. (July 8, 2010, 12:00 PM), http://host.madison.com/news/local/govt_and_politics/blog/politics-blog-ethics-case-against-justice-gableman-dropped/article_bbd6b6138-8ab3-11df-abd8-001cc4e05286.html.
campaign’s exceedingly negative tone was to depress voter turn-out below 20%. 721

The final significant election in Wisconsin during this period pitted Joanne Kloppenburg, 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. 722 Prosser eventually won the 2011 reelection by a narrow 7,000 vote margin out of nearly 1.5 million votes cast. 723

The Prosser-Kloppenburg contest set yet another record for independent expenditures in judicial elections in Wisconsin with five groups spending almost $3.6 million. 724 One left-leaning group spent approximately $1.36 million, while four right-leaning groups spent a combined $2.21 million. 725 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.” 726 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. 727

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. 728 In addition, Justice Prosser reportedly called Chief Justice

---

725. Id.
726. See Billy Corrigher, CTR. FOR AM. PROGRESS & LEGAL PROGRESS, FIXING WISCONSIN’S DYSFUNCTIONAL SUPREME COURT ELECTIONS 2 (July 2013).
727. See Erik Opsal, One Week Later: What Happened in Wisconsin?, BRENNAN CTR. FOR JUST. (Apr. 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”).
728. See Corrigher, supra note 726, at 3.
Abrahamson a “total bitch,” and declared that he would “destroy” her.\textsuperscript{729} Justice Prosser reportedly admitted using this language.\textsuperscript{730} 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 the ethics investigation into these matters by a three to three vote reflecting the same partisan divide that separates the justices on environmental law and other topics.\textsuperscript{731}

C. Judicial Elections and Wisconsin Environmental Law

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,” for example, but which might nonetheless have serious environment implications. It also does not pick up the \textit{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, are briefly summarized as follows (from most recent to oldest):

- \textit{Rock-Koshkonong Lake District v. State Department of Natural Resources}: Reversing denial by the Department of Natural

\textsuperscript{729} Id.
\textsuperscript{730} Id.
\textsuperscript{731} Id. at 2.
Resources ("DNR") 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. 732

- **Andersen v. Department of Natural Resources**: Holding that the DNR 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. 733

- **State v. Harenda Enterprises, Inc.**: Holding that trial court properly granted judgment in favor of State in suit seeking civil penalties and other relief based on environmental auditor’s failure to follow regulations prescribing the method for testing for the presence of potentially dangerous levels of asbestos in building undergoing renovation. 734

- **State v. Schweda**: 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. 735

- **Hilton ex rel. Pages Homeowners’ Association v. Department of Natural Resources**: Upholding a decision by DNR 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.  

- **Clean Wisconsin, Inc. v. Public Service Commission of Wisconsin:** 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.  

- **Donaldson v. Board of Commissioners of Rock-Koshkonong Lake District:** 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.  

- **Wisconsin Citizens Concerned for Cranes and Doves v. Department of Natural Resources:** Upholding a decision by DNR establishing an open hunting season for mourning doves.  

- **Johnson Controls, Inc. v. Employers Insurance of Wausau:** Overruling the prior decision of the Court in *City of Edgerton v. General Casualty Company of Wisconsin,* and ruling in the 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.

---


741. Johnson Controls, Inc. v. Emp’rs Ins. of Wausau, 665 N.W.2d 257 (Wis. 2003).
- **Responsible Use of Rural and Agricultural Land (RURAL) v. Public Service Commission of Wisconsin**: Upholding an order of the Public Service Commission and related DNR ruling granting a certificate of public convenience for the construction and operation of a natural gas-fired electric generation power plant.\(^{742}\)

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.\(^{743}\) 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 of whether DNR had the statutory authority to establish an open season for hunting of mourning doves.\(^{744}\) 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, 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.\(^{745}\)

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.\(^{746}\) The only significant exceptions to

---


\(^{743}\) Professor Alan Ball of Marquette University has assembled a database 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 generally Alan Ball, Statistics for Previous Years, SCOWSTATS.COM, http://www.scowstats.com/statistics-for-previous-years (last visited Feb 2, 2015).

\(^{744}\) See Wis. Citizens Concerned for Cranes & Doves, 677 N.W.2d 612 (holding that the Department of Natural Resources had express authority to establish an open hunting season).

\(^{745}\) In eight of these nine cases, the justices writing separately filed opinions dissenting in whole or in part from the opinion for the Court. See Hilton, 717 N.W.2d at 178–79 (Prosser, J., concurring) (three conservative justices 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 21st century”).

\(^{746}\) For these purposes, over the 13 years examined, the “conservative” justices include Justices Babitch, Gableman, Prosser, Roggensack, Sykes, Wilcox, and Ziegler. The “liberals” include Justices 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 nonpartisan
this pattern is 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). 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.

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 United States 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 Supreme Court, the side favoring less stringent environmental controls prevailed three times, while in the fourth case (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 clear and unmistakable evidence that the personnel on Wisconsin’s highest court, and the outcome of judicial elections in this

elections). Justice Crooks is the most difficult to categorize, switching between the “conservative” to “liberal” sides from case to case. One non-consequential departure from this pattern was Justice Butler’s vote with the conservative majority in Clean Wisconsin, Inc.

See Johnson Controls, Inc., 665 N.W.2d at 262, 295, 297. The justices from each political party took a different view of this case. The majority opinion was authored by Justice Prosser, a “conservative,” Chief Justice Abrahamson, a “liberal,” joined this opinion along with Justices Babitch and Sykes. Justice Crooks, a “moderate conservative,” wrote a concurring opinion and Justice Wilcox, a “conservative,” filed a dissenting opinion joined by Justice Bradley, a “liberal.”

See id. at 270 n.16 (“[I]n the 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.” (citation omitted)).
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, the Supreme Court, by a four to three vote, ruled in 2011 that DNR, 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 and United States 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 EPA to administer the Clean Water Act. The Act vests the EPA with authority to implement the National Pollution Discharge Elimination System (“NPDES”), but authorizes the EPA to delegate this permitting authority to the state. Wisconsin, like most states, has obtained delegated authority to administer the NPDES permitting program.

The question presented in Andersen was whether a coalition of citizens and advocacy groups could challenge a permitting decision by the DNR 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. The Court recognized, as a general matter, that a state is required to exercise delegated Clean Water Act-permitting authority in accordance with federal requirements, and that the EPA retains the authority to review and overturn individual state permitting actions if they are contrary to federal law. 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. 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.

Chief Justice Abrahamson filed a dissenting opinion, joined by two of her colleagues. She read both federal and state law to authorize the

749. Andersen, 796 N.W.2d at 19.
750. See id. at 4 (explaining that the issue presented by the case was whether Wis. Stat. § 283.63 requires the DNR to hold a public hearing on CWAC’s petition for review of the permit reissued to Fort James’ Broadway Mill when the premise of CWAC’s petition is that the permit fails to comply with basic requirements of the Clean Water Act and federal regulations promulgated thereunder).
751. Id. at 16.
752. Id. at 12.
753. Id. at 17.
754. Id. at 18.
755. Id. at 19–22 (Abrahamson, C.J., dissenting).
Department to consider whether DNR permitting actions complied with federal law.\footnote{Id.} Any other conclusion, she argued, “invert[ed] the federal-state partnership” the Clean Water Act was designed to implement.\footnote{Id. at 22.} 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.”\footnote{Id. at 21 (citing Dist. of Columbia v. Schramm, 631 F.2d 854 (D.C. Cir. 1980)).} 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.”\footnote{Id. at 22.}

The \textit{Andersen} decision is unquestionably problematic as a matter of federal statutory interpretation.\footnote{See also Adam Babich, \textit{The Supremacy Clause, Cooperative Federalism, and the Full Federal Regulatory Purpose}, 64 \textit{Admin. L. Rev.} 1, 43–44 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).’”).} 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 EPA retains the authority to review and overturn individual state permitting actions, and, if permitting violations remain persistent, EPA has the ultimate authority to withdraw the delegation of permitting authority from the state.\footnote{33 U.S.C. § 1342(b)–(c) (2012).} But, EPA cannot effectively oversee every state permitting action. Thus, Congress included citizen-enforcement mechanisms in the Clean Water Act to help ensure that states continue to implement the Act effectively. To the extent citizen enforcement to help ensure state compliance with the Clean Water Act is today a dead letter in Wisconsin, the goals of the Clean Water Act itself have been compromised.

The environmental consequences of Wisconsin’s judicial elections also came home to roost in the case of \textit{Rock-Koshkonong Lake District v. State of Wisconsin}, decided by the Wisconsin Supreme Court in 2013.\footnote{\textit{Rock-Koshkonong Lake Dist.}, 833 N.W.2d 800.} The central issue in the case was whether the 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.\footnote{Id. at 804.} All of the justices ultimately agreed that the DNR
possessed the 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. 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. 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 four to three loss for the public trust argument appears to reflect a major reversal in direction on one of Wisconsin’s signature contributions to United States 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 shore-land zoning ordinance adopted pursuant to state guidelines constituted a “taking” of private property. 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. 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. While Rock-Koshkonong is potentially distinguishable

764. Id. at 800.
765. Id. at 835.
766. Id. at 840–46.
768. 201 N.W.2d 761, 767, 772 (Wis. 1972).
769. 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”).
770. See, e.g., Lake Beulah Mgmt. Dist. v. Dep’t of Natural Res., 799 N.W. 73 (Wis. 2011) (recognizing that state statute authorizing Department of Natural Resources 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
on its facts, the majority 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 of regulatory authority above the mean high water line.  

As the contrasting arguments make clear, the seemingly technical legal justices’ 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, 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 Penokee Hills, upstream of the Bad River Indian Reservation near Lake Superior. A Florida-based company has purchased mineral rights covering a large area in northwestern Wisconsin and proposes what critics 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 administrative, requires the lawmaking body to act in all cases where action is necessary, not only to preserve the trust, but to promote it.”).

771. The Rock-Koshkonong case arguably presented the narrow question of whether the public trust doctrine could be invoked to protect wetlands adjacent to navigable waters 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 threaten public trust uses and values.


773. See also Dan Kaufman, The Fight for Wisconsin’s Soul, N.Y. TIMES (March 29, 2014), http://www.nytimes.com/2014/03/30/opinion/sunday/the-fight-for-wisconsins-soul.htm.?_r=0 (“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.”).
describe as potentially the largest open-pit iron-ore mine in the world. 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. Given the politicization of the Wisconsin Supreme Court and the 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 were 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. 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.

CONCLUSION

There are several clear conclusions to be drawn from these four case studies about the role of the environmental issue in state election contests: the identities of the persons sitting on the states’ elected high courts matter to the content of environmental law, and therefore effective participation in state judicial elections by supporters of environmental protection efforts is crucial to the success of those efforts. One might wish for the elimination of judicial elections. But the elected state courts have proven to be impervious to reform efforts to replace them with courts less prone to direct political influence. Given this reality, responsible citizens who care about the environment have no choice but to fully participate in these elections, as advocates for fair and impartial justice.

LOCOMOTIVES V. LOCAL MOTIVES: THE COMING CONFLICT, STATUTORY VOID, AND LEGAL UNCERTAINTIES RIDING WITH REACTIVATED RAILS-TO-TRAILS

By Matthew J. McGowan†

Study after study projects that the United States economy will come to rely more and more on freight rail in the twenty-first century. Few would have predicted the industry’s reemergence 30 years ago when Congress, alarmed at the mass exodus from railroad and the resulting anemic rail infrastructure due to abandonment, began passing laws that culminated in 1983 with a rail-banking amendment to the National Trail System Act of 1976. The new statute streamlined the transfer of these rail corridors to private groups for safekeeping in the event railroads once again needed to reactivate the corridors. Since then, parks departments, nonprofits, and local transportation authorities have taken full advantage of the available “linear parks,” nationally amassing some 21,000 miles of former freight corridors now used as trails or converted for local use as light passenger rail.

Courts, federal officials, and scholars have thoroughly explored the legal questions raised by landowners during the rails-to-trails program’s initial legal maelstrom; but surprisingly, little discussion has addressed the legalities of reactivation, which, after all, is the whole premise for the rails-to-trails program. Data tracking freight rail’s reemergence suggests corridor-starved rail companies will soon begin reactivating their old lines. But local communities have come to rely on these rail-banked corridors for their transportation and recreational needs. This paper attempts to start a conversation about the legalities of reactivation before offering to trail groups strategies for preserving recreational use even after the freight trains return, an arrangement called rails-with-trails. It also proposes new laws at the state and federal level that might further encourage rails-with-trails.

†J.D. Candidate, Texas A&M University School of Law, May 2015; B.A. in Journalism, Texas Tech University, 2008. Author would like to thank Professor Timothy M. Mulvaney for his insight, patience, and continual vote of confidence from the very inception of this Comment; and classmates Whitley Zachary, Terrell Fenner, and Brian Singleterry for their gracious and helpful suggestions.
INTRODUCTION

Rising about 30 feet above the bustle of Manhattan’s Lower West Side on a ribbon of concrete and steel, the leafy park space of the High Line pierces through more than a mile of one of the most densely populated neighborhoods in the United States. The High Line’s hulking concrete substructure was once a freight rail corridor sitting on an easement dating back to the 1920s. At first, the freight trains regularly groaned along the


corridor. But as the decades passed, demand for freight rail began to decline.\textsuperscript{3} Daily rail service became weekly. Weekly became monthly. Monthly became biannually, and so on. Finally, in the 1970s, the last freight car came and went, leaving the corridor dilapidated and abandoned for more than a generation until a community group, Friends of the High Line, saw recreational potential in a 1.45 mile stretch of the structure and approached local officials about converting it into a public park under a federal program called Rails-to-Trails.\textsuperscript{4} In 2009, the unique “linear park,” as they are called, opened to the public and has since drawn approximately 3.7 million visitors each year,\textsuperscript{5} many of which are presumably only vaguely aware of the corridor’s freight-rail beginnings.\textsuperscript{6}

Imagine the following scenario: CSX Transportation, Inc., the railroad company that transferred the right-of-way to the City of New York decades after ceasing freight service over it, suddenly finds itself in need of the corridor and, acting under a federal rail-banking law, reactivates the corridor, dismantles its landscaping, demolishes its amphitheaters, and reinstates freight rail operations along it—all exactly as Congress intended.

This sort of scenario is perhaps farfetched for this particular stretch of former freight corridor, but this Comment argues that such reactivations of corridors-turned-parks should become increasingly common as economic realities demand more railroad shipping,\textsuperscript{7} putting railroad companies’ needs on a collision course with local initiatives that have employed the unused corridors as public parks or, in some instances, as extensions of local light-rail networks for commuters.\textsuperscript{8} Freight companies’ interests once aligned

\textsuperscript{3}Id.

\textsuperscript{4}National Trails System Act, 16 U.S.C. § 1247(d) (2012).


\textsuperscript{7}Daniel Machalaba, \textit{The Future of Rail: Freight Railroads Have Made a Strong Comeback in Recent Years. Can They Stay on Track?}, WALL ST. J. (May 23, 2011), http://online.wsj.com/news/articles/SB100014240527487033834804576301230350030512 (concluding that railroads could soon enjoy a “comeback and are poised to become busier places in the years ahead. Forecasts for freight growth are substantial, prompting railroads to plan capacity additions”); see also TEX. DEP’T OF TRANSP., TEXAS RAIL PLAN 1–12 (2012), available at http://ftp.dot.state.tx.us/pub/txdot-info/rail/plan/ch1.pdf (“According to the Association of American Railroads (AAR), one gallon of diesel fuel moved one ton of freight an average of 235 miles in 1980; by 2009, one gallon moved one ton of freight an average of 480 miles, a 104% improvement.”).

\textsuperscript{8}The Rails-to-Trails Conservancy estimates that America’s 20,000-plus miles of rails-to-trails corridors draw about 100 million trail users each year. \textit{History of RTC and the Rail-Trail
with the public’s, initially at least when federal law, now commonly called the “rail-banking” provision of the National Trails System Act of 1976,\(^9\) gave both railroad companies and the trail-creating entities what they wanted: railroads shed the tax and tort liability of unused land while retaining near-unfettered authority to reactivate the rights-of-way; trail enthusiasts and local governments obtained readymade strips of land well suited for pedestrian and passenger light-rail traffic,\(^10\) subject to only a farfetched possibility of later surrendering the corridors back to the railroads.\(^11\) Everybody won, until now.

The coming decades will see railroads once again become a fulcrum of the American economy.\(^12\) And with that boom in railroad use could come a shortage of corridors, meaning railroad companies will increasingly return to the Surface Transportation Board (“STB”), the federal agency that administers rail-banking, and invoke their right to reactivate.\(^13\) Although reactivation has occurred only 11 times since the program took off with the rail-banking statute of 1983\(^14\) —meaning only a small fraction of the more


\(^10\) Aaron Kraut, Trail Supporters Run To ‘Save The Trail’ As Purple Line Nears, BETHESDA NOW (May 29, 2013), http://www.bethesdanow.com/2013/05/29/trail-supporters-run-to-protect-the-trail/. It should be noted at the outset that not all reinstatement of “rail” service necessarily constitutes reactivation in the context of this article. Freight-rail service can be distinguished from light-rail, or passenger, service such as the scenario cited above in Bethesda, Maryland. Specifically, many local governments utilized the trail program to put light commuter rail networks on the rail-banked land. Passenger lines are nonetheless still subject to freight reactivation under the rail-banking statute. See e.g., Balt. & Ohio R.R., Metro. S. R.R. & Washington & W. Md. Ry. Co.—Abandonment & Discontinuance of Serv.—in Montgomery Cnty., Md., & D.C., No. AB–19 (Sub-No. 112), 1990 WL 287371, at *2 (Interstate Commerce Comm’n Mar. 2, 1990) (stating that “[t]he reuse of a right-of-way for a public purpose concurrently with a trail use has previously been found consistent with the Trails Act”).

\(^11\) Rails-with-trails receives extensive discussion infra Part VI, but the concept is precisely as its name suggests: the reactivation of a railroad line alongside an existing trail. See generally RAILS-TO-TRAIL CONSERVANCY, Trail-Building Toolbox, http://www.railstotrails.org/build-trails/trail-building-toolbox (last visited Jan. 29, 2015).

\(^12\) See, e.g., Machalaba, supra note 7 (explaining that rail activity could possibly double by the mid-point of the century, 2035–2040).

\(^13\) See infra Part VI (arguing that states have failed to fill in the legislative gap by ignoring reactivation and that the STB or Congress should implement a second regulatory scheme to accommodate the coexistence of light passenger rail-with-trail and freight rail on reactivated railroad corridors).

\(^14\) E-mail from Dennis Watson, Media Officer, Surface Transp. Bd., to Matthew J. McGowan, author (Nov. 5, 2013, 12:37 CDT) (on file with author) (explaining the discrepancy between the importance of the low reactivation rate and its being overlooked by legal scholarship). For one of the few discussions that touches on the legal aspects of reactivation, see Scott Andrew Bowman & Danayna H. Rosenberg, Charitable Deductions for Rail-Trail Conversions: Reconciling the Partial Interest Rule and the National Trails System Act, 32 WM. & MARY ENVTL. L. & POL’Y REV. 581 (2008), available at http://scholarship.law.wm.edu/wmelpr/vol32/iss3/2 (explaining the history of the National Trails System Act of 1983).
than 700 rail-banked corridors have seen resumed freight operations\textsuperscript{15}—the frequency of reactivation seems poised to explode.

Although freight rail plays an increasingly vital economic role in modern America, the same is true about nature trails and light passenger rail. The once-aligned interests would turn against one another as railroad companies’ need to reactivate conflicts with the possessory needs of trail stewards and local governments that have poured resources into developing the corridors, which play crucial roles in these communities. Fortunately, these uses need not all be mutually exclusive. Much room remains for compromise, and this Comment attempts to start the conversation on how to get there.

First, it begins with a brief legal history of the rails-to-trails initiative before going on to show why reactivation, a once-remote scenario despite its being the basis for federal rail-banking laws in the first place, could become much more common.\textsuperscript{16} The following sections then turn to the legal machination of reactivation, an administrative process at the STB,\textsuperscript{17} before sounding an alarm to trail groups only now entering into negotiations with railroad companies that they should safeguard certain contractual rights to the corridors at the outset. This Comment also addresses methods by which groups that have already converted railroad corridors might compromise with reactivating railroad companies to retain trails-with-rails. Finally, this Comment concludes by calling on state and federal lawmakers to enact new laws that, in addition to promoting rail-banking generally, also help to facilitate such trails-with-rails compromises.

\section*{I. History of Rails-to-Trails}

Flat, dismantled, and up to 100 feet wide, corridors of former freight railroad rights-of-way patchwork the country in disconnected segments


\textsuperscript{16} See generally H.R. REP. NO. 98-28 (1983), reprinted in 1983 U.S.C.C.A.N. 112 (presenting an example of the rails-to-trails initiative growing in exposure); see also U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-00-4, SURFACE TRANSPORTATION: ISSUES RELATED TO PRESERVING INACTIVE RAIL LINES AS TRAILS 11 (1999) (quoting a railroad official who noted that the “rights-of-way [the company] agreed to bank were banked under the assumption that the conversion to trails would be permanent”).

\textsuperscript{17} See 49 C.F.R. § 1152.29(a) (2012) (stating that the STB provides much of the regulatory requirements of rail-banking).}
ranging in length anywhere from a mile or two to a few hundred miles.\textsuperscript{18} Local communities and the public in general typically cherish their role as nature trails.\textsuperscript{19} Officials in some densely populated areas took advantage of rail-banking by adopting the abandoned corridors and putting them to use within their local passenger transportation network.\textsuperscript{20} These converted corridors, however, did not take their present form quietly.

All those hundreds of miles of rail-banked corridors now used as trails or light-rail lines came at tremendous cost to taxpayers. The 1983 law that made rail-banking possible sparked furious backlash by adjacent landowners who argued the rail-banking process violated the Fifth Amendment’s prohibition of uncompensated governmental takings by depriving them of a future reversionary right in the right-of-way.\textsuperscript{21}

The Supreme Court upheld the rail-banking law’s constitutionality as a valid exercise of commerce power, but it went on to note that landowners may seek just compensation under the Tucker Act.\textsuperscript{22} Today, some 20 years after the Supreme Court’s landmark holding on rail-banking, courts and scholars have extensively explored most legal aspects of the initial rails-to-trails conversion—and, in fact, the Supreme Court again addressed rail-banking in 2014.\textsuperscript{23} The next round of legal salvos, those fired over the


\textsuperscript{19} Many studies have shown general community-wide support of various rails-to-trails corridors. \textit{See}, e.g., Bhavana Kidambi, Assessing the Impacts of Converted Rail-Trails in North Texas Communities: Learning From the Stakeholders’ Perspectives 58 (Dec. 2011) (unpublished Master’s dissertation at University of Texas at Arlington), \textit{available} at http://dspace.uta.edu/bitstream/handle/10106/9597/Kidambi_utx_2502M_11147.pdf?sequence=1) (determining that many nearby landowners, even those who initially opposed rails-to-trails in their communities, grew to appreciate the trails). The report gauged the regional value of six North Texas trails through interviews with more than a dozen “stakeholders” from municipalities, neighborhood associations, and trail-building groups. \textit{Id. at v.} (concluding that “[t]he findings of the research reveal that although each of the five factors assessed weigh differently, the stakeholders all affirm the positive impacts of rail-trail conversions in North Texas. The study also reveals, that while rail-trails may have specific tribulations, stakeholders value the adaptation and point out that the benefits to the environment outweigh the problems.”).


\textsuperscript{21} \textit{See}, e.g., Helen Thompson, Railroaded: Hiking in a Country Setting? Great, But Not in My Back Yard, Say Rural Citizens, Tex. Monthly 76, 78 (Mar. 1992), \textit{available} at http://www.texashourly.com/content/railroaded) (quoting landowner, “Most people around here who need to jog or walk can go to the mall. We won’t be able to sleep at night; our cattle will be in danger; we won’t have any privacy”).

\textsuperscript{22} Preseault v. I.C.C. (\textit{Preseault I}), 494 U.S. 1, 5 (1990) (plurality opinion) (“We also hold that the statute is a valid exercise of congressional power under the Commerce Clause.”).

\textsuperscript{23} Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1257 (2014). The case issues and facts, although intriguing on the question of railroad easements initially granted on federal land, do not fall within the scope of this article.
reactivation of these hard-won nature trails, however, has thus far only loomed in the background—but the implications of reactivation have nonetheless cropped up in takings litigation.

The following section briefly explains the history of the rails-to-trails initiative and the takings lawsuits it sparked, a legal narrative punctuated by reminders that reactivation is the sole driver of all the hubbub.

A. Rail’s Decline & Congressional Solutions

American railroad use entered an era of decline that culminated in the 1960s as shippers (and passengers) increasingly opted for trucks, cars, and airplanes for their logistical needs.24 Railroad companies that had obtained rail corridors over the past half-century began submitting applications to the Interstate Commerce Commission (“ICC”), the STB’s precursor, seeking permission to abandon the unused lines unnecessarily burdening them with tax and legal liability.25 Traditional abandonment proceedings were relatively straightforward. Upon receiving a request to abandon a line, the ICC would first determine whether cessation of service along it would not harm public interest.26 Once it made that determination, the agency would issue a discontinuance order giving the company one year to commence whatever actions necessary to cancel service.27 If, upon the expiration of that year window, the services had not recommenced, the agency’s discontinuance order became a finalized certificate of abandonment.28

By the 1970s, the ICC was granting discontinuation requests at a rate that alarmed Congress as America’s rail infrastructure shrank from its peak

24. John C. Spychalski, Rail Transport: Retreat and Resurgence, 553 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 43 (1997) (“Between the dawn of the 1960s and the mid–1970s, rail carriage labored under siege and suffered retreat on virtually all major fronts. The primary force behind this siege and retreat was relentless, growing competition from road, air, water, and pipeline transport.”).
25. See Bowman & Rosenberg, supra note 14, at 588–89 (noting that rail-banking permits railroads “to escape tort liability to trespassers on unused corridors and the environmental liability from a century of heavy industrial railroad use”).
26. 49 C.F.R. § 1152.29(a)(2).
27. Danaya C. Wright, Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court’s Fifth Amendment Takings Jurisprudence?, 26 COLUM. J. ENVTL. L. 399, 446 (2001) (“Under the federal abandonment law, once a certificate of discontinuance is granted affirming that the public convenience and necessity do not require continued rail services, the railroad has one year to complete abandonment proceedings by taking whatever steps it desires to terminate services. It need not sell any real estate, nor does it have to remove tracks and ties. In most cases the salvage value will encourage such actions, but they are not required by the STB. If the railroad decides at the end of a year that it has no future interest in the discontinued line, the discontinuance certificate will be converted to an abandonment certificate and the railroad will no longer be liable to the shipping and traveling public along the abandoned route; it cannot be forced to resume active rail services later.”).
28. Id.
of 270,000 miles in 1920 to 141,000 miles in the 1970s. 29 Federal lawmakers responded in 1976 with the Railroad Revitalization and Regulatory Reform Act ("4-R Act"), a law authorizing the ICC to grant railroad companies permission to divest themselves of possessory interest in the rights-of-way while retaining the reversionary right to reactivate years down the line. 30 It was a prophylactic measure aimed at preserving the corridors in case freight demand returned in the future. The 4-R Act directed the ICC to suspend abandonment requests for lines that might serve non-rail public interests, such as “mass transportation, conservation, energy production or transmission, or recreation.” 31 Administratively, that early law directed the agency to, upon receipt of an abandonment request from railroad companies, suspend the abandonment for up to 180 days if it believed the corridor would serve those public interests. 32 Third-parties interested in using those corridors for interim uses were invited to petition the agency to grant it stewardship authority over the right-of-way until—and this was always also a big “if”—the railroad chose to return service to the line. 33

But the first congressional attempt fell short of corridor preservation due to its failure to contend with state property laws that terminated the rights-of-way before the interim transfer took place. 34 As Congress soon learned, the mere specter of abandonment triggered state property laws that shattered railroad companies’ often fragile interests in these corridors. 35 Many—perhaps, some say, even most 36—railroad companies never actually

---

30. Wright, supra note 27, at 434.
32. Id.
34. See Preseault I, 494 U.S. at 6–8 (stating that Congress prevented property interests from reverting under state law by deeming interim trail use more similar to discontinuance than abandonment).
35. Id. at 8.
36. Richard Welsh, Federal Rails To Trails Act: 18 Years of Hell for 62,000 Property Owners, NAT’L ASS’N REVERSIONARY PROP. OWNERS (July 1, 2001), http://home.earthlink.net/~dick156/hell.htm (estimating that 85 percent of railroad rights of way sit on easements). NARPO’s numbers are certainly subject to dispute. One rails-to-trails scholar insists the organization’s estimate that some 80% of rail corridors are easements is erroneous. Transcript of Public Hearing at 170–71, Twenty-Five Years of Rail Banking: A Review and Look Ahead (Surface Transp. Bd. July 8, 2009) (Ex Parte No. 690), available at http://www.stb.dot.gov/TransAndStatements.nsf/transcriptsandstatements?openview (testimony of Danaya C. Wright.) (arguing before the STB that “the claim is that railroads acquired most of their property rights as easements is simply untrue. I have examined over probably 3,000 and my students and I have examined over 7,000 railroad deeds from the 19th Century, and I can attest that over 80 percent
owned the land on which their lines ran, meaning they held no fee, only century-old rights-of-way or easements.37 Thus, the 4-R Act did not go far enough because the railroad companies’ constructive intent to abandon—as evidenced by the ICC’s discontinuation order—immediately extinguished the carrier’s interest in the right-of-way and the ICC’s oversight authority, which triggered the landowners’ reversionary interest under state property law.38 In other words, upon filing abandonment requests with the ICC, railroad companies showed intent to forfeit their interests in the underlying land.39 Under most states’ property law, manifestation of that intent alone meant legal abandonment of railroad use and immediate termination of the right-of-way.40 Thus, despite some successful trail conversions under the 4-R Act, the law failed to protect railroad companies from individual quiet-title actions by landowners who believed their reversionary rights were violated.41 This understandably soured railroad companies’ willingness to take advantage of the 4-R Act.

With this flaw in mind, Congress enacted 1983’s rail-banking statute,42 an amendment to the National Trails System Act that carried out the aims of the 4-R Act.43 The new law sought to preserve would-be abandoned corridors by expressly preempting state law through nullification of landowners’ abandonment claims upon transfer to non-railroad entities. It reads, in part, as follows:

Consistent with the purposes of [the Railroad Revitalization and Regulatory Reform Act], and in furtherance of the national policy

of those from States like Pennsylvania, New York, Ohio, Indiana, Kansas, Missouri, Iowa, Idaho and Washington are clear, unambiguous fee simple absolute deeds in the railroads”.

37. See Emily Drumm, Addressing the Flaws of the Rails-to-Trails Act, KAN. J. L. & PUB. POL’Y 158, 158 (1999) (“Estimates hold that 85% of all railroad tracks are mere easements on property (as opposed to fee simple) actually owned by adjoining landowners, easements that would revert back to the owners upon abandonment were it not for the Act.”). Although “rights-of-way” and “easements” are both terms of art, this paper refers to the corridors as both interchangeably. See, e.g., W. Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540, 570 (1904) (concluding that a “railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement”).

38. Morgan et al., supra note 33, at 526.


41. Bowman & Rosenberg, supra note 14, at 589 (“Railroads and trail groups have had to defend each individually deeded or acquired parcel of land comprising the corridor from attacks by adjacent landowners who feel that abandoned corridors should be merged into their own back yards.”).

42. 16 U.S.C. § 1247(d).

to preserve established railroad rights-of-way for future reactivation of rail service . . . in the case of interim use of any established railroad rights-of-way . . . if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a[n] [entity, private or public] is prepared to assume full responsibility for management [and assume tort and tax liability] . . . then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use. 44

In effect, the statute “specifically holds that these easements will remain valid during an interim trail use period because the corridor is being used for railroad purposes; it is being preserved for possible future rail reactivation. A number of courts have recognized that corridor preservation constitutes a legitimate railroad use.” 45 Railroads, by operation of the statute, retained their full rights in the corridor, less only a possessory interest. And trail groups—whether state parks departments, municipalities, or private groups of trail enthusiasts—now had the option to negotiate with railroad companies to obtain stewardship rights to the trails on behalf of public use, subject only to the express provision that they stand aside if and when railroad companies returned some day to reactivate the corridors. 46

Railroad companies eagerly embraced this strengthened statutory ability to shield themselves from tax and tort liability without relinquishing any permanent rights in the corridor. 47 So long as the trail groups promised not to interfere with the resumption of railroad service, federal authorities would refrain from dictating any further provisions in the deal between the railroad carriers and the trail sponsors. 48 Following 1983’s amendment, the issuance of ICC rail-banking orders—called Notice of Interim Trail Use (“NITU”)—also meant that, administratively, the agency preserved its

44. 16 U.S.C. § 1247(d) (internal citations omitted) (emphasis added).
45. Bowman & Rosenberg, supra note 14, at 588.
46. Id.
47. Morgan et al., supra note 33, at 527 (noting that “the value and advantage of a preserved rail corridor when compared with a brand new alignment is evident: individual property negotiations are avoided, environmental processes are streamlined, and major structures will have been kept intact”).
48. Id.
jurisdiction over the corridor. Meanwhile, trail groups obtained a trail right-of-way, railroad companies kept a right to re-enter, and “state law property rights were held in a limbo on that ground.”

The law’s creation of recreational parks garnered tremendous popular support, making it almost an afterthought that the law was in fact an infrastructure-preservation measure masquerading as a recreational one. Congress merely employed linear parks as, in a sense, property-interest placeholders to overcome the prohibitive headache of undergoing new eminent domain proceedings and forced easements necessary to cobble together a railroad right-of-way. The 1983 amendment did the trick administratively, but landowners continued demanding redress.

B. Constitutionality: Uneasy Easements

Rail-banking prompted burdened landowners to assert their reversionary interest in the idle rights-of-way, which the federal law preempted, because most states’ common laws—absent contrary language in the original granting instrument—would have otherwise terminated the easement. These landowners found their land burdened by another easement—at least that is how they would soon argue it under state law.

The Supreme Court upheld rail-banking as facially constitutional in Preseault v. I.C.C., a case out of Vermont involving a railroad right-of-way dating back nearly 100 years. A unanimous Court upheld the amended law as a valid exercise of commerce power. Notably, the Court disregarded plaintiffs’ allegations that lawmakers’ stated railroad-preservation purpose was a sham because, the challengers argued, economic realities showed little likelihood of any future trail reactivations. In the end, the Court remanded on the takings liability

49. Fex, supra note 40, at 678.
50. Id.
51. Wright & Hester, supra note 18, at 435.
52. Preseault I, 494 U.S. at 22 (O’Connor, J., concurring) (“Although the Commission’s actions may pre-empt the operation and effect of certain state laws, those actions do not displace state law as the traditional source of the real property interests.”).
53. Id. at 5.
54. These details come from a later Federal Circuit Court decision on remand, a holding in which the facts received much more extensive discussion. Preseault v. United States (Preseault III), 100 F.3d 1525, 1535 (Fed. Cir. 1996).
55. Preseault I, 494 U.S. at 17.
56. Id. at 18 (plaintiffs claimed “the rail banking rationale is a sham. If Congress really wished to address the problem of shrinking trackage, it would not have left conversions to voluntary agreements between railroads and state and local agencies or private groups”). Many scholars continue to question congressional motives behind enacting the rail-banking law. See, e.g., James V. DeLong, Property Matters: How Property Rights Are Under Assault — and Why You Should Care
question because, it reasoned, the Tucker Act provided the plaintiffs an opportunity to seek just compensation. The ruling set off a torrent of often bitter and protracted rails-to-trails takings lawsuits, many class actions, filed at a rate almost in lockstep stride with the proliferation of the trails themselves.

C. Reactivation as a Factor in Compensation

Takings litigation breaks down into two general stages: (1) courts determine whether a taking occurred in the first place and, upon determining that a taking has in fact occurred, they (2) determine how much money the government owes the landowner. The Federal Claims Court places little emphasis on the possibility of a rail reactivation when it determines whether the trail conversion, in and of itself, constitutes a taking because such consideration is a matter of speculation about the distant future, based on uncertain economic and social change, and a change in government policy by managers not yet known or perhaps even born. Such speculation does not provide a basis for denying protection to existing property rights under the Constitution.

In rails-to-trails litigation, state property law most often supports a liability finding upon which the Federal Claims Court assesses compensation as “the difference in the value [to plaintiffs] before and after 268 (1997) (“The right-of-way is railbanked, against the possibility of future need. No one really believes this, and it is amusing to imagine the reaction of hikers and bikers if the government tried to take the trails back for railroad use. The banking idea was a convenient fiction to justify keeping the rights-of-way.”).
the taking.” 63 Here, at this point in the litigation process, courts factor reactivation as a value-reducing new burden placed on the aggrieved landowner. Stated differently, reactivation potential does have some bearing on the second question of how much the government must compensate landowners for the trails. 64 The persistent threat of reactivation serves to reduce the value of a parcel because it is now not only subject to the presence of hikers, bikers, joggers, and intra-city rail lines, but also to the possibility that freight trains could rumble through once again. 65

In exchange for just compensation, the government obtains a new easement over the land but does not receive a deed to the corridor. 66 Presumably, based on the compensation amount’s reflection of the potential for future rail resumption, this new easement includes both trails and rails use. The railroad company, on the other hand, retains a future right to reactivate the line, an unvested interest that itself is fully alienable. 67 Finally, the adopting entity obtains a right-of-way access to the span of the trail. 68

As discussed in detail below, that possessory right to access is fully subservient to the resumption of railroad service, and STB decisions reflect a general attitude of erring on the side of permitting reactivation. 69 The agency’s orders have delved deeper into the nuances of property law in a

64. See generally Childers v. United States, 112 Fed. Cl. 617 (2013) (calculating just compensation for landowners who brought Fifth Amendment taking actions against the federal government).
65. Id. at 641, 644 (granting plaintiffs efforts to consider “negatively impacted property values [resulting from] the possibility that the railroad corridor could be reactivated” because “a knowledgeable buyer would likely have considered the potential reactivation of transit on the corridor and factored that into the price he was willing to pay for the subject properties”).
66. Id. at 628 (“In a rails-to-trails case, the imposition of a recreational trail creates a new easement for a new purpose across the landowner’s property, which constitutes a taking entitling the landowners to just compensation.”); see also Jenna Greene, Rail-to-Trails Program Costly to Taxpayers, NAT’L L. J. (Sept. 2, 2013), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202617666798&thepage=3 (“The irony is that the U.S. doesn’t even get a deed. At the end of the day, [the claimants] still get to keep the property.”).
67. See, e.g., Owensville Terminal Co.—Abandonment Exemption—in Edwards & White Cnty., Ill., & Gibson & Posey Cnty., Ind., No. AB-477 (Sub- No. 3X), 2005 WL 2292012, at *1 (Surface Transp. Bd. Sept. 20, 2005) (“An interim trail use arrangement is subject to being cut off at any time by the reinstatement of rail service.”); see also E-mail from Dennis Watson, supra note 14 (explaining how upon reactivation by the STB, some rail lines may not have actually restarted service).
select few reactivations that involved a dispute. Courts, meanwhile, have yet to address disputes arising from reactivations, which are becoming increasingly more likely.

II. A FUTURE OF RAIL: USE PROJECTIONS

In 2009 Warren Buffett, widely regarded as perhaps America’s savviest investor, orchestrated one of the most expensive buyouts in the history of his multi-billion-dollar investment firm, Berkshire Hathaway, when he cut a check for $34 billion for Burlington Northern Santa Fe, a freight railroad company. When asked about his obvious faith in the freight-rail industry, the “Oracle of Omaha” responded, “It’s a business that has real economic advantages. If you look at fuel costs, drivers’ wages on the highway—as long as more goods move from place to place in this country, rails are going to get their share, and it should be a very profitable business.” His gamble appears to be paying off. The company has since nearly doubled in value, thanks to ever-growing demand for freight rail transport.

Although highly uncommon throughout the first 30 years of the rail-banking program, reactivation is set to become a much more frequent occurrence as the freight-rail industry rebounds and all that soaring demand overwhelms the now-skeletal network of remaining corridors, prompting the freight industry to ease bottlenecks by opening new lines.

---

72. Id.
73. Id. See also Joann Muller, Zack O’Malley Greenburg & Christopher Helman, All Aboard: Why America's Second Rail Boom Has Plenty Of Room To Run, FORBES (Jan. 22, 2014), http://www.forbes.com/sites/joannmuller/2014/01/22/americas-second-rail-boom/ (“The industry, so recently an aging also-ran in the age of superhighways, is now a fountain of superlative figures: Industry wide, revenues have surged 19% from $67.7 billion to $80.6 billion since 2009, creating 10,000 new jobs at railroad companies and countless thousands in related industries—and paying out $21 billion in wages last year alone, up nearly $1 billion. As the U.S. population swells, the Federal Railroad Administration projects that the tonnage of freight shipped by the U.S. rail system will increase 22% by 2035.”).
74. Lindsey Hovland, Derailed: How Government Interference Threatens to Destroy the Rail Industry—and How to Get Back on Track, 40 TRANSP. L.J. 49, 60 (2013) (“The most significant issue facing freight railroads today is the need for additional capacity.”).
A. Rail Infrastructure Shortage on National Level

The data are unequivocal: although it fell from favor over the second half of the last century, rail—particularly freight rail—once again appears poised to play a central role in the twenty-first century. The Federal Railroad Administration expects population growth to increase the tonnage of goods shipped on American railroads by 22% between 2010 and 2035.75 By 2050, when the United States population is projected to reach 420 million, total tons shipped will be up 35% over their 2010 levels.76 Freight carriers shipped less than 10 billion tons of materials in 1993, but by mid-century they are expected to transport 17 billion tons annually.77

These estimates have prompted many transportation experts to sound alarms that the nation’s shrunken rail infrastructure will soon fail to meet its needs.78 They are warning that freight rail demand is expected to exceed supply in coming decades. The Congressional Budget Office, after synthesizing a number of studies, noted that only 170,000 miles of railroad tracks remain in the United States and arrived at the following conclusion:

At the same time, the number of train-miles has grown, especially in recent years. That has led to a greater intensity of use of tracks. . . . Such growth helps explain why some tracks are becoming increasingly congested, a factor that has contributed to concern about the railroads’ ability to meet future demand. As the number of trains per mile of track has increased, the average speed—a measure that experts often use as an indicator of railroads’ performance—has declined; it is now lower than it has been since the early 1980s . . . .79

B. Rail Infrastructure Shortages at the State Level

Even at the state level, projections paint a picture of a rail-heavy future, both in freight movement and, perhaps to a lesser extent, passenger service

---

76. Id.
77. Id.
79. Id.
between dense population centers. But, again, the infrastructure will likely fail to satisfy the increased demand.

Take, for instance, Texas, home to the nation’s largest railroad network. Approximately 11,000 miles of tracks traverse the state, representing about 8% of the national railroad infrastructure. That number represents a 37% decline from peak mileage of over 17,000 in the 1930s. Just since 2005, Texas rail operators abandoned some 146 miles of corridor. In juxtaposition, between 1991 and 2006 the amount of freight tonnage transported in Texas grew from roughly four million carloads to more than ten million, a 146% increase spurred at least in part by the creation of the North American Free Trade Agreement.

The Texas Department of Transportation (“TxDOT”) estimates that freight and passenger rail will contribute significantly to the Texas economy, but the state is facing capacity constraints. Freight demand was projected to exceed capacity beginning in 2013, and TxDOT estimates that keeping up with demand could cost more than $600 million over the next 20 years. A TxDOT report also urges state officials to drastically enhance


82. Id. at 3-13 — 3-14.
83. Id. at 3-26.
84. Id. at 3-29.
85. Id. at 3-7.
86. Id. at 7-1.
87. Id. at 7-16.
the state’s passenger inter-urban rail network, which could potentially implicate rail-banked corridors.  

C. Energy Boom: Crude Oil Transport

Meanwhile, a surge in freight rail demand is also occurring as American energy producers, frustrated by gluts arising from inadequate pipeline capacity (assuming the infrastructure is locally available at all), are relying more and more heavily on railroad corridors to move their freshly extracted resources to Texas refineries along the Gulf of Mexico. 

Explosive growth in Bakken Formation shale oil production in the Dakotas and to the north in Canada has sparked steep spikes in demand for freight-rail transport. For instance, in 2008 freight-rail carriers transported about 9,500 carloads of oil from production sites to refineries. By 2012, that number rose to a staggering 233,698 carloads and in 2013, to more than 407,000. The industry transported almost 230,000 carloads of crude oil in the first six months of 2014 alone.

And even if the strained railroad infrastructure does not buckle under increased transport, in terms of safety, the current routes through

88. See id. at 7-26 (“Passenger rail services and facilities will complement municipalities creating more livable, sustainable urban activity centers. . . . As passenger rail traffic increases, new, higher speed rail services will be launched on separated, dedicated rights-of-way.

89. Russell Gold & Chester Dawson, Dangers Aside, Railways Reshape Crude Market Shipping Crude by Rail Expands as New Pipelines Hit Headwinds and Train Companies Reap Revenue, WALL ST. J., (Sept. 21, 2014), http://online.wsj.com/articles/dangers-aside-railways-reshape-crude-market-1411353150 (“Today, about 939,000 barrels of oil a day are riding the rails, about 11% of the total pumped in the U.S., according data [sic] from the federal Surface Transportation Board, chugging across plains and over bridges, rumbling through cities and towns on their way to refineries on the coasts and along the Gulf of Mexico. If all the railcars loaded with crude on one day were hitched to a single locomotive, the resulting train would be about 17 miles long.”.


91. Id.

92. Id.

93. Id.

94. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-740, FREIGHT TRANSPORTATION: DEVELOPING NATIONAL STRATEGY WOULD BENEFIT FROM ADDED FOCUS ON COMMUNITY CONGESTION IMPACTS 19 (2014), available at http://www.gao.gov/assets/670/665972.pdf (“One reason for the increase in crude oil being shipped by rail is the limitation of the nation’s pipeline capacity to handle current oil production. In March 2014, we found that most of the system of crude oil pipelines in the United States was designed primarily to move crude oil from the South to the North; emerging crude oil production centers in Western Canada, Texas, and North Dakota have strained the existing pipeline infrastructure, and in some areas pipeline capacity has been inadequate.”); see also MOVING CRUDE, supra note 90, at 3 (“[I]n places like North Dakota that have seen huge increases in crude oil production, the existing pipeline network lacks the capacity to handle the higher production. Railroads have the capacity and flexibility to fill this gap.”).
population centers are becoming disfavored. Stirred by a string of major derailments that have killed scores of people, federal transportation officials and advocacy groups have begun urging railroad companies to reroute crude oil rail services away from population centers. These requirements could divert crude oil shipments away from city centers and instead put them along the outskirts of suburban areas, where railroad companies might avail themselves of rail-banked corridors.

In a sense, the resurgence of the freight-rail industry is the result of happenstance, a fortuitous blend of economic, technological, and natural resource developments that only an oracle on par with Buffett could have predicted in 1983. Yet, Congress apparently had an inkling because this unmistakable rebirth of the industry is exactly the sort of scenario that prompted rail-banking in the first place. It stands to logic that railroad companies will take advantage of that legal mechanism to accommodate increased tonnage and frequency.

Just how, exactly, that reactivation will take place remains somewhat murky, thanks in large part to the rarity of reactivations. The STB has touched on the topic, however, in a select few decisions that require an understanding of how the rail-banked corridors were created in the first place.

III. RAIL-BANKING & REACTIVATION PROCEDURES

The rail-banking regulatory scheme limits STB’s role to a ministerial one. A division within the U.S. Department of Transportation, the STB oversees the rails-to-trails program as part of its broader mission to regulate and adjudicate the American railroad industry, including an active role in

---

95. Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains, 79 Fed. Reg. 45016-01, 45029 (proposed Aug. 1, 2014) (stating that crude oil transport authorizations must “where technically feasible, require rerouting to avoid transportation of such hazardous materials through populated and other sensitive areas.”); see also It Could Happen Here: The Exploding Threat of Crude by Rail in California, NAT. RESOURCES DEF. COUNCIL, http://www.nrdc.org/energy/ca-crude-oil-by-rail.asp (last revised June 18, 2014) (“More crude oil was transported by rail in North America in 2013 than in the past five years combined, most of it extracted from the Bakken shale of North Dakota and Montana. In California, the increase in crude by rail has been particularly dramatic, from 45,000 barrels in 2009 to 6 million barrels in 2013. As ‘rolling pipelines’ of more than 100 rail cars haul millions of gallons of crude oil through our communities, derailments, oil spills and explosions are becoming all too common. Between March 2013 and May 2014, there were 12 significant oil train derailments in the United States and Canada. As oil companies profit, communities bear the cost.”).


97. Goos v. I.C.C., 911 F.2d 1283, 1295 (8th Cir. 1990).
shepherding line abandonment, a core mission. Its regulations extensively cover matters regarding initial rail-banking but contain no rules explicitly dealing with the reactivation of these corridors.

The following section explains the rail-banking process administratively, from the intent to abandon to reactivation. The process of creating the rail-banked trail is important for two reasons: first, reactivation issues are, for the most part, only understandable within the context of the initial rail-banking; second, groups seeking to adopt these corridors must understand the administrative mechanics of rail-banking if they hope to safeguard non-freight uses upon reactivation, or even thwart it after learning of reactivation proceedings. Thus, a short overview of the process follows.

A. Rail-Banking Proceedings

When a rail carrier—that is, one that sells “common carrier railroad transportation” in the “general system of rail transportation” wishes to abandon a corridor, it must first seek approval from the STB, which is statutorily prohibited from permitting any abandonment that could inconvenience the public. Interested trail groups may then alert the STB, through a Statement of Willingness, that they are entering negotiations with the would-be-abandoning railroad.

99. This lack of reactivation regulation likely stems from the initial law’s own neglect of reactivation. See generally 49 U.S.C. § 10102 (noting at least how there is no definition for the word “reactivation” in the definition section). See, e.g., Richard Henick, Rails-to-Trails: Everyone Benefits, Don’t They?, 10 TEMP. ENVTL. L. & TECH. J. 75, 79–80 (1991) (“The effect of § 1247(d) today is to allow interim use of the land as recreational trails, while retaining the possibility of use for railroad purposes at some undetermined future date. In fact, under the Trails Act, there is no specific provision for the actual resumption of rail service at all, thus effectively authorizing interim trail use for an indefinite period.”).
100. 49 U.S.C. § 10102 (defining “rail carrier” as “a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation”).
101. Id.; see also Fex, supra note 40, at 678 (providing a background of rails-to-trails litigation and rail-banking). For a discussion of the breadth of federal authority, see Reed v. Meserve, 487 F.2d 646, 649 (1st Cir. 1973) (“The phrase ‘public convenience and necessity’ is not, of course, infinitely elastic. The ICC may not ignore the effects of its decisions on interstate commerce or competition for traffic. The phrase ‘must be given a scope consistent with the broad purpose of the Transportation Act of 1920 to provide the public with an efficient and nationally integrated railroad system.’”) (internal citations omitted) (quoting I.C.C. v. Ry. Labor Execs. Ass’n, 315 U.S. 373, 376 (1942)).
102. 49 C.F.R. § 1152.29(a)(2).
Upon receiving written notice of the negotiations, the STB issues a NITU. The agency retains the discretion to issue the NITU only “[i]f the carrier is willing to negotiate an agreement, and the public convenience and necessity permit abandonment.” Once issued, the NITU creates a 180-day window during which the abandonment is postponed but the railroad may proceed regardless by canceling its service and dismantling its tracks.

If the parties reach an agreement within that timeframe, the railroad and trail group then jointly file the following with the agency: (1) a copy of the NITU; (2) an express trail group acknowledgement that it assumes responsibility for the trail; (3) an express acknowledgment by the trail group that it will cede to railroad use if future reactivation is approved; and (4) the date of the trail’s transfer from the railroad to the group. If negotiations fail, the abandonment proceeds, state property laws take hold, and the STB loses its jurisdiction over the line.

Prior to issuing a rail-banking decree, the STB’s only role in the final approval is to ensure it receives from the trail group an assurance that the agreement contains the above statutorily derived provisions. Any additional provisions within the agreement do not go to the STB for review. Upon satisfaction of its requirements, the agency issues an order establishing interim trail use that preserves the STB’s continued jurisdiction over the trail indefinitely, thus keeping the corridor eligible for reactivation.

Notably, trail groups should be sure to finalize an agreement with a railroad company as soon as possible after the issuance of a NITU, because even though the STB is generally permissive of negotiation extensions, the STB’s loss of jurisdiction typically triggers automatic termination of the

---

103. Id. at § 1152.29(d)(2). The STB might also grant a Certificate of Interim Trail Use (“CITU”), depending on whether the railroad is seeking to abandon via traditional processes or through an expedited proceeding. The distinction is irrelevant because both filings have identical legal effect, at least in the rail-banking context, so this Comment lumps both authorizations into the NITU category. See also Fex, supra note 40, at 679–80 (“Because the CITUs are issued pursuant to petitions filed under the abandonment process, which is typically more onerous, NITUs are more common in the Trails Act takings cases.”).

104. 49 C.F.R. § 1152.29(b)(1)(ii).


106. 49 C.F.R. § 1152.29(f)(1).

107. Id. at § 1152.29(e)(2).

108. For an instance of the STB rightfully declining to ratify a trail agreement, see Md. Transit Admin. v. Surface Transp. Bd., 700 F.3d 139, 144 (4th Cir. 2012).

109. See Wright & Hester, supra note 18, at 455–56 (“[Rail-banking] is a presumptive showing of intent not to abandon.”).
easement. After all, “adverse consequences may flow from loss of ICC jurisdiction to corridor preservation efforts” because “as with the King’s horses and men in the Humpty Dumpty nursery rhyme, ICC cannot put a corridor back together again once it has been scrambled.”

Some commentators have speculated that the trail group presumably must in fact open a trail on the corridor, but it seems likely that the railbed left after the removal of tracks—regardless of any additional signage, fencing, etc.—alone would satisfy that requirement. The STB has also permitted trail groups to repurpose the corridors for a variety of other uses “so long as [they] do not interfere with possible future freight rail use.” For trail groups, this permits a variety of “creative possibilities” like trolleys or other forms of passenger light rail so long as they parallel the trails themselves and do not interfere with preservation of rail service. As noted above, many local governments have seized these public-transit opportunities and assumed possession of corridors that are then equipped with light-rail tracks and linked to surrounding transportation networks.

B. Reactivation Proceedings

When the need arises to resume rail operations along any length of the rail-banked corridor, a railroad carrier—regardless of whether it was the corridor’s original carrier—asks STB officials to vacate the NITU. In most cases, the STB promptly vacates it. Once the STB vacates the NITU, the railroad company must then rebuild tracks and resume operations.

110. See Wright, supra note 27, at 447 (“As mentioned above, the railbanking statute serves to continue federal jurisdiction over the corridor and to prevent abandonment under state law even though the traditional elements of abandonment might be met under some states’ laws when the corridor is converted to a recreational trail.”).

111. Montange, supra note 20, at 156.

112. Id. at 155.

113. Id.

114. Id. This scenario, the addition of light passenger rail alongside the trail, is discussed more fully infra, Part VI.

115. Local governments are subject to the same restrictions as private groups, meaning that reactivating the corridors will force the removal of the passenger service, at least it would absent some sort of compromise or contractual agreements with the reactivating railroad company.

116. See Fex, supra note 40, at 678 (offering a breakdown of the regulatory process behind railbanking).


118. Once railroads reactivate railroad corridors connected to the national rail network, they once again become subject to federal regulation as common carriers. 49 U.S.C. § 10501(a)(2) (requiring STB oversight of any rail operations between two places within a state along corridors connected to the interstate network; between states or a state and a territory; between territories; within a territory; between states but through a foreign country; and between a state and a foreign country). Common
Trail-group input is conspicuously absent from the administrative process, even if the entities have grounds to dispute reactivation because, for instance, the railroad violated its rail-banking agreement in some aspect of reinstating service. Regardless, trail holders suddenly must relinquish a tract of land that, in the time since conversion, has cost vast sums to develop while becoming a beloved aspect of a community. The coming years could see that very scenario unfold as technological gains and road congestion turn passengers' and shippers' attention to railroads, which in turn will look toward all those miles of rail-banked corridors to alleviate infrastructure bottlenecks.

carrier status requires that railroads must resume rail service along those corridors if public demand for such service exists. See Gen. Foods Corp. v. Baker, 451 F. Supp. 873, 875–76 (D. Md. 1978) (holding that "[d]iscontinuation of rail service can cause great harm, and railroads are held to a higher standard of responsibility than most private enterprises. They may not, on their own authority, refuse to maintain service when it becomes inconvenient to do so or because profits are declining. A railroad may not make a unilateral decision to abandon a line, but must apply to the Interstate Commerce Commission for a certificate") (internal citations omitted); see also 49 U.S.C. § 11101 (2012) (providing rules for rail carrier service and rates). If a carrier fails to apply for an abandonment proceeding, it could face STB sanctions for a host of requirements attendant to that status, ranging everywhere from employment standards to heightened tort liability, and expose itself to liability for the economic harms borne by would-be shippers caused by its refusal to reinstate rail operations. See, e.g., GS Roofing Products Co. v. Surface Transp. Bd., 143 F.3d 387, 394 (8th Cir. 1998) (holding a railroad liable for damages that shippers incurred due to unavailability of rail services because the railroad "failed to restore service within a reasonable time"). Thus, railroad companies that reactivate a line must reinstate rail services, lest they face liability to surrounding businesses that might rely on their freight line. Their alternative, of course, is to again seek abandonment authorization from the STB, which could then trigger another rail-banking cycle. Railroad companies do have another option, one the STB has granted at least once in the past. BG & CM R.R.—Exemption from 49 U.S.C. Subtitle IV, BG & CM R.R.—Acquistion & Operation Exemption—Camas Prairie Railnet, Inc., No. 34399 & No. 34398, 2003 WL 22379168, at *1 (Surface Transp. Bd. Oct. 17, 2003). That option entails the company’s filing for a new NITU that would name itself as the interim trail sponsor. Id. The STB granted such a request in 2003 for a fifty-plus-mile stretch of Idaho trail a local company sought to reactivate only seasonally. Id. In doing so, the company received a right to use the right-of-way without any common-carrier obligations. Id.

119. 49 C.F.R. § 1152.29(a)(3) (requiring that putative trail groups “acknowledg[e] that interim trail use is subject to . . . possible future reconstruction and reactivation of the right-of-way for rail service”).

120. See Machalaba, supra note 7 (concluding that railroads could soon enjoy a “comeback and are poised to become busier places in the years ahead. Forecasts for freight growth are substantial, prompting railroads to plan capacity additions”); see also Bowman & Rosenberg, supra note 14, at 625 (“With the current national rail system relatively sleek and efficient, limited to a handful of major carriers, the rate of abandonments has decreased, indicating that we are unlikely to see a significant increase in the railbank. However, the slimness of the system means that we may see more reactivations as transportation pressures increase.”).
The initially abandoning railroad does retain a reactivation right that it may sell to third parties with STB approval. The STB has dubbed this future interest “a residual common carrier obligation” retained when the railroad hands over the right-of-way to the trail sponsor. Moreover, trail-to-rail reactivation may occur at the behest of any railroad, not just the one that initially sought to abandon or that purchased the right from the abandoning company, so long as it proves its status as a bona fide operator with the resources to actually reinstate rail service. If another, non-reactivation-interest-holding carrier wishes to reactivate the line, it must first show the holder of that right has refused to do so and continued dormancy of the corridor will inconvenience the public.

STB officials denied such a request in 2011. A railroad carrier, GNP, sought to reactivate a nine-mile stretch of rail-banked corridor in Washington that another railroad company had rail-banked years before. King County, as one of several trail sponsors along the stretch slated for reactivation, had earlier acquired from the originally abandoning railroad the right to reactivate. The county and other sponsors objected to GNP’s reactivation request. King County ultimately defeated reactivation by showing the STB that the would-be reactivating carrier had recently entered involuntary bankruptcy proceedings and likely would have lacked the financial resources to recommence rail operations along the line. The STB declared that the potential bankruptcy belied GNP’s assertions that it was a bona fide carrier.

122. See, e.g., Iowa Power, Inc.—Constr. Exemption—Council Bluffs, Ia., 8 I.C.C.2d 858, 867 (Dec. 11, 1990) (“Moreover, in this case a non-carrier (not the abandoning railroad) seeks to restore active rail service. Given the fact that the abandoning carrier voluntarily agreed to the interim trail use (and rail banking), prior to our modification of a NITU or CITU, we find that the abandoning carrier, if available, should at least concur in the non-carrier’s proposal.”).


125. Id.

126. Id.

127. Id.

128. Id. at *1 (“In the September 2009 Decision, the Board granted King County’s request to acquire BNSF’s rights and obligations, including the right to reinstate rail service in the future.”).

129. Id.

130. Id.

131. Id.
In addition to insolvency concerns, the STB also questioned GNP’s assertions that several manufacturers along the stretch had expressed interest in contracting with the railroad to ship its freight.\textsuperscript{132} Those it cited as potential clients also lacked the necessary facilities to move their products by rail.\textsuperscript{133} Also, GNP had recently entered into an agreement with local authorities that it would specifically \textit{not} conduct freight-rail operations along the very stretch it sought to reactivate.\textsuperscript{134}

Two years later, the STB denied another proposed reactivation on that same corridor by a third-party railroad due to similar, but even less specifically documented, concerns about solvency.\textsuperscript{135} The STB cited the unprofitability of the carrier’s nearby operations, which were subsidized by other lines.\textsuperscript{136} Moreover, high property values in the area also cast doubt on whether the operator could afford the up-front costs of acquiring additional necessary rights-of-way following the board’s permission to do so.\textsuperscript{137}

Also related to reactivation processes, the STB issued a decision in 2009 that would not require that reactivating railroad companies complete an additional Environmental Impact Study, pursuant to the National Environmental Policy Act applied to the STB in 49 U.S.C. § 10901.\textsuperscript{138} Although the STB’s regulations require such a study in the case of new or extended rail corridors, it remained unclear prior to this decision whether the requirements also applied to reactivations.\textsuperscript{139} This ruling should only further encourage future reactivation by removing the sometimes-prohibitive costs of such studies, which can exceed $20 million.\textsuperscript{140}

\begin{flushleft}
\begin{itemize}
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Id.
\item \textsuperscript{134} Id.
\item \textsuperscript{136} Id.
\item \textsuperscript{137} Id.
\item \textsuperscript{139} See, e.g., Transcript of Public Hearing at 119–21, Twenty-Five Years of Rail Banking: A Review and Look Ahead (Surface Transp. Bd. July 8, 2009) (Ex Parte No. 690), \textit{available at} http://www.stb.dot.gov/TransAndStatements.nsf/transcriptsandstatements?openview (testimony of Eric Strohmeyer, CNJ Rail Corp.) (discussing the additional costs associated with the application requirements for reactivations).
\item \textsuperscript{140} Id. at 121.
\end{itemize}
\end{flushleft}
IV. TRAIL-GROUP OPPOSITION: DISPUTING REACTIVATION

Reactivation has in at least two instances prompted trail groups to dispute reactivation attempts.141 The popularity of the rail-banked trails—and the sometimes hefty financial investment required for trail conversion142—suggests opposition could become common in future reactivations.143 But judging from the language and tone of STB decisions on the matter, trail groups may want to take heed that the agency is highly deferential to the reactivation of rail service and will ardently refuse to address what, if anything, the railroad must convey to the trail group in compensation for the now-defunct trail.144 Trail groups thus may want to be careful to create contractual, private remedies for themselves during initial negotiations with the railroads prior to the establishment of the trail. Even the non-fulfillment of those, however, will not weigh at all in the STB’s consideration of whether to vacate the interim use.145

The STB drove home the point in resolving a dispute out of Georgia in 2003.146 A trail group petitioned the agency seeking an order forcing the reactivating railroad, Georgia Great Southern, to compensate it for the fair-market value of the roughly 14-mile corridor the company sought to reactivate.147 The group claimed that it had purchased the right-of-way through an outright sale seven years earlier and thus the railroad, which

---

141. Ga. Great S. Div., S.C. Cent. R.R.—Abandonment & Discontinuance Exemption—Between Albany & Dawson in Terrell, Lee, & Dawson Cnty., Ga., 2003 WL 21132515, at *3 (“In short, an interim trail use arrangement is subject to being cut off at any time by the reinstatement of rail service. If and when the railroad wishes to restore rail service on all or part of the property, it has the right to do so, and the trail user must step aside.”).

142. See, e.g., THE MIDDLE GA. REG’L DEV. CTR., supra note 120, at 24 (estimating that the cost of constructing a 33 mile rail-trail in Georgia would average out to about $100 per foot for an overall total cost of $17.5 million. That figure does not include the costs of actual acquisition from the railroad).

143. Bowman & Rosenberg, supra note 14, at 594 (discussing how “there are those instances when a railroad wants to reactivate, and the trail group opposes it, that their interests diverge. Although this has not occurred often, it can be a bitter and expensive process if the parties do not understand the rights that each possesses”).

144. The STB takes a straightforward, almost mechanical, approach to reactivation. See, e.g., Owensville Terminal Co.—Abandonment Exemption—in Edwards & White Cnty., Ill., & Gibson & Posey Cnty., Ind., 2005 WL 2292012, at *1 (“Where an application to construct (or acquire as is the case here) and operate a rail line over the right-of-way is authorized [under STB regulations] the Board will reopen the abandonment proceeding and vacate the NITU. BG&P has complied with the requirements . . . regarding a request to vacate the NITU! Therefore, vacation of the NITU will be granted so that rail service can be restored on the line.”).


146. See generally id. (discussing how the STB will not consider a private, contractual arrangement for a trail group to buy a right-of-way in their decision to reactivate the rail line).

147. Id. at *4.
sold it at a discount and claimed the sale as a tax write-off, owed it market value for seizing the group’s interest in the land.\footnote{148}

The agency demurred, refusing to dictate anything about the terms of the reactivation because “the Trails Act does not speak to compensation, either by a railroad to an interim trail sponsor for reactivation of rail service, or by an interim trail sponsor to a railroad to use the property on an interim basis as a trail.”\footnote{149} Any terms beyond the limited specific provisions of the statute—or, specifically, that trail sponsors assume certain liabilities for the corridor and that they acknowledge the potential for reactivation—exist only in the “voluntary agreement of the parties,” and the STB does not “oversee, review, approve, or interpret the terms of the parties’ trail use agreements. Such issues are for a court to address.”\footnote{150}

For trail groups, perhaps the most stirring takeaway from this decision is the fragility of their default interest in the corridor. Even groups that purchase rights-of-way from railroads at rail-banking do not have any absolute rights to indefinite use of the trail.\footnote{151} Thus, prospective trail sponsors should secure certain guarantees from the railroad before expending time and money in the creation of trails.\footnote{152} The Rails-to-Trails Conservancy, the nation’s most ardent rail-banking advocacy group, admonishes prospective trail groups to do exactly that.\footnote{153} Specifically, the nonprofit counsels:

\begin{quote}
[P]rudent trail managers must anticipate that contingency in order to protect their substantial investment in the acquisition and
\end{quote}

\footnote{148. Id.}
\footnote{149. Id. at *5.}
\footnote{150. Id.}
\footnote{151. See, e.g., Transcript of Public Hearing at 121–22, Twenty-Five Years of Rail Banking: A Review and Look Ahead (Surface Transp. Bd. July 8, 2009) (Ex Parte No. 690), \url{available at http://www.stb.dot.gov/TransAndStatements.nsf/transcriptsandstatements?openview} (testimony of Eric Strohmeyer, CNJ Rail Corp.) (discussing with STB officials a case in which a right-of-way was conveyed to a city “in its entirety” and “what isn’t clear in that particular case is how do you reactivate rail service? . . . But the question had always come up of, ‘How do I get the service back if I want to get the service back?’” Strohmeyer went on to note that the STB has historically restored the line regardless in those situations).
}
\footnote{152. The Association of American Railroads urges the STB to encourage such provisions within the agreements. Its CEO, Edward R. Hamberger, has asked the board to “informally encourage, but not require, parties in their agreements to identify potential issues that may arise.” He went on to note that one of these included issues is reactivation and whether the railroad should compensate trail groups upon restoring rail service. Transcript of Public Hearing at 111, Twenty-Five Years of Rail Banking: A Review and Look Ahead (Surface Transp. Bd. July 8, 2009) (Ex Parte No. 690), \url{available at http://www.stb.dot.gov/TransAndStatements.nsf/transcriptsandstatements?openview} (testimony of Edward Hamberger, Ass’n of Amer. R.R.).
}
\footnote{153. See Ferster, supra note 29, at 6 (noting that conservancy groups should secure guarantees from railroads before expanding their trails and incurring expenses).}
development of the trail and associated facilities in the event of rail service reactivation. Of particular importance is the need to establish terms and conditions such as compensation and future rights to railbank, since the STB regards its role in the event of a petition to vacate a railbanking order as being ministerial in nature.154

Even in circumstances where the railroad is in breach of those private agreements, at least in the STB’s eyes, the railroad may reactivate the line regardless of its obligations to the trail groups.155 Railroad companies’ vacation requests are of growing concern for small entities that have acquired railroad rights-of-way and, especially when those entities are city and county governments, plan to use their newly acquired corridors to build light rail transportation routes.156 This potential conflict places the burden on courts to “take into account the dual purposes of the federal statute and attempt to devise a solution that serves both ends.”157 Railroad companies, under this more pro-trail approach, should be required to pay fair market value of the trail or, at the very least, reimburse the trail groups for the costs incurred in the conversion.

These sorts of issues are likely to arise in disputed future reactivations. Opposition to reactivation might be fierce. So, too, might be those on the other side calling for expanded railroad use. As one study points out, the complexity of reactivation battles only grow more dizzying when one considers the additional interest groups that might enter the fray, including mass transportation or environmental activists with their own stake in the new lines.158 After all, “rail line service restorations do not take place in a vacuum. Environmental and recreation groups are often among the more vocal supporters of the rail mode, given its environmental and fuel consumption advantages.”159 The study suggests a compromise: rails-with-trails.160

154. Id.
156. Montange, supra note 20, at 153 n. 76.
159. Id.
160. Id.
V. RAILS-WITH-TRAILS: A GRAND COMPROMISE

Trail groups might have another option: the reestablishment of rail service parallel to the trails, both remaining on the right-of-way after reactivation, a simultaneous use of the land called rails-with-trails.\(^{161}\) According to the Rails-to-Trails Conservancy (“RTC”), the model has gained significant popularity beginning in the early 2000s.\(^{162}\) By 2013, these types of trails represented nearly 10% of rail-trails, and their prevalence was “growing rapidly.”\(^{163}\) That same year, the RTC catalogued some 161 rails-with-trails across 41 states, a “significant increase” over a similar count ten years earlier when 100 fewer were in existence across 20 states.\(^{164}\) Another 60 rail-with-trail projects across the country were in various stages of development at the time of this Comment’s writing.\(^{165}\)

Nevertheless, rails-with-trails remains a viable option for reactivated freight lines (or even interstate passenger lines thereon). This section begins with a discussion of rails-with-trails in the rail-banking context, arguing that trail groups should, at the very least, seek to preserve the trails alongside reactivated lines in the event they fail to stave off reactivation entirely.

The need for sound right-of-way agreements in rail-banking discussions, however, is just as—or even more—acute in the rails-with-trails context. Rail operators are particularly “hostile” to proposed rails-with-trails reactivations “because they seldom generate revenue, may carry significant liability risks, and may serve to limit or at least complicate future efforts to add rail capacity through new, parallel second main tracks, or passing sidings.”\(^ {166}\) Long-range carriers, in particular, oppose the retention of trails paralleling the rail lines after reactivation.\(^ {167}\) Some have gone so far as to issue “public policy or guidance documents that explicitly discourage rail-with-trail development in their corridors.”\(^ {168}\) These

---


\[^{162}\] RAILS-TO-TRAILS CONSERVANCY, AMERICA’S RAILS-WITH-TRAILS: A RESOURCE FOR PLANNERS, AGENCIES AND ADVOCATES ON TRAILS ALONG ACTIVE RAILROAD CORRIDORS 4 (2013).

\[^{163}\] Id.

\[^{164}\] Id.

\[^{165}\] Id.

\[^{166}\] NAT’L COOP. HIGHWAY RESEARCH PROGRAM, supra note 158, at 12.

\[^{167}\] Id.

\[^{168}\] RAILS-TO-TRAILS CONSERVANCY, AMERICA’S RAILS-WITH-TRAILS, supra note 161, at 11.
companies base their rail-with-trail aversion to possible interference with “future expansion,” safety hazards, trespass, and tort liability.\textsuperscript{169}

Short line carriers, although still wary, have appeared more amenable to the continuation of trail activities along the corridors.\textsuperscript{170} However, many have adopted standardized requirements that trail sponsors must meet before these carriers agree to permit continued trail use.\textsuperscript{171} The line in question must be a low-frequency, low-speed operation.\textsuperscript{172} Most salient for trail groups who hope to negotiate for such a scenario, these requirements include a statutory scheme that is “compatible with joint use between trails and railroads.”\textsuperscript{173} Moreover, trail operators—in addition to compensating the carrier through sale or lease for the continued trail—must pay the necessary costs to maintain liability insurance.\textsuperscript{174}

The takeaway is similar to that of standard, trail-abolishing reactivations: rails-with-trails proponents should negotiate for these provisions when their leverage is highest—that is, when the railroad company is eager to disentangle itself from tax and tort liability without having to permanently surrender a corridor that could prove useful in the future. Additionally, trail groups should heed the advice of the United States Department of Transportation and, in the event a rail-with-trail is authorized, ensure that railroad officials are intimately involved at every stage of the design and implementation process. As one North Texas trail builder reported, the railroad industry is “formal” and is keen to play an active role in the trail’s creation.\textsuperscript{175}

VI. THE REGULATORY & STATUTORY VOID

Efforts to expand rails-with-trails will lose momentum if state and federal laws fail to address the challenges that most frequently frustrate them—not least of which being the lack of incentive for railroads to agree to the trails—and continue to treat reactivation in general as though it were nothing more than a congressional subterfuge to promote more parks.\textsuperscript{176} These initiatives are the best option to serve the greatest number of

\begin{itemize}
\item \textsuperscript{170} Id. at v.
\item \textsuperscript{171} Id. at 29.
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Id.
\item \textsuperscript{174} NAT’L COOP. HIGHWAY RESEARCH PROGRAM, supra note 158, at 12.
\item \textsuperscript{175} U.S. DEPT. OF TRANSP., supra note 169, at 28.
\item \textsuperscript{176} See, e.g., DeLONG, supra note 56, at 268 (discussing state and federal court responses to challenges to rails-with-trails initiatives).
\end{itemize}
interests, whether economics, environmentalism, or recreation. All parties benefit from rails-with-trails, but the silence about them on the state and federal levels could prove deleterious to their continued adoption.

Following a general discussion of states’ roles in rail-banking, this section argues that rails-to-trails are sometimes statutorily addressed by the states, but those same states have failed to fill in the legislative gap by ignoring reactivation, particularly as rails-with-trails, where they have the most authority to act. Lastly, this section then goes on to argue that the STB (if it has the authority, which is arguable) or Congress should implement a second regulatory scheme to accommodate the coexistence of light passenger rail-with-trail and freight rail on reactivated railroad corridors.

A. Rail-Banked, Jr.

Many states have officially embraced rail-banking as an alluring means toward both recreational and economic goals. Some have enacted statutes specifically endorsing and regulating the program. Pennsylvania, 177 Minnesota, 178 Tennessee, 179 Indiana, 180 California, 181 Louisiana, 182 and Maryland 183, for example, have all enacted statutes aimed at promoting the establishment of new trails. Altogether, roughly 30 states have passed “mini-rail-banking” statutes, though few of these laws explicitly name railroad corridor preservation as their purpose. 184

These state statutes take a variety of forms. Some promote trail growth, such as Wisconsin’s statute that authorizes the state’s parks department to acquire would-be abandoned railroads directly, regardless of whether a

---

177. 32 PA. STAT. ANN. § 5614 (West) (authorizing state parks department “to participate in abandonment proceedings with the Interstate Commerce Commission for the purposes of acquiring available railroad rights-of-way for use as interim trails or railbanking as set forth in section 8(d) of the National Trails System Act”).

178. MINN. STAT. ANN. § 222.63 (West) (“A state rail bank shall be established for the acquisition and preservation of abandoned rail lines and rights-of-way, and of rail lines and rights-of-way proposed for abandonment in a railroad company’s system diagram map, for future public use including trail use.”).

179. TENN. CODE ANN. § 11-11-111 (West) (“The department shall review all formal declarations of railroad right-of-way abandonments by the interstate commerce commission, for possible inclusion into the state trails system.”).

180. IND. CODE ANN. § 8-4.5-6-1 (West) (“A recreational trail may be authorized under this chapter on any part of a corridor that has rail traffic with the consent of the rail traffic operator and owner after consideration of appropriate and safe design and operation.”).

181. CAL. PUB. RES. CODE §§ 5070–5077.8 (West)

182. LA. REV. STAT. ANN. § 56:1781.

183. MD. CODE ANN., NAT. RES. § 5–1010 (West) (authorizing state transportation officials to acquire corridors and “request interim use of the property for public recreational use”).

A private entity has stepped forward.185 A Michigan law grants volunteer trail builders “the same immunity from civil liability as a [parks] department employee” during work outings.186 Others protect the interests of adjacent landowners, such as Kentucky’s statute creating a presumption that individuals working on or using the trail, but who stray onto the landowner’s property, are trespassers, shielding landowners from tort liability for errant trail users entering their property.187

Generally speaking, according to one scholar, state rail-banking falls into five categories: (1) statutes hailing rail preservation as an opportunity to create linear parks and providing for it in master plans; (2) statutes permitting trail conversions, including some that make abandoned corridors the preferred site of new trails; (3) statutes forcing abandoning railroad companies to give a certain amount of notice so that putative trail groups have time to file for rail-banking; (4) statutes authorizing state departments to acquire rail-banked corridors; and (5) statutes providing the framework for government acquisition while also securing, or tweaking, state private property rights.188

Although the STB’s plenary authority to regulate reactivations largely preempts any interfering state attempts to do the same, states nonetheless have a variety of avenues to better safeguard their own converted trails in the event of reactivation. Most notably, states stand in a particularly unique position to further rails-with-trails programs, yet all but a small handful of states have failed to legislate the matter—even though STB officials have explicitly left it to state capitols to establish guidelines ensuring the safety of rail-with-trail corridors, noting that the agency “do[es] not police trail use agreements. The appropriate remedy for safety problems lies with State and local authorities.”189

Once again, Texas serves a fitting example of the state-level disconnect between policy and law. On the one hand, the Texas Parks & Wildlife Department expressly committed, among other trail initiatives, in its strategic plan190 to “[p]ursue funding for acquisition of land, conservation

185. WIS. STAT. ANN. § 85.09 (West).
186. MICH. COMP. LAWS ANN. § 324.72105a (West).
187. KY. REV. STAT. ANN. § 511.090 (West).
188. POWELL & WOLF, supra note 184, at § 78A.11[4].
Texas, on the other hand, is calling for the continued conversion of railroad tracks that it—as home to the nation’s most railroad miles and end-destination oil refineries—will likely need in the coming years, but it has failed to enact any statutes pertaining to the establishment of rails-with-trails. Although rails-with-trails initiatives can and have gone forward without state statutory oversight, these local laws help smooth such efforts. In addition to the five broad categories of identified state laws that promote rail-banking in the first place, another category is warranted but lacking: those that provide guidance for the implementation of rails-with-trails.

B. Rails-with-Trails: Increasing State Involvement

The RTC is calling on states to pass new laws that preserve, or at least provide guidelines for, nature trails on rail-banked lines upon their reactivation. The group is also calling for more research into safety guidelines for rails-with-trails designs. Such guidelines are lacking, leaving trail groups and already-reluctant railroads in the lurch. But safety guidelines should only be a small first step. More assertive, more sweeping, and more innovative rails-with-trails legislation is needed at the state level. Some states, however, are already leading the way.

Such legislation would likely include, in part, rather straightforward provisions, such as the rails-with-trails language in Pennsylvania’s own local rails-to-trails statutory scheme with multiple provisions aimed at augmenting and working in tandem with federal rails-to-trails initiatives, even going so far as to establish an entire office within its parks department devoted to coordinating the program’s statewide success. The rails-with-trails portion of the law directs the state’s transportation department to

---

191. Id.
192. Texas, for instance, has already seen the creation of a rail-with-trail. See, e.g., Jake Lynch, Rail-Trail Sparks Bike Boom in Denton, Tex., RAILS-TO-TRAILS CONSERVANCY (Dec. 9, 2011) (“A rarity in the field of corridor abandonments, but not without precedent, rail service was reactivated in June of this year. . . . The rail-to-trail has now become a rail-with-trail.”).
193. RAILS-TO-TRAILS CONSERVANCY, AMERICA’S RAILS-WITH-TRAILS, supra note 162, at 9–10.
194. Id. at 9.
195. Id.
196. 32 PA. STAT. ANN. § 5613 (West); see also IND. CODE ANN. § 8-4.5-6-1 (West) (providing that “[a] recreational trail may be authorized under this chapter on any part of a corridor that has rail traffic with the consent of the rail traffic operator and owner after consideration of appropriate and safe design and operation”).
contemplate the feasibility of leaving trails intact after reactivation and that it must do so if “feasible as determined by the department.”

Rail-with-trail-specific Recreational Use Statutes (“RUS”) offer another trail-group-friendly option for states. RUS provisions, which exist in some form in every state, all but completely shield from liability certain types of private individuals who open their land to the public. Maine specifically provides in its RUS that applicable premises “includes railroad property, railroad rights-of-way and utility corridors to which public access is permitted.” In 2010, Virginia similarly included railroad rights-of-way into the scope of its RUS. Part of the elegance of this tactic is its breadth. These statutes not only protect the railroad companies—thus thawing their cool-heeled approach to rails-with-trails—but they also might protect trail groups. Maine’s RUS, for instance, applies to “holder[s] of an easement or occupant[s] of premises.”

Even absent language applying the statute to both railroads and trail groups, courts have interpreted them to apply to both. A Washington appellate court held in 2012 that a city, equivalent to a trail operator in present context, stood immune from a wrongful death suit under a RUS worded to include “owner and possessors.” The plaintiff, the estate of a bicyclist struck dead by a train at the intersection of a city trail and a freight line, claimed the statute did not shield the city because it did not “own” the crossing. Although not the dispositive issue in the end, the court reasoned that the statute’s language barred unintentional tort liability “arising out of use of the land.”

Moreover, state action need not come from lawmakers. Policymakers can also promote rail-with-trail efforts through simple decrees, such as the 2013 policy pivot at the Massachusetts Department of Transportation (“MassDOT”). Responding to a municipal official seeking to implement a rail-with-trail, the department’s director announced:
While MassDOT has consistently supported the appropriate development of rails with trails, we have considered their implementation on a case-by-case basis. This method of analysis has, unfortunately, caused unnecessary difficulties and tended to result in little to no progress for proposed rails with trails. Going forward, therefore, MassDOT will as a matter of policy permit the construction of shared-use paths along active or planned railroad rights-of-way provided appropriate fencing separates the two uses.206

These sorts of state-backed decisions benefit rails-with-trails in three ways: (1) they facially permit more rails-with-trails projects; (2) they convey to the public an official state imprimatur on the construction of new trails; and (3) they send to railroad companies a message of strong official state trail endorsement.

At the very least, local lawmakers should open state-owned corridors to trail use. The state-owned Alaska Railroad Corporation is expressly authorized to open its routes to parallel trails so long as the proposed trails will meet safety standards and not interfere with nearby utilities.207 As a balancing measure, the statute also requires that a trail group indemnify the corporation.208

The vast majority of states, thus far silent on the matter, could learn from these examples of trail-friendly laws. Such legislation is indispensable in the preservation of trails upon railroad reactivation. Trail groups may still grouse about reactivation, but at least they keep the trail.

C. Rails-with-Trails: A Call to the STB—or Congress

More trail-friendly guidance must come from the federal level as well, because the STB’s limited ministerial role in rail-banking and reactivation leaves it without authority to go much beyond its current regulatory scheme, other than to unofficially encourage railroads to take a more pliable stance on rails-with-trails proposals.

The more important and more directly trail-preserving task before the agency is the preservation of rail-banked corridors put to light-rail use,

207. ALASKA STAT. ANN. § 42.40.420 (West).
208. Id.
which remain subjected to freight-rail reactivation at any time.\(^{209}\) An urban planner outlined the problem to the STB in 2009 when asked by commissioners if the agency should require the rail-banking of \textit{all} proposed abandonments. He responded:

\begin{quote}
Right now the issue of mandatory-ness is almost moot. I go back to my point that the horse is out of the barn. Someone was late to close the door. Honestly, my concern right now is to preserve corridors that are already being preserved . . . . I think that if reactivation-type issues are not handled properly, there will be a tremendous incentive on the part of the entity I’m representing here today, and many other agencies that are acquiring these and using them with an eye toward using them for light rail or putting in an expensive trail investment in, not to do that. Why would they invest if they’re going to lose all of their money? . . . [T]he fear I have and where I think if I were to make a recommendation . . . is to look at reactivation and think in terms of what the interest holders on the rail-bankers side of the fence are looking at, as opposed to rail abandonments.\(^{210}\)
\end{quote}

This solution would presumably entail a separate regulatory scheme for interim trail use that includes light passenger rail. Such a new scheme might push the limits of the STB’s authority and thus would necessarily fall on congressional shoulders in the form of another NTSA amendment. Such an amendment might grant the agency authority to not only administer rail-banking but also to subsequently remove reactivation eligibility from a corridor targeted for light-rail service.

But, some believe, such a scheme could remain within the STB’s purview.\(^{211}\) The STB has already held that light-rail interim use is consistent with rail-banking—that is, it does not interfere with preservation for returning freight rail—but light rail tracks could actually, in some circumstances, be compatible with freight rail cars.\(^{212}\) A “time separation of the two uses” whereby passengers travel by day and freight by night, would

---

\(^{209}\) Montange, \textit{supra} note 20, at 153 n. 76.


\(^{211}\) \textit{Id.} at 89.

\(^{212}\) \textit{Id.} at 87.
further help make the two uses compatible. If compatible, and assuming the STB would have the authority to coordinate mixed-use passenger-freight on the reactivated lines, the agency might have the authority to do so within the rail-banking law’s broad directive that the program facilitate the “restoration or reconstruction for railroad purposes.”

If the STB would have to overstep its authority in regulating rails-with-trails, Congress should act instead, adding a clause to the NTSA granting the STB authority to exempt reactivations involving passenger rail. Both passenger and freight rail have gained policy relevance in recent years and will likely continue to do so. From the local perspective, not everyone will be satisfied with rails-with-trails, but it remains the most attractive compromise.

CONCLUSION

When Congress conceived rail-banking, it did so amidst a frantic struggle to save the rapidly declining railroad infrastructure. Perhaps lawmakers then would not have predicted that, only a generation later, the railroad industry would have rebounded. Congress, however, foresaw such a scenario and acted accordingly, even at great expense in the form of landowner compensation.

Thousands of miles of rights-of-way now sit securely within federal protection under the stewardship of trail groups. Over the past 30 years, local communities have come to embrace their trails and passenger light-rail lines, so they likely will not forfeit them without a fight—or at the very

213. Id. Shared use is compatible in the long-distance intercity passenger rail context. Marks, supra note 80, at 315 (“There are four categories of freight/passenger property sharing. First, is ‘Shared Track and Mixed Operation: transit trains and freight trains are separated by headway intervals measured in minutes in an operating schedule.’ The second type is ‘Shared Track and Time-Separated Operations: both transit and freight trains utilize the same track but are separated by time windows.’ The final two types of sharing arrangements are shared right-of-way and shared corridor. The term ‘shared right-of-way’ means that the freight and passenger tracks are less than twenty-five feet apart from one another. If the tracks are more than twenty-five feet, but less than 200 feet, apart, then the term of art is a ‘shared corridor.’”). In some cases, like a network in Denver, Colorado, light rail is also apparently compatible with freight operations. Id. at 320–21.


215. Transcript of Public Hearing at 112, Twenty-Five Years of Rail Banking: A Review and Look Ahead (Surface Transp. Bd. July 8, 2009) (Ex Parte No. 690), available at http://www.stb.dot.gov/TransAndStatements/TranscriptsandStatements?opencview (testimony of Charles Montange, Ass’n of Amer. R.R.) (“The changes in shipping patterns and demand for various products change, and therefore the potential for the need for rail banking opportunities is there, and we believe that the public interest is well served by providing the opportunity for the economic and environment benefits of rail transportation to be provided for a time when it might be needed in the future.”).

least a protest. The writing is on the wall: the trains are coming and reactivation legally will be no quieter than the initial rail-banking.

Lawsuits will ensue. Tempers will flare. Pro-recreation and pro-mass-transportation policies will conflict with economic realities.

But there is still time for prophylactic measures. With the right laws passed by lawmakers and the right steps taken now by trail groups to secure their interests in the corridors, compromise will ease the tension and appease most interest groups. In other words, local motives can indeed be furthered as America re-embraces locomotives.
SETTLING ENVIRONMENTAL DISASTERS: THREE JUDICIAL FACTORS TO CONSIDER AND APPLICATION TO THE MAYFLOWER, ARKANSAS OIL SPILL

By Michael S. Campinell*

Introduction ..................................................................................................................... 520

I. Case Study: The BP Oil Spill of 2010 ...................................................................... 522
   A. Factual Background and History ................................................................. 522
   B. Application of the Three Factors ............................................................... 524
      1. Likelihood of Plaintiff’s Success at Trial ........................................ 525
      2. Degree of Environmental Cleanup or Remediation that Will Result from the Plea Agreement ................................................................. 526
      3. Non-adjudicatory Method is More Advantageous to the Plaintiff than Litigation ................................................................. 527

II. Case Study: The Love Canal Settlement Agreement ............................................ 528
   A. Factual Background and History ................................................................. 528
   B. Application of the Three Factors ............................................................... 530
      1. Plaintiff’s Likelihood of Success at Trial ........................................ 530
      2. Degree of Environmental Cleanup or Remediation that Will Result from the Settlement Agreement ................................................................. 531
      3. Non-adjudicatory Method is More Advantageous to the Plaintiff than Litigation ................................................................. 532

III. Application: The Mayflower, Arkansas Oil Spill of 2013 ............................. 533
   A. Factual Background, History, and Relevance ........................................ 533
   B. Application of the Factors to the Mayflower, Arkansas Oil Spill:
      What Kind of Settlement Agreement Would a Court Accept? ............ 535
      1. Likelihood of Plaintiff’s Success at Trial .......................................... 535

*Vermont Law School J.D./Masters of Environmental Law and Policy Candidate, 2015. The author would like to thank Professor Sean Nolon and Note Editor Jim Cunningham for all of their insights, suggestions, and counsel.
Environmental disasters are typically so complicated that the parties involved file multiple lawsuits. Determining the relevant facts and applicable law often causes considerable confusion. Should parties share damages, fines, or penalties? Did the disaster harm many different groups of people? Is a class action suit impractical? Should the parties choose a non-adjudicatory method? In addition to these questions, parties must decide what processes to use to remediate the disaster: arbitration, mediation, or settlement—which typically arises as a defendant’s guilty plea to the criminal charges associated with an environmental disaster.

This Note examines the non-adjudicatory solutions available in environmental disasters and the application of three common factors courts look to when deciding whether to accept a solution. These factors include: (1) the likelihood of plaintiff’s success at trial; (2) the degree of environmental cleanup and remediation that will result from the settlement or agreement; and (3) whether the non-adjudicatory method is more beneficial to the plaintiff. While no court has identified these three factors as an explicit test, several have conducted these examinations and applied these factors either implicitly or outside of the typical frameworks for considering settlements and plea agreements.

To demonstrate how courts apply this framework, this Note references two environmental disasters: the British Petroleum (“BP”) oil spill in the Gulf of Mexico in 2010 and the Love Canal disaster of the 1970s. For each of these cases, this Note discusses one of the important settlements or guilty pleas of each respective case. The BP Spill of 2010 involved a guilty plea agreement between the U.S. Department of Justice (“DOJ”) and BP. As a result of the settlement, the DOJ received a larger monetary sum than

2. Id.
litigation would have provided and expedited the environmental cleanup. The Love Canal disaster involved a settlement agreement between the United States, the State of New York, and the Hooker Chemical and Plastic Corporation that created a “phased approach for remediation” and cleanup of the site. With both the BP oil spill and Love Canal cases, the courts considered the three factors listed above when accepting guilty pleas or settlement agreements. By considering these three factors, courts approved agreements that involved a greater deal of environmental remediation and a better solution for the plaintiffs than would have been likely through litigation.

In Part III, this Note applies this three-factor framework to the Mayflower, Arkansas pipeline spill of 2013 to show what a court considers an acceptable settlement agreement. The Mayflower spill was relatively small: approximately 5,000 barrels (about 210,000 gallons; the same amount that spilled per day in the BP case). This spill was in a residential area and resulted in the evacuation of 21 homes. While small, this spill offers a valuable context for disasters that could occur with the construction of new pipelines such as the still controversial Keystone XL Pipeline, Enbridge’s pipeline expansions in the Midwest, or the smaller Northeast Energy Direct pipeline in New Hampshire and Massachusetts.

4. Id. at 10, 15.
6. Id. at 1073.
9. Exxon Sued Over Arkansas Oil Spill, supra note 7; Corrective Action Order CPF No. 4-2013-5006H (2013), supra note 8, at 2.
The DOJ, the State of Arkansas, and at least one private citizen brought a civil suit against ExxonMobil for the rupture of the Mayflower, Arkansas pipeline. Although the investigation of the spill continues, the private citizens’ civil suit alleges three counts against ExxonMobil. Based on these causes of action and the available information, a court is likely to accept a settlement agreement that has an adequate amount of environmental remediation and allows the plaintiffs to recover more in penalties than they would be likely to win in court. A settlement agreement is likely to benefit both parties and those of the general public whom the oil spill impacted. By applying this framework to a current environmental disaster, this Note highlights what a settlement agreement must include in order for a court to accept it. Furthermore, applying these factors to the Mayflower oil spill demonstrates what a settlement agreement should include for future pipeline ruptures.

I. CASE STUDY: THE BP OIL SPILL OF 2010

A. Factual Background and History

In 2008, BP purchased the rights to drill in the Mississippi Canyon Block 252, commonly known as the Macondo Well. Two years later, the BP oil spill occurred. Oil and natural gas traveled up through a pipe drilled two and a half miles into the ocean floor and spilled onto the deck of an offshore oil rig called the Deepwater Horizon. The rig caught fire and exploded, killing eleven people. Two days later, the entire Deepwater Horizon oil rig collapsed and sank. When the rig sank, it cut the riser that

15. Id. at 4–6.
17. Id. at 89–90.
18. Id. at 94; See also Investigative Report: How the BP Oil Rig Blowout Happened, POPULAR MECHANICS 2, 89 (Sept. 2, 2010), available at http://www.popularmechanics.com/science/energy/coal-oil-gas/how-the-bp-oil-rig-blowout-happened (providing more detail about the mechanics of the spill and explaining that the oil spill was the result of a poorly done negative pressure test of the well).
20. Id.
was leading from the bottom of the ocean to the rig itself.\textsuperscript{21} Crude oil and natural gas began spewing into the Gulf of Mexico at a rate of approximately 25,000 to 30,000 barrels of oil per day.\textsuperscript{22} After five months and many attempts at closing the well, BP was finally successful on September 19, 2013.\textsuperscript{23} Despite BP’s best efforts, the Deepwater Horizon disaster caused approximately 210 billion gallons of oil to spill into the Gulf of Mexico.\textsuperscript{24} “The BP spill is by far the world’s largest accidental release of oil into marine waters . . . [outstripping] the estimated 3.3 million barrels spilled into the Bay of Campeche by the Mexican rig Ixtoc I in 1979, previously believed to be the world’s largest accidental release.”\textsuperscript{25}

The negative effects of the spill were far reaching and led to both civil and criminal actions against BP.\textsuperscript{26} The Gulf of Mexico also suffered serious environmental harm and the Gulf states suffered severe economic loss.\textsuperscript{27} The spill devastated the sensitive Gulf-area wetlands, which are environmentally and economically important as a breeding ground for a variety of fish and wildlife, including 98% of the commercial fish and shellfish caught in the Gulf of Mexico.\textsuperscript{28} BP’s dispersant, though intended to break the oil into microscopic drops, actually created more harm than good when it sank the oil to the bottom of the ocean, and created dead zones in the Gulf.\textsuperscript{29} The use of this dispersant may have allowed these oil droplets to travel farther throughout the Gulf of Mexico.\textsuperscript{30} In addition to the harm relating to the wetlands of the Gulf, the spill also caused serious economic harm to tourism.\textsuperscript{31}

\begin{itemize}
\item \textsuperscript{21} Id.
\item \textsuperscript{23} LEHNER & DEANS, supra note 19, at x.
\item \textsuperscript{24} SCOTT SUMMY, THE LEGAL CHALLENGES AND RAMIFICATIONS OF THE GULF OIL SPILL 5 (Mary Ellen Fox et al. eds., 2010).
\item \textsuperscript{26} Emily Yehle & Lawrence Hurley, BP to Pay $4B to Resolve Criminal Claims, GREENWIRE (Nov. 15, 2012), http://www.cenews.net/stories/105997298.
\item \textsuperscript{27} J. BURTON LEBLANC, NATURAL RESOURCES DAMAGES: A CHALLENGE FOR STATES AFFECTED BY THE GULF OIL SPILL (2010), in 2010 GULF COAST OIL DISASTER: LITIGATION AND LIABILITY 21, 22 (Mary Ellen Fox, et al. eds., 2010).
\item \textsuperscript{28} Id.; see also MELISSA GASKILL, How Much Damage Did the Deepwater Horizon Spill Do to the Gulf of Mexico?, SCIENTIFIC AM. (Apr. 19, 2011), http://www.scientificamerican.com/article.cfm?id=how-much-damage-deepwater-horizon-gulf-mexico (examining the economic and environmental impact of the BP oil spill one year after the accident).
\item \textsuperscript{29} LEBLANC, supra note 27, at 21–22.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id., see also OXFORD ECONOMICS, The Impact of the BP Oil Spill on Visitor Spending in Louisiana, TOURISM ECON. (Dec. 2010), http://www.crt.state.la.us/tourism/research/Documents/2010-11/OilSpillTourismImpacts20101215.pdf (exploring the spill’s economic impact on tourism in Louisiana).}


B. Application of the Three Factors

In addition to the civil claims brought by both private citizens and the U.S. government, the DOJ also brought criminal charges against BP. This case study will concentrate on the criminal claims. Specifically, BP pled guilty to:


Judge Sarah Vance of the U.S. District Court for the Eastern District of Louisiana then accepted the plea agreement.

The three factors this Note examines are all present in the court’s reasoning for accepting the plea agreement. In addition to the typical factors used for deciding to accept a plea agreement, the court also considered the


36. Id. at 24.

37. Id. at 2 ("[T]he Court should analyze the proposed plea agreement in light of 18 U.S.C. §§ 3553; 3563; 3572, which govern the imposition of sentences ... in federal criminal cases. Those statutory provisions require that all federal criminal sentences take into account a number of factors, including the nature and circumstances of the offense and the history and characteristics of the defendant; the need to reflect the seriousness of the offense, promote respect for the law, and provide just punishment; the need to afford specific and general deterrence to criminal conduct; and the need to protect the public.") (citing United States v. BP Prods. N. Am. Inc., 610 F. Supp. 2d 655, 727–28 (S.D. Tex. 2009); 18 U.S.C. 3553(a), available at http://www.justice.gov/criminal/vns/docs/2013/01/2013-01-30-bp-exploration-reasons-for-accepting-plea-agreement.pdf.)
likelihood of plaintiff’s success at trial, the degree of environmental cleanup or remediation that will result from the plea agreement, and that the non-adjudicatory method is more advantageous to the plaintiff than litigation.

1. Likelihood of Plaintiff’s Success at Trial

From the court’s acceptance of the plea agreement, it is evident the court believed the government would succeed at trial against BP. When examining the gravity of the wrongdoing, the court wrote, “[t]here is no question that BP has committed serious offenses.” The court then goes on to explain the serious impacts of BP’s negligence: the death of eleven workers, serious environmental harm, and its obstruction of Congress. The court’s “matter-of-fact” tone when describing these wrongs shows the belief that the DOJ is likely to win at trial. The court also wrote, “the government’s charges reasonably reflect the severity of the offensive conduct.” By acknowledging that the claims against BP are “reasonable,” the court is, in essence, agreeing with the charges. Indeed, the court wrote if the charges against BP were unreasonable, it would not accept the plea agreement.

Lastly, BP’s acquiescence to the guilty plea is evidence that the DOJ would win in court. It is “unusual” that a corporation, like BP, would plead guilty to manslaughter. If BP had a chance to win on these most serious counts (eleven counts of manslaughter), it makes the most sense that BP would not want to plead guilty here. Additionally, by agreeing to this guilty plea, BP is exposing itself to “not only substantial fines, but also collateral consequences in other litigation, as well as suspension or debarment from government contracts, including new leases for oil and gas exploration[;]” the consequences of this plea agreement go much farther than just these eleven charges. By pleading guilty here, BP acknowledges the strength of

---

39. Id. at 4.
40. Id. at 4–7; see also Press Release, United States Department of Justice, Former BP Engineer Convicted for Obstruction of Justice in Connection with the Deepwater Horizon Criminal Investigation (Dec. 8, 2013), available at http://www.justice.gov/opa/pr/2013/December/13-crm-1329.html (“Kurt Mix, a former engineer for BP, was convicted today of intentionally destroying evidence requested by federal criminal authorities investigating the April 2010, Deepwater Horizon disaster . . . [A] jury in New Orleans found that Kurt Mix purposefully obstructed the efforts of law enforcement during the investigation of the largest environmental disaster in U.S. history.”).
42. Id. at 3–4.
43. Id. at 6–7.
44. Id. at 7.
the DOJ’s case. Although it is unclear exactly why BP agreed to the plea agreement, it seems that if BP thought the plea agreement was unreasonable, BP would not accept it.45

The court acknowledges this Note’s first factor both explicitly and implicitly. The court explicitly recognizes the plaintiff’s likelihood of success at trial when it states the harm BP caused.46 Implicitly, it recognizes this factor when considering the seriousness of the manslaughter charges and the far reaching impacts of a guilty plea.

2. Degree of Environmental Cleanup or Remediation that Will Result from the Plea Agreement

One of the most unique aspects of the BP oil spill plea agreement is how the agreement allocates the penalties. Rather than going to the treasury, most of the fine “is targeted toward mitigating and repairing the damage done by the spill.”47

The plea agreement distributes funds to three organizations with the specific goal of remediation or oil spill research in the Gulf: the Gulf of Mexico Research Initiative, the National Academy of Sciences, and the National Fish and Wildlife Foundation.48 “The $100 million fine for violation of the Migratory Bird Treaty Act is required by statute and the plea agreement to be used by the Director of the Interior to carry out wetlands conservation and restoration projects located in the Gulf Coast states.”49 The fine paid to the National Academy of Sciences was “for the purposes of oil spill prevention and response in the Gulf of Mexico.”50 BP also agreed to pay $2.394 billion to the National Fish and Wildlife Foundation “to remedy harm and eliminate or reduce the risk of future harm to Gulf Coast natural resources”51 and “to create and restore barrier islands off the coast of Louisiana and/or . . . for the purpose of restoring the coastal habitat of the state.”52 Lastly, BP promised to “continue to fulfill its commitment to fund the Gulf of Mexico Research Initiative.”53 BP created

45. David Shand, BP Prepares to Fight Gulf Oil Spill Charges, EXPRESS (Feb. 20, 2013), http://www.express.co.uk/finance/city/378855/BP-prepares-to-fight-Gulf-oil-spill-charges (“[BP has] always been open to settlements on reasonable terms, failing which we have always been prepared to defend our case at trial.”).
47. Id. at 13.
48. Id. at 13–14.
49. Id. at 14.
50. Id.
51. Id.
52. Id.
53. Id. at 16.
the Gulf of Mexico Research Initiative (“GoMRI”) on May 24, 2010 when it “committed $500 million over a 10-year period to create a broad, independent research program to be conducted at research institutions primarily in the U.S. Gulf Coast States.” GoMRI’s purpose is to “investigate the impacts of the oil, dispersed oil, and dispersant on the ecosystems of the Gulf of Mexico and affected coastal States.”

The second factor seems to play a very important role in the court’s reasoning for accepting the plea agreement. It explained that, when evaluating the plea agreement, it “must make an ‘individualized assessment of the plea agreement’ based on the facts and circumstances specific to the case,” as Federal Rule of Criminal Procedure 11(c)(1)(C) requires. In addition to this requirement, it gives a great deal of weight to the amount of environmental remediation to be done as a result of the plea agreement. The court recognizes this factor explicitly and explains its importance as a way to prevent similar disasters from occurring in the future.

3. A Non-adjudicatory Method is More Advantageous to the Plaintiff than Litigation

The non-adjudicatory method in this case was the plea agreement. The advantage to the plaintiff is the increased fine that BP paid. “There is a significant risk that absent a plea agreement, the government would be unable to recover more than $8.19 million dollars in fines from BP.” This is drastically different from the $4 billion fine in the settlement agreement. This vast difference makes the plea agreement much more advantageous to the plaintiff. Even if litigation went as successfully as possible for the plaintiff, the fine would be “less than half a percent (0.205%) of the total negotiated criminal recovery of $4 billion.” Additionally, there is also a risk that the government would win less than

55. Id.
56. See BP Exploration and Prod. Inc., No. 2:12-cr-00292, at 4, 6, 13, 24 (acknowledging the severity of the environmental harm from the disaster and the importance of proper remediation).
57. Id. at 1 (citing Fed. R. Crim. P. 11(c)(1)(C)).
58. Id. at 15.
59. Id. at 7 (emphasis in original).
60. Shand, supra note 45 (“[BP has] always been open to settlements on reasonable terms, failing which we have always been prepared to defend our case at trial.” BP’s reasons for accepting the settlement are unknown, but BP wrote it would fight the settlement if the settlement agreement was unreasonable.).
61. See BP Exploration and Prod. Inc., No. 2:12-cr-00292, at 10 (acknowledging the vast difference in penalties when comparing the possible outcome of litigation to the settlement agreement).
$8.19 million.\textsuperscript{62} “In order to recover fines of the magnitude [of the plea agreement], the government would have to prove the applicability of the Alternative Fines Act.”\textsuperscript{63} This would be a large hurdle for the government because the court cannot apply the Alternative Fines Act when its application would “unduly complicate or prolong the sentencing process.”\textsuperscript{64} By avoiding trial and using a plea agreement, the government was able to secure a much larger fine.

The court further examined this factor, but similar to the other two factors, no statute, rule, or common law requires the court to consider this factor. Rather, the court was able to accept a balanced plea agreement because it considered these three factors in its examination of the plea agreement. If the court had strictly used the statutorily mandated factors, the plea agreement would likely be less effective because the court would accept a much smaller fine.\textsuperscript{65}

No statute or case law mandates the court consider these three factors when accepting the plea agreement. Examining the plaintiff’s success at trial, environmental remediation, and the benefits to the plaintiff would not typically play a role in the court’s reasoning. In particular, the parties and victims should consider this plea agreement a success because of the amount of environmental remediation involved. The court intends the fine to remedy the environmental harm the oil spill caused. This is important because without the court’s consideration of environmental remediation, the plea would be much less effective, but the court would still accept it.

II. CASE STUDY: THE LOVE CANAL SETTLEMENT AGREEMENT

A. Factual Background and History

“The Love Canal site is roughly rectangular, 16-acre parcel of land located in the City of Niagara Falls, New York.”\textsuperscript{66} The land was originally developed to create a canal that would be used to create electricity for industrial development in the surrounding area.\textsuperscript{67} This plan, however, never came to fruition and instead, the Hooker Chemical and Plastics Corporation (“Hooker”) purchased the land in 1920.\textsuperscript{68} Hooker and the Town of Niagara

\begin{table}[h]
\centering
\begin{tabular}{|c|c|}
\hline
Factor & Description \\
\hline
1. Plaintiff’s success at trial & The court examined the plaintiff’s success at trial.
\hline
2. Environmental remediation & The court considered environmental remediation.
\hline
3. Benefits to the plaintiff & The court considered the benefits to the plaintiff.
\hline
\end{tabular}
\end{table}
both intentionally and knowingly use the land as a municipal and toxic waste dump.\textsuperscript{69} In 1953, the Niagara Falls Board of Education purchased the property for $1.\textsuperscript{70} The Niagara Falls Board of Education knew Hooker dumped toxic chemicals at the site.\textsuperscript{71} Consequently, Hooker required a clause in the deed to disclaim all liability to protect itself into the future.\textsuperscript{72} Ultimately, the town used the property for a school, parks and recreational areas, and private homes.\textsuperscript{73}

Between Hooker’s sale of the property in 1953 and government intervention and clean up in 1978, a variety of problems arose related to the toxic chemicals buried beneath the site.\textsuperscript{74} This included many problems with construction, complaints of strong odors, minor chemical burns when children picked up powdery materials they found, land collapses, and puddling of toxic materials.\textsuperscript{75} Additionally, a myriad of health problems associated with the chemicals buried underneath the site began to appear and were reported.\textsuperscript{76} These problems included:

- Above-normal amounts of miscarriages . . . the birth-defect rate in the five preceding years [of the study] to be 56 percent; an increase in central nervous system disease including epilepsy, nervous breakdowns, suicide attempts, and hyperactivity in children; a greater chance of contracting urinary disorders . . . an increase in asthma and other respiratory problems.\textsuperscript{77}

Furthermore, a study of births in the Love Canal area “showed that out of the last 15 pregnancies . . . we have had only two normal births. The rest resulted in a miscarriage, and stillborn or birth-defected babies.”\textsuperscript{78} The Environmental Protection Agency (“EPA”) and the State of New York eventually cleaned up the site and then sought damages from Hooker Chemical under the Comprehensive Environmental Response,

B. Application of the Three Factors

Although the court was not required to examine the three factors, the court considered them either implicitly or explicitly when determining if the court should accept the settlement agreement. In particular, this “settlement decree prescribes a phased approach for remediation” of the site. Although there were several different settlement agreements after Love Canal, this Note examines the settlement agreement involving the Hyde Park landfill site. “When [Hooker] ceased using Love Canal, it switched most of its waste disposal operations to Hyde Park. From 1953 to 1975 Hooker used the Hyde Park site to dispose of the toxic byproducts of its chemical manufacturing processes.”

1. Plaintiff’s Likelihood of Success at Trial

Although the court wrote “the most important factor is the court’s determination of the strength of the plaintiff’s case,” compared to the other factors, the court actually discusses the plaintiff’s success at trial the least. Instead, the court continues its analysis and explains the “special policy considerations” that exist, in particular, “the court’s primary concern . . . to ensure that the settlement protects the public health and the environment to the greatest extent feasible.”

This contradictory language seems to indicate the court actually has two very important considerations: the likelihood of the plaintiff’s success at trial (the first factor), and the protection of the public interest and the environment (more related to the second factor). Although the court does not discuss the likelihood of plaintiff’s success at trial in great detail, it seems to rely on Hooker Chemicals’ and the government’s acceptance of the agreement to conclude this factor exists in the settlement agreement. “The settlement was . . . approved by counsel for all parties [and] by the

81. Id. at 1073.
84. Id. at 1073.
state and federal agencies which are charged with the review of the various environmental protection statutes. This approval carries with it a strong presumption of validity.\textsuperscript{85}

Although the court did not discuss the plaintiff’s likelihood of success at trial as much as it indicated, the court still likely considered this factor. The effort both parties put into the plea agreement seemed to indicate to the court that the plaintiffs would likely prove successful at trial. Instead of concentrating on the plaintiff’s likelihood of success at trial, the court concentrated its efforts on the importance of the public interest involved: environmental remediation.

2. Degree of Environmental Cleanup or Remediation that Will Result from the Settlement Agreement

This factor is the most prominent reason for the court’s acceptance of the settlement agreement. In fact, the primary purpose of the settlement agreement is “a phased approached for remediation.”\textsuperscript{86} The court stresses the importance of its role in protecting “public policy and the environment to the greatest extent feasible under currently existing technology.”\textsuperscript{87}

The court examines many details of the settlement agreement and whether or not the settlement agreement is ultimately motivated to protect the public health.\textsuperscript{88} One particular detail that is worth repeating is that the government will supervise both phases of the process; first, “find out what is happening above and below the surface in the affected area,” and second, “the decree requires Hooker to provide a definite plan for remediation.”\textsuperscript{89} Next, Hooker “will be required to execute [the definite plan], again under the supervision of the appropriate federal and state agencies and the court.”\textsuperscript{90} The court mentions this supervision five more times throughout the court’s opinion.\textsuperscript{91} By emphasizing the required supervision, the court indicates that Hooker must conduct the remediation properly.

The court also looks to the amount of environmental cleanup and remediation when it addresses opponents’ concerns to the agreement. Opponents of the settlement were concerned that “Hooker’s compliance with the terms of the agreement will constitute a complete defense to any

\textsuperscript{85.} Id. at 1080.
\textsuperscript{86.} Id. at 1073.
\textsuperscript{87.} Id.
\textsuperscript{88.} Id. at 1073–79.
\textsuperscript{89.} Id. at 1073–74.
\textsuperscript{90.} Id. at 1074.
\textsuperscript{91.} Id. at 1073–80.
future actions which the governmental parties might bring." The court, however, argues that these concerns are unwarranted because several clauses in the settlement agreement stress the importance of environmental cleanup at other waste sites, such as the litigation surrounding what is commonly called Love Canal. Section 11(d) of the settlement agreement states that the agreement does not “waive or release any cross-claims for contribution and/or apportionment of the Town of Niagara or the Town of Lewiston asserted against [defendant] in any pending or future legal action brought by a non-party to this action.” The court is very clear that this settlement agreement is not necessarily the end of litigation, or environmental remediation duties, for Hooker in the Love Canal disaster: “this judgment will not, and indeed cannot, absolve Hooker from liability in actions brought by private individuals who are not parties to the settlement.” Indeed, the court expects environmental remediation to continue as individuals and other private parties bring suit against Hooker.

The court takes environmental remediation very seriously in this settlement agreement. The court’s standard of review does not necessarily involve environmental remediation, merely “special policy considerations.” In this case, these policy considerations are concentrated around environmental remediation. The court could have also reasonably accepted a settlement agreement that did not consider environmental remediation, but rather, included admittance of guilt and an appropriate fine. Environmental remediation was not required for this settlement agreement to be accepted. Indeed, even though unnecessary, the court’s consideration of environmental remediation led to the acceptance of a settlement agreement that helped to solve the problem created by the defendant.

3. Non-adjudicatory Method is More Advantageous to the Plaintiff than Litigation

The court also considered this last factor when evaluating the settlement agreement from this part of the Love Canal disaster. Like the other two factors, the court was not required to consider it, but it ultimately did. This factor is important to consider for environmental disasters because

---

92. Id. at 1079.
93. Id.
94. Id.
95. Id.
96. Id.
97. Id. at 1072.
it reflects the complicated nature of environmental disaster resolution. Oftentimes, litigation can be very risky for plaintiffs as the monetary and time commitments are both very significant. For example, the Exxon Valdez oil spill litigation was not completed until 20 years after the accident. This long process involved many parties and many appeals; costing those involved a great deal of time and money.

In the Hooker case, the court wrote it was this “expenditure of considerable time, money and effort” that helped to justify the court’s acceptance of the settlement agreement. The court knew both parties took the settlement agreement seriously. By agreeing to a settlement, the plaintiffs saved considerable time and money that would have been necessary for adjudication. Furthermore, “there [was] no evidence in the . . . record to indicate that even after a favorable decision at the end of a protracted trial any remedy could be fashioned which would be more advantageous to the government or to the residents of the community.” The court reasoned that it should accept the settlement agreement because it was more advantageous to the plaintiffs. By taking into account these three factors, the court allowed a settlement agreement that focused on remediation and allowed both parties to begin the necessary cleanup process.

After discussing the importance of these three factors in past disputes, it is important to look at how to apply these three factors to a current environmental disaster: the Mayflower, Arkansas oil spill of 2013.

III. APPLICATION: THE MAYFLOWER, ARKANSAS OIL SPILL OF 2013

A. Factual Background, History, and Relevance

On March 29, 2013, a pipeline owned by ExxonMobil ruptured in Mayflower, Arkansas. The Pegasus pipeline spilled about 5,000 barrels

---

100. Id.
101. James T. O’Reilly, When and Why Should Settlement be Considered?, in 2 TOXIC TORTS PRAC. GUIDE § 30:14 (2013) (“Among [the several factors to consider] are the continuing financial costs of litigation versus the finite costs of settlement . . . and the chances of success upon motion and at trial.”).
of crude oil into a suburban area about forty kilometers from Little Rock.\(^{104}\)
This led to the evacuation of 21 homes, property damage, environmental harm, possible health effects, and questions about oil pipelines in the United States.\(^{105}\) An original manufacturing defect caused the rupture.\(^{106}\)
“Microcracking might have occurred immediately following the pipe’s manufacturing, which led to further cracking and thinning of the pipeline during service, and ultimately causing the rupture.”\(^{107}\) Furthermore, regulators from the U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration (“PHMSA”) found the pipeline was about 70 years old and Exxon recently reversed the flow of the pipe.\(^{108}\) This reverse in flow increased the capacity of the pipeline and as a result, increased the pressure of the oil flowing through it.\(^{109}\) Although this increase in pressure did not exceed the maximum pressure the pipe could sustain, the combination of the microcracking and the increase in pressure likely led to the rupture.\(^{110}\)

Although not nearly as severe as the BP oil spill or the incident at Love Canal, the Mayflower oil spill is an important case study for several reasons. First, its recentness provides an excellent opportunity to consider the factors applied in past settlement or plea agreements resulting from environmental disasters. This case study thus provides great opportunity to examine how an environmental disaster should or could be resolved. Second, pipeline ruptures have occurred in the past in the United States.\(^{111}\) The Mayflower rupture was certainly not the first pipeline rupture in the United States,\(^{112}\) which leads to the third reason this is a useful case study: the Keystone XL Pipeline.

\(^{104}\) Exxon Sued Over Arkansas Oil Spill, supra note 7; Corrective Action Order CPF No. 4-2013-5006H (2013), supra note 8, at 2 (“[ExxonMobil Pipeline Company] estimates that approximately 3500-5000 barrels of crude oil was released as a result of the Failure . . . Local police evacuated 21 homes.”).

\(^{105}\) Gerken, supra note 103.

\(^{106}\) Id.

\(^{107}\) Id.

\(^{108}\) Id.

\(^{109}\) Id.


\(^{112}\) Id.
TransCanada proposed the Keystone XL Pipeline to the U.S. State Department in May 2012. The TransCanada Corporation proposed that a pipeline be built from the Canada-Montana border and connect to a pipeline in Steele City, Nebraska. The Keystone XL pipeline would connect oil extraction in Canada to refineries in Nebraska. This pipeline is very controversial; pitting many different groups against each other. By examining the possible outcomes, and determining what an adequate settlement or plea agreement would look like, we will be better able to understand how to deal with a spill that could result from the construction of the Keystone XL Pipeline. Particularly, by determining an appropriate settlement or plea agreement from the Mayflower oil spill, we may be better able to determine an adequate remedy for a future spill in a suburban neighborhood.

B. Application of the Factors to the Mayflower, Arkansas Oil Spill: What Kind of Settlement Agreement Would a Court Accept?

In June 2013, the DOJ, on behalf of the EPA, brought two claims against the ExxonMobil Pipeline Company and Mobil Pipe Line Company ("ExxonMobil"). In addition, the Arkansas Attorney General, on behalf of the Arkansas Department of Environmental Quality, brought four claims against the same parties.

1. Likelihood of Plaintiff’s Success at Trial

Based on the facts of this situation, plaintiffs will likely succeed at trial because ExxonMobil’s use of the pipe was the major cause of the rupture. PHMSA determined, through an independent assessment, that the crack in the pipe, which caused the rupture, was an original manufacturing defect. Even though this may seem like the court should blame the manufacturer of

---

114. Id.
115. Id.
117. Complaint, ExxonMobil, supra note 13, at 2.
118. Id. at 1.
the pipeline, “the actual use of the pipe” is an important contributing factor. A court is likely to find ExxonMobil responsible for the pipeline rupture because ExxonMobil used the pipe for approximately 70 years, changed the flow, and increased the pressure of the pipe. Therefore, the plaintiffs will likely succeed at trial if a jury agrees and finds Exxon’s use was the primary cause of the rupture. However, success at trial does not necessarily mean a windfall for the United States or the State of Arkansas. The court will also have to examine the environmental cleanup or remediation that will result from the agreement.

2. Degree of Environmental Cleanup or Remediation that Will Result from the Settlement Agreement

Hopefully, any settlement agreement that the parties reach will include a degree of environmental remediation. Whether the parties will include environmental remediation is hard to predict at this point. However, based on the two previous case studies, there are several different paths the parties could follow. First, similar to the BP oil spill, the DOJ could decide that rather than put any settlement money in the general treasury, the settlement funds would be used strictly for cleanup in the Mayflower, Arkansas area. This could include granting the settlement funds to the EPA, the Arkansas Department of Environmental Quality, the U.S. Fish and Wildlife Service, or a local nonprofit or third-party organization dedicated to environmental cleanup.

Second, the DOJ and ExxonMobil could follow the lead of the Love Canal settlement. This would require ExxonMobil to create a remediation plan that the government approves and then oversees. Based on the Love Canal case study, the government would be able to review any plan ExxonMobil provides. Although PHMSA has already requested a remedial work plan from ExxonMobil, this plan is not for environmental remediation; it is for repair of the pipeline to prevent future ruptures. PHMSA extended the due date of this remedial plan until January 6, 2014. PHMSA accepted ExxonMobil’s remediation plan and approved

120. Id.
121. Id.
ExxonMobil’s plan to restart the pipeline. A plan that a court is likely to accept would need a significant amount of government oversight. As explained in the Love Canal case study, government oversight is important for the health, safety, and wellbeing of the environment, the residents of the area and those assigned to conduct necessary remediation. Government supervision of remediation is important to ensure remediation is completed appropriately and ensures that chemical migration is kept to a minimum.

Third, ExxonMobil and the EPA could work together to create an adequate remediation plan. This would ensure both parties are satisfied with the goals and requirements of the plan. Additionally, it will give both parties more flexibility to deal with the situation as they see fit. If such a remediation plan is included in a settlement agreement, it is more likely to be accepted by the court and is likely to ensure adequate remediation of the site.

3. Non-adjudicatory Method is More Advantageous to the Plaintiff than Litigation

Based on the complaint and the relevant federal and state laws, the United States and the State of Arkansas are likely to secure civil penalties as a result of adjudication. However, the important question to ask is: what will make a settlement agreement more beneficial to the plaintiffs than adjudication? In addition to the degree of remediation involved in a settlement agreement, the court’s acceptance of the BP oil spill agreement relied heavily on the additional penalties the DOJ secured. In order to determine how much the United States and the State of Arkansas stand to win from this case, several of the claims against ExxonMobil must be
explored. This Note will determine this amount by examining each respective cause of action and the possible fines associated with it.

The first cause of action brought on behalf of the EPA was for "violations of CWA Section 311(b)." \(^\text{131}\) The civil damages pursuant to this claim are up to $1,100 or up to $4,300 per barrel spilled, depending on whether the court finds ExxonMobil was grossly negligent or not. \(^\text{132}\) With approximately 5,000 barrels of oil spilled, this claim could result in a civil penalty of either $5.5 million or $21.5 million. In addition to the federal government’s claim under the Clean Water Act, the State of Arkansas brought four claims that seek civil penalties from ExxonMobil. \(^\text{133}\) This Note will discuss each of these claims and the civil penalties associated with them separately.

The State of Arkansas brought a claim under the Arkansas Hazardous Waste Management Act for the oil ExxonMobil cleaned up in Mayflower, Arkansas and then stored at a site off Highway 36 “in such a manner or place as to create or is likely to create a public nuisance or a public health hazard.” \(^\text{134}\) The civil penalties associated with this claim are not to exceed $25,000 per day per violation. \(^\text{135}\) The complaint, however, does not outline the exact relief sought under this claim; it only requests the amounts referenced above. The complaint does not include a specific number of violations. \(^\text{136}\) Assuming that the oil has been stored at the Highway 36 site for 45 days as of June 17, 2013, the civil penalties for the violation could be up to $1.1 billion. \(^\text{137}\)

The State of Arkansas also seeks civil penalties under the Arkansas Water and Air Pollution Control Act. \(^\text{138}\) These two causes of action are based on water and air pollution resulting from the oil spill. \(^\text{139}\) Because of a lack of available information, the civil penalties for these two causes of action are much harder to calculate. Both claims include a civil penalty of $10,000 per violation per day. But again, the complaint does not include the specific number of violations or number of days that the violations occurred over. This is likely because some of the violations are ongoing and may

\(^{131}\) Complaint, United States v. ExxonMobil, at 7.
\(^{132}\) Id.
\(^{133}\) Id. at 2.
\(^{134}\) Id. at 9.
\(^{135}\) Id. at 11.
\(^{136}\) Id.
\(^{138}\) Complaint, United States v. ExxonMobil, at 2.
\(^{139}\) Id. at 11–15.
continue through the ongoing trial, which began in February 2014. Based on nine separate violations and at least one hundred days of violations, the penalties for the water pollution could reach $1 million. This could be even larger depending on when the court considers the cleanup complete. The civil penalties associated with the air pollution in the fifth cause of action are even harder to determine at this point because no assessment has been conducted at this time.

Lastly, the State of Arkansas is seeking civil penalties under the Oil Pollution Act ("OPA"). "OPA provides that 'each responsible party for a vessel or facility from which oil is discharged . . . is liable for the removal costs and damages . . . that result from such incident.'" This means that ExxonMobil is liable for the costs associated with the State of Arkansas’ cleanup efforts. These costs are estimated to be more than $70.5 million. Altogether, ExxonMobil could be ordered to pay civil penalties ranging from $77 million to $94 million. In addition to civil penalties, ExxonMobil has been ordered to pay $2.6 million for violations of PHMSA regulations.

Ultimately, based on the previous case studies, the settlement agreement would likely have to exceed the penalties the United States and the State of Arkansas would be able to win through litigation. What this amount is, however, is hard to calculate based on the limited information available and the recent nature of the oil spill. As the parties and news organizations release more information and assessments of the situation, they will help paint a clearer picture as to an appropriate settlement amount.

A court is likely to use the three factors in the two previous case studies of the BP oil spill and Love Canal to consider a settlement agreement from


141. See Steve Hargreaves, Exxon Sued Over Arkansas Pipeline Spill, CNN MONEY (June 13, 2013), http://money.cnn.com/2013/06/13/news/companies/exxon-pipeline-lawsuit (stating that violating state environmental laws can have a penalty of up to $10,000 per violation per day).

142. Id.

143. Complaint, United States v. ExxonMobil, at 15.

144. Id.


the Mayflower, Arkansas oil spill. Although the parties are still compiling the relevant information, it will be important for the parties involved to begin assessing what kind of settlement agreement is possible. The United States and the State of Arkansas are likely to want as much environmental remediation and the largest civil penalties possible. ExxonMobil, on the other hand, is most likely interested in finding an affordable way to manage this disaster without damaging its public image. An acceptable settlement agreement will, not only balance the needs of both parties, but it will also include terms that will help the public impacted by this disaster.

An adequate settlement agreement would be beneficial to everyone involved in this case. Such a settlement agreement will allow remediation to begin in a timely fashion with adequate government supervision. Supervision will allow the government to ensure that remediation is completed properly and, similarly to the Love Canal case, will provide public access to this data. Furthermore, an adequate settlement agreement may supply significant monetary fines to the United States government and the State of Arkansas. This could play two roles: punish ExxonMobil and further remediation efforts. Similar to the BP settlement, a large fine could punish ExxonMobil’s behavior and provide funding for remediation. Additionally, a settlement agreement could provide a timely solution to what could be a long term problem, if allowed to proceed to trial. By avoiding possible years of litigation, the parties will be able to solve the problem sooner, rather than later. Lastly, a settlement agreement may help to improve ExxonMobil’s public image. BP’s public relations campaign after the spill in the Gulf relied on apologetic ads, many of which reflect BP’s commitment to remediation efforts in the Gulf. ExxonMobil may choose the same route in order to improve its own image. A settlement agreement between the United States, the State of Arkansas, and ExxonMobil may be a long way off. However, a settlement agreement that points the court in the direction of these three factors is not only likely to be accepted, but may also be one of the best ways to adequately clean up Mayflower, Arkansas.

---

150. Id.
CONCLUSION

When deciding to accept a settlement agreement, courts will consider a standard set of factors. In the context of environmental disasters, courts consider the following additional factors: the likelihood of plaintiff’s success at trial, the degree of environmental cleanup or remediation that will result from the agreement, and if the non-adjudicatory method is more advantageous to the plaintiff than litigation. Courts used these factors when accepting the agreements resulting from the BP oil spill and the Love Canal disaster. It is also likely the court will use these additional factors if a settlement agreement arises from the Mayflower, Arkansas oil spill because these factors lead to a more effective settlement agreement.

This Note argues that courts should explicitly recognize these factors in order to ensure that future settlements address the variety of needs that arise from an environmental disaster. Not only have these factors been used in the past, using them in the future ensures that timely environmental remediation, one of the most important aspects of resolving environmental disasters, will play an important role in future disasters. In the meantime, parties to a dispute can use these factors to write and approve adequate agreements and avoid litigation. Avoiding litigation with an adequate agreement can help save both time and money, and also improve cleanup efforts. The benefits of an adequate settlement agreement measurably affect the courts, the parties involved, and the public at large.
**ENGAGING FARMWORKERS IN ENFORCEMENT OF ENVIRONMENTAL POLICY: THE CASE FOR A NEW COOPERATIVE VISA**

*By Sarah Zelcer*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>542</td>
</tr>
<tr>
<td>I. Profile of the Risk</td>
<td>547</td>
</tr>
<tr>
<td>A. Health Effects from Pesticide Exposure</td>
<td>547</td>
</tr>
<tr>
<td>B. Demographics of Farmworkers</td>
<td>548</td>
</tr>
<tr>
<td>II. Labor Laws—Inadequate by Design</td>
<td>549</td>
</tr>
<tr>
<td>A. H-2A Temporary Agricultural Guest Worker Visa Program</td>
<td>550</td>
</tr>
<tr>
<td>B. Labor Law and Agriculture—A Brief Historical Synopsis</td>
<td>551</td>
</tr>
<tr>
<td>C. Agricultural Worker Protection Act</td>
<td>552</td>
</tr>
<tr>
<td>D. National Labor Relations Act and Agriculture</td>
<td>553</td>
</tr>
<tr>
<td>E. Limitations of Current Pesticide Use Regulations</td>
<td>554</td>
</tr>
<tr>
<td>F. Limitations of Tort Recovery</td>
<td>556</td>
</tr>
<tr>
<td>III. Harm to Society of Agricultural Pesticide Misuse and Limitations of Environmental Law to Regulate Pesticide Usage</td>
<td>559</td>
</tr>
<tr>
<td>A. Federal Insecticide Fungicide and Rodenticide Act</td>
<td>559</td>
</tr>
<tr>
<td>B. Clean Water Act</td>
<td>561</td>
</tr>
<tr>
<td>C. Clean Air Act</td>
<td>561</td>
</tr>
<tr>
<td>IV. Cooperative Visa Programs—Groundwork for a Solution</td>
<td>563</td>
</tr>
<tr>
<td>A. The POWER Act</td>
<td>563</td>
</tr>
<tr>
<td>B. The S Visa</td>
<td>564</td>
</tr>
<tr>
<td>C. The T Visa</td>
<td>565</td>
</tr>
<tr>
<td>D. The U Visa</td>
<td>566</td>
</tr>
<tr>
<td>V. Envisioning a New Cooperative Visa Program</td>
<td>567</td>
</tr>
<tr>
<td>Conclusion</td>
<td>571</td>
</tr>
</tbody>
</table>

**INTRODUCTION**

In Immokalee, Florida, around Christmas of 2005, three pregnant farmworkers experienced tragedy. They each bore a child with severe
deformities, which they believe may have been caused by the pesticides sprayed on the fields in which they labored. The first baby, Carlitos, was born with an extremely rare condition called tetra-amelia syndrome, which left him without arms or legs. The second baby, Jesus, was born with Pierre Robin Sequence, a deformity of the lower jaw, resulting in constant danger of his tongue falling back into his throat and choking him to death. Jorge, the third baby, born just days later, “had one ear, no nose, a cleft palate, one kidney, no anus, and no visible sex organs.” Hours after birth, doctors determined Jorge was in fact a girl and she was renamed Violeta. Violeta’s birth defects were so severe she survived for only a few days. The babies, all born in the United States, were American citizens; their parents were not. Ultimately, with significant help from the community, social workers, and a dedicated lawyer, Carlitos’ parents won an undisclosed settlement after bringing a lawsuit against the corporate farm where they worked. The family brought no action against the chemical company that made the pesticide used on the tomato farm. Carlitos’ parents remain in the United States to care for their sick child; without documentation, they could be deported at any time.

Agricultural chemical use poses enormous risks to farmworkers and the environment. Current legal protections against pesticide exposure are inadequate and under-enforced. By design, pesticides are toxic substances

3. Id.
4. Id. at 36.
5. Id.
6. See id. at 35–36 (explaining that all three babies were born in the United States); Laura Layden, Ag-Mart Sued over Birth Defects, NAPLES DAILY NEWS (Mar. 2, 2006), http://www.naplesnews.com/news/crime/agmart_sued_birth_defects_nap.
8. See id. at 277–78 (explaining the relationship between the attorney and the child’s parents, their immigration status, and the choice not to bring the case as a toxic tort). “Before he could proceed with litigation, Yaffa [the attorney] had to convince Carlitos’ parents that they had legal rights despite their undocumented status . . . . He quelled their fears of employer retaliation and deportation by convincing them to leave Ag-Mart and move to an undisclosed location for the duration of the lawsuit. In February 2006, Yaffa filed suit against Ag-Mart in Hillsborough County, Florida Circuit Court on behalf of Carlitos and his parents, seeking damages for medical and hospital costs, lifetime care costs, disability, disfigurement, pain and suffering, mental anguish, and, eventually, punitive damages. The case was based on premises liability, which allowed the plaintiffs to avoid the complicated burden of proving the elements of causation required in toxic tort cases.” Id.
that kill or control living organisms. Pesticides can adversely affect human health by increasing the risk of cancer and neurological disorders, and may even cause death. Pesticides also harm the environment by inadvertently killing or causing reproductive abnormalities in non-target species, including fish, birds, and other wildlife.

Environmental statutes and regulations are insufficient to protect farmworkers and wildlife from the harmful effects of pesticides. In response to the growing environmental movement in the United States, Congress passed a variety of environmental statutes in the 1970s, such as the Clean Air Act and the Clean Water Act. Yet, most of these statutes provide exemptions for agricultural activities and, therefore, fail to adequately protect farmworkers’ health and surrounding wildlife. Additionally, statutes regulating pesticide use on farms are often not enforced, due in large part to the fact that their investigative programs rely on complaints from the public. Reliance on voluntary reporting, instead of inspections and investigations, results in many unreported pesticide-related illnesses every year.

To compound the issue, farmworkers receive little legal protection under federal labor laws. For instance, farmworkers are explicitly excluded from protection under the National Labor Relations Act (“NLRA”), which prohibits employers from firing employees for joining labor unions and engaging in labor union activity. Furthermore, under the Fair Labor Standards Act, which guarantees minimum wage and overtime pay to most employees, farmworkers are not entitled to overtime pay and, in some

---

11. Id.
13. See Flocks, supra note 7, at 259, 262–64 (explaining the reasons why occupational injuries and illnesses are undetected and unreported for undocumented workers, and further explaining that regulations that are supposed to protect farmworkers from pesticide exposure are often “nonexistent, ineffective, or unenforced”).
14. 29 U.S.C. § 152(3) (1978). The term employee includes: [A]ny employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor, practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer. Id.
circumstances, minimum wage. Accordingly, employers often take advantage of farmworkers and subject them to long hours with low wages. Moreover, the power balance is further enhanced to favor growers over farmworkers who are undocumented. In the absence of lawful status, deportation fears outweigh the benefits of taking legal action.

The use of non-citizen labor in United States agriculture is nothing new. Historically, farmworkers have been paid below-market wages, suffered from abusive work conditions, and worked extraordinarily long hours. Modern agriculture continues to depend on the systematic use of non-citizen labor because employers can pay these workers next to nothing and demand they work long hours with minimal legal protections. Until Congress addresses this issue, the agricultural workforce will continue to be dominated by undocumented workers, who have little power to enforce their rights.

Undocumented farmworkers would be more likely to report these injustices, including the misuse of pesticides by their employers, if Congress offered them some legal protection from deportation during that process. The Senate has already accepted this rationale for protecting victims of serious violations of labor and employment law. Congress already grants temporary visas to undocumented immigrants if they are victims of human trafficking under the T visa program. Likewise, Congress provides temporary visas to undocumented immigrants who are victims of explicitly enumerated crimes under the U visa program. The rationale for all of these programs is twofold: first, the programs protect

society from criminal wrongdoing; and second, they assist United States officials in the prosecution of the offenses by securing the witness’ location within the United States. Under this same logic, Congress should expand these protections to farmworkers who are the victims of over-application or misapplication of pesticides and other toxic chemicals on farms. Congress created relevant environmental laws for public benefit, and the laws’ enforcement systems necessitate complaints from those who are in the best position to witness abuse—in this case, farmworkers.

In this note, I critique the agricultural exemptions to all major federal labor, employment, union, and environmental laws. I argue for narrowing agricultural exemptions to environmental statutes and the engagement of farmworkers in the enforcement of the more defined law. To incentivize this partnership and remedy the problematic exposure farmworkers suffer from agricultural chemicals, I argue farmworkers should be offered an immigration benefit similar to that currently existing under the U visa for their cooperation in civil law enforcement. This rationale was embraced in the Protect Our Workers from Exploitation and Retaliation Act (“POWER Act”), introduced in both the Senate and the House of Representatives beginning in 2010 and 2011. While the legislation was not enacted, several key provisions were taken up in the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013 in the Senate’s approved immigration reform bill in 2013.

Section I discusses the health implications associated with overexposure to pesticides. Section II provides background information on the demographics of modern farmworkers, the agricultural guest worker program, and the limited legal protections available to undocumented farmworkers. Section III examines the limited utility of environmental statutes to farmworkers. Section IV explains the history and policy rationale behind the United States’ cooperative visa programs. Section V proposes that Congress create a new cooperative visa program for undocumented farmworkers who are victims of pesticide abuse or misuse on farms by their employers, and who report such abuse to, and cooperate with, law enforcement.

---


I. PROFILE OF THE RISK

Pesticides cause enormous harm to human health and the environment. Among those at risk to pesticide exposure are consumers, those who live on or near farms, and farmworkers. There are significant social, environmental, and moral interests in ensuring that such chemicals are used safely.

A. Health Effects from Pesticide Exposure

Farmworkers are one of the primary populations exposed to pesticides. Consequently, farmworkers suffer the highest rate of illness caused by chemical exposure across industries. According to the General Accounting Office (“GAO”), many pesticide-related illnesses go unreported. In 1993, the GAO released a report stating there were no comprehensive data on the occurrence of chronic health effects of pesticide exposure and called for implementation of a program to monitor pesticide illnesses. As of 2000, the GAO found the lack of comprehensive information remained largely unaddressed. Farmworker advocates know this underreporting is due in large part to the fact that farmworkers depend on the employer for employment, housing, and, most significantly, often the visa through which they are permitted to come to the United States to earn a living and support their families. Additionally, many of the harms of pesticides are unknown to non-English speaking communities, or, there is nowhere to report injuries and no way to effectively communicate with health care providers.

Despite the fact that pesticide-related illnesses are sometimes difficult to diagnose and are underreported, the Environmental Protection Agency (“EPA”) estimates that between 10,000 to 20,000 farmworkers suffer from

26. IMPROVEMENTS NEEDED, supra note 9, at 10.
27. Id.
28. Id. at 11.
29. See Flocks, supra note 7, at 259 ("They rarely have insurance or the private resources to pay for health care, they may not have transportation, and they may risk losing their jobs if they take time off to seek health care.").
acute or chronic illnesses due to pesticide exposure annually.\textsuperscript{30} As noted in the introduction, acute exposure to pesticides can cause a wide range of illnesses, such as headaches, fatigue, nausea, skin rashes, eye irritation, flu-like symptoms, chemical burns, paralysis, and death.\textsuperscript{31} Exposure to pesticides during pregnancy has been linked to severe birth defects.\textsuperscript{32} Chronic illnesses and illnesses with delayed onsets, including cancer, neurological disorders, and reduced cognitive skills, also occur as a result of pesticide exposure.\textsuperscript{33} Given the serious, sometimes fatal, nature of pesticide-related illnesses, environmental and immigration statutes should protect farmworkers’ health from overexposure to pesticides, and farmworkers should be entitled to functional legal remedies that provide them with compensation for their injuries.

\textbf{B. Demographics of Farmworkers}

Approximately 83\% of farmworkers in the United States identify themselves as members of a Hispanic ethnicity group.\textsuperscript{34} Seventy-one percent of those Latino farmworkers in the United States were born in Mexico or Central America.\textsuperscript{35} These statistics demonstrate the extent to which immigrant workers dominate the farming industry of the United States.

The use of Mexican laborers in farming began during World War II with the Bracero Program. “The Bracero Program was a bilateral accord between the United States and Mexico, under which Mexican workers were brought to the United States to perform seasonal agricultural labor, and then returned to Mexico.”\textsuperscript{36} Despite the program’s success, it was subsequently abolished and many full-time farmworkers in the United States today are undocumented immigrants.

According to a United States Department of Agriculture (“USDA”) Economic Research Service survey, approximately half of the 1.1 million

\begin{itemize}
\item[31.] IMPROVEMENTS NEEDED, supra note 9, at 5.
\item[32.] See generally ESTABROOK, supra note 2 at 35–40 (summarizing the experience of the three female farmworkers in Florida whose babies were born with severe deformities).
\item[33.] IMPROVEMENTS NEEDED, supra note 9, at 5.
\item[36.] Baker, supra note 17, at 84.
\end{itemize}
full- and part-year farmworkers and agricultural service workers in the United States are undocumented laborers. Other studies suggest that roughly 60% of the nation’s noncitizen farmworkers are undocumented workers. Moreover, according to a report by the Executive Office of the President, “[a]mong new entrants to farm-work (those having worked on a farm for less than two years), fully 72% of farmworkers in crop agriculture reported working without authorization—with shares of 97% in fruit production and 90% in vegetable production.” Demographic information gathered from the 2007–2009 National Agriculture Workers Survey indicates “48% of farmworkers do not have legal authorization to work in the United States and only 33% are U.S. citizens.” From these reports and studies, it is clear that undocumented farmworkers now make up a significant portion of the farming industry.

One reason so many farmworkers are undocumented immigrants is because of the lax requirements under the Immigration Reform Control Act (“IRCA”) of 1986. Congress enacted IRCA in 1986 to revise and reform the Immigration and Nationality Act. Despite the fact that IRCA section 101 made it a crime to knowingly employ an undocumented person, section 101(a)(3) continues to permit an employer’s good faith effort to ascertain the employee’s immigration status as an affirmative defense, therefore, providing employers shelter from criminal enforcement of IRCA. The importation of immigrant labor to work in domestic agriculture continues, although it is largely unregulated because of deficits in immigration policy and enforcement.

II. LABOR LAWS—INADEQUATE BY DESIGN

The inadequacy of legal protections for farmworkers makes them vulnerable to employment abuses and extraordinarily reluctant to complain about pesticide exposure. The fact that farmworkers’ ability to work and be physically present in the United States is tied to a host employer under the H-2A visa system, combined with the lack of a protected right to unionize under the NLRA, low wages, and less than ideal physical living conditions.
arrangements provided by the employer all contribute to the realistic impracticalities of farmworkers being able to make good faith complaints about pesticide misuse.

A. H-2A Temporary Agricultural Guest Worker Visa Program

Under current immigration law, noncitizens working in agriculture with immigration authorization work under the H-2A temporary agricultural guest worker program. It is the only program that authorizes foreign-born workers to enter the United States and perform agricultural labor.\(^{44}\) “The H-2A temporary agricultural program establishes a means for agricultural employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign workers to the United States to perform agricultural labor or services of a temporary or seasonal nature.”\(^{45}\) Importantly, the H-2A program grants temporary seasonal work visas. It does not extend to year-round agriculture production and therefore does not cover dairy production and related activities.

The Office of Foreign Labor Certification certified 76,824 H-2A temporary workers in the fiscal year ("FY") 2013.\(^{46}\) This number is up from 62,743 in FY 2012.\(^{47}\) This program allows noncitizen laborers to obtain jobs that they could not otherwise obtain in their native countries and provides employers with inexpensive labor.

Critics of the program note that H-2A workers are often exposed to abusive work environments.\(^{48}\) Moreover, H-2A workers receive below-market wages and work extremely long hours. While the H-2A program provides noncitizen workers an avenue to legally work in the United States, it does not sufficiently protect their well-being. Instead, it excludes H-2A workers from the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), the one statute that exists to protect farmworker health, and ties the workers to one employer.

---

47. Id.
Agriculture is largely exempt from the Fair Labor Standards Act ("FLSA"). Temporary workers who migrate to the United States to pick fruits and vegetables, under the H-2A program, are exempt from AWPA. Additionally, farmworkers are also excluded from the NLRA.

FLSA barely extends to agriculture. Originally, the FLSA of 1938 excluded all farmworkers. It was amended in 1966 to include farmworkers under limited circumstances. The 1966 amendments “raise[d] minimum wages and extended protection to employees not previously covered under the Act, including agricultural workers.” Most notably, the amendments removed growers from the agricultural exemption list when the grower reached 500 or more man-days of labor in the previous year's peak quarter. In practice, the 500-man-day exemption continues to shield most agricultural operations from FLSA’s reach.

(a) Minimum wage and maximum hour requirements
The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer’s immediate family. Id.

50. 29 U.S.C. § 1802(8)(B)(ii) (2013). Practitioners use “AWPA” not “MAWPA” to refer to this section. “The term ‘migrant agricultural worker’ does not include—(i) any immediate family member of an agricultural employer or a farm labor contractor; or (ii) any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 1101(a)(15)(H)(ii)(a) and 1184(c) of title 8.” Id.

51. 29 U.S.C. § 152(3).
The term ‘employee’ includes: [A]ny employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor, practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer. Id.


53. Id.


55. Glader, supra note 52, at 1461.

56. Id. at 1461–62.

57. Five hundred man-days is roughly equivalent to seven employees employed full time in a calendar quarter, “[h]owever, a farmer who hires temporary or part-time employees during part of the year, such as the harvesting season, may exceed the man-day test even though he may have only two or three full-time employees.” 29 C.F.R. § 780.305(a) (2011).
C. Agricultural Worker Protection Act

In 1983, Congress passed AWPA. The express purpose of AWPA was “to remove restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers; to require farm labor contractors to register under this chapter; and to assure necessary protections for migrant and seasonal agricultural workers, agricultural associations, and agricultural employers.” AWPA requires every non-exempt farm labor contractor, agricultural employer, and agricultural association to: “disclose [upon request] the terms and conditions of employment” in writing; “post information about worker protections at the worksite”; pay workers on time and provide workers with an itemized statement of their earnings and deductions; ensure that any housing the employer offers to its employees complies with substantive federal and state safety and health standards (usually Occupational Safety and Health Administration (“OSHA”)); ensure that any vehicles the employer provides to its employees for transportation “meet applicable federal and state safety standards and insurance requirements,” and that employees driving these vehicles have obtained driver’s licenses; comply with the terms of any work agreement; and keep payroll records for each employee for the last three years. The strength of AWPA is that it allows farmworkers to bring a private cause of action for its violations.

Despite Congress’ intent to provide farmworkers with legal protection under AWPA, many farmworkers fall under AWPA’s statutory exemptions and thus, remain unprotected. For example, AWPA excludes farmers that work on family farms or for “small businesses.” Moreover, AWPA excludes H-2A farmworkers. In addition to its broad statutory exemptions, AWPA is devoid of any language protecting farmworkers from pesticide misapplication or over-application. Accordingly, the few farmworkers who are protected under AWPA must find an alternative legal avenue to seek redress for their injuries that result from pesticide exposure.

The working arrangement provisions of AWPA provide that “[n]o farm labor contractor, agricultural employer, or agricultural association shall, without justification, violate the terms of any working arrangement made by that contractor, employer, or association with any migrant [or seasonal]
agricultural worker.” 62 Recently, farmworker advocates have been attempting to expand the scope of the working arrangement concept under AWPA to encompass issues of pesticide usage. If such efforts were successful, farmworkers would be allowed to bring a private cause of action against employers who violate the under-enforced provisions of related law (OSHA and the Worker Protection Standard (“WPS”)).63 “Despite the fact that the working arrangement provisions comprise a substantial part of the protections provided to farmworkers under AWPA, neither the Act itself nor the regulations promulgated under authority of the Act define working arrangement.”64 Accordingly, it remains unclear if the standards of OSHA and WPS are enforceable through AWPA.

D. National Labor Relations Act and Agriculture

The NLRA is another piece of federal legislation that was drafted with an exemption for agricultural workers.65 Since its inception, the NLRA has excluded farmworkers from its protection of workers’ right to collective bargaining.66

Although agricultural laborers are not protected there is no mention that agricultural laborers are forbidden from forming unions. But without the protection offered by the NLRA, farmers do not have to recognize the union nor will they face any consequences in failing to so recognize in contrast with employers in other industries.67

62. 29 U.S.C. §§ 1822(c), 1832(c) (2012); Lockard, supra note 24, at 520.
63. See Lockard, supra note 24, at 519 (outlining the case for an expanded use of the working arrangement prong of AWPA to protect farmworker health and safety).
64. Id. at 523.
65. 29 U.S.C. § 152(3) (2012). The term employee includes:
[A]ny employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor, practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer. Id.
66. Jaclyn Reilly, Agricultural Laborers: Their Inability to Unionize Under the National Labor Relations Act, 1 (n.d.) (unpublished J.D. student paper, Pennsylvania State University) (on file with Pennsylvania State University, Dickinson School of Law), available at http://law.psu.edu/_file/aglaw/Publications_Library/Agricultural_Laborers.pdf (“Employees who engage in collective bargaining are able to band together to bargain with employers for better wages, a safer working environment, fringe benefits and other terms and conditions of employment. The NLRA protects this bargaining process and the parties involved.”).
67. Id.
Several scholars have pointed out that this exclusion keeps agricultural workers in low-wage, dangerous working conditions, and exacerbates the workplace safety risks they face.68

E. Limitations of Current Pesticide Use Regulations

In 1974, the EPA published its WPS.69 The WPS requires farmers that use pesticides or employ workers that use pesticides to take steps to reduce the risk of pesticide-related illnesses.70 There is no private cause of action for a violation of the WPS.

One of the most important requirements involves keeping workers out of treated areas during applications and while the restricted entry interval (REI) remains in effect. Growers also must provide workers with protective equipment and decontamination supplies when they enter treated fields within 30 days of expiration of the REI.71

Generally, the EPA has cooperative agreements with states, through which states are delegated the authority to implement and enforce provisions of the WPS while EPA’s regional offices oversee their activities.72

The WPS authorizes EPA and delegated state officials to conduct compliance inspections on farms. These inspections are either routine or for cause (i.e., in response to a complaint).73 Noncompliance with WPS may result in both civil penalties by EPA and criminal liability under the Federal Insecticide Fungicide and Rodenticide Act (“FIFRA”).74

68. See Lockard, supra note 24, at 518 (arguing that farmworkers’ exclusion from NRLA bolsters the case for allowing farmworkers the right to seek monetary damages under AWPA in a private cause of action).
74. 40 C.F.R. § 170.9(b) (2012).
Under [] FIFRA section 12(a)(2)(G) it is unlawful for any person “to use any registered pesticide in a manner inconsistent with its labeling.” . . . A person who has a duty under this part, as referenced on the pesticide product label, and who fails to perform that duty, violates FIFRA section 12(a)(2)(G) and is subject to a civil penalty under section 14. A person who knowingly violates section 12(a)(2)(G) is subject to section 14 criminal sanctions. 

Interestingly, while OSHA “assure[s] safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance,” it does not protect farmworkers from pesticide misapplication and over-application.76 Since its inception in 1970, OSHA has only promulgated one regulation that applies to the agricultural industry, the Field Sanitation Standard (“FSS”). The FSS requires growers “to provide potable drinking water, toilet facilities, and hand washing facilities to all employees engaged in hand-labor operations in fields and allow employees reasonable opportunities throughout the workday to use these facilities.”77 Notably, there is no private right of action under the Occupational Safety and Health Act, which created OSHA, for employees to enforce its rules or standards.78 Instead of OSHA, which is well versed in the practice of workplace safety, it is EPA that regulates pesticide use on farms. Initially, EPA and OSHA disputed which agency was responsible for overseeing workplace protection standards for agricultural laborers. “[T]wo advocacy groups and a pesticide-affected worker filed an action to compel the Secretary of Labor to issue permanent farmworker pesticide safety regulations under OSHA.”79 The D.C. Circuit held that Congress had conferred authority to regulate pesticides at agricultural workplaces to EPA under FIFRA.80 Thus, since the early 1970s, “OSHA has been prevented from governing farmworkers’ pesticide safety.”81

In 2000, the GAO found three main areas of inconsistent enforcement of the WPS.82 First, only three of EPA’s ten regions set a target number for

---

75. 40 C.F.R. § 170.9 (2012).
77. Lockard, supra note 24, at 512.
78. Id.
79. Flocks, supra note 7, at 265.
80. Id.
81. Id.
82. Lockard, supra note 24, at 516.
inspections. Second, EPA did not clearly define what constituted a worker protection inspection. Finally, EPA’s supervision of state enforcement varied greatly. Due to these insufficiencies, some farmworker advocates have argued for the creation of a private right of action under the WPS, FIFRA, or the extension of AWPA’s private right of action to pesticide-related incidents. Currently, “FIFRA does not expressly provide a private right of action through which farmworkers can hold employers liable for violations of EPA regulations.” So-called “citizen suits” permit individuals or advocacy groups to bring legal claims against agencies, which, if successful, require the agency to enforce provisions of environmental statutes and regulation, and, in some cases, to collect reasonable attorney’s fees.

Under FIFRA and the WPS, the only recourse for an individual harmed by failure of enforcement or insufficient standards is to petition EPA to take action or to attempt traditional theories of tort recovery. FIFRA itself does not offer a victim under the WPS the statutory right to bring a private cause of action.

In February 2014, EPA announced proposed rulemaking changes to the WPS. According to EPA, the proposed changes include: “increased frequency of mandatory trainings . . . to inform farmworkers of protections they are provided under law”; expanded mandatory posting of REI no-entry signs; a 16-year-old minimum age requirement for pesticide handlers; “no entry buffer zones around pesticide-treated fields”; measures to improve state compliance and enforcement abilities; standard OSHA respirators for all applicators; and mandatory availability of pesticide application information to farmworkers and their advocates. It remains to be seen whether any of these proposed changes will be adopted.

F. Limitations of Tort Recovery

In Bates v. Dow Agrosciences, the Supreme Court did away with a decade and a half of jurisprudence that assumed all pesticide-related tort
claims were barred under federal FIFRA preemption. In the lower courts prior to Bates, a plaintiff alleging “a pesticide product was negligently designed because it harmed a person even when applied according to the label, the court[s] would rule that such a cause of action was really a ‘failure to warn’ disguised as ‘design defect.” In other words, the courts reasoned that because EPA had decreed that the product was a good product when used according to the label, the tort claim was preempted because, “the judgment about whether it was properly designed had already been made [according to federal regulations].”

In Bates, the Supreme Court dealt with the question of whether the state tort claims filed by a group of Texas peanut farmers were preempted under FIFRA. The Court held that FIFRA did not preempt claims for defective design, defective manufacture, negligent testing, or breach of express warranty. The Court reasoned the long history of tort litigation against manufactures of poisonous substances prior to the enactment of FIFRA and the lack of express wording in FIFRA to prevent state tort remedies emphasized the fact that such claims were not preempted.

Quoting Justice O’Connor’s opinion in Medtronic, Inc. v. Lohr, Justice Stevens, writing for the majority, held:

[A] state cause of action that seeks to enforce a federal requirement does not impose a requirement that is [preempted by federal law for being] different from, or in addition to, requirements under federal law. To be sure, the threat of a damages remedy will give manufacturers an additional cause to comply, but the requirements imposed on them under state and federal law do not differ. 360k does not preclude States from imposing different or additional remedies, but only different or additional requirements. Accordingly, although FIFRA does not provide a federal remedy to farmers and others who are injured as a result of a manufacturer's violation of FIFRA’s labeling requirements, nothing in § 136v(b) precludes States from providing such a remedy.

92. Dansby, supra note 91.
93. Id.
95. Id. at 452.
96. Id. at 449.
97. Id. at 448 (internal citations omitted).
Thus, state tort claims are not prohibited under FIFRA and could be brought in the case of farmworker injury, provided all the other elements could also be met. Still, farmworkers like Carlitos’ parents face other legal and practical obstacles in bringing tort claims for pesticide-related injuries. First, in many states, pesticide exposure is considered a workplace injury covered by worker’s compensation.98 Traditionally, an individual injured at work has a right to worker’s compensation, but has no standing to bring a private cause of action if the employer fails to provide it.99 Oftentimes farmworkers are employed as private contractors where the employer is not obligated to provide worker’s compensation, leaving private contractor farmworkers even less protected.

Second, under traditional tort theory, a claimant has the burden of proving a causal connection between the tortfeasor’s activities and the harm that he or she has suffered.100 This burden is practically insurmountable in the pesticide context; it is difficult for farmworkers to prove by a preponderance of the evidence that a pesticide caused their illness. Proving a causal link between pesticide exposure and illness is both scientifically and practically difficult. Scientifically, the chronic harms caused by pesticide exposure can take years to manifest. According to the National Center for Environmental Health of the Centers for Disease Control and Prevention, studies conducted to date are inconclusive as to whether pesticides cause injuries to health.101 For this reason, the attorney representing Carlitos’ parents chose not to pursue a tort claim against the chemical company, and instead charged the employer with a breach of duty.102 Realistically, farmworkers often do not speak English, live in remote areas without access to medical care (where even if they could make it to a medical facility, very few medical care providers are trained to recognize the symptoms associated with pesticide illness), and may be undocumented and reluctant to seek assistance out of fear of deportation. In order to facilitate farmworkers bringing tort claims, they need some assurance that they will not be deported when they bring tort claims for illnesses caused by pesticides.

101. IMPROVEMENTS NEEDED, supra note 9, at 4.
102. ESTABROOK, supra note 2, at 40.
III. HARM TO SOCIETY OF AGRICULTURAL PESTICIDE MISUSE AND LIMITATIONS OF ENVIRONMENTAL LAW TO REGULATE PESTICIDE USAGE

In the United States, there are several statutes that are designed to protect the environment. These laws recognize the societal value in protecting the natural environment including water, air, and endangered species. However, many of these environmental statutes contain exemptions for agricultural activities. Moreover, environmental statutes and regulations that do regulate agricultural activities, including the application of pesticides, are rarely enforced. Thus, these laws offer farmworkers, who bear direct witness to the environmental impact of farming, virtually no protection from the misuse of pesticides.

A. Federal Insecticide, Fungicide, and Rodenticide Act

As mentioned in Section II, FIFRA is the primary statute regulating pesticide use in the United States. FIFRA charges EPA with the responsibility for regulating the use and sale of pesticides. FIFRA’s statutory provisions, however, fall short of protecting the environment and farmworker health.

In order to legally sell pesticides on the market, pesticide manufacturers must submit an application to EPA for approval to sell that pesticide.\(^{103}\) EPA takes the information submitted by the entity seeking to sell, distribute, or use the pesticide and evaluates its claims that the pesticide will be “used in accordance with widespread and commonly recognized practice [and] will not generally cause unreasonable adverse effects on the environment.”\(^{104}\) If EPA determines that the pesticide has unreasonable adverse effects on the environment, EPA rejects the pesticide for sale. FIFRA defines “unreasonable adverse effects on the environment” as:

\[
\text{[A]ny unreasonable risks to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide, or (2) a human dietary risk from residues that result from a use of a pesticide in or on any food inconsistent with the standard [under the Federal Food, Drug and Cosmetics Act (FFDCA)].}^{105}
\]


\(^{105}\) MARY JANE ANGELO ET AL., FOOD, AGRICULTURE, AND ENVIRONMENTAL LAW 131 (2013).
Since its inception, EPA has interpreted this language to require a cost-benefit analysis, except for instances where the more rigorous FFDCA applies. The FFDCA regulates the presence and permissible levels of pesticide residues in or on food products at time of purchase for consumption. Under the FFDCA, “before a registration can be granted for a food use pesticide, a tolerance or tolerance exemption must be in place.” Additionally, the FFDCA requires the use of a health-based standard for setting the tolerance; that standard is “reasonable certainty of no harm.”

The cost-benefit analysis utilized under FIFIRA is a lower standard than the health-based standard of the FFDCA. This leaves farmworkers far less protected than consumers from exposure to pesticides. While EPA does require data to assess and evaluate human exposure to pesticides, including “acute human hazard, sub chronic human hazard, chronic human hazard, mutagenicity, metabolism, reentry hazard, spray drift evaluation, as well as . . . oncogenicity, teratogenicity, neurotoxicity, and reproductive effects in humans,” the information is subject to the cost-benefit analysis. Therefore, as long as the economic and social benefits outweigh the human and environmental risks, EPA will approve the pesticide.

Another problem with FIFRA is that it does not require farmers to report their annual pesticide use to EPA. To date, only California’s state implementation plan contains a system for reporting full agricultural pesticide use to EPA. Accordingly, farmworker advocates have pointed out that even though EPA has estimated that approximately 5.1 billion pounds of pesticides are used annually in the United States, there is not enough reporting of their use for the agency to accurately evaluate the risks to human health and the environment.

106. Id.
108. Id.
109. Id.
110. ANGELO ET AL., supra note 106.
111. Id.
112. This is subject to change if the amended rule making passes EPA’s approval. See ENV’T PROT. AGENCY, PROPOSED AGRICULTURAL WORKER STANDARD: EPA NEEDS YOUR INPUT, http://www.epa.gov/opppfedl/safety/workers/proposed/index.html (last visited Oct. 20, 2014).
113. Id.
B. Clean Water Act

The Clean Water Act ("CWA") is the primary federal law in the United States governing the environmental impacts to water sources from agriculture.\(^{115}\) Because the CWA does not sufficiently provide direct federal authority for regulating most of the agricultural sources of water pollution, it does not provide the tools with which to regulate the application of pesticides and their potential to harm farmworkers.\(^{116}\)

One of the most significant provisions of the CWA is the National Pollutant Discharge Elimination System ("NPDES") permit system.\(^{117}\) The NPDES system requires entities to apply for a permit if their activities will add pollutants from a point source into navigable waters of the United States.\(^{118}\) Many agricultural discharges, including those containing pesticide residue, fall outside the purview of the CWA because the CWA explicitly excludes agricultural water discharges and return flows from irrigated agriculture.\(^{119}\) Therefore, the CWA leaves an enormous gate through which the current of pesticide-contaminated water flows largely unregulated.

C. Clean Air Act

The Clean Air Act ("CAA") is a federal law that aims to protect and enhance the quality of the nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.\(^{120}\) Since pesticides have an effect on air quality, the CAA can be applied to pesticides. However, because the CAA charges states with enforcement, each state is left to develop its own implementation plans, programs, and policies for CAA enforcement. Therefore, the regulation of pesticides through the CAA is cumbersome. Most states lack the resources to do an effective job, thus leaving farmworkers and the natural environment under- or unprotected by the CAA.

Congress granted states wide authority over air regulations believing they would be better equipped to develop local solutions.\(^{121}\) "Under the CAA, state, local, and tribal governments . . . monitor air quality, inspect

\(^{115}\) ANGELO ET AL., supra note 106, at 147.
\(^{116}\) Id. at 161.
\(^{117}\) Id.  
\(^{118}\) Id.; 33 U.S.C. § 1342 (2012).  
\(^{120}\) 42 U.S.C. § 7401(b)(1) (2012); see also Understanding the Clean Air Act, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/airquality/peg_caa/understand.html (last updated Oct. 28, 2014) (noting that since the CAA was passed, the nation’s GDP has tripled and its energy use has doubled).  
\(^{121}\) Understanding the Clean Air Act, supra note 121.
facilities under their jurisdictions and enforce CAA regulations.” 122 Pursuant to the CAA, states must develop State Implementation Plans (“SIPs”) that outline how each state will control air pollutants. 123 “A SIP is a collection of the regulations, programs and policies that a state will use to clean up polluted areas.” 124

States regulate many pollutants under their SIPs, including Volatile Organic Compounds (“VOCs”). VOCs are “usually made from petroleum and are a major constituent of gasoline. They are also used as solvents present in products from paints and adhesives to inks and some, but not all, consumer and commercial pesticide formulations. As these products dry, VOC solvents are emitted into the air.” 125 Moreover, “VOC-emitting pesticides are highly prone to drifting away from where they are applied onto farmworkers and rural communities. Most VOC-emitting pesticides are fumigants, the most dangerous and toxic pesticides used in agriculture.” 126 Again, California provides one example of a state that has adopted a protective SIP. The California Department of Pesticide Regulation (“DPR”) is “responsible for maintaining an emission inventory to track the VOC emissions from agricultural and commercial structural pesticide products. One of the key components in estimating emissions is determining the VOC content (emission potential) of pesticide products.” 127

Some farmworker advocates, like the CRPE, have incorporated DPR’s studies into their broader approach to protect farmworkers from pesticides. “In 2008, [the CRPE] pesticide campaign succeeded in forcing the [DPR] to adopt regulations to control smog-forming VOC emissions from pesticides, as they had promised to do as far back as 1994.” 128 However, even in a state with a rigorous SIP like California, the CAA does not and cannot provide farmworkers with adequate protections to keep them safe because of a lack of enforcement resources.

122. Id.
123. Id.
124. Id.
128. CTR. ON RACE, POVERTY & THE ENV’T, supra note 127.
IV. COOPERATIVE VISA PROGRAMS—GROUNDWORK FOR A SOLUTION

A. The POWER Act

In 2010, Senator Robert Menendez of New Jersey introduced S. 3207, the POWER Act to Congress. The POWER Act sought to provide protection to ensure equal application of workplace laws, provide U visa eligibility for workers suffering serious labor violations, preserve labor law enforcement opportunities, and hold employers responsible for labor law violations, and in so doing protect all workers in the United States. The bill died after it was referred to the judiciary committee. The following year, the POWER Act was reintroduced in the Senate and the House. It was not enacted by either.

Despite the failure of either house to enact the POWER Act, several of its key provisions were picked up in S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013. Specifically, Subtitle B—Protecting United States Workers, Section 3201 Protections for Victims of Serious Violations of Labor and Employment Law (Section 3201)—included protections introduced by the POWER Act. Section 3201 would amend the U visa program to encompass serious violations of “any Federal, State or local law, serious workplace abuse, exploitation, retaliation or violation of whistleblower protections,” as well as violations giving rise to a civil cause of action under 18 U.S.C. § 1595—Civil Remedy, or a violation resulting in the deprivation of due process or constitutional rights. Section 3201 would also amend section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996—8 U.S.C. § 1367—by adding “bona fide workplace claim” to the list of

130. Menendez Joined By Rev. Jesse Jackson, Labor and Civil Rights Groups to Announce Workers’ Rights Legislation, supra note 129.
limitations on sources of information that may be used to make adverse immigration status determinations.\textsuperscript{135}

The rationale behind the POWER Act, Section 3201, and the cooperative visas currently in place is consistent through each. The express purpose of each of these programs is threefold. First, Congress recognized the need to catch all perpetrators of serious crimes (and serious employment violations under Section 3201). Second, that noncitizens would only cooperate with police if they received protection from deportation. Third, Congress acknowledged the importance of noncitizens’ presence in the United States to testify against perpetrators of crimes (and civil violations in the case of Section 3201) and to assist in investigations.\textsuperscript{136}

While the Senate passed Section 3201 in S. 744, the bill has not become law because the House failed to approve a similar measure. Therefore, there are currently three visa categories that provide immigration relief to noncitizens to encourage cooperation with law enforcement. As previously mentioned, those cooperative visas are categories S, T, and U. In order to qualify for these visas, the noncitizen must be a victim or witness to a crime and cooperate with law enforcement to catch the perpetrator of the crime.

\textbf{B. The S Visa}

The S visa is an “informant” visa for undocumented immigrants who cooperate with law enforcement in prosecuting criminal actions, particularly cases involving terrorist activities.\textsuperscript{137} The S visa is “designed to assist in the prevention of acts of international terrorism, international narcotics trafficking, serious violations of international humanitarian law, transnational organized crime, and other related criminal acts.”\textsuperscript{138}

The process for granting an S visa to an individual who has assisted law enforcement as a witness or informant begins when the law enforcement agency submits an application for permanent residence on behalf of the witness or informant, after that individual completes the terms and conditions of his/her S classification.\textsuperscript{139} Only federal or state law

\textsuperscript{135} S. 744, 113th Cong. § 3201(f) (2013).
\textsuperscript{136} Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464 (2000) (showing the purposes of this division are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims).
\textsuperscript{139} S Nonimmigrant, supra note 137.
enforcement agencies and U.S. Attorney’s offices may submit a request for an S nonimmigrant visa on behalf of a witness or informant.\footnote{KARMA ESTER, IMMIGRATION: S VISAS FOR CRIMINAL AND TERRORIST INFORMANTS 2 (2005), available at http://www.fas.org/sgp/terror/RS21043.pdf.}

The S visa grants authorization to live and work in the United States for up to three years.\footnote{Id.} If the information supplied by the S visa holder leads to a successful prosecution, he or she may be able to adjust to legal permanent resident status—what is commonly referred to as a “green card.”\footnote{Id.} “Qualifying immediate family members . . . may also be eligible for a green card.”\footnote{S Nonimmigrant Status, supra note 137.}

The S visa does not provide relief to undocumented farmworkers because the underlying activity being reported must be criminal. The misapplication or over-application of pesticides, even when it causes health-related problems, is not a criminal offense. Therefore, the S visa does not protect undocumented farmworkers from deportation if they report that violation.

\section{The T Visa}

Congress created the T nonimmigrant status by passing the Victims of Trafficking and Violence Protection Act (“VTVPA”) in October 2000.\footnote{T Nonimmigrant Status, supra note 20.} The purpose of the T visa is “to combat trafficking in persons, a contemporary manifestation of slavery[,] . . . to ensure just and effective punishment of traffickers, and to protect their victims.”\footnote{22 U.S.C. § 7101(a).}

Once certified as an eligible victim of human trafficking, the federal benefits for T nonimmigrants include stabilization of immigration status, and financial and social support in rebuilding their lives equivalent to those of refugees.\footnote{Id. § 7105(b)(1).} The T visa grants four-year authorization to live and work in the United States.\footnote{Questions and Answers: Victims of Human Trafficking, T Nonimmigrant Status, U.S. CITIZENSHIP & IMMIGRATION SERVS., www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status/questions-and-answers-victims-human-trafficking-t-nonimmigrant-status (last updated Dec. 29, 2014).} After three years, there is a possibility for adjustment of status to permanent resident.\footnote{8 U.S.C. § 1253(l)(1)(A).} The T visa also extends to certain derivative family members.\footnote{Id. § 1253(l)(1).}
The T visa, however, does not provide relief to undocumented farmworkers following pesticide injuries. To qualify for a T visa, an individual must be a victim of a severe form of human trafficking; being injured by pesticides or a witness to their misapplication does not meet this requirement.

D. The U Visa

The U visa was created in October 2000, “to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of aliens and other crimes . . . while . . . [at the same time,] offering protection to victims of such crimes.” 150 In order to be eligible for a U visa, an individual must: have suffered substantial physical or mental abuse as a result of having been a victim of a qualifying criminal activity that occurred in the United States; have information concerning that criminal activity; and must have been, currently is, or is likely to be helpful in the investigation or prosecution of the crime. 151 Qualifying criminal activities include one or more of the following: abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, female genital mutilation, felonious assault, hostage, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice,peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, torture, trafficking, witness tampering, unlawful criminal restraint and other related crimes. 152 The individual must file a petition for U nonimmigrant status with United States Citizenship and Immigration Services and provide the appropriate certification from a certifying agency. The U nonimmigrant status certification must demonstrate that the petitioner “has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the criminal activity.” 153 For successful applicants, the U visa grants four-year permission to live and work in the United States. After three years, there is a possibility for permanent residency. The U visa also allows for certain derivative family members to remain in the United States with the U visa holder. 154

---

150. Id. § 1513, 114 Stat. at 1533.
151. Id. § 1513(b)(3).
152. Id.
153. Questions and Answers, supra note 147.
If the agricultural exemptions were tightened, pesticide misapplication and over-application could serve as serious violation of labor and employment law, FLSA, the WPS and maybe even other federal statutes, but the House has not passed a bill with language equivalent to Section 3201. Therefore, pesticide-related workplace injury or exposure does not currently satisfy any of the enumerated criminal grounds that form the basis for relief under the U visa. Thus, the U visa does not provide relief to undocumented farmworkers exposed to pesticides.

V. ENVISIONING A NEW COOPERATIVE VISA PROGRAM

Farmworkers are not sufficiently protected against pesticide misuse. There is a severe under-reporting of agricultural chemical misuse because the environmental laws that do regulate pesticide usage rely on the so-called “citizen suit” or complaint system. This is a disservice to farmworkers, rural communities, and the natural environment.

The restriction of agricultural exemptions to environmental statutes and creation of a new relief visa are justified by the health, social, and environmental benefits that it would ensure. Such revisions would increase farmworkers’ ability to report pesticide misuse and bring tort claims. Protecting noncitizen farmworkers from deportation would facilitate cooperation between them and enforcement agencies in order to hold pesticide abusers accountable.

As seen in the case of Carlitos’ parents, noncitizen farmworkers are reluctant to seek legal help because they are afraid of being deported, often depend on their employers for housing, frequently lack transportation, typically do not speak English, and lack an understanding of their legal rights. In Carlitos’ case, the deformity was so severe, requiring such expensive and constant medical attention, his parents likely concluded the potential benefit of covering his care outweighed the possibility of deportation. Carlitos’ parents are the exception, not the rule. In other instances where undocumented persons have been victimized, they tend to seek help from law enforcement when the government has offered some buffer from removal and the potential for temporary nonimmigrant status.

While the current relief visas deal with criminal activities, the underlying social policy goals of extending immigration benefits to victims of pesticide misuse and over-application are analogous to Congress’ intent for those visas. This is further evidenced by the Senate’s adoption of the dual-purpose rationale in Section 3201. The current relief visas exist because Congress and the public wanted to provide an incentive for noncitizens to report unlawful activities without fearing deportation. The social benefit rationale is the same for expanding immigration benefits to
undocumented farmworkers who facilitate the enforcement of environmental laws.

While Section 3201 has not become law, it would have addressed the immigration piece of this larger legal issue. In the absence of comprehensive immigration reform, Congress can and should enact legislation that will specifically protect farmworkers based on all the policy rationales outlined in this Note. One way it could do this is by passing a new cooperative relief visa.

This new visa, which this Note will call the Z visa, would extend to civil violations, specifically pesticide misuse. The Z visa, in tandem with stricter environmental statutes and narrower agricultural exemptions covered here, would provide incentive and security to the vulnerable population that is the most likely to witness conduct that violates FIFRA and other environmental statutes.

The Agricultural Chemical Exposure (“ACE”) Act proposed here would enable the Z visa. The ACE Act would amend 7 U.S.C. § 136–136y to allow a person who witnesses or is exposed to harmful effects of agricultural chemical use the right to bring a private cause of action against the manufacturer, the grower, and or the government agency responsible for permitting the use of such chemical. The ACE Act would also amend 8 U.S.C. § 1101(a)(15) to include subsection Z. Section Z would read as follows:

(i) ELIGIBILITY. Subject to section 1184(p) of this title, an alien who files a petition for status under this subparagraph, if the Secretary of Homeland Security determines that

(I) the alien has witnessed or been exposed to a covered violation;
(II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning activity described in subparagraph (II);
(III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting civil violations described in clause (II); and

155. S. 744, 113th Cong. § 3201(a), and the U visa provide the template for the statutory proposal I lay out here.
(IV) the action described in clause (II) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States.

(ii) VIOLATION. A covered violation referred to in this subparagraph is a serious violation involving 1 or more of the following or any similar activity in violation of any Federal, State, or local law:
(I) pesticide exposure or misapplication under the Worker Protection Standard of 7 U.S.C. §§ 136–136y, codified at 40 C.F.R. Part 170;
(II) serious workplace abuse;
(III) exploitation, retaliation, or violation of whistleblower protections;
(IV) a violation giving rise to a civil cause of action under section 1595 of title 18, United States Code; or
(V) a violation resulting in the deprivation of due process or constitutional rights.

(iii) TEMPORARY STAY OF REMOVAL. Section 274A (8 U.S.C. 1324a), as amended by section 3101, is further amended (1) in subsection (e) by adding at the end the following:
(I) CONDUCT IN ENFORCEMENT ACTIONS. If the Secretary undertakes an enforcement action at a facility about which a bona fide workplace claim, including violation of the Worker Protection Standard, has been filed or is contemporaneously filed, or as a result of information provided to the Secretary in retaliation against employees for exercising their rights related to a bona fide workplace claim, the Secretary shall ensure that
(A) any aliens arrested or detained who are necessary for the investigation or prosecution of a bona fide workplace claim or criminal activity (as described in subparagraph (T) or (U) or (Z) of section 101(a)(15)) are not removed from the United States until after the Secretary
(i) notifies the appropriate law enforcement agency with jurisdiction over such violations or criminal activity; and
(ii) provides such agency with the opportunity to interview such aliens;
(B) no aliens entitled to a stay of removal or abeyance of removal proceedings under this section are removed; and
(C) the Secretary shall stay the removal of an alien who
(i) has filed a claim regarding a covered violation described in clause (II) of section 101(a)(15)(Z) and is the victim of the same violations under an existing investigation;
(ii) is a material witness in any pending or anticipated proceeding involving a bona fide workplace claim or civil rights claim; or
(iii) has filed for relief under such section if the alien is working with law enforcement as described in clause (i)(III) of such section.

(iv) VICTIMS OF CRIMINAL ACTIVITY OR PESTICIDE MISUSE OR LABOR AND EMPLOYMENT VIOLATIONS. The Secretary of Homeland Security may permit an alien to remain temporarily in the United States and authorize the alien to engage in employment in the United States if the Secretary determines that the alien
(I) has filed for relief under section 101(a)(15)(Z); or
(II)(A) has filed, or is a material witness to, a bona fide claim or proceeding resulting from a covered violation (as defined in section 101(a)(15)(Z)(II)); and
(B) has been helpful, is being helpful, or is likely to be helpful, in the investigation, prosecution of, or pursuit of civil remedies related to the claim arising from a covered violation, to
(i) a Federal, State, or local law enforcement official;
(ii) a Federal, State, or local prosecutor;
(iii) a Federal, State, or local judge;
(iv) the Environmental Protection Agency;
(v) the Equal Employment Opportunity Commission;
(vi) the Department of Labor; or
(vii) a medical professional.

In summary, the Z visa, like other cooperative visas, would grant victims of pesticide abuse temporary status after cooperation with enforcement agencies and later they would be eligible for adjustment to legal permanent resident status. Similar to the U visa, which requires the certification of an enforcement agency, the Z visa would add EPA and medical professionals to the list of certifying agencies. The medical certification would verify that the harm suffered by the individual matched specified criteria relating to the acute and chronic health effects of pesticide
exposure. The Z visa would not require the same standard of causation used in tort recovery; rather a prima facie showing that links physical symptoms to pesticide exposure. Just like Section 3201, the Z visa would establish protections against abuse to ensure it would only be granted for meritorious claims.  

CONCLUSION

As consumers of food, we should all care about where our food comes from, what substances were utilized in its production, and that the people who grew, processed, and prepared it before it reaches our mouths were guaranteed basic protections from harm. In theory, existing environmental laws are designed to protect farmworkers and the environment from the adverse effects of pesticides. However, these laws and the tort system, combined with draconian immigration policy, fail to ensure complete reporting of pesticide misuse.

Historically, agricultural laborers have received little-to-no legal protections regarding labor, wages, abuse, or working conditions. While chattel slavery ended about 149 years ago, the United States once again finds itself with a system of agricultural production that depends on labor performed by persons without citizenship status and the privileges that status affords. Just as former slaves needed the guarantees of citizenship to ensure access to the legal system in order to ensure basic civil liberties, so do the undocumented farmworkers today. There is no legitimate reason why chemical companies that make these chemicals, and the growers who utilize them, should not be held legally responsible for the toxic chemical exposure experienced by undocumented farmworker employees or independent contractors.

Farmworkers should be incorporated into an enforcement system because they are in a unique position to witness and experience pesticide misuse. The structure of this new relief visa better protects farmworkers and the natural environment. The Z visa would provide security that coming forward would not jeopardize their place in the U.S. labor market. Just as the U and T visas facilitate participation in enforcement through cooperation with law enforcement, the Z visa would incentivize farmworker participation in environmental law enforcement.

156. S. 744, 113th Cong. § 3201(a) (2013).
157. The Thirteenth Amendment of the U.S. Constitution abolished the institution of slavery in 1865. U.S. CONST. amend XIII.