

Justice Roggensack, ‘Tireless Advocate’ for Court System, Retires

BY JEFF M. BROWN

Justice Patience Roggensack will retire from the Wisconsin Supreme Court on July 31.

When Justice Patience Drake Roggensack was elected to the Wisconsin Supreme Court in 2003, she was the first justice in the court’s history to have previously served on the Wisconsin Court of Appeals.¹ She also may be the only justice to run for the state’s high court on a dare.

Roggensack first ran for the supreme court in 1995, after a conversation with a family friend who was a politically connected lawyer. Roggensack kept asking the friend if he knew who was running for the seat on the court that came open when Justice Nathan Heffernan retired.

“He said, ‘I have a trial coming up next week, I don’t have time for this. If you’re so interested, why don’t you run yourself?’ and I said to him ‘Maybe I will,’ so I did,” Roggensack said.

She finished fourth in the February primary.

“I had no idea what I was doing,” Roggensack said.

Roggensack, who eventually won a seat on the supreme court in 2003, will complete her long career as a lawyer and a judge when she steps down from the court this summer. She has served two 10-year terms on the high court, including a six-year stint as chief justice.

As of May, when *Wisconsin Lawyer* went to press, Roggensack had written 339 supreme court opinions, including concurrences and dissents. She has also written articles that have been published in various law journals. Her tenure on the court saw marked changes in the types of disputes that come before the court and in

the conduct of supreme court races.

Chief Justice Annette Ziegler, who called Roggensack a good friend and role model, said that Roggensack played an essential role in helping the state’s court system adapt to the pandemic.

“She helped guide the courts through some of our most challenging times ever,” Chief Justice Ziegler said. “As many state court systems were just coming to grips with the pandemic, she had already formed a broad-based task force to advise us on best practices moving ahead. Her leadership and the development of interim rules and procedures provided essential guidance to attorneys, litigants, judges, and the public, and kept the Wisconsin court system running.”

Ziegler said that Roggensack has been a tireless advocate for Wisconsin courts.

“When first elected chief justice in 2015, she quickly identified the need to increase judicial compensation to help attract and retain good judges, and to bring our pay more in line with other states,” Ziegler said. “Despite working against the odds at times, and engaging in a process that took years, she persevered and succeeded. The court system and the people of Wisconsin will continue to benefit from her years of dedicated service.”

From Science to Law

Roggensack was born in Joliet, Ill., and attended high school in nearby Lockport. She received a B.A. in biology from Drake University in 1962.

Shortly after graduating from Drake University, Roggensack followed her husband, Jeff, to the University of Iowa, where he attended medical school. She took a research job with the medical school’s



department of physiology and continued to work in science jobs as she and her husband moved to Utah and Maryland for his post-medical school training.

Over the years, social conversations piqued Roggensack's interest in the law.

"Our social set included a lot of lawyers, and it seemed like they did very interesting things," Roggensack said. "Because I had such a science-focused education, I really had nothing that related to the law. But I became very interested in the things they were doing and the things we talked about."

That interest, plus a keen desire to continue her education, convinced Roggensack to sign up for a political science class at UW-Madison.

"I took a class in constitutional law from Professor David Adamany, who was then the chairman of the department of political science," Roggensack said. "I absolutely loved it. He was a wonderful teacher. He loved the law, loved the constitution. David Adamany is the main reason I went to law school."

'Contracts and Kids'

Roggensack graduated with honors from the University of Wisconsin Law School in 1980. She then entered private practice in Madison, spending most of her career as a lawyer at DeWitt Ross & Stevens S.C.

Eventually, Roggensack focused on commercial litigation in state and federal courts, including ERISA and securities litigation. But her practice was much broader at the beginning of her legal career.

"When I started out, I did everything nobody else would do because that's what you do when you're a new lawyer."

Toward the end of her time at the firm, Roggensack said, she worked mainly on "contracts and kids," handling commercial disputes and juvenile court matters.

"I probably have tried every kind of case," Roggensack said.

Daredevil

It was that breadth of experience that in part convinced Roggensack to launch her 1995 campaign for the supreme court.

"I ran on a dare, which is not the way anybody should start out a political



Justice Patience Roggensack administers the oath of office to new admittees at a ceremony inside the Wisconsin Supreme Court chambers in April 2023.

career," Roggensack said. "I knew the courtroom; I was very comfortable there. But running a campaign is a totally different skill than being a good lawyer, or being a good judge, for that matter."

When a seat on the Wisconsin Court of Appeals opened in 1996, Governor Tommy Thompson came calling.

At a dinner party thrown by business executive Dennis Markos, Thompson buttonholed Roggensack and urged her to run for the court of appeals. She turned him down.

But Thompson was undaunted – he invited her to lunch. Roggensack accepted the invitation on one condition: she could bring guests. Thompson agreed.

Roggensack brought two veteran political strategists: Bill Krause and Brandon Scholz. Thompson brought several guests of his own.

"We had a good conversation," Roggensack said. "I said 'I appreciate the invitation, but I don't know how to do this.' And he said, 'Look at all these people. They do know how to do it, and they'll help you.' And I said, 'Well, I'll need more than that,' and he said 'Brandon, will you run her campaign?' Brandon said yes."

With Scholz helping her campaign, Roggensack defeated Erica Eisinger by 2,450 votes out of 223,202 cast.

"I lost Dane County, but I won every other

county in District IV," Roggensack said.

She was reelected in 2002, having run unopposed.

Elevation to High Court

Encouraged by Markos, Roggensack ran for the supreme court in 2003. Once again, Scholz ran her campaign.

In the April election, Roggensack defeated Edward Brunner. She was re-elected in 2013, defeating Edward Fallone by 125,000 votes.

Roggensack said her first supreme court conference was less momentous than it would have been for a new justice who hadn't served on the court of appeals. She also said that during her time on the supreme court, the justices' conferences have not been marred by indecorum.

"Contrary to popular opinion, we never have screamed or yelled at each other in conference – it doesn't happen. We don't swear or use bad language."

Alone among the justices, Roggensack takes notes during conferences.

"I circulate the notes to all the justices, and you know what? They use them," Roggensack said. "We'll see if someone picks it up when I leave. I've done it since I got here."

Roggensack said her experience on the court of appeals made it easier for her to take up opinion writing on the high court.

"I already knew the format that was necessary for drafting an opinion," Roggensack said.

First Majority Opinion

The first majority opinion Roggensack wrote as a supreme court justice came in *McCormick v. Schubring*, a property case that centered on a dispute over a prescriptive easement.

Then as now, opinions were assigned by pulling poker chips out of a hat, with the justice who is second in seniority drawing the chips.

Given her experience on the court of appeals, Roggensack said that writing supreme court opinions "was more of the same, except that on the court of appeals we couldn't overrule ourselves."

Roggensack brought with her from the court of appeals the habit of using descriptive subheadings in her opinions.

"Even though I practiced in the courts all the time and wrote a lot of briefs, I never realized how much the standard of review matters when you get on appeal," Roggensack said.

"When I got to the court of appeals, I very quickly learned that, and I began putting in my opinions a separate section that talks about the standard of review for every issue. Many judges on the court of appeals picked that up, and now I think most of them do it."

Roggensack said that subheadings are a big help to readers.

"When you're writing an opinion, it's not a law review article. It is really something that should be very user friendly. You make it much more user friendly when you tell people the scope of review that you're



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going to be looking at and you identify each issue that they're going to have to focus on.

"Many people will read a case for only one issue, and that's fine. They should be able to do that."

Opinion-Writing Process

Roggensack said she always has her law clerk write the first draft of a majority opinion, "because then it will be less 'The Law by Roggensack' and more just an integration of the issues coming from my notes. I write down what each justice says, so my law clerk knows what was bothering the other justices."

"Anybody that's in the majority, you want to take into account what was concerning them about the issues," Roggensack said. "So, we'll do that, then when the clerk gives me her draft, I'll do my revisions. If I write a separate opinion, be it a concurrence or dissent, I write that 100% myself, then I give it to my law clerk to look at and say, 'Did I persuade you,' and so she kind of looks over what I wrote and makes suggestions to me."

Role of Statutory Interpretation

Roggensack's majority opinion in *McCormick v. Schubring* was not her first supreme court opinion. That came when she wrote a concurring opinion in *Hubbard v. Messer*, a nuts-and-bolts employment law case.

In her short concurrence, Roggensack argued that the majority had erred by applying the canon of statutory interpretation for an ambiguous statute without analyzing whether the statute at issue was ambiguous.

It was fitting that Roggensack's first opinion on the high court concerned statutory interpretation, given how often the court is called upon to interpret statutes.

"That is our major task, to interpret a statute," Roggensack said. "That's what we do most often, although people want to talk about the constitution."

"The words are very important ... the legislature's intent is either in the words or you can forget about it, because that's

what we have to live by, is the words," Roggensack said.

"My take on the legislature is, when they pass a statute, they're either trying to confer a benefit or they're trying to fix a problem. They've got something very specific in mind. They don't just pluck it out of the thin air. But what we interpret here is something they never thought of when they were putting the statute together. So, you have to use their words, and use them carefully."

Process for Hiring Clerks

To select her next law clerk, Roggensack and her then current law clerk would review resumés and writing samples from applicants and rate them on a scale of one to five. Roggensack said she only interviewed the candidates who had an overall score of four or five. Most of the time, Roggensack said, her law clerk's rankings mirrored her own.

"We almost always pick the same four to five people," Roggensack said.

The applicants then interviewed with Roggensack alone, and then with her law clerk alone. Roggensack instructed her clerk to be totally frank during the interview.

"I tell each applicant, 'He or she can tell you anything and everything, because every job has some warts on it, and you need to know both sides. You can ask them any question and they know that they can answer you, with my permission, no matter what they say.'"

For Roggensack, the process worked out well.

"I've had wonderful laws clerks, smart and fun to work with," Roggensack said.

Change in High Court's Philosophy

During Roggensack's early years on the supreme court, conservatives and business interests criticized the court, led by then-Chief Justice Shirley Abrahamson, for its perceived judicial activism.

Decisions cited by the court's critics included *Ferdon v. Wisconsin Patients Compensation Fund*,² in which the court struck down the legislative cap on non-economic damages in medical malpractice cases, and *State v. Knapp*,³ in which the

court interpreted article I, section 8 of the Wisconsin Constitution more broadly than the self-incrimination clause in the Fifth Amendment to the U.S Constitution.

Both decisions came on 4-3 votes, with Roggensack joining the dissent in both cases.

The court swung the other way after the defeat of Justice Louis Butler by Judge Michael Gableman in the 2008 election. It was the second supreme court election in a row that saw heavy spending by outside special-interest groups.

In the wake of Gableman's election, the supreme court upheld 2011 Wis. Act 10, which ended collective bargaining for public employees,⁴ turned down a constitutional challenge to lame duck legislation enacted in the wake of Governor Tony Evers' election in 2018,⁵ and upheld the legislative maps drawn by the legislature after the 2020 census.⁶ Roggensack voted with the majority in all three cases.

"When Shirley was the chief justice

and Louis Butler was on the court, she had four votes, and she used them," Roggensack said.

Selection as Chief Justice

Roggensack became chief justice in 2015, after voters enacted a constitutional amendment that decreed that the chief justice is to be determined by a vote of the justices rather than seniority.

Abrahamson filed a federal lawsuit challenging the amendment on federal constitutional grounds. She lost at the district court level and later dropped her appeal before the U.S. Court of Appeals for the Seventh Circuit.

Roggensack allowed Abrahamson to remain in the chief justice's chambers, which are larger than the other justices' chambers, and focused on "moving slowly and carefully to lead the court in the right direction."

"After we got over the first bump, it worked out fine," Roggensack said.

Reforms as Chief Justice

Roggensack served as chief justice until 2021, when the justices elected Justice Annette Kingsland Ziegler to serve in the role. As chief justice, Roggensack created a finance committee for the supreme court and instituted a commercial docket pilot project.

The finance committee is chaired by the chief justice and is made up of circuit court and court of appeals judges and two supreme court justices. The committee helps the supreme court set the budget for the state court system. Roggensack said she created the committee to vet budget requests from court staff.

Under the commercial docket pilot project, Waukesha and Dane counties and the circuit courts in the Second, Eighth, and Tenth Judicial Administrative Districts have dockets dedicated to large-claim commercial cases. Qualified judges volunteer to take on commercial cases in addition to their regular caseloads.

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For Roggensack, creation of the commercial docket in 2017 was a no-brainer. At the time the project began, 28 states, including the states surrounding Wisconsin, had similar programs. Thirty states now have commercial courts.

"It's really state of the art," Roggensack said. "You have a judge who's experienced in that area and wants to add that to his or her calendar."

Change in Supreme Court Campaigns

Roggensack bemoans the changes in supreme court campaigns that have occurred since she was first elected in 2003.

"We ran the whole 2003 campaign, with a primary, for less than \$1 million and there were very few independent expenditures," Roggensack said. "None of them were negative. You talked about why you were the best person for the job because you had the experience and background."

By contrast, Roggensack said, the April 2023 supreme court election was run more like a legislative election and candidates sought out-of-state campaign contributions, a major reason the flavor of the supreme court campaign had a bitter taste.

"I really think that pushes it with an agenda more than if you make a state race a state race," Roggensack said.

Another reason, Roggensack said, is that the judicial branch is increasingly being called upon to decide issues that have traditionally been decided by the legislative and executive branches – a dynamic reflected in the jump in the number of 4-3 decisions from her first term (11%) to last year's term (54%).

"I also think that many more things have been sent to the court that the legislature and the governor would have dealt with, and it wouldn't have been this 'You disagree with my point of view so you're evil' – that's kind of what's developed

rather than, 'We see this issue differently,' which is what it used to be," Roggensack said. "And I think that tagging someone as a bad person because they disagree with you increases the anxiety, the tension, and the anger that underlie any political race."

Roggensack predicts that dynamic will change.

"I'm not sure what it will take to make it go the other way, but I do think that eventually it will go the other way," Roggensack said.

Less Time in Chambers

Another change for the worse, according to Roggensack, is that justices don't interact in person as much since the advent of the pandemic.

When Roggensack first came on the court, all seven justices and their law clerks worked in the Capitol almost every day. Roggensack said that made it easier to confer with her fellow justices on cases.

Now, Roggensack says, not all the justices work at the Capitol. "I miss being able to walk down the hall and talk to a justice about an opinion I'm writing, and I'm concerned about whether I'm getting what they really wanted when I'm writing an opinion," she said.

Roggensack said the lack of opportunities for the justices to confer in person has led to an increase in the number of cases in which the supreme court hears oral argument but doesn't decide the case.

"It's the highest I've ever seen," Roggensack said. "No opinion comes out. It's improvidently granted, or the court is sitting six and we're 3-3, so the court of appeals is affirmed. That happened very seldom in past years. This year, we'll probably have five or six."

Retirement Projects

Roggensack has several projects to keep

her busy in her retirement.

One is pushing for the construction of a new public safety building in Milwaukee. The current building, which stands behind the Milwaukee County Courthouse, is dilapidated and unsafe, Roggensack said.

"We need to replace that building," said Roggensack, noting that her daughter, Ellen Brostrom, is a circuit court judge at that courthouse. Roggensack said the current layout creates security concerns for judges and victims and "is an accident waiting to happen."

Another retirement project is learning to speak French. Roggensack said she'll lean on her daughter, who is fluent in French.

'The Lawyer Works Here'

What about her legacy as a supreme court justice?

"I haven't been very concerned about a legacy, to be honest with you," Roggensack said.

But she does speak proudly about Wisconsin's commercial docket pilot project, which she spearheaded as chief justice.

"The court needed to go there, because Wisconsin needs to make its courts as friendly as every other state around us," said Roggensack, noting that having judges that are specifically trained on commercial questions creates efficiencies in the system.

Roggensack said that one benefit of the project is to streamline big-dollar commercial litigation.

"So much of discovery is now done electronically" she said. "You've got to make the parties focus and have a search set up that answers what they need to have answered."

Perhaps the best indicator of how Roggensack looks back on her 20 years on the supreme court is the framed calligraphy print that hangs on the wall behind her desk. It reads simply "L'avocat travaille ici" – French for "The lawyer works here." **WL**

ENDNOTES

¹Justice Brian Hagedorn became the second supreme court justice to have served on the court of appeals when he was elected in 2019.

²*Ferdon v. Wisconsin Patients Comp. Fund*, 2005 WI 125, 284 Wis. 2d 537, 701 N.W.2d 440.

³*State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899.

⁴*Madison Teachers Inc. v. Scott Walker*, 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337.

⁵*Service Emps. Int'l Union (SEIU), Local 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35.

⁶*Johnson v. Wisconsin Elections Comm'n*, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559. **WL**