



# TOM TIFFANY

STATE SENATOR • 12TH SENATE DISTRICT

## **Testimony on Senate Joint Resolution 2 Senate Committee on Judiciary and Public Safety January 15, 2015**

I would like to thank Chairman Wanggaard and members of the committee for taking the time to hear Senate Joint Resolution 2 today.

Senate Joint Resolution 2 is the second consideration of the constitutional amendment that would modify the way the Chief Justice of Wisconsin's Supreme Court is chosen. Currently, the Chief Justice is selected based on seniority where the longest, continuous serving member of the court serves as the Chief Justice.

Senate Joint Resolution 2 would amend the Constitution of Wisconsin to require that the Chief Justice be elected for a term of two years by a majority of justices then serving on the court.

This constitutional amendment represents the democratic process at its very foundation. Having a peer vote will allow the justices to elect their leader and promote a healthier relationship amongst the members of the court.

I want to thank my co-author Representative Hutton for all his hard work on this issue. My thanks also to all of you for your time and consideration, and to the Chairman for holding this hearing. I would now like to turn it over to Justice Jon Wilcox for his comments.



# Rob Hutton

STATE REPRESENTATIVE • 13<sup>TH</sup> ASSEMBLY DISTRICT

## **Testimony of Representative Rob Hutton in Support of Assembly Joint Resolution 1**

The Chief Justice of the Supreme Court is named in our state Constitution as the administrative head of the judicial system of our state. Currently, the sole determination for Chief Justice is based on seniority, which is the Supreme Court Justice who has served longest on the Supreme Court. Wisconsin's seniority system is rare and only seen in 4 other states.

Assembly Joint Resolution 1 would allow the justices to elect the Chief Justice for a term of two years. This puts Wisconsin in line with 23 other states with a similar peer vote process for Chief Justice. Those states include our neighbors Iowa, Illinois and Michigan.

Peer selection will promote collegiality within our Supreme Court. While a peer selection process may not be perfect it provides a great incentive for each Justice to conduct themselves in a manner that promotes healthy cooperative relationships within the court. This allows each equally elected justice the flexibility to determine who will lead their branch of government and what direction they will set for the State of Wisconsin.

This proposed change to our state constitution is about improving the efficiency and effectiveness of our courts. By changing how the administrative head of the judicial system is chosen we will be bringing the position of Chief Justice to the foundation of the democratic process.

This legislation is not about one branch of government determining how another branch of government operates. Recent polling of Wisconsin citizens has clearly indicated a growing level of dissatisfaction with the job performance of the State Supreme Court. This resolution is about giving all Wisconsinites a say in improving the functionality in our Supreme Court.



## TESTIMONY IN OPPOSITION TO 2015 SJR 2

Submitted by Scot Ross

Executive Director, One Wisconsin Now

January 8, 2015

Members of the Assembly Judiciary Committee, I present this testimony on behalf of One Wisconsin Now's more than 80,000 online supporters across the state in strong opposition to Senate Joint Resolution 2.

This resolution is little more than an effort by the Republican legislative majority to oust Chief Justice Shirley Abrahamson because she is ideologically divergent from the Republican legislature and their special interest allies. What they could not achieve at the ballot box in four statewide elections spanning back to 1979, they are trying to do through legislative fiat.

Our state Supreme Court has been politicized enough. Seventy-two year-old Justice and former Republican Assembly Speaker David Prosser physically attacked his female colleague. Conservative Justices Michael Gableman and Annette Ziegler have been the subject of ethics investigations into their misconduct. Justice Roggensack's recent campaign was overseen by a lobbyist for special interests. The Wisconsin Manufacturers and Commerce and Wisconsin Club for Growth have spent \$8 million to secure a pro-corporate star chamber and then wrote the Court's recusal rules adopted by this corporate bloc.

Enough is enough.

I note while this resolution is being fast-tracked by the Republican legislative majority, not one word has been spoken by the resolution's authors about a true crisis of confidence that faces the Wisconsin State Supreme Court regarding the on-going John Doe investigation of criminal collusion involving Republican Governor Scott Walker and a number of the special interest funding mechanisms that have ensured the Republican lock on power in state government.

In April, One Wisconsin Now filed a formal letter with the seven justices of the Wisconsin Supreme Court, urging four of the court's justices to recuse themselves from a legal request by the campaign of Gov. Scott Walker related to the ongoing John Doe investigation surrounding allegations of illegal coordination between Republican-aligned groups during the recall of Walker.

In our letter, One Wisconsin Now noted that two of the groups reported by media to be involved in the investigation, Club for Growth and Wisconsin Manufacturers and Commerce (WMC), financed over \$8 million in spending to elect the four justices, who constitute a conservative majority on the court.

Involvement of a party, like Club for Growth or Wisconsin Manufacturers and Commerce that has spent substantial sums to elect the judge or justice hearing their case results in the appearance of bias if not actual bias.

Our letter notes that both the Wisconsin Club for Growth and Wisconsin Manufacturers and Commerce were extremely active in the Supreme Court races in support of each of the most

recent electoral efforts of Justices Annette Ziegler, Michael Gableman, David Prosser and Patience Roggensack. The four were elected to 10-year terms in campaigns from 2007 to 2013. According to figures compiled by the non-partisan Wisconsin Democracy Campaign:

- Club for Growth and WMC spent a combined \$7.3 million in support of those four justices' campaigns' for the Supreme Court. In addition, \$985,000 was spent by Citizens for a Strong America on behalf of the 2011 campaign of Justice David Prosser. A review of Club for Growth's 2011 Internal Revenue Service 990 form shows that Club for Growth contributed \$4.6 million to Citizens for a Strong America - the organization's entire operating budget.
- In all four cases of these justices' election campaigns, the percent of spending by these two entities was a substantial portion of the support these campaigns received. A Wisconsin Democracy Campaign total of the spending on behalf of Justice Prosser, including his own campaign, showed that spending of Club for Growth, WMC and the Club for Growth - financed Citizens for a Strong America, provided 75 percent of the \$3.5 million in spending on behalf of Justice Prosser. If the public financing grant obtained by Justice Prosser is removed as "spending," this figure leaps to a jaw-dropping 85 percent.
- A similar review of spending on behalf of Justice Michael Gableman, shows a similar and stunning lopsided percent from Club for Growth and WMC. These two entities provided in excess of 70 percent of the \$3.2 million spent on his 2008 election campaign to the court.

Simply said: There is an \$8 million weight on the scales of justice if the conservatives on the court move forward to shield the very entities that put them on the court.

If the Republican-controlled legislature is seeking to have an open and honest discussion about challenges facing the other branches of state government, including the state Supreme Court, it may want to start here, instead of this power grab, that if it were undertaken in another country, would be rightfully deemed a "coup."



**TESTIMONY OF:** Christine Bremer Muggli, on behalf of the  
**Wisconsin Association for Justice**  
**BEFORE:** The Senate Judiciary Committee  
**REGARDING:** Opposition to 2015 Joint Senate Resolution 2  
**DATE:** January 15, 2015

**ANN S. JACOBS**  
PRESIDENT  
MILWAUKEE

**RUSSELL T. GOLLA**  
PRESIDENT-ELECT  
STEVENS POINT

**BENJAMIN S. WAGNER**  
VICE-PRESIDENT  
MILWAUKEE

**HEATH P. STRAKA**  
SECRETARY  
MADISON

**EDWARD E. ROBINSON**  
TREASURER  
BROOKFIELD

**CHRISTOPHER D. STOMBAUGH**  
PAST-PRESIDENT  
PLATTEVILLE

**BRYAN M. ROESSLER**  
EXECUTIVE DIRECTOR

My name is Christine Bremer Muggli. I am a Past-President of the Wisconsin Association for Justice (“WAJ”), and we are here to testify against 2015 Joint Senate Resolution 2. We thank you for the opportunity to be heard on this date. WAJ promotes a fair and effective justice system: one that ensures justice for all. WAJ supports policies that protect accident victims and hold at-fault persons responsible through the justice system. We believe that the independence of the judiciary is crucial to our mission. It is for this reason that we oppose any attempt to remove our current sitting Chief Justice, Shirley Abrahamson.

When Chief Justice Shirley Abrahamson was appointed to the Wisconsin Supreme Court in 1976, she became the first woman to serve on our state’s highest court. She brought to the bench a wealth of wisdom and experience. She had graduated from Indiana University Law School 20 years earlier, and had gone on to earn a doctorate of law in American Legal History from UW Law School in 1962. She used her doctorate degree as a lawyer in private practice for 14 years and as a professor at UW Law School.

The Chief Justice has dedicated herself to improving the judiciary in our state and our country. She is a past president of the National Conference of Chief Justices, gaining insight into how to best direct the Court from colleagues around the nation. She is a past Chair of the Board of Directors of the National Center for State Courts and the National Institute of Justice’s National Commission on the Future of DNA Evidence. She is a member of the Council of the American Law Institute and the New York University School of Law Institute of Judicial Administration. She has served in positions with the State Bar of Wisconsin and the American Bar Association.

It comes as no surprise that the Chief Justice has earned accolades and respect from around the country for her work, earning 15 honorary doctor of law degrees and UW-Madison’s Distinguished Alumni Award. She is a fellow of both the Wisconsin Academy of Arts and Sciences and the American Academy of Arts and Sciences. She is an elected member of the American Philosophical Society. She received the American Judicature Society’s Dwight D. Opperman Award for Judicial Excellence. In 2009, the National Center of State Courts awarded

her the Harry L. Carrico Award for Judicial Innovation for her work serving as a national leader for safeguarding judicial independence, improving inter-branch relations and expanding outreach to the public. The Chief Justice is listed in *Great American Judges [Top 100]: An Encyclopedia* (John R. Vile ed. 2003) and *The Lawdragon 500 Leading Lawyers in America* (2005 and 2006).

Since her appointment to the bench, the voters have re-elected her to her position four times: every ten years since 1979. In 1996, she became the Chief Justice of the Court, meaning she has twice been re-elected as Chief Justice. Her current term expires in 2019.

Justice Abrahamson had devoted herself to carrying out her increased responsibilities as Chief Justice. As Chief, she presides over oral arguments and the Court's adjudicative and administrative conferences. She is the administrative head of our state's entire judicial system, and works closely with the Director of State Courts, court staff, chief trial judges and district court administrators. She chairs or serves on numerous court committees. She sacrifices personal time for carrying out these rewarding administrative duties. She promotes court programs that improve the administration of justice, including increasing volunteers in the courts; providing assistance to people involved in the court system without attorneys; certifying court interpreters; creating unified family courts; improving protection of children; developing new opportunities for judicial education across our state, country and the world; establishing legislative-judicial seminars; improving relations among state, federal and tribal courts; and increasing the Court's outreach and education across Wisconsin.

As an example of her dedication, Chief Justice Abrahamson once volunteered to fill in as a judge in a Milwaukee County Small Claims Court. She used the experience as an opportunity to hear directly from the people of Wisconsin and help them resolve their problems. This helped her gain a greater appreciation of the work done by judges at all levels of Wisconsin's judicial system, and made her a better administrator. She believes in ensuring our state's judges understand different vantage points, serving as a juror in both civil and criminal cases and initiating a program that allows Wisconsin Court of Appeals judges to sit as trial judges, and vice-versa.

Unfortunately, 2015 Joint Senate Resolution 2 appears to overturn the will of the electorate and remove the Justice Abrahamson from the Chief position to which she has twice been elected by Wisconsin's voters—the position to which she has dedicated her career. This Resolution would serve to effectively remove Justice Abrahamson from the leadership position to which she was elected.

In 2009, Chief Justice Abrahamson campaigned on her experience as Chief Justice and the fact that, if re-elected, she would continue in the same position. She earned a decisive victory and is serving a term that does not expire until 2019. If the proposed Constitutional Amendment

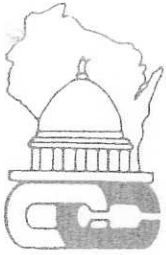
is enacted retroactively, it would have the effect of nullifying the vote of the people of Wisconsin. In his testimony in support of this resolution, former Justice Wilcox even conceded that this Joint Resolution should be enacted prospectively only, which would allow the Chief Justice to serve out her current term. The authors of the Resolution have indicated that the Court should have its own “democratic process” for choosing its leader. That same reasoning should apply to the democratic process that re-elected the Chief Justice in the first place. The Chief Justice should not be prevented from serving her term in the role to which she was elected.

This Resolution would not bring collaboration and cohesion to the Court. The Constitution provides that the Justice with the most seniority will serve as Chief. The genius of this system is that it allows the Justice with the most institutional knowledge and experience to carry out the increased responsibilities of the position. While, just like in any workplace, the Chief Justice may have to make some unpopular decisions, the predictability of the current system allows for those tough decisions to be made without having to take into account whether those decisions will be popular. Rather than inviting cohesion and collaboration, the Resolution would invite a new conflict—a new popularity contest—with election of a new Chief every two years. Instead of spending time resolving cases, the Court will be bogged down every two years in a battle for Chief, creating discord and inviting factions to form and grow.

Our judiciary should not be governed by political activity. By having a set procedure for how the leadership of the Court is determined, politics are taken out of the picture and the Court maintains its integrity and independence as our third branch of government.

When combined with the pending bill seeking to institute a mandatory retirement age for sitting Justices, it appears the only motivation behind this targeted attack on Chief Justice Abrahamson is to squeeze out minority ideological views and pack the Court with those who align ideologically with the current majority. Her presence, as directed by the electorate, gives much-needed balance so that the rights of *all* people are considered, not just the wealthy and powerful.

If this measure is truly above partisanship—if it is *truly* not a reason to remove the Chief Justice—let her serve out her term and “grandmother” her in. Other states which have enacted such changes have done so. We oppose the Joint Resolution in full, but if it is passed, we ask that, at a minimum, the Joint Resolution be amended so that it is enforced only after the current Chief Justice fulfills the term to which she was elected by a wide majority of the voters of Wisconsin.



# Common Cause in Wisconsin

152 W. Johnson Street \* P.O. Box 2597 \* Madison, WI 53701-2597 \* (608) 256-2686

Jay Heck, Executive Director \* [www.commoncausewisconsin.org](http://www.commoncausewisconsin.org)

## STATEMENT OF JAY HECK, EXECUTIVE DIRECTOR OF COMMON CAUSE IN WISCONSIN, IN OPPOSITION TO SENATE JOINT RESOLUTION 2 - DIRECTING THE WISCONSIN SUPREME COURT TO ELECT ITS CHIEF JUSTICE EVERY TWO YEARS

Before the Wisconsin State Senate Committee on the Judiciary and Public Safety

Thursday, January 15, 2015

I am Jay Heck, the director of Common Cause in Wisconsin, one of the state's largest non-partisan, non-profit political reform advocacy organizations with approximately 2,300 members. We oppose Senate Joint Resolution 2 because it is so transparently ideologically partisan and is obviously designed to remove from the position of Chief Justice of the Wisconsin Supreme Court one specific individual: the current Chief Justice, Shirley Abrahamson.

Common Cause in Wisconsin strongly believes that there are already far too many partisan political considerations surrounding and infusing the current deliberations and elections of our state's highest court and that this measure will only exacerbate, rather than decrease and diffuse ideological differences. We are concerned that citizen confidence in the integrity and impartiality of the Wisconsin Supreme Court, which has already fallen considerably in recent years according to public opinion polls, will plummet still further if this proposal is passed in the Wisconsin Legislature and then sent to statewide referendum in what will almost certainly be a very politically ideological and divisive statewide campaign, as early as this April. All of us can readily predict the outside special interest groups that will spend hundreds of thousands, and likely millions of dollars primarily in the form of nasty, negative attack communications on the airwaves and in the mail on top of the millions likely to be spent on the upcoming Wisconsin Supreme Court election this Spring.

It is also a certainty that this proposal, which passed in the 2013-2014 legislative session, and which is again before you today, would never have been devised or proposed if the current Chief Justice was named David Prosser, or Patience Roggensack, or Annete Ziegler, or Michael Gableman. But because the Chief Justice is named Shirley Abrahamson and many members of the State Legislature simply cannot abide her views or philosophy, she has become the specific target of this ill-advised and ill-timed measure. If that were not the case and if the proposal was being made for non-ideological or non-personal reasons, it would contain a provision that would make this measure effective after the next election of Justice



Abrahamson in 2019. This contains no such provision. It is targeted specifically at the current Chief Justice.

This measure also constitutes an obnoxious and intrusive assault by the Legislature on the separation of powers of the three branches of state government in Wisconsin. Dictating how the Wisconsin Supreme Court ought to select its Chief Justice is not something the Legislature ought to be deciding any more than the Wisconsin Supreme Court ought to be determining how the legislative leadership is selected.

This joint resolution, if it passes and if it is sent to referendum, ought to be seen by the citizens of Wisconsin as a partisan, petty measure that will further politicize an already far-too politicized State Supreme Court. It is not worthy of their consideration, much less their support. Senate Joint Resolution 2 ought not be advanced by this committee or by the Wisconsin Legislature, either.

Thank you.

## SJR 2 in the context of Wisconsin History

The Wisconsin Legislature has defined the contours of our Supreme Court since the state's founding. Through the amendment process, including public referendum, we have defined the court's organization, imposed terms of office on members of the court, and clarified the role of the Chief Justice.

In other words, it is and always has been the Legislature's job to ensure the Wisconsin Supreme Court functions as smoothly and efficiently as possible. Below is an overview of the amendment based reforms the legislature has enacted based on Jack Stark's treatise, The Wisconsin State Constitution.<sup>1</sup>

- **Since Wisconsin's founding, the Legislature has conditioned the Supreme Court's composition & organization.**<sup>2</sup>
  - Originally, a group of circuit court judges comprised our court of last resort;
  - The legislature had express authority to create a separate supreme court;
  - The Legislature's power was not limitless; if the legislature created a supreme court then they could not dissolve it later;
  - Ultimately the legislature acted and created a separate Supreme Court.
  
- **Since 1877, the legislature has refined the number of justices and their term of office.**<sup>3</sup>
  - In 1887, an amendment was ratified to increase the size of the supreme court to five and to set their term of office at ten years;
  - Revisions in 1889 and 1889 muddied the waters regarding the justices' term of office;
  - In 1963, an amendment was ratified that accomplished three separate goals;
    - It expressly limited the justices' term of office to ten years;
    - Increased the number of justices from five to seven;
    - Barred any more than one justice from being elected during any year.
  
- **In 1977, legislatively driven reforms defined access to and the role of the Chief Justice.**<sup>4</sup>
  - New language expressly allowed a justice to decline the role of Chief Justice;
  - The language was the first instance whereby the Chief Justice became express administrative head of the Wisconsin judicial system.

SJR 2 is merely the newest manifestation of the legislature exercising its power to shape the contours of the Wisconsin Supreme Court. The proposal merely asks the public whether seniority should continue to decide who serves as the chief justice. If the public says no, then the members of the court will be empowered to decide who the chief justice shall be.

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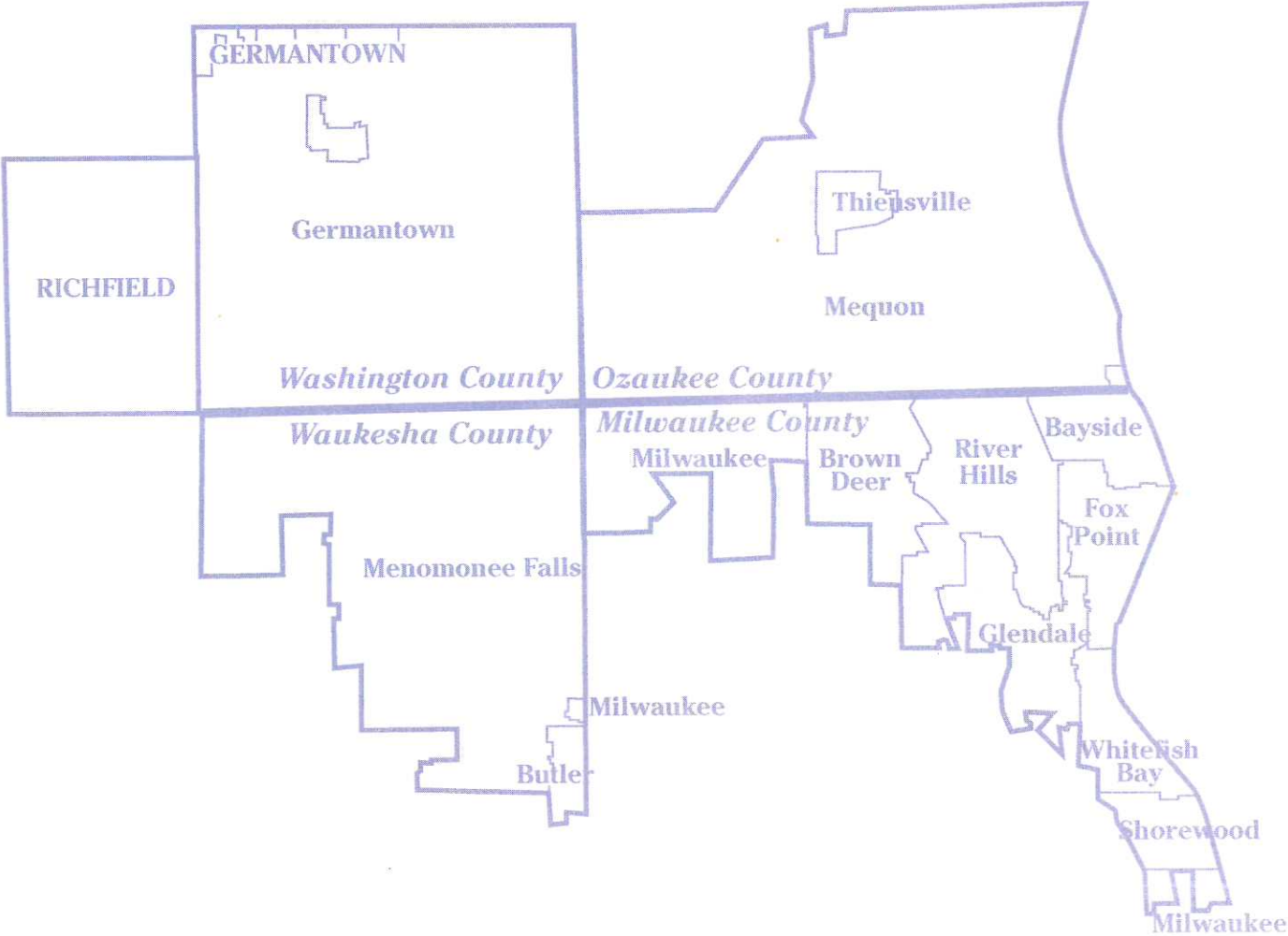
<sup>1</sup> Jack Stark, The Wisconsin State Constitution: A Reference Guide (1997)

<sup>2</sup> Id. at 143-144

<sup>3</sup> Id. at 144

<sup>4</sup> Id.

# Wisconsin's 8th Senate District



# Frederick B. Wade

ATTORNEY AT LAW

FAX (608) 255-3358

SUITE 610  
122 WEST WASHINGTON AVENUE  
MADISON, WISCONSIN 53703

Phone (608) 255-5111

January 15, 2015

## TESTIMONY ON ASSEMBLY JOINT RESOLUTION 1

(Opposition to Biennial Election of Chief Justice of the Wisconsin Supreme Court)

Assembly Joint Resolution 1 would require a majority of the Wisconsin Supreme Court to elect a Chief Justice for a two year term. The Constitution has provided, for at least 125 years, that the “longest . . . continuous member of said court” shall serve in that capacity.

As a lawyer, student of legal and constitutional history, and long time observer of the Court, I believe the amendment would be a serious mistake. The Court has been plagued for many years by reports of friction and personal animosity between members of the Court. The potential for additional infighting over who should be elected as Chief Justice can only generate additional tensions and distractions for members of the Court that will further undermine its credibility and legitimacy as an institution.

The proposed amendment would also undermine the credibility and legitimacy of the Court for another reason. It appears to be a partisan attempt to reduce the role of the current Chief Justice, at a time when the Court is already perceived by too many as a partisan, rather than an independent, arbiter of the law. This perception can only be exacerbated by the fact that the Court is on the threshold of considering a number of cases arising from the “John Doe” investigation that have political implications. In my view, confidence in the rule of law will suffer if this amendment is adopted.

I find it surprising that such an amendment has been given fast track status, when there is no apparent need for the proposed change, when the current system has worked for 125 years, and more importantly, when the Legislature has failed, for decades, to pass a constitutional amendment that would prevent governors from using their partial veto power to create laws that the Legislature has neither considered, nor approved. While constitutional amendments did pass in 1990 and 2008 that prevent governors from “rejecting individual letters” of a word to create a new word, and from “combining parts of 2 or more sentences” to create a new sentence, those amendments permit governors to create laws from the vetoed remnants of appropriation bills, that on their face, do not have the “consent of the governed,” as expressed by their representatives in the Legislature. The statute books are littered with such bogus laws, despite the Constitution’s command that “*the* legislative power shall be vested in a senate and assembly” (emphasis added). For more information, see my article in the Wisconsin Lawyer Magazine, “The Origin and Evolution of Partial Veto Power,” which was published in March of 2008.

The Wisconsin Constitution currently provides that the longest-serving justice of the Wisconsin Supreme Court shall be the chief justice of the court. SJR 2 proposes to amend the Wisconsin Constitution to provide that the chief justice shall be elected by a majority of the justices serving on the court.

To amend the Wisconsin constitution, a proposal must be approved by two successive legislatures and ratified by the people. SJR 2 is before the legislature on second consideration. If it is passed, the question whether to amend the constitution to provide for the election of chief justice will be placed on the ballot for the April 7, 2015 election.