

THE “TOUGH LITTLE BUNCH”:¹ THE RHODE ISLAND
SUPREME COURT’S STRONG JUDICIAL INTEGRATION AND
COMMITMENT TO JUDICIAL RESTRAINT

*Christina M. Tripoli**

In the words of Chief Justice John Roberts, “judges must be constantly aware that their role, while important, is limited. They do not have a commission to solve society’s problems, as they see them, but simply to decide cases before them according to the rule of law.”² In recognition of this philosophy, the Supreme Court of Rhode Island consistently adheres to principles of judicial restraint.

Indeed, the court itself has noted that the judiciary’s “duty [is] to determine the law, not to make the law.”³ “To do otherwise, even if based on sound policy and the best of intentions, would be to substitute our will for that of a body democratically elected by the citizens of this state and to overplay our proper role in the theater of Rhode Island government.”⁴

Because of the justices’ commitment to judicial restraint, the Rhode Island Supreme Court maintains a strongly integrated system, evidenced by the low number of dissents filed by each justice of the court.⁵ Indeed, the justices of the Rhode Island Supreme Court apply their state constitution *as it is written*, not as they or any other unelected official *wishes* it were written. Therefore, they also have a fairly low reversal rate, as their goal is

¹ Maureen McKenna Goldberg, *Rhode Island’s Unique Constitutional History*, 72 ALB. L. REV. 601, 601 (2009).

* Managing Editor, Albany Law Review; J.D. Candidate, Albany Law School, 2011; B.S., The College of Saint Rose, 2007. I would like to thank Professor Michael Hutter and certain law school comrades for the inspiration and motivation for this Article. In addition, I would like to extend a special thank you to the 2009–2010 *Albany Law Review* Editorial Board and Associate Editors, whose tireless dedication made this work possible. Lastly, I would like to thank all my family and friends who have given me encouragement and support, and most importantly God, for being my sustainer each day.

² *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing on S. 109-158 Before the S. Comm. on the Judiciary*, 109th Cong. 66 (2005) (statement of Hon. John G. Roberts, Jr., United States Supreme Court Justice).

³ *City of Pawtucket v. Sundlun*, 662 A.2d 40, 57 (R.I. 1995).

⁴ *DeSantis v. Prella*, 891 A.2d 873, 881 (R.I. 2006).

⁵ See Appendix B (showing number of dissents filed each year from 2005–2009).

to make sure the lower court applied the law correctly, and not to seek to remedy any social harms that any such laws may have inflicted.

State supreme courts are influential institutions. They exercise final authority over some of the most important cases in the United States and pronounce and shape legal doctrine by issuing thousands of opinions a year. In short, they are some of the most significant institutions for the lives of United States citizens, especially the lives of the citizens of the state in which they sit.⁶

As the court of last resort in the State of Rhode Island, the Rhode Island Supreme Court renders decisions that impact almost every area of life for its citizens. As a result, the cases that come before the Rhode Island Supreme Court may seem neither “great” nor “hard.”⁷ But “[g]reat cases like hard cases make bad law.”⁸ In the words of one late Rhode Island Supreme Court justice, “[w]e just don’t get jazzy constitutional law cases.”⁹ While the cases may involve basic constitutional principles, “[t]hey are [often] of concern only to the immediate parties, and are rarely vehicles for broader questions.”¹⁰ The decisions of the Rhode Island Supreme Court therefore often go without notice and rarely receive national attention.

The last study of the voting trends of the Rhode Island Supreme Court was conducted by Edward N. Beiser in 1973.¹¹ Perhaps potential successors in interest have concluded that another study of the voting patterns of the court would be insignificant—perhaps because the court has too small of a caseload or because the court does not decide groundbreaking cases of which legal scholars and judges ought to take consideration. Indeed, when many think of Rhode Island, touristy seaside towns along the coast of the Ocean State and glimpses into the lives of America’s high society may be more prevalent than reflections about jurisprudence and

⁶ Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dissent and Variability in State Supreme Courts: The Centrality of Jurisdictional Sources*, 89 B.U. L. REV. 1451, 1453 (2009).

⁷ Edward N. Beiser, *The Rhode Island Supreme Court: A Well-Integrated Political System*, 8 LAW & SOC’Y REV. 167, 173 (1974).

⁸ *N. Sec. Co. v. United States*, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting) (“For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.”).

⁹ Beiser, *supra* note 7, at 173.

¹⁰ *Id.* (emphasis omitted).

¹¹ *See id.*

“significant” court decisions. Because the court rarely issues earth-shattering decisions, one could mistakenly conclude that the Rhode Island State Supreme Court seldom decides any noteworthy cases.

Seeking to label a case as “significant” or “important,” however, is quite arbitrary. As with any court study, some important cases will inevitably go unstudied. Furthermore, the nature of sampling state court cases is in and of itself “biased.”¹² First, cases that interpret state statutes and laws often go unnoticed as they may have little effect upon national jurisprudence.¹³ In their respective state, however, they make up a large portion of the court’s docket and hold great importance for the residents of that state and for practitioners before the court. Second, it may take time for a case to become “significant” at a national level.¹⁴ Therefore, the cases that follow in this study are by no means exhaustive of those cases that may have actually been significant for the residents of Rhode Island and have “left [their] mark on the jurisprudence of the state and the nation.”¹⁵ Instead, they are a sampling of those cases that have a strong tendency to support the proposition that Rhode Island adheres to judicial restraint and has a strongly integrated political system.

This study will be organized in the following manner: Part I discusses the methodology used in this particular state high court study. Part II provides an introduction and background information of the Rhode Island Supreme Court, including its history and current structure and the tenure of the judges and the appointment process. Part III discusses the judicial restraint employed by federal and state courts, and that of the Rhode Island Supreme Court. Part IV presents current voting trends and statistics of the court, analyzes cases from 2005–2009 in which a justice filed a dissent, and examines both the particular voting patterns of the different justices and the frequency of dissents and reversals. Part V portrays how judicial restraint has affected several of the court’s leading “significant” cases. Part VI offers some remarks in conclusion.

In 1977, Edward N. Beiser of Brown University did a complete

¹² See HISTORICAL SOCIETY OF THE COURTS OF THE STATE OF NEW YORK, “THERE SHALL BE A COURT OF APPEALS . . .” 49, 50–51 (1997), *available at* <http://www.courts.state.ny.us/history/elecbook/thereshallbe/cover.htm>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

study of the then current Rhode Island Supreme Court.¹⁶ Beiser concluded that justices of the Rhode Island Supreme Court almost never disagree with each other.¹⁷ Beiser proposed that the five justices of the Rhode Island Supreme Court acted and worked together as a tightly-knit and strongly integrated political system.¹⁸ Beiser explained that, among other things, by keeping their personal opinions and political trends from creeping into their decisions, the justices were able to maintain this strong system.¹⁹ In addition, they simply, but strictly, adhered to the wishes of the legislature.²⁰ Furthermore, they placed great faith in the decisions of the trier of fact, their only standard of review being to make sure that the lower court used and applied the correct law. And, where a case involved a federal issue, the Court *always* resorted to the United States Constitution.²¹

One commentator has opined that “[t]he question of whether, and under what circumstances, it is legitimate for state courts to reach conclusions under their state constitutions that are more protective of rights than United States Supreme Court decisions is one of the most important questions of American constitutional federalism.”²² Since Beiser’s study, some have argued for more vigorous state constitutionalism in the Rhode Island Supreme Court’s approach to its review of cases involving both federal and state claims that involve “analogous, but distinct, provisions of the federal and state constitutions,”²³ proposing the following:

The court should determine state constitutional claims before federal ones when both are raised, and decline to reach the federal constitutional issue when the state constitution affords the relief requested. Even if the court elects to continue to address federal constitutional claims first, when the federal Constitution does not provide relief

¹⁶ Beiser, *supra* note 7, at 167.

¹⁷ *Id.*

¹⁸ *Id.* at 168.

¹⁹ *Id.* at 177.

²⁰ *Id.* at 171–72.

²¹ *Id.* at 171.

²² Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1018 (1997).

²³ Thomas R. Bender, *For a More Vigorous State Constitutionalism*, 10 ROGER WILLIAMS U. L. REV. 621, 623 n.7 (2005). In addition, “the Rhode Island Supreme Court has not taken full advantage of judicial federalism, and [] the court, in interpreting the Declaration of Rights, has instead adopted a philosophy of reflexive deference to decisions of the United States Supreme Court interpreting corresponding rights in the federal Bill of Rights.” *Id.* at 622.

and a state constitutional claim has been raised, the court must vigorously explore the state constitution to determine if it is, or if it should be, more protective of the particular right at issue, and whether it can supply the relief requested by the litigant.²⁴

Indeed, the result of Rhode Island's fall back on the U.S. Constitution has perhaps been "to reduce the Rhode Island Declaration of Rights to a 'mere row of shadows' alongside the federal Bill of Rights, and to effectively cede to the United States Supreme Court the Rhode Island Supreme Court's own sovereign authority to determine state constitutional meaning."²⁵

On the other hand, some commentators have expressed disagreement with Rhode Island's absolute deference to the legislature, and have advocated for stronger judicial activism, particularly when individual rights are violated by the legislative enactments. With respect to *Bandoni v. State*,²⁶ a case in which the Rhode Island Supreme Court refused to create a cause of action to entitle victims to collect monetary damages from state officials where the officials failed to notify the victims of their constitutional rights, one commentator expressed the following:

On May 4, 1776 the colony of Rhode Island and Providence Plantations threw off the yoke of British repression represented by George III. Seventy and some-odd-years later the State of Rhode Island adopted its Constitution. It amazes one to think in this day and age that that which was wrestled from George III is now by judicial custom and tradition periodically handed back to his predecessor, Charles II, by right of his colonial charter, whenever the state constitution appears not to address a given issue. Rhode Island rejected the monarch and the British Parliament, and rightfully so. To hold that such a fractious and generally pernicious body as the General Assembly should retain such imperial, and sometimes oppressive plenary power is itself an insult to that cherished document, the Rhode Island Constitution, and to its framers, past and present.²⁷

²⁴ *Id.* at 678.

²⁵ *Id.* at 622 (quoting *State v. Bradberry*, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring)).

²⁶ 715 A.2d 580 (R.I. 1998).

²⁷ Marty C. Marran, "Ubi Jus, Ibi Remedium"—*Sed Non Hodie: Bandoni v. State of Rhode Island, a Ten Year Retrospective*, 13 ROGER WILLIAMS U. L. REV. 594, 628 (2008).

Yet it has also been noted that “[w]hen faced with only a state constitutional claim the court has shown itself quite willing and capable of vigorously examining the sources and history, as well as competing strands of constitutional philosophy, relevant to the constitutional provision at issue.”²⁸ The purpose of this study is not to call into question the decisions of the Rhode Island Supreme Court, but merely to objectively present such information and to provide a greater potential understanding of the jurisprudence and voting trends of a court that often goes without notice, and to show that the court’s caseload perhaps contains significantly more noteworthy cases than expected.

I. METHODOLOGY

This high court study analyzes the overall jurisprudence of the Rhode Island Supreme Court by examining various leading cases decided subsequent to Beiser’s study and considering how the ideologies embedded in past cases, such as the court’s restrictive standard of review, continues to influence court’s decisions today. In particular, this study analyzes a handful of significant cases²⁹ (most notably *Rhode Island v. Lead Industries Association, Inc.*³⁰), points out how the court strongly defers to lower court decisions and the clear intent of the legislature in these cases, and analyzes the dissents in each case to determine whether there is any resistance to the court’s allegiance to judicial restraint. Through this examination, it can be seen that the court’s judicial restraint, a strongly implemented judicial policy of separation of powers and extreme deference to the legislature, has been key to determining the outcome of Rhode Island cases. In addition, in the few instances in which dissenting opinions are filed, instead of being reflective of the justice’s personal opinion and attitude regarding the particular individual right(s) at stake in the case, it is often reflective of the respective justice’s different interpretations of the legislature’s intent in enacting a statute, as opposed to the majority’s interpretation of the statute.

This high court study also includes an empirical overview of all the cases decided by the justices of the Supreme Court of Rhode Island from 2005–2009. The appendix to this study contains tables which show how many times each justice has voted to affirm,

²⁸ Bender, *supra* note 23, at 623 n.7.

²⁹ See Part V, *infra*, for an in depth discussion of each of the decisions.

³⁰ 951 A.2d 428 (R.I. 2008).

vacate, reverse, or remand—or any combination thereof.³¹ This study also tracks when and how many times a justice joined in a majority opinion, and more importantly, when a justice wrote his or her own dissenting and/or concurring opinion, or joined a dissenting or concurring opinion of another justice. Appendix A provides a list of each dissenting opinion filed by a justice of the Rhode Island Supreme Court between January 2005 and December 2009; Appendix B contains the number of appeals and cases with a dissent or concurrence between 2005–2009; Appendix C provides the complete findings of the study of the voting trends of the court during this time, including a list of the affirmation and reversal rate of each of the justices; and Appendix D provides statistics of the national state supreme court voting trends.

II. BACKGROUND INFORMATION OF THE COURT

A. *Government and Politics*

This study would not be complete without supplying at least a brief history of Rhode Island and its supreme court. Rhode Island was founded by Roger Williams, who sought freedom from the religious persecution of the Massachusetts Bay Colony and settled in present day Providence, Rhode Island.³² In 1663, King Charles II granted Rhode Island a charter, bestowing upon Rhode Island enormous independence and freedom.³³ In the eyes of the colony's critics, Rhode Island was “a ‘downright democracy’ whose government officials were ‘entirely controlled by the populace’”³⁴ “The state’s individualism, its democratic localism, and a tradition of autonomy caused it to resist the centralizing tendencies of the federal Constitution.”³⁵ Rhode Island was ultimately the last state to sign and to ratify the United States Constitution.³⁶ As the 2009 acting Chief Justice Goldberg stated at the *Albany Law Review* 2009 State Constitutional Commentary Symposium: State High Court Judges on Making Their Hardest

³¹ See Appendix C.

³² See D. KURT GRAHAM, TO BRING LAW HOME: THE FEDERAL JUDICIARY IN EARLY NATIONAL RHODE ISLAND 16–17 (2010); PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., THE RHODE ISLAND CONSTITUTION: A REFERENCE GUIDE 3 (2007).

³³ CONLEY & FLANDERS, *supra* note 32, at 6–7.

³⁴ *Id.* at 13.

³⁵ *Id.* at 15.

³⁶ *Id.*

Decisions, “we’re a tough little bunch down there.”³⁷

When King Charles II granted Rhode Island the Charter of 1663, he placed ultimate authority in the Rhode Island legislature, the General Assembly.³⁸ Under the charter, the development of both the executive power and judicial autonomy were severely repressed by the power of the legislature.³⁹ When Rhode Island finally adopted its own state constitution in May 1843, the same clause that King Charles included in his charter was left intact, and all powers that were not specifically assigned were to remain with the General Assembly.⁴⁰ The General Assembly thus remained the ultimate authority in the state of Rhode Island until 2004.⁴¹

Three of the four present justices of the supreme court were appointed by current Republican Governor Donald Carcieri, and the Supreme Court’s partisan make-up is presently all Republican. Several judicial studies have analyzed the tendency of “conservative” judges to apply judicial restraint and defer to the legislature, while “liberal” judges adopt judicial activism in upholding individual rights.⁴² This study does not discuss the influences that a judge’s political affiliations may have upon their decisions. Undoubtedly, however, this will affect a judge’s decision-making to some extent. With a court of four conservative judges, and possibly soon a fifth,⁴³ this conservative make-up of the court likely contributes to the justices’ commitment to judicial restraint.

B. History of the Court

The Rhode Island Supreme Court was founded in 1747.⁴⁴ In 1798, the General Assembly renamed the Superior Court “The Supreme Judicial Court,” and in 1843, “The Supreme Court,” as it is

³⁷ See Goldberg, *supra* note 1, at 601.

³⁸ *Id.* at 6–7.

³⁹ *Id.* at 10.

⁴⁰ *Id.* at 21–23.

⁴¹ *Id.* at 40–41.

⁴² See, e.g., Teresa Stanton Collett, *Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments*, 41 LOY. U. CHI. L.J. 327, 328–30 (2010); Richard G. Wilkins et al., *Supreme Court Voting Behavior: 2007 Term*, 37 HASTINGS CONST. L.Q. 287, 290–91 (2010).

⁴³ Tracy Breton, *Carcieri Nominates Indeglia for Supreme Court*, PROVIDENCE J., Mar. 9, 2010, available at http://www.projo.com/news/stategovernment/content/INDEGLIA_SUPR_EME_COURT_03-09-10_6QHN3QA_v23.3a64f33.html.

⁴⁴ Gail I. Winson, RESEARCHING THE LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS: FROM LIVELY EXPERIMENT TO STATEHOOD 20, available at http://law.rwu.edu/sites/lawlibrary/content/pdf/researchguides/rhode_island_gw_0104.pdf.

known today.⁴⁵ Formation of the court was difficult, as Rhode Islanders of the eighteenth century had a strong distrust of the judiciary.⁴⁶ The appointment of lawyers to the bench was strongly discouraged, and most of the early judges of the eighteenth century were merchants, laymen, or farmers.⁴⁷ In 1747, the Assembly appointed the first Chief Justice, Gideon Cowell, who was not a lawyer.⁴⁸ The second Chief Justice, Joshua Babcock, was a Yale-educated physician.⁴⁹ Without justices who had formal legal training, the early court was hindered from explicitly following British common law. In addition, consistent with the mistrust of the judiciary, when the Court ruled on a case, parties could still appeal to the British monarch, English courts, or the General Assembly, the ultimate authority.⁵⁰

C. Formal Changes Since Inception

In 1747, the General Assembly passed an act “designating five judges, a chief and four associates, to be chosen annually by the assembly and commissioned by the governor, to hold court for two sessions a year in every county.”⁵¹ Judges continued to be annually elected until 1843,⁵² when the justices remained in office until a majority of each house passed a resolution that declared their office vacant.⁵³ A 1905 amendment to the Rhode Island Constitution removed the word “annual” from constitutional language,⁵⁴ and Supreme Court justices now hold office for life.⁵⁵

From 1747, when the Rhode Island General Assembly appointed its first Chief Justice, until 1994, the Rhode Island Supreme Court justices were chosen without the governor’s consent by the grand committee—or both chambers of the General Assembly (the Senate

⁴⁵ *Id.*

⁴⁶ IRVING BERDINE RICHMAN, RHODE ISLAND: A STUDY IN SEPARATISM 192 (1905).

⁴⁷ *Id.*

⁴⁸ CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 66 (2008).

⁴⁹ *Id.*

⁵⁰ RICHMAN, *supra* note 46, at 192.

⁵¹ Winson, *supra* note 44, at 20.

⁵² GRAHAM, *supra* note 32, at 29.

⁵³ American Judicature Society, History of Reform Efforts, Formal Changes Since Inception, http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=RI (last visited Apr. 5, 2010).

⁵⁴ CONLEY & FLANDERS, *supra* note 32, at 249.

⁵⁵ American Judicature Society, History of Reform Efforts, Altering Selection Methods, http://www.judicialselection.us/judicial_selection/reform_efforts/altering_selection_methods.cfm?state=RI (last visited Apr. 5, 2010).

and House of Representatives) sitting and acting in concert.⁵⁶ This remained the practice until November 1994, when a constitutional amendment providing for merit selection of the supreme court justices was approved by the electorate by well over a two-to-one margin.⁵⁷ Rhode Island has the distinction of being the most recent state to adopt such merit selection by constitutional amendment. “The intention of merit selection laws is to promote the selection of judges based exclusively on merit rather than on the basis of political and other extrajudicial considerations.”⁵⁸ Before 1994, the process of choosing supreme court justices “encouraged backroom dealing and the appointment of influential legislators to judgeships.”⁵⁹ Former United States Senator Lincoln D. Chafee was quoted as saying, “[t]he legislature loved the power. Everybody in the room thought maybe they would someday be appointed to the court. If you were a good soldier, you were rewarded.”⁶⁰

The move to merit selection was ultimately prompted by a series of scandals in the late 1980s and early 1990s involving Rhode Island Supreme Court justices. During this time, two justices resigned under threat of impeachment, and one was convicted of soliciting bribes and sent to prison.⁶¹ A broad-based coalition known as “Right Now!” headed the reform effort and included members such as Common Cause of Rhode Island, the Rhode Island Bar Association, and the Rhode Island League of Women Voters.⁶² Other coalition members included the Chamber of Commerce, the Rhode Island State Council of Churches, several environmental groups, the Catholic Diocese of Rhode Island, and prominent business leaders.⁶³

⁵⁶ American Judicature Society, *Judicial Selection in the States: Rhode Island*, http://www.judicialselection.us/judicial_selection/index.cfm?state=RI (last visited Apr. 5, 2010).

⁵⁷ See Formal Changes Since Inception, *supra* note 53.

⁵⁸ Barton P. Jenks, III, *Rhode Island's New Judicial Merit Selection Law*, 1 ROGER WILLIAMS U. L. REV. 63, 64 (1996).

⁵⁹ Katie Mulvaney, *Maneuvering to Succeed Williams Begins as Seat Is Still Warm*, PROVIDENCE J., Dec. 14, 2008, available at http://www.projo.com/news/content/williams_successor2_12-14-08_82CKEIN_v18.3ac796e.html.

⁶⁰ *Id.*

⁶¹ *Id.* Joseph A. Bevilacqua (former House Speaker) resigned in 1986, facing impeachment charges over allegation of ties with criminals. *Id.* Thomas F. Fay (House speaker to chief justice), who replaced Bevilacqua, also resigned seven years later, facing impeachment over allegations that “he used his position to benefit himself, his business [associates] and political allies.” *Id.*

⁶² *Judicial Selection in the States: Rhode Island*, *supra* note 56.

⁶³ See Formal Changes Since Inception, *supra* note 53.

In 2007, the General Assembly passed legislation allowing the governor to choose judicial appointees from lists of finalists dating back five years.⁶⁴ The Rhode Island Constitution was thereby amended by the Rhode Island citizens to allow the governor to choose a supreme court nominee from a list of candidates approved by a non-partisan nominating committee.⁶⁵ This committee, the Judicial Nominating Commission (the “JNC”), publicly submits three to five names to the Governor. “The JNC was created by statute in 199 and is composed of nine members.”⁶⁶ Of the nine, four members are appointed by the governor and five are appointed by the House and the Senate.⁶⁷ Both chambers of the General Assembly still must approve any nominees and must give their advice and consent for any appointee.⁶⁸ The present court still consists of five members, but each justice is now appointed by the governor. Currently, however, due to former Chief Justice Williams’ resignation in December 2008,⁶⁹ the fifth seat of the court is vacant.⁷⁰

IV. JUDICIAL RESTRAINT AND THE RHODE ISLAND SUPREME COURT

A. *Popular Review and Judicial Restraint in Federal and State Courts*

In general, state governments are not as limited as the federal government. State constitutions are inherently different than the federal constitution. The federal constitution is effectively a list of negative rights—“rights that prevent the government from doing something to people, like unreasonably searching their homes and that cannot be violated by government inaction.”⁷¹ On the other

⁶⁴ *Id.*

⁶⁵ Judiciary of Rhode Island, <http://www.courts.state.ri.us/supreme/defaultsupreme.htm> (last visited Apr. 5, 2010).

⁶⁶ David K. DeWolf, Rhode Island: The Legal Climate for the Protection of Life 9 (2007).

⁶⁷ American Judicature Society, Methods of Judicial Selection: Rhode Island, http://www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm?state=RI (last visited Apr. 8, 2010).

⁶⁸ Judiciary of Rhode Island, *supra* note 65.

⁶⁹ W. Zachary Malinowski, *R.I. Chief Justice Williams Resigns in Surprise Move*, PROVIDENCE J., Dec. 18, 2008, available at http://www.projo.com/news/content/WILLIAMS_RESIGNS_12-12-08_KBCJS42_v25.3d54d87.html.

⁷⁰ Judiciary of Rhode Island, Supreme Court Frequently Asked Questions, <http://www.courts.ri.gov/supreme/faq.htm> (last visited Apr. 5, 2010).

⁷¹ Sonja Ralston Elder, Note, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 DUKE L.J. 755, 760 (2007).

hand, some state constitutions provide for positive rights, such as the right to education.⁷² Therefore, it is often posited that state courts do not have to exercise the same heightened judicial restraint and deference as federal courts in upholding separation of powers between the judicial branch and the executive and legislative branches.⁷³ One reason scholars commonly give to explain federal courts' exercise of restraint and deference is that the federal government is one of limited powers.⁷⁴

Article III courts were established in direct rejection of the English common law system of courts in which final appeal rested with the House of Lords, which frequently mixed policymaking with judicial determinations. On the other hand, states are sovereigns with legislative and judicial powers broader than those of the federal government, and state courts have inherent powers as well as statutorily granted ones.⁷⁵

Additionally, state governments are not as limited as the federal government in that Article III of the United States Constitution subjects federal courts to substantial limits on their powers through the Constitution's jurisdictional restraints. However, state courts are not limited in the same manner. Most state courts are common law courts, "directly engaged in crafting the law as well as applying it."⁷⁶ Therefore,

common law jurisprudence is inherently a policymaking enterprise because the process of selecting a legal test for tort liability or good faith dealing, for example, rests in large part on what values the court decides to uphold and then on how such values can be promoted through rules, tests, and doctrines.⁷⁷

Thus, it is "not out of place for state courts to engage in the policymaking decisions necessary to enforce and uphold constitutional rights."⁷⁸ Because of this, state high courts are not expected to usually apply the same degree of judicial restraint as federal courts and may employ judicial activism in their decision-

⁷² Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1135 (1999) ("Unlike the Federal Constitution, every state constitution in the United States addresses social and economic concerns, and provides the basis for a variety of positive claims against the government.").

⁷³ Elder, *supra* note 71, at 761.

⁷⁴ *Id.* at 762.

⁷⁵ *Id.* (citation omitted).

⁷⁶ *Id.* (citation omitted).

⁷⁷ *Id.* at 762-63.

⁷⁸ *Id.* at 763.

making.

Furthermore, heightened judicial restraint at the federal level is also attributed to the fact that judges are appointed by the executive for life terms and that the federal judiciary is therefore beyond popular control. In her article advocating for more vigorous judicial activism protecting constitutional rights that are restricted by state legislatures, Elder discusses the concerns related to strong judicial activism, and argues that state judiciaries should not be criticized for applying judicial activism as they are subject to removal through the election process or through judicial review.

In such a system, there is legitimate concern for those worried about a loss of democratic control if judges insert themselves too much into policymaking, which, by design, is to be carried out by the popularly elected branches of government. Thirty-eight states, however, engage in some form of judicial elections. Eleven of the remaining twelve states usually appoint judges for terms that are renewable by the state legislature; only Rhode Island appoints judges for life. Although the merits of judicial elections are debatable, the fact that nearly all state court judges are elected or subject to review by elected officials means that criticisms of so-called judicial activism based on life tenure are largely inapplicable to state courts.⁷⁹

These principles of judicial restraint and how they apply differently to state courts than to federal courts—and particularly phrased in the manner that Elder employed in her article—are clearly on point. Only the one state that appoints judges for life, as Elder mentioned, may take exception—Rhode Island.⁸⁰

B. Rhode Island's Judicial Restraint

When judges are appointed for life, their decision-making process is not tainted by their desire to garner public favor in hopes of achieving reelection. It could be assumed, however, that when justices are appointed for life that they may not feel the need to exercise judicial restraint because their decisions will never place their position in such jeopardy. But “[w]hat can fairly be inferred from the constitutional scheme is that the judges are not to exercise the same free-wheeling legislative discretion as the elected representatives”⁸¹ “In such a system, there is legitimate

⁷⁹ *Id.* at 765.

⁸⁰ *Id.* at 764.

⁸¹ Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 *IND. L.J.* 1, 16 (1983).

concern for those worried about a loss of democratic control if judges insert themselves too much into policymaking, which, by design, is to be carried out by the popularly elected branches of government.”⁸² Therefore, Rhode Island Supreme Court justices, as the only state court justices appointed for life, must exercise extra caution in their rulings and in their interpretation of legislative intent.

Another distinguishing element between the strong judicial restraint, to which the justices of the Rhode Island Supreme Court have held themselves, and the more lenient deference to the legislature that other state high courts employ is due to the extraordinary power that the General Assembly has traditionally held in Rhode Island. “Prior to the adoption of the state constitution in 1843, the assembly exercised its ‘power both as a court of original jurisdiction in some cases and as a court of review in others without serious questions.’”⁸³ Until 2005, all power not given to any other branch was reserved for the General Assembly.⁸⁴ The analysis of the Rhode Island Supreme Court caseload and the cases that follow exemplify the judicial restraint employed by the court, deference to the legislature, and the uniform decision making of the justices.

IV. VOTING PATTERNS OF THE COURT

A. *Caseload Statistics*

A recent study concluded that in mandatory jurisdictional cases, Rhode Island currently has the lowest reversal rate of any state in the nation.⁸⁵ A 2001 state supreme court study found that 97% of the time, each of the Rhode Island justices joined the majority opinion.⁸⁶ Only in 2% of the cases did a Rhode Island justice dissent; and, similarly, only in 2% of the cases did a justice choose not to participate in voting.⁸⁷

In 1973, Beiser found that between December 1964 and October 1967, almost a three-year time span, the court decided 445 cases, 402 with opinion and forty-three per curiam, with a total of twenty-

⁸² Elder, *supra* note 71, at 764.

⁸³ GRAHAM, *supra* note 32, at 28.

⁸⁴ R.I. CONST. art. VI, § 10 (repealed 2004).

⁸⁵ Eisenberg & Miller, *supra* note 6, at 1474.

⁸⁶ Paul Brace & Kellie Sims Butler, *New Perspectives for the Comparative Study of the Judiciary: The State Supreme Court Project*, 22 JUST. SYS. J. 243, 257 (2001).

⁸⁷ *Id.*

five dissenting votes and five concurring votes.⁸⁸ Thirteen dissenting opinions and two concurring opinions appeared in 3.7% of the total number of cases decided with opinion.⁸⁹ Beiser concluded in his study that strong integration evident in low reversal rate and low number of dissents was a result of four characteristics of the Rhode Island Supreme Court: “(1) consensus as to goals and methods; (2) the nature of the cases coming before the court; (3) the environment in which they operate; and (4) the justices’ commitments to their job.”⁹⁰

The first reason, the justices’ consensus as to their goals and methods, seems to currently be the strongest reason to explain the voting patterns of the Rhode Island justices. Just as Beiser found of the five justices in his study, the current justices of the Rhode Island Supreme Court seem to all share the common belief “of how they are to approach statutory interpretation: their task is to carry out the will of the legislature.”⁹¹ Therefore, there is clearly a strong link between the judge’s commitment to judicial restraint and carrying out the explicit will of the legislature, and their low dissenting and reversal rate.

“The function of the Rhode Island Supreme Court” one justice remarked, “is to decide whether a trial judge committed error under the law, as it stands.”⁹² Therefore, the standard of review on appeal is only to determine if the lower court applied the correct law. Furthermore, “[i]t is the way of the state appellate courts to defer to the United States Supreme Court on constitutional matters.”⁹³ The task is to apply the rules of the U.S. Supreme Court to the Rhode Island legal system, no matter what the justice may think of the rules themselves. Therefore, “difference in constitutional theory—and the justices do differ on constitutional questions—are not permitted to affect the harmony within the court.”⁹⁴ When judges do not take into consideration social policy arguments, avoid personal opinions or political influences, and side-step the desire to remedy wrongs, there will almost always be a low reversal rate as long as the lower court has applied the correct law.⁹⁵ In addition, when judicial activism is not involved in

⁸⁸ Beiser, *supra* note 7, at 168.

⁸⁹ *Id.*

⁹⁰ *Id.* at 179.

⁹¹ *Id.* at 171–72.

⁹² *Id.* at 170.

⁹³ *Id.* at 171.

⁹⁴ *Id.*

⁹⁵ *Id.* at 170.

deciding the outcome of cases, dissenting rates will be low, as the justices usually interpret a statute in the same manner as one another.⁹⁶

A recent exhaustive state supreme court (“SSC”) study by Eisenberg and Miller concluded that jurisdictional source is associated with several important aspects of SSC behavior, such as reversal and affirmation rates, dissent patterns, and judicial policy preferences.⁹⁷ As a state with a relatively small volume of appeals, Rhode Island handles its cases without the need for discretionary jurisdiction.⁹⁸ Instead, as one of seven states with a five-justice appellate court comprised of one chief justice and four associate judges, the Rhode Island Supreme Court uses mandatory jurisdiction to decide all cases en banc.⁹⁹

According to Eisenberg and Miller’s 2009 study, in 2003, the Rhode Island Supreme Court decided 145 mandatory cases, reversing 16.6% of these cases.¹⁰⁰ This is extremely low compared to the national percentages: SSCs reversed 51.6% of discretionary cases, compared to 28.1% of mandatory cases.¹⁰¹ Dissent rates also had similar patterns: 26.7% of discretionary cases generated at least one dissenting opinion, compared to 18.8% for mandatory cases.¹⁰² As their study points out, this may be suggestive of the fact that the Rhode Island Supreme Court has mandatory jurisdiction to hear cases.

Between 2005–2009, the Rhode Island Supreme Court decided 734 cases.¹⁰³ Of the total number of opinions filed, thirty-one dissenting opinions and seven concurring opinions appeared in the court’s total caseload.¹⁰⁴ A total of thirty-six dissenting *votes* were cast during this time period. While the percentage has risen slightly since 2005, only 4% of cases still contain a dissenting

⁹⁶ *Id.* at 175.

⁹⁷ Eisenberg & Miller, *supra* note 6, at 1452.

⁹⁸ Victor E. Flango & Carol R. Flango, *A Taxonomy of Appellate Court Organization, CASELOAD HIGHLIGHTS, July 1997, available at* http://www.ncsconline.org/d_research/CSP/Highlights/Vol3No1Taxom.pdf.

⁹⁹ *Id.*

¹⁰⁰ See Eisenberg & Miller, *supra* note 6, at 1471.

¹⁰¹ *Id.* at 1452.

¹⁰² *Id.*

¹⁰³ This calculation was determined through an addition of the Rhode Island Supreme Court cases that appeared in the Westlaw database “Rhode Island Cases” (“RI-CS”) from 2005–2009. See Appendix B.

¹⁰⁴ See Appendix B. A list of all Rhode Island Supreme Court from 2005–2009 containing a dissent or dissenting opinion can be located through the following Westlaw search of the Rhode Island Cases database (“RI-CS”): “supreme court of rhode island” & dissent! & da(aft 12/31/2004 & bef 1/1/2010).

opinion.¹⁰⁵ However, in analyzing¹⁰⁶ the total number of *votes*, not cases, collectively cast by the justices of the Rhode Island Supreme Court during 2005–2009, dissenting votes make up only 1.24% of the total votes cast by the Rhode Island Supreme Court justices.¹⁰⁷ In terms of reversal for 2005–2009, the Rhode Island Supreme Court also comes in with an incredibly low rate of only 8.4%.¹⁰⁸

While many high court studies involve a detailed analysis of the individual voting trends of each of the justices of the high court under study, this study is primarily focused upon the judicial restraint employed by the Court as a whole. In addition, the “well-integrated system” of the Rhode Island Supreme Court places less significance upon the need to study the individual trends of each of the justices and more significance on the collective voting patterns of the Court. Furthermore, when a Court has an infrequent percentage of dissent among justices, as does the Rhode Island Supreme Court, this is generally a stronger characteristic of a court as a whole, as is the case in Rhode Island, rather than the individual justices,¹⁰⁹ another reason to focus more heavily upon the Court’s collective voting patterns as a whole. For the purpose of completely educating the reader, only a brief biography and discussion of the individual voting trends of each justice is included.

B. Individual Justices

Chief Justice Paul Suttell was appointed to the Rhode Island Supreme Court in 2003 by Republican Governor Donald Carcieri.¹¹⁰

¹⁰⁵ See Appendix B.

¹⁰⁶ Based upon the data provided by Westlaw Judicial Reports, there were ninety-one occurrences when one of the justices of the Rhode Island Supreme Court did not cast a vote in a case between 2005–2009. Source: a comparison of each case listed in the Westlaw Judicial Reversal Reports, Document List (January 2005–January 2010) belonging to each justice. Based upon the Judicial Reversal Reports, there were a total of 2623 votes collectively cast during this period (Suttell: 527; Goldberg: 517; Robinson: 525; Flaherty: 524; Williams: 530). See Appendix C. Therefore, in only 3.5% of the cases have four of the justices cast a vote; whereas in 96.5% of the cases, all five justices cast a vote. Applying these percentages to the 734 total cases decided during 2005–2009, in twenty-six cases four votes were cast and in approximately 708 cases five votes cast, for an approximate *3,644 total votes* cast by the justices of the Rhode Island Supreme Court between 2005–2009.

¹⁰⁷ See Appendix A and Appendix B. Percentage determined by dividing the total number of dissenting votes (36) by the total number of votes cast (2,901) during 2005–2009.

¹⁰⁸ See Appendix C. Caseload statistics in Appendix C were gathered through Westlaw Judicial Reports for 2005–2009, which only include cases in which the lower court is identified.

¹⁰⁹ *Id.* at 181.

¹¹⁰ Press Release, State of Rhode Island Office of the Governor, Carcieri Swears in Paul

In 2009, the governor elevated him to chief justice.¹¹¹ Justice Suttell has been “[d]escribed widely as a fair-minded, kind judge with a sharp intellect and humble nature”¹¹² His judicial philosophy is to “administer justice without respect to personage and with equal rights to the poor and the rich.”¹¹³ Justice Suttell only files a dissent in 0.9% of the cases that comes before the court, and has voted in cases that are reversed in 7.9% of the time.

Justice Maureen Goldberg was appointed justice in 1997 by Governor Almond. Justice Goldberg has stated that the court’s advisory responsibilities, “or advisory opinion responsibilities,” where the court has the authority to steer away from strict judicial restraint and employ some form of personal opinion, “are some of the most difficult that confront the members of my court.”¹¹⁴ Goldberg has filed *or* joined in no more than two total dissents each year since 2005. Her dissents appear in less than 0.7% of the court’s total caseload, easily making her the justice who dissents less than any other.¹¹⁵ Justice Goldberg participates in cases that are reversed 8% of the time.

Justice William Robinson was appointed to the Rhode Island Supreme Court in 2004 by Governor Carcieri. Former Chief Justice Frank J. Williams has described Justice Robinson as an individual with “an almost bulldog tenacity in grappling with the issues.”¹¹⁶ Justice Robinson has the second highest dissenting rate, after Justice Flaherty, filing a dissent in 1.2% of the Court’s opinions. Justice Robinson’s reversal rate is 9%.

Justice Francis Flaherty, appointed to the Rhode Island Supreme Court in 2003 by Governor Carcieri, dissents more than any other justice of the Rhode Island Supreme Court.¹¹⁷ However, this fact is not equivalent to a large amount of dissents, as he still files or joins

Suttell as Supreme Court Justice (July 9, 2003), *available at* <http://www.ri.gov/GOVERNOR/view.php?id=314>.

¹¹¹ Kate Mulvaney, *Suttell Confirmed as RI’s Chief Justice*, PROVIDENCE J., June 25, 2009, *available at* <http://newsblog.projo.com/2009/06/suttell-to-take.html>.

¹¹² *Id.* In particular, Governor Carcieri noted that “[t]hroughout his years as an Associate Justice of the Family Court, Paul has exhibited his substantive knowledge of the law, his steadfast commitment to presiding in a just and measured way and his unequaled depth of compassion.” Carcieri Swears in Paul Suttell as Supreme Court Justice, *supra* note 110.

¹¹³ Jim Baron, *Suttell Sworn in as Chief Justice*, PAWTUCKET TIMES, July 17, 2009, *available at* <http://www.pawtuckettimes.com/content/view/90663/76/>.

¹¹⁴ Goldberg, *supra* note 1, at 605.

¹¹⁵ See Appendix B.

¹¹⁶ Edward Fitzpatrick, *Carcieri Nominates Lawyer Robinson to Supreme Court*, PROVIDENCE J., May 28, 2004, *available at* http://www.projo.com/news/content/projo_20040528_judge28.3280bf.html.

¹¹⁷ See Appendix C.

in a dissent in only 1.9% of the cases that come before the Rhode Island Supreme Court. Justice Flaherty participates in cases that are reversed in 8.5% of the time.

For each of the four justices of the Rhode Island Supreme Court, there are only a handful of dissents issued in the past five years. No justice has written or joined in a dissenting opinion in any significantly higher number than any other justice. Therefore, the dissenting rates of the justices cannot truly be used as support to show any judge's personal preference in favor of judicial activism and employment of public policy considerations over strict adherence to constitutional provisions, or vice versa, that each justice could possibly employ. Instead, such a low dissenting rate, a low reversal rate, and nearly similar percentages for each judge is proof that the Court is a strongly integrated system.

V. JUDICIAL RESTRAINT IN THE COURT'S CASELOAD

A. *The Lead-Based Paint Case*¹¹⁸

In this landmark lawsuit, former Attorney General of the state of Rhode Island filed suit against various former lead pigment manufacturers and the Lead Industries Association.¹¹⁹ Similar suits had previously failed in Wisconsin, Missouri, Ohio and New Jersey¹²⁰ when Motley Rice LLC, a Rhode Island plaintiff's litigation firm,¹²¹ convinced former Rhode Island Attorney General Sheldon Whitehouse to hire the firm on a contingency fee.¹²² Motley was successful, and the first state-backed case over lead-based paint was brought before the Rhode Island Supreme Court in 1999.¹²³ One of the attorneys at Motley Rice had conceived the idea of using a public nuisance claim against the lead-based paint manufacturing companies, essentially "redefining the controversy as an on-going

¹¹⁸ State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 434 (R.I. 2008).

¹¹⁹ *Id.*

¹²⁰ John O'Brien, *Court Costs Debated in Landmark Lead Paint Suit*, LEGALNEWSLINE, Aug. 8, 2008, <http://www.legalnewsline.com/news/214739-court-costs-debated-in-landmark-lead-paint-suit>.

¹²¹ Motley Rice Firm Profile, <http://www.motleyrice.com/info/firm-profile> (last visited Mar. 21, 2010).

¹²² John O'Brien, *Lead Poisoning at New Low in Rhode Island*, LEGALNEWSLINE, Apr. 28, 2008, <http://www.legalnewsline.com/news/211554-lead-poisoning-at-new-low-in-rhode-island>.

¹²³ John O'Brien, *After Nearly a Decade, Public Nuisance Issue Finally Brought Before R.I. SC*, LEGALNEWSLINE, May 15, 2008, <http://www.legalnewsline.com/news/212412-after-nearly-a-decade-public-nuisance-issue-finally-brought-before-r.i.-sc>.

nuisance”¹²⁴ as an effective way around certain defenses, such as the statute of limitations, that would likely have barred a products liability claim. The first trial resulted in a mistrial, but the second became the longest civil jury trial in Rhode Island history.¹²⁵

After a seven-year battle, Rhode Island’s plaintiffs found themselves victorious against the former manufacturers of lead-based paint Sherwin-Williams, NL Industries, ConAgra Grocery Products and Millennium Holdings.¹²⁶ But their victory was short-lived. On July 1, 2008, the Rhode Island Supreme Court reversed the 2006 superior court decision, vacating the judgment and holding that the defendants were entitled to judgment as a matter of law.¹²⁷

Of note was Justice Maureen McKenna Goldberg’s recusal of herself from the case. Former Chief Justice Frank Williams, however, was quoted as saying that this case was precisely the type “that the public should see.”¹²⁸ And, in a unanimous decision authored by the former chief justice himself, the court reiterated its strong commitment to judicial restraint.

Using “principles of judicial restraint and a respect for the policy making prerogative of the legislature,”¹²⁹ the court held that the State could not allege sufficient facts to state a common law claim for public nuisance against the lead-paint manufacturers.¹³⁰ In particular, the court stated that “the public nuisance claim should have been dismissed at the outset because the state . . . [could not] allege that defendants’ conduct interfered with a public right or that the defendants were in control of lead pigment at the time it caused harm to children in Rhode Island.”¹³¹ The court based its decision on two primary factors: “1) although the manufacturers placed lead pigment into the stream of commerce, they did not control it at the time it harmed the children; and 2) that harm did not constitute an interference with a public right for purposes of a common law public

¹²⁴ Res Ipsa Loquitur, <http://jonathanturley.org/2008/07/01/rhode-island-lead-paint-case-reversed/> (last visited July 1, 2008).

¹²⁵ See *State v. Lead Indus. Ass’n, Inc.*, 951 A.2d 428, 434 (R.I. 2008) (citing Peter B. Lord, *Jurors in Lead-Paint Trial Say They’re Proud of Verdict*, PROVIDENCE J., Mar. 12, 2006, at B1, available at http://www.projo.com/news/content/projo_20060312_jury12.348f26f.html).

¹²⁶ *State v. Lead Indus. Ass’n, Inc.*, No. PC 99-5226, 2007 WL 711824 (R.I. Super. Ct. Feb. 26, 2007).

¹²⁷ *Lead Indus. Ass’n, Inc.*, 951 A.2d at 443.

¹²⁸ O’Brien, *supra* note 123.

¹²⁹ Thomas R. Bender, *State of Rhode Island v. Lead Industries Association*, NUISANCE LAW, <http://www.nuisancelaw.com/court-decisions/rhode-island-supreme-court-2008>.

¹³⁰ See *Lead Indus. Ass’n, Inc.*, 951 A.2d at 443.

¹³¹ *Id.* at 443.

2010]

The Tough Little Bunch

1627

nuisance.”¹³²

The court defended its decision in failing to provide a remedy for the harmed children by acknowledging its duty to practice judicial restraint. The court stated:

This Court is bound by the law and can provide justice only to the extent that the law allows. Law consists for the most part of enactments that the General Assembly provides to us, whereas justice extends farther. Justice is based on the relationship among people, but it must be based upon the rule of law. This Court is powerless to fashion independently a cause of action that would achieve the justice that these children deserve.¹³³

Quoting the late United States Supreme Court Justice Benjamin N. Cardozo, the court essentially summarized their views on the inherent limitations of the judicial role as follows:

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to “the primordial necessity of order in the social life.”¹³⁴

The court bolstered its decision with the words of another United States Supreme Court judge, Chief Justice John G. Roberts, Jr., quoting “judges must be constantly aware that their role, while important, is limited. They do not have a commission to solve society’s problems, as they see them, but simply to decide cases before them according to the rule of law.”¹³⁵

The court went on to hold that “[i]n recognition of this philosophy, we consistently have adhered to principles of judicial restraint that

¹³² Bender, *supra* note 129.

¹³³ *Lead Indus. Ass’n, Inc.*, 951 A.2d at 436. The Court stated in a footnote that “[l]aw consists not only of legislative enactments, but also of certain principles, norms, and causes of action that have evolved over centuries as ‘the common law.’” *Id.* at 436 n.4.

¹³⁴ Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921) (quoting François Géný, *Méthode d’Interprétation et Sources en droit privé positif*, vol. II, p. 303, sec. 200, ed. 1919; transl. Modern Legal Philosophy Series).

¹³⁵ *Lead Indus. Ass’n, Inc.*, 951 A.2d at 436 (quoting *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing on S. 109-158 Before the S. Comm. on the Judiciary*, 109th Cong. 66 (2005) (statement of Hon. John G. Roberts, Jr., United States Supreme Court Justice)).

prevent courts from creating a cause of action for damages in all but the most extreme circumstances.”¹³⁶ Indeed, the court had long held “that the creation of new causes of action is a legislative function.”¹³⁷

The court made it clear that they were enforcing the traditional standard of public nuisance, and that a public nuisance must be one that affects the “interest common to the general public, rather than peculiar to one individual, or several.”¹³⁸ The case classically exemplified the traditional judicial restraint of the court.

In addition, the court stated that it was “cognizant of the fact that the common law is a knowable judicial corpus and, as such, serves the important social value of stability; [and] although the common law does evolve, that evolution takes place gradually and incrementally and usually in a direction that can be predicted.”¹³⁹ “After all, the judiciary’s ‘duty [is] to determine the law, not to make the law.’”¹⁴⁰ “To do otherwise, even if based on sound policy and the best of intentions, would be to substitute our will for that of a body democratically elected by the citizens of this state and to overplay our proper role in the theater of Rhode Island government.”¹⁴¹ *State v. Lead Industrial Association* is likely the strongest display of the court’s adherence for the principle of judicial restraint in its recent caseload.

B. Chambers v. Ormiston¹⁴²

In May of 2004, Rhode Island residents Margaret Chambers and Cassandra Ormiston took a trip to Massachusetts and applied for a marriage license.¹⁴³ The same-sex couple was promptly married and soon returned to Rhode Island where they resided with each other until they wished to dissolve their marriage in 2006.¹⁴⁴ The women brought their claim to Rhode Island Family Court, which referred the case to the Rhode Island Supreme Court to determine if

¹³⁶ *Lead Indus. Ass’n, Inc.*, 951 A.2d at 436 (quoting *Bandoni v. State*, 715 A.2d 580, 595 (R.I. 1998) (quotations omitted)).

¹³⁷ *Id.* at 436 (quoting *Accent Store Design, Inc. v. Marathon House*, 67 A.2d 1223, 1226 (R.I. 1996)).

¹³⁸ *Lead Indus. Ass’n, Inc.*, 951 A.2d at 447.

¹³⁹ *Id.* at 445 (citation omitted).

¹⁴⁰ *Id.* at 436 (quoting *City of Pawtucket v. Sundlun*, 662 A.2d 40, 57 (R.I. 1995)).

¹⁴¹ *Lead Indus. Ass’n, Inc.*, 951 A.2d at 436 (quoting *DeSantis v. Prella*, 891 A.2d 873, 881 (R.I. 2006)).

¹⁴² *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007).

¹⁴³ *Id.* at 958.

¹⁴⁴ *Id.* at 958–59.

family court had proper subject matter jurisdiction to grant the petition for divorce of a same-sex couple legally married under the laws of another state.¹⁴⁵

Basing its entire decision on the interpretation of the word “marriage” within the context of Rhode Island’s divorce jurisdiction statute, Justice Robinson, writing for the “majority,”¹⁴⁶ held that the Rhode Island Family Court could not recognize marriage “for the purpose of entertaining the divorce petition”¹⁴⁷ between a same-sex couple.¹⁴⁸ Once again applying judicial restraint and giving the utmost deference to the legislature, the court affirmed that the role of the judiciary in interpreting the original intent of a statute is to determine the meaning of a word contemporaneous with the time the statute was enacted.¹⁴⁹

The court looked to the original intent of the statute, and interpreted the ordinary meaning of “marriage” at the time of the statute’s enactment in 1961. The court determined that the statute was unambiguous and therefore looked to legislative intent and various dictionaries published or revised around 1961. These sources indicated or referred to “marriage” as the union between a man and a woman. Therefore, the court concluded that the family court lacked jurisdiction to entertain the divorce petition.¹⁵⁰

Chief Justice Suttell, however, joined by Justice Goldberg, issued a strong dissent.¹⁵¹ Before he did so, however, he was ever careful to preface his decision with a disclaimer that his opinion was not an attempt to detract from the strong deference that is always to be afforded to the legislature:

We are in complete agreement with the majority on one

¹⁴⁵ *Id.* at 959.

¹⁴⁶ Justice Robinson wrote the opinion for the Court, and was joined by Justice Flaherty and former Chief Justice Williams; Justice Suttell dissented and filed opinion in which Justice Goldberg joined. *See id.*

¹⁴⁷ Danielle Johnson, Comment, *Same-Sex Divorce Jurisdiction: A Critical Analysis of Chambers v. Ormiston and Why Divorce Is an Incident of Marriage That Should Be Uniformly Recognized Throughout the States*, 50 SANTA CLARA L. REV. 225, 242 (2010).

¹⁴⁸ *Chambers*, 935 A.2d at 967 (“We conclude that the word ‘marriage,’ in . . . the statute which empowers the Family Court ‘to hear and determine all petitions for divorce from the bond of marriage,’ was not intended by the General Assembly to empower the Family Court to hear and determine petitions for divorce involving . . . ‘two persons of the same sex who were purportedly married in another state.’”).

¹⁴⁹ *Id.* at 965. In a footnote, the court added: “In one of his most quoted opinions, Justice Holmes wrote: ‘A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances *and the time in which it is used.*’” *Id.* at 962 n.8 (quoting *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (citation omitted)).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 967.

critical point, however. The legal recognition that ought to be afforded same-sex marriages for any particular purpose is fundamentally a question of public policy, more appropriately determined by the General Assembly after full and robust public debate. If the courts are called upon to resolve any issue involving the validity of such a marriage, they must, of course, do so, but only when presented with an actual controversy by parties having adverse interests.¹⁵²

Chief Justice Suttell, broadly interpreting the jurisdictional statute, then explained how he believed that the Rhode Island statutory law did not bar the family court from making a judicial decision as to the marital status of the couple because “the family court could entertain a divorce petition of a same-sex couple even without assessing the underlying validity of the marriage in Rhode Island.”¹⁵³ He explained how family court had jurisdiction to hear the divorce petition, whether or not the marriage was legally valid in Rhode Island, as the parties were otherwise validly married under Massachusetts’ law.¹⁵⁴ Chief Justice Suttell “criticized the majority for employing such formal rules of interpretation,”¹⁵⁵ and analyzed the broad objectives of the statute and “common sense of the situation” to conclude that the legislators at the time of the enactment of the statute would have intended to provide to all Rhode Island citizens “a comprehensive forum for resolving issues concerning marital relations.”¹⁵⁶

C. *State v. Faria*¹⁵⁷

State v. Faria involved a defendant who claimed that a particular Rhode Island felon/non-felon classification left felons unfairly exposed to social stigma and economic disability. Defendant Faria was arrested and charged with two counts of unlawful possession of a controlled substance.¹⁵⁸ Upon discovering that the drugs in the car were prescription drugs that a disabled friend had left behind,

¹⁵² *Id.* (Suttell, J., dissenting) (citing *Devane v. Devane*, 581 A.2d 264, 265 (R.I. 1990) (“[C]ourts exist for the purpose of deciding live disputes involving ‘flesh and blood’ legal problems with data ‘relevant and adequate to an informed judgment’” (citation omitted))).

¹⁵³ Goldberg, *supra* note 1, at 607 n.49.

¹⁵⁴ See Johnson, Comment, *supra* note 147, at 243.

¹⁵⁵ *Id.*

¹⁵⁶ *Chambers*, 935 A.2d at 971, 973–74 (Suttell, J., dissenting).

¹⁵⁷ 947 A.2d 863 (R.I. 2008).

¹⁵⁸ *Id.* at 864.

the charges were dropped.¹⁵⁹ Relying upon sections 12-1-12 and 12-1-12.1 of the Rhode Island General Laws, the defendant moved to have all the records relating to the charges destroyed.¹⁶⁰ Both sections “allow for the destruction of certain police records and the sealing of court records, but neither section permits relief for persons previously convicted of a felony offense.”¹⁶¹ Defendant Faria had a prior felony, and protested that the statutes violated his equal protection and “unconstitutionally discriminate against persons with previous felony convictions because such classification bears no reasonable relationship to the public health, welfare, or safety.”¹⁶²

The state argued in response that such a classification can promote the “state’s interest in effective law enforcement,”¹⁶³ namely identification of criminal activity patterns and the apprehension of suspects.¹⁶⁴ The district court, in applying a rational basis review, which they referred to as a “relaxed standard” and “easily satisfied,”¹⁶⁵ could not find any conceivable, rational basis between to distinguish between felons and non-felons in sections 12-1-12 and 12-1-12.1.¹⁶⁶ The court reached this conclusion by determining that the “criminal justice system and law enforcement personnel should not accord any relevance to an arrest record or charge when it later [was] judicially determined to have been improperly brought or to be without evidentiary support.”¹⁶⁷ In addition, the lower court believed such classifications “would lead to confusion and mistakes”¹⁶⁸ and that refusing to allow a previously convicted felon to have his news records sealed or destroyed was meaningless in light of the fact that the previous felony might be completely unrelated to a new charge.¹⁶⁹

Chief Justice Suttell, writing for the majority, refrained from any similar social arguments, and instead conducted “a sober calculation of the judicial standard requiring that the Court defer to the General Assembly’s power to make rational determinations

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 865.

¹⁶² *Id.*

¹⁶³ *Faria*, 947 A.2d at 868.

¹⁶⁴ *Id.* at 865.

¹⁶⁵ *Id.* at 866.

¹⁶⁶ *Id.* at 866–67.

¹⁶⁷ *Id.* at 866.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

aimed at solving legitimate social problems.”¹⁷⁰ As neither the state nor defendant claimed that a fundamental right was at stake, nor was a suspect class of persons involved, the supreme court confirmed the district court’s determination that the legislation is therefore properly analyzed under a minimal scrutiny test.¹⁷¹ However, the supreme court ended up at a completely different conclusion than the lower court, stating that “the proper inquiry is not whether this *Court* can find a rational basis for the statute, but whether “*the General Assembly* rationally could conclude that the legislation would resolve a legitimate problem.”¹⁷²

As one commentator has suggested, the “decision is most remarkable for an absence of remarkableness.”¹⁷³ While “each component of the Court’s rationale and holding is tightened into place within the pre-drilled and defined narrows of stare decisis,”¹⁷⁴ the decision is significant in terms of once again emphasizing the court’s commitment to judicial restraint and at clear avoidance of an attempt at judicial activism.

Following the timeworn adage that it is better to measure twice and cut once, the court cites to sister state models demonstrating judicial restraint in relation to the fulfillment of the separation of powers principle. The Rhode Island Supreme Court cites favorably to Louisiana and Georgia Supreme Court decisions that illustrate how the minimal-scrutiny test operates when operating well. It is a measure that implies great deference to the legislature’s prerogative in applying its discretion; it is a measure that respects the unique position of the elected legislature as the truest and nearest implementer of the will of the citizenry in matters that do not implicate the Constitution.¹⁷⁵

While the decision provides no dicta, and could easily be classified as unremarkable, *State v. Faria* is a classic Rhode Island Supreme Court example of a “model of the workmanlike self-restraint that underscores principled, unassuming adherence to the separation of powers doctrine.”¹⁷⁶

¹⁷⁰ See Brian Fielding, *2008 Survey of Rhode Island Law: Constitutional Law*, 14 ROGER WILLIAMS U. L. REV. 402, 408 (2009).

¹⁷¹ *Faria*, 947 A.2d at 868.

¹⁷² *Id.* at 868 (quoting *Mackie v. State*, 936 A.2d 588, 596 (R.I. 2007)).

¹⁷³ Fielding, *supra* note 170, at 408–09.

¹⁷⁴ *Id.* at 408.

¹⁷⁵ *Id.* at 409.

¹⁷⁶ *Id.*

2010]

The Tough Little Bunch

1633

*D. Bandoni v. State*¹⁷⁷

While *Bandoni* was decided in 1998, and this study is focused upon the jurisprudence of the Rhode Island Supreme Court from 2005–2009, the principles cited in the two opinions in *Bandoni* are still important to note for the purposes of accessing the jurisprudence of the court, and particularly in regards to how far the Rhode Island Supreme Court has gone in applying judicial restraint. In addition, the majority opinion was written by Justice Goldberg, a current member of the court.

The Bandonis were riding their motorcycle on the evening of August 1, 1992, when they were hit by a drunk driver. A few days later, they were assured by the police that they would be informed of the impending criminal case against the driver. However, the case was decided completely without their knowledge. The Bandonis subsequently sued “asserting that had they been advised of Richardson’s court dates, they would have, inter alia, objected to the plea bargain and requested restitution from Richardson.”¹⁷⁸ Their suit was denied, and “[o]n appeal the Bandonis proceed[ed] under both negligence and constitutional deprivation theories to recover monetary damages for defendants’ failure to notify them of their rights as crime victims.”¹⁷⁹

The court held that principles of judicial restraint prevented them from finding a cause of action based in negligence, since there was no existing duty at common law to notify victims of their rights, in addition to the fact that the legislature had failed to provide for civil liability in situations such as this.¹⁸⁰ The court stated that “the function of adjusting remedies to rights is a legislative responsibility rather than a judicial task.”¹⁸¹ As in *State v. Lead Industrial Association*, the court emphasized that only the legislature could create a private cause of action, in this case one for failure to notify victims of their rights.¹⁸²

In examining the second claim of a constitutional tort, the court

¹⁷⁷ 715 A.2d 580 (1998).

¹⁷⁸ *Id.* at 583.

¹⁷⁹ *Id.*

¹⁸⁰ See Shannon M. Garvey, *Survey Section: Constitutional Law: Bandoni v. State*, 715 A.2d 580 (R.I. 1998), 4 ROGER WILLIAMS U. L. REV. 621, 621 (1999); see also *Bandoni*, 715 A.2d at 585 (“Therefore, whatever the merits of the Bandoni’s claim may be, we are of the opinion that principles of judicial restraint prevent us from creating a cause of action where a duty to apprise crime victims of their rights did not exist at common law and where our Legislature has neither by express terms nor by implication provided for civil liability.”).

¹⁸¹ *Bandoni*, 715 A.2d at 596.

¹⁸² *Id.* at 594.

held that a “cause of action could not be derived from the amendment itself, due to the fact that it is overly broad and does not enumerate ways that victim’s rights can be enforced.”¹⁸³ Reading the plain language of the amendment, “[t]he Court found that the amendment merely enumerated general principles, not a specific right or ways to protect or enforce that right, thus the amendment was not self-executing.”¹⁸⁴ The court ultimately refused to address the issue of whether there exists a cause of action for damages stemming from the victims’ rights amendment, thereby precluding the Bandonis of any remedy for the violation of their rights.

A poignant dissent by former Justice Flanders¹⁸⁵ began with the following ominous words: “This is a dark day for state constitutional law and judicial independence in Rhode Island. For crime victims in particular, this day will doubtless live in legal infamy.”¹⁸⁶ Justice Flanders “advanced the theory that specific rights, enumerated in the constitution, such as those in the Victims’ Bill of Rights, should be judicially enforced, absent an ‘express textual negation’ within the body.”¹⁸⁷ Such judicial enforcement, in Justice Flanders’ opinion, included a remedy for the violation of these rights. The failure of the legislature to create a cause of action was not an excuse for the court to fail to uphold a fundamental right.¹⁸⁸ Believing that the Victims’ Bill of Rights *is* self-executing, Justice Flanders stated that the Bandonis had a fundamental right as crime victims to be afforded a remedy at the hands of the judiciary.¹⁸⁹

¹⁸³ Garvey, *supra* note 180, at 625.

¹⁸⁴ *Id.* at 625–26.

¹⁸⁵ Robert G. Flanders, Jr., a former associate justice of the Rhode Island Supreme Court (1996–2004), is a strong proponent of appellate court dissents. “[Q]uality dissents enhance rather than diminish the prestige of an appellate court.” Robert G. Flanders, Jr., *The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents are Valuable*, 4 ROGER WILLIAMS U. L. REV. 401, 415 (1999). “Especially here in Rhode Island, a state that was founded and nourished by an independent, contrary-minded breed of dissenters, we should cherish the institution of dissenting judicial opinions.” *Id.* at 417.

¹⁸⁶ *Id.* at 602.

¹⁸⁷ Garvey, *supra* note 180, at 627.

¹⁸⁸ “I take strong exception to the majority’s opinion, but not because it protests too much, persuades too little, and perturbs throughout, nor because of its hamfisted swipes at the dissent’s so-called ‘subjective considerations.’ Rather, what vexes me is the majority’s remarkable refusal to enforce the plain language of the victims’ rights amendment to our State Constitution.” *Id.* (Flanders, J., dissenting).

¹⁸⁹ Garvey, *supra* note 180, at 627.

VI. CONCLUSION

It is safe to say that Rhode Island Supreme Court has been permeated by consistent voting trends. The Court maintains a strict adherence to constitutional principles and strict deference to the legislature, particularly in the area of torts and individual rights.¹⁹⁰ The court's recent 2008 decision in *State of Rhode Island v. Lead Industries Association*¹⁹¹ once again firmly established this conclusion. By "dismissing the State's public nuisance complaint . . . the Court embraced a traditional, historic and defined view of a common law . . ." ¹⁹² By basing its decision upon "principles of judicial restraint and a respect for the policy making prerogative of the legislature, it refused to wholly transform the common law of public nuisance to address a public policy issue already comprehensively addressed by the legislature."¹⁹³ Such a holding was strongly consistent with the justices' commitment to judicial restraint.

The Rhode Island Supreme Court also continues to be a highly integrated system. "[D]espite Rhode Island's reputation and history as a haven for the contrary-minded," former Justice Flanders stated, "its highest court has largely functioned as a bastion of 'monolithic solidarity,' a trend that continues on the current court."¹⁹⁴ The low dissenting and reversal rate of the justices reflects this solidarity among the justices. Based upon this study, judicial restraint and deference to legislative intent, and the justices' clear understanding that their most important goal is to ensure the lower court applied the correct law, seem to enforce this strongly integrated system.

Other factors may also attribute to the current jurisprudence, voting patterns, and tightly integrated system of the Rhode Island Supreme Court. The internal cohesiveness of a small five-member court could easily play a large part in how the judges vote. The absence of cases posing major constitutional questions that could

¹⁹⁰ "[I]t is not the function of this Court to act as a super legislative body and rewrite or amend statutes already enacted by the General Assembly Therefore, whatever the merits of the Bandonis' claim may be, we are of the opinion that principles of judicial restraint prevent us from creating a cause of action where a duty to apprise crime victims of their rights did not exist at common law and where our Legislature has neither by express terms nor by implication provided for civil liability. *Bandoni*, 715 A.2d at 584–85.

¹⁹¹ *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008).

¹⁹² *Bender*, *supra* note 129.

¹⁹³ *Id.*

¹⁹⁴ *Flanders*, *supra* note 185, at 422–23.

produce divisiveness based on differing judicial philosophies may also play a part.

Political affiliations can be considered, but as stated, this study is not devoted to the analysis of the correlation between conservative judges and judicial restraint, and liberal judges and judicial activism. Each of the present justices is Republican, and this may well strengthen their commitment to judicial restraint; however, this may not have as great an effect, per se, as many studies have shown is the case with the United States Supreme Court, because the Rhode Island Supreme Court has long displayed a commitment to judicial restraint since its inception, spanning time periods and court eras consisting of judges of various political affiliations.

Of note is that because of the absence of an intermediate appellate court, the Rhode Island Supreme Court is not able to reduce or restrict the flow of case that it receives, as the United States Supreme Court and most other state high courts have an opportunity to do.¹⁹⁵ This causes a heavy workload and a wide variety of cases to come before the justices. Beiser reasoned in his analysis of the Rhode Island Supreme Court that the justices do not have as much time to write dissents as the justices of other high courts may.¹⁹⁶ "If you're going to dissent, you have to do it well,"¹⁹⁷ one former Rhode Island justice was quoted as saying. If dissenting is unusual, and agreement is the norm, a dissent then requires very careful justification.¹⁹⁸ While likely not always the conscious intent of the Court, this inevitably helps to strengthen the political integration of the Court as a whole.

In addition, former Justice Flanders acutely described what is many justices' feelings concerning dissents:

By and large, appellate judges feel the same way about the filing of dissenting opinions in their courts. They, too, dislike it. Instead of having to prepare and file a dissent, they would much prefer to join the majority and thus be on the prevailing side of an appeal. If an appellate judge's views about a case do not conform to those of his or her colleagues, then most such judges are amenable to reexamining their position to determine whether they should reconsider their initial judgments in light of their colleagues' contrary opinions. Thus, joining the majority is the best way for an

¹⁹⁵ Beiser, *supra* note 8, at 173.

¹⁹⁶ *Id.* at 175.

¹⁹⁷ *Id.* The particular justice remained anonymous in Beiser's study.

¹⁹⁸ *Id.*

appellate judge to avoid having to take on the burden and the risk of writing a dissent that may not, after all, represent the best resolution to any given case. And as for their colleagues filing dissents to the opinions that appellate judges have been assigned to prepare on behalf of the court, their attitude, not infrequently, can be summed up in one word: FAGEDDABOWDIT!¹⁹⁹

In addition, that the Rhode Island Supreme Court has mandatory jurisdiction and sits en banc could lead one to conclude, as Beiser suggested, that sheer time and energy restraints dictate the low dissenting rate among the justices.

Eisenberg and Miller's study showed in contrast to Beiser's study, however, that for recent civil and criminal discretionary and mandatory cases, there was no noticeable that pattern emerged in the relation between reversal rates and filings per SSC justice.²⁰⁰ Therefore, when comparing the Rhode Island Supreme Court to other state high courts, there is no concrete evidence that docket pressure drive reversal rates. In addition, the results are not different when combining state SSCs that sit in panels with those that always sit en banc, as does Rhode Island.²⁰¹

Most suggestive of all the evidence presented in this study, however, is that the Rhode Island Supreme Court voting trends are attributable to the harmony among the justices from their similar goals: their strong commitment to judicial restraint, and making sure the lower court applied the law. In determining if the appropriate law was applied, the justices always look to legislative intent. Perhaps this may be due to the history of an overpowering General Assembly in Rhode Island, which since the Rhode Island Supreme Court's inception has placed a damper on any judicial activism in which the Court might have engaged. The reasoning becomes circular, however, because as the Court continues to employ stare decisis, and rely upon prior decisions, they continue to enforce the principles judicial restraint, which were the very reason for such precedential outcomes.

While this study is only a small sampling of opinions of the Rhode Island Supreme Court, it still evokes a strong conclusion that each of these relatively new appointed members of the of the court will continue to practice and affirm the principles of judicial restraint.

¹⁹⁹ Flanders, *supra* note 185, at 401–02.

²⁰⁰ Eisenberg & Miller, *supra* note 6, at 1488.

²⁰¹ *Id.*

Even though an individual justice at times may veer away from judicial restraint, in particular such as Justice Suttell's dissent in *Bandoni*, where a sensitive individual right was involved, as a whole the Court is still strongly committed to practicing deference to the General Assembly's intent. Particularly in light of Rhode Island's history of such strong deference to the General Assembly, a continued tradition of similar jurisprudence by Rhode Island's Supreme Court justices seems especially certain. The more recent cases cited by this study of the Rhode Island Supreme Court have affirmed the commitment of the courts to follow the language of the Rhode Island Constitution rather than speculate upon what the authors of the constitutional provision might have intended, and to interpret the plain meaning of statutes, thereby leaving the People of Rhode Island the power to exercise their elective power and continue to allow only the legislature to determine any future changes.

2010]

The Tough Little Bunch

1639

APPENDIX A: Cases with a Dissenting and/or Concurring Opinion, 2005–2009				
Case	Citation	Dissent	Concurrence	Majority Holding
Vivieros v. Town of Middletown	973 A.2d 607 (R.I. 2009)	Robinson		Affirmed
Young v. Warwick	973 A.2d 553 (R.I. 2009)	Flaherty		Affirmed & dismissed
State v. Clark	974 A.2d 558 (R.I. 2009)	Robinson	Robinson	Vacated and remanded
Irons v. Rhode Island Ethics Com'm	973 A.2d 1124 (R.I. 2009).	Suttell		
Mumma v. Cumberland Farms	965 A.2d 437 (R.I. 2009)	Goldberg		Affirmed
State v. Huy	960 A.2d 550 (R.I. 2008)	Flaherty		Affirmed
City of Cranston v. Rhode Island Laborers' Dist. Council Local 1033	960 A.2d 529 (R.I. 2008)	Flaherty		Denied and Dismissed
State v. Barkmeyer	949 A.2d 984 (R.I. 2008)	Flaherty	Flaherty	Affirmed
State v. McCarthy	945 A.2d 318 (R.I. 2008)	Flaherty		Affirmed
State v. McManus	941 A.2d 222 (R.I. 2008)	Flaherty		Affirmed
Chambers v. Ormiston	935 A.2d 956 (R.I. 2007)	Suttell; Goldberg joined		Certified question answered

1640

Albany Law Review

[Vol. 73.4

Lamarque v. Fairbanks Capital Corp.	927 A.2d 753 (R.I. 2007)	Robinson		Affirmed
Horn v. Southern Union Co.	927 A.2d 292 (R.I. 2007)	Suttell; Flaherty joined		Question answered
State v. DiPetrillo	922 A.2d 124 (R.I. 2007)	Flaherty	Robinson	Affirmed in part; vacated in part; case remanded
New England Development, LLC v. Berg	913 A.2d 36 (R.I. 2007)	Goldberg	Goldberg	Affirmed
Riley v. Stone	900 A.2d 1087 (R.I. 2006)	Flaherty: dissented in part	Concurred in judgment	Affirmed
McGinity v. Pawtucket Mut. Ins. Co.	899 A.2d 504 (R.I. 2006)	Flaherty		Affirmed
Mead v. Papa Razzi	899 A.2d 437 (R.I. 2006)	Suttell		Affirmed
State v. Gardiner	895 A.2d 703 (R.I. 2006)	Flaherty: filed a dissenting opinion as to Part II-F	Flaherty: concurring in judgment	Affirmed
Barrett v. Barrett	894 A.2d 891 (R.I. 2006)	Robinson		Affirmed and Remanded
State v. Carvalho	892 A.2d 140 (R.I. 2006)	Flaherty		Affirmed
Town of Johnston v. Santilli	892 A.2d 123 (R.I. 2006)	Robinson		Reversed and Remanded

2010]

The Tough Little Bunch

1641

Marques v. Harvard Pilgrim Healthcare of New England, Inc.	883 A.2d 742 (R.I. 2005)	Robinson		Affirmed in part, reversed in part, and remanded
State v. Mohapatra	880 A.2d 802 (R.I. 2005)	Robinson	Robinson	Affirmed
Newport Realty Inc. v. Lynch	878 A.2d 1021 (R.I. 2005)	Flaherty	Flaherty	Reversed and Remanded
In re Court Order Dated October 22, 2003	886 A.2d 342 (R.I. 2005)	Goldberg	Goldberg: also concurred & joined in judgment	Order of Superior Court quashed.
McKenna v. Williams	874 A.2d 217 (R.I. 2005)	Suttell	Suttell: also concurred & joined in judgment	Decision quashed; case dismissed
Kells v. Town of Lincoln	874 A.2d 204 (R.I. 2005)	Robinson; Suttell joined	Robinson; Suttell joined	Affirmed
State v. Santos	870 A.2d 1029 (R.I. 2005)	Flaherty		Reversed
State, Dept. of Corrections v. Rhode Island Broth. of Correctional Officers	867 A.2d 823 (R.I. 2005)	Flaherty; Robinson joined		Reversed
D'Amico v. Johnston Partners	866 A.2d 1222 (R.I. 2005)	Goldberg; Suttell joined		Reversed and Remanded

1642

Albany Law Review

[Vol. 73.4

APPENDIX B²⁰²: Number of Appeals and Cases with a Dissent and/or Concurrence, 2005–2009					
Year	2005	2006	2007	2008	2009
Cases Appealed	171	162	129	124	148
Total Dissents Filed	9	7	5	5	5
Total Dissenting Votes ²⁰³	12	7	7	5	5
Suttell Dissents	3	1	2	0	1
Goldberg Dissents	2	0	2	0	1
Flaherty Dissents	3	4	2	5	1
Robinson Dissents	4	2	1	0	2
Concurrences Filed	6	2	2	1	1

²⁰² Appendix B was confirmed through an individual review of each of the cases from 2005–2009 that resulted from the following search of the Westlaw database “Rhode Island Cases” (“RI-CS”) (where “x” is the relevant year being searched from ‘05-’09): “supreme court of rhode island” & “r.i., 200x” & da(200x).

²⁰³ The number of dissents and concurrences includes those in which a justice authored or joined in an opinion.

2010]

The Tough Little Bunch

1643

**APPENDIX C: Appealed Decisions to Three Rhode Island
Supreme Court Justices, 2005–2009²⁰⁴**

Appeals of Decisions to Chief Justice Paul Suttell

Year	2005	2006	2007	2008	2009	Total
Affirmed	76	76	60	74	71	360
Vacated	13	10	9	8	11	48
Reversed	19	11	7	6	5	42
Affirmed in Part/ Reversed in Part	11	6	10	5	3	33
Affirmed & Remanded	3	4	2	1	4	13
Appeal Dismissed	2	0	0	3	2	7
Petition Denied	1	1	0	0	3	4
Remanded	2	0	1	0	1	4
Affirmed as Modified	0	1	0	0	0	1
Other	0	0	2	0	0	1
Affirmed/ Total Appealed	76/127	76/109	61/91	74/97	73/104	359/527
Subsequently Heard by the Supreme Court	0	0	0	0	0	0

Appeals of Decisions to Judge Maureen McKenna Goldberg

Year	2005	2006	2007	2008	2009	Total
Affirmed	80	78	60	71	71	360
Vacated	13	10	8	7	10	48
Reversed	17	11	6	5	3	42
Affirmed in Part/ Reversed in Part	10	6	11	3	3	33
Affirmed/ Remanded	2	4	2	1	4	13
Appeal Dismissed	2	0	0	3	2	7

²⁰⁴ Information in Appendix C was gathered through Westlaw Judicial Reports, and as such the report only includes information from appeals where the lower court judge is identified in the decision. Therefore, the total number of cases appealed to the Rhode Island Supreme Court is more accurately reflected in Appendix B. The information in Appendix C reflects the tendency of each justice to either appeal or reverse a lower court decision.

1644

Albany Law Review

[Vol. 73.4

Remanded	2	0	1	0	1	4
Petition Denied	1	0	0	0	3	4
Affirmed as Modified	0	1	0	0	0	1
Other	0	0	2	0	0	1
Affirmed/ Total Appealed	80/127	78/110	61/90	71/90	73/101	362/517
Subsequently Heard by the Supreme Court	0	0	0	0	0	0

Appeals of Decisions to Judge Francis X. Flaherty

Appealed Decisions	2005	2006	2007	2008	2009	Total
Affirmed	81	79	61	69	70	360
Reversed	19	11	7	6	5	48
Vacated	12	10	9	7	10	48
Affirmed in Part/ Reversed in Part	11	4	11	5	3	48
Affirmed & Remanded	3	4	2	1	4	14
Appeal Dismissed	2	0	0	3	1	6
Petition Denied	1	1	0	0	2	4
Remanded	2	2	0	1	0	4
Affirmed as Modified	0	1	0	0	0	1
Other	0	0	2	0	0	1
Affirmed/ Total Appealed	81/131	79/110	62/93	69/91	72/100	362/524
Subsequently Heard by the Supreme Court	0	0	0	0	0	0

Appeals of Decisions to Judge William P. Robinson III

Year	2005	2006	2007	2008	2009	Total
Affirmed	82	78	58	71	70	359
Vacated	13	11	9	8	11	52
Reversed	18	11	7	5	3	45
Affirmed in Part/	11	6	10	5	3	35

2010]

The Tough Little Bunch

1645

Reversed in Part						
Affirmed & Remanded	2	3	2	1	4	12
Appeal Dismissed	2	0	0	3	2	7
Petition Denied	1	1	0	0	3	5
Remanded	2	0	1	0	1	4
Affirmed as Modified	0	1	0	0	0	1
Other	0	0	2	0	0	1
Affirmed/ Total Appealed	82/131	78/111	59/89	71/93	72/102	361/525
Subsequently Heard by the Supreme Court	0	0	0	0	0	0

1646

Albany Law Review

[Vol. 73.4

Appendix D²⁰⁵: State Supreme Court Outcomes		
Outcome	Frequency	Percentage
Affirmed	3588	50.86
Affirmed in part and reversed in part	524	7.43
Affirmed in part, reversed in part, and vacated	11	0.16
Affirmed in part and vacated	114	1.62
Writ or petition denied	162	2.30
Writ or petition denied in part and granted in part	17	0.24
Writ or petition granted	153	2.17
Reversed	1947	27.60
Reversed and vacated	42	0.60
Vacated	299	4.24
Other, outcome not coded	198	2.81
Total	7055	100.00

²⁰⁵ The numbers in this chart were gathered from SSC Westlaw Opinions, 2003, and compiled by Theodore Eisenberg and Geoffrey P. Miller in their 2009 study of the reversal and dissent variability in state supreme courts, and used for the purpose of comparing the reversal and dissent rates of Rhode Island with the national average. *See* Eisenberg & Miller, *supra* note 6, at 1468.