

A NEW DIRECTION FOR THE WISCONSIN SUPREME COURT

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I am very grateful for the friendship and support of so many of the people in this room during the course of my service on the state and federal bench. I know all of you care very much about the rule of law and the role of the judiciary, and I appreciate that you follow developments in Wisconsin's judicial branch just as you follow and study the work of the governor and the state legislature. I have been asked this evening to briefly recap a lecture I delivered last spring at Marquette University Law School about the Wisconsin Supreme Court's new jurisprudential direction.¹

In the lecture I discussed five watershed cases from the court's 2004-2005 term that stand as hallmarks of the court's recent expansion of the scope and uses of its power. The cases spanned civil and criminal law, and presented questions of constitutional interpretation, tort liability, and the scope and proper use of the court's supervisory power. Considered individually, each of these cases represents a significant change in the law. Together, these five cases mark a dramatic shift in the court's jurisprudence, departing from some familiar and long-accepted principles that normally operate as con-



straints on the court's use of its power: the presumption that statutes are constitutional, judicial deference to legislative policy choices, respect for precedent and authoritative sources of legal interpretation, and the prudential institutional caution that counsels against imposing broad-brush judicial solutions to difficult social problems.

In *Ferdon v. Wisconsin Patients Compensation Fund*,² the court invalidated the statutory cap on noneconomic damages in medical malpractice cases, which had been adopted by the legislature some years earlier as part of a comprehensive reform of our medical malpractice law. To invalidate the statutory cap, the court had to rewrite the rational basis test for evaluating equal protection challenges to state statutes under the Wisconsin Constitution. Statutes are presumed to be constitutional, and ordinary "rational basis" review applies to statutes not implicating a fundamental right or creating a racial or other suspect classification. What this

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means is that a statute cannot be struck down as unconstitutional unless it is shown to be “patently arbitrary” with “no rational relationship to a legitimate government interest.” This is a hard test to flunk—and deliberately so, to guard against the court substituting its own policy preferences for those of the legislature.

But in *Ferdon* the court ramped up the rational basis test, calling it “rational basis with teeth” and “rational basis with bite,” and engaging in a more exacting inquiry into the relationship between the legislative means and ends. This heightened scrutiny conflicts with the separation of powers principle that it is the prerogative of the legislative branch to evaluate the effectiveness of statutory solutions to social problems, and to decide whether the inevitable trade-offs are acceptable and the allocation of economic burdens and benefits appropriate to the circumstances. What the court’s new “rational basis with teeth” standard does is transform judicial review into an exercise in political policy judgment, leaving more room for judicial displacement of legislative judgment.

In *Thomas v. Mallet*,³ the court’s most consequential common law decision in recent memory, the court extended a little-used common law innovation known as “risk contribution” theory to the lead-paint industry, allowing a childhood lead-paint claim to go to trial against lead-paint manufacturers despite the plaintiff’s inability to identify which manufacturers caused his injury. This altered a basic premise of our liability system: the requirement that a plaintiff prove that the defendant was at fault and caused his injury before liability attaches. As extended in *Thomas*, “risk contribution” theory relieves the plaintiff of the requirement of proving causation, allowing recovery against manufacturers not because of any specific factual link to the plaintiff’s injury but because each contributed to a general risk. The burden is placed on the manufacturer to prove that it did not produce or market lead paint during the relevant time period or in the relevant geographic marketplace. As a factual matter, this manufacturer burden of exculpation is nearly impossible to carry because the

court made it clear that the relevant time period is not the time period of the plaintiff’s exposure but the entire time period that the houses with lead paint *existed*—a period spanning nearly eight decades.

The court’s expansion of “risk contribution” theory basically operates as a form of collective tort liability untethered to any actual responsibility for the specific harm asserted, imposed by the judiciary as a matter of loss-distribution policy in response to a public health problem. It represents a major reordering of the purposes of our liability system—from adjudicating individual remedies for private civil wrongs to finding funding sources to address broad public policy problems. If the court goes further down this road and extends “risk contribution” theory to other industries, the *Thomas* case will have substantial implications for the stability and predictability of our liability system, and consequently, for the state’s economy.

In the criminal sphere, the court plunged into the so-called “new federalism” movement to arrive at expansive new interpretations of the state constitution’s self-incrimination and due process clauses. The “new federalism” invoked by the court derives from a famous 1977 *Harvard Law Review* article by United States Supreme Court Justice William Brennan,⁴ in which he implored the justices of state supreme courts to continue the Warren Court’s rights revolution under the auspices of state constitutional interpretation. Justice Brennan called on state supreme courts to “step into the breach” created by the emergence of a more conservative United States Supreme Court. The Wisconsin Supreme Court had long resisted this call; many of the court’s precedents held that in the absence of a meaningful difference in language, intent, or history, the state constitution’s Declaration of Rights should be interpreted in conformity with the United States Supreme Court’s interpretation of parallel provisions in the Bill of Rights. This is no longer the prevailing view on the court.

In *State v. Knapp*,⁵ the court adopted a new rule of state constitutional law requiring the

suppression of physical evidence derived from the failure of police to deliver *Miranda*⁶ warnings to a suspect in custody. The United States Supreme Court had held that suppression of physical evidence was not required in this situation; only a defendant's unwarned incriminatory statements implicated the right against self-incrimination. But the Wisconsin Supreme Court held that the Wisconsin Constitution required a more expansive interpretation in favor of the defendant. The court did not identify anything in the language, structure, or history of the state constitution that supported this more expansive interpretation, but essentially made a policy judgment that deterring *Miranda* violations by police required suppression. As a result, reliable physical evidence must now be excluded in criminal trials in Wisconsin courts as a remedy for a *Miranda* violation, even though *Miranda* warnings protect against self-incrimination and have nothing to do with the recovery and admissibility of physical evidence.

And in *State v. Dubose*,⁷ the court departed from the long-standing reliability standard for due process challenges to eyewitness identification evidence and fashioned a stricter rule of admissibility under the Wisconsin Constitution. The court was faced with a challenge to a common identification procedure known in police nomenclature as the "show up"—a one-on-one display of a suspect to a crime victim or eyewitness, usually soon after and at or near the scene of the crime. The court held that "show-up" identifications are inherently suggestive and will no longer be admissible in evidence unless the procedure was "necessary." The court cited certain social science studies that it said "confirmed" that eyewitness testimony is often "hopelessly unreliable." On the strength of these studies, the court abandoned the United States Supreme Court's standard for case-by-case

assessment of the reliability of eyewitness identifications and instead imposed a blanket rule excluding this entire category of identification evidence regardless of individualized reliability. The justification for the new rule was "new federalism"—the court's power to interpret the state constitution to "provide greater protections than its federal counterpart." In other words, the mere existence of the power justified its exercise.

Finally, in *In re Jerrell C.J.*,⁸ the court invoked its supervisory authority over the state court system to adopt a rule requiring law enforcement to electronically record all custodial interrogations of juveniles. This may be good interrogation policy, but the use of the court's supervisory authority to impose the rule was unprecedented. The state constitution vests the Supreme Court with "superintending and administrative authority over all courts," but never before had this power been interpreted so expansively—in essence, to permit the court to reach beyond supervision of the court system to regulate the practices and procedures of another branch of government. The court's majority tried

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to characterize the decision as merely controlling "the flow of evidence in state courts," but by this interpretation the court's superintending power is almost limitless, potentially extending to any law enforcement procedure designed to secure evidence for use in court.

These cases—and there were others in the court's 2005-2006 term, most notably the *Dairyland*⁹ case regarding Indian gaming—represent a highly aggressive mode of judging, hardly in keeping with the themes of judicial restraint and modesty that are preached and practiced elsewhere. The Wisconsin Supreme Court is vigorously asserting itself against the other branches of state government and demonstrating a strong preference for its own

judgment over that of the Wisconsin legislature or the United States Supreme Court. When the court decides cases on the basis of the state constitution (as several of these cases were), it is operating at peak power because legislative modification and further judicial review are impossible, and the constitution is difficult to amend. The court has also demonstrated a strong interest in devising and imposing its own solutions to what it perceives to be important public policy problems—civil and criminal—rather than deferring to the political process. And finally, the court has adopted a dismissive attitude toward the sources of legal interpretation generally thought to be most authoritative and objective: the language, structure, logic, and history of the law, and the court’s own precedents. Instead, long-standing legal standards are disregarded or rewritten at will, either by reference to less authoritative decisional resources—such as disputed social science research—or simply the court’s own subjective policy judgment and raw power to render a binding statewide decision.

The court’s new direction reflects a disinclination to acknowledge limits on the scope of judicial authority and competence and an unwillingness to be bound by the usual constraints on the use of judicial power. The court’s work is far-reaching, influencing not just the legal order but the political, social, and

economic future of this state. Judicial trends are difficult to halt, much less reverse. Time will tell whether the court will continue the extraordinary activism of its 2004-2005 term, will adjust its pace, or take a breather. But the court certainly has been throwing its weight around in the constitutional system, and that has consequences for the balance of power in Wisconsin.

Notes

1. See Diane S. Sykes, *Reflections on the Wisconsin Supreme Court*, 89 MARQ. L. REV. 723, 723-38 (2006). Judge Sykes’s Hallows Lecture was delivered at Marquette University on March 7, 2006.
2. *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440.
3. *Thomas ex rel. Gramling v. Mallet*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523.
4. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 489-504 (1977).
5. *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899.
6. *Miranda v. Arizona*, 384 U.S. 436 (1966).
7. *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582.
8. *In re Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110.
9. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408.