ACTIVIST VS. RESTRAINT
WHERE IS WISCONSIN'S COURT HEADED?

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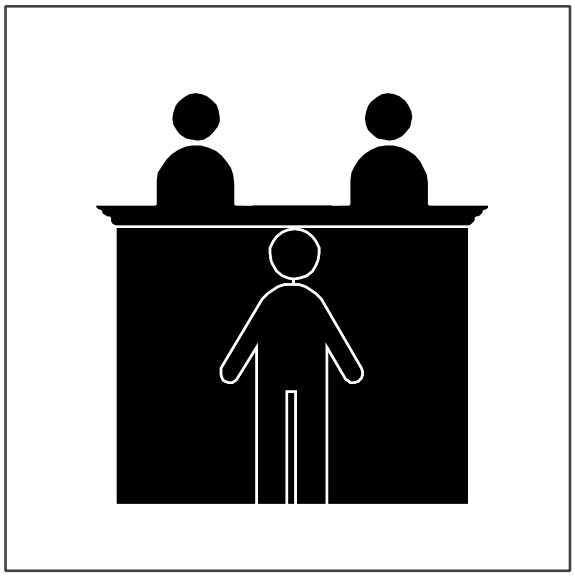

There are few terms more abused than "judicial activism" and "judicial restraint." Much of the public conversation regarding these terms presumes either a sharp dichotomy (activist judges do whatever they want, while restraintists simply follow clear legal instructions) or a complete absence of standards (all judges are activists).

Even the metaphors get tricky. During his confirmation hearing, Chief Justice John Roberts told the Senate Judiciary Committee that "[j]udges are like umpires. Umpires don't make the rules; they apply them . . . ."[1] Some of us, however, remember the story of three umpires (perhaps they were at a bar) who had very different views of their roles.

The first umpire claimed to call them as he sees them. The second says that he calls them as they are. The third—who may have held down a day job as a law professor at Yale—went one step further. "They are," he said, "nothing until I call them."

In attempting to understand judicial restraint, the first umpire has it right. Just as there are many pitches on which an umpire must make a judgment call, even judges practicing judicial restraint may differ on what the law means. But just as not all pitches can be either strikes or balls depending upon the whim of the umpire, the constitution and statutes cannot mean anything and ought not to be made to mean whatever we think is a good idea this morning. A good judge, like a good umpire, needs to believe that there is a strike zone and that it must be honored.

Few lawyers or judges would actually advocate judicial activism in the sense of explicitly urging that judges ignore the law and do whatever they want. Yet much of the popular criticism of "conservative" judges is based not on a claim that they get the law wrong, but that they are "unfeeling" or hand down decisions that are not "good" policy. These critics are likely to sympathize with that third umpire. For them, the strike zone is elastic. Perhaps laws cannot mean anything, but they can mean many things—so many things, it seems, that there is little to prevent judges from doing whatever they believe to be right.

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Characteristics of judicial restraint

While it is common to hear that one judge's activism is another's restraint, I believe that these terms, while lacking scientific precision and permitting lots of room for debate about how particular cases should be decided, do have meanings upon which reasonable people can agree.

A judge exercising restraint must act on external and legitimate sources of authority. Judicial restraint, for our purposes, is the notion that judges ought to base their decisions upon a source of authority that is outside of themselves and their own notions of the just. More fundamentally, this source should be rooted, at some point, in the formal consent of the governed, as opposed to the judge's preferred political or moral philosophy. In other words, the exercise of judicial authority ought to be based upon, or fairly inferable from, some language in the constitution or statutes.

This view of the judicial function is implicit in our system of government. A nation certainly could choose to be governed by tribunals of wise men and women who would consider arguments, discern the just and rule. But we have not done so.

Rather, we have chosen a democratic form of government with checks and balances largely implemented through a separation of powers. Having made that choice, who gets to decide an issue becomes just as important as what is decided. We have given judges the final say on what the law means because they do not get to say what the law is.

Sticking to the interpretation of laws that are made by others is vital not only to the maintenance of democracy, but to the very notion of judicial independence. If judges come to be another set of political actors—deciding which set of policies are best—there is no compelling reason to regard their decisions as final or to respect their independence from the political fray.

A judge must believe that rules mean something. Judges who seek to exercise restraint will tend to adopt techniques of construction that confine, rather than expand their discretion. They will be less likely to adopt indeterminate meanings for legal terms or to construe them through the use of multi-part "tests" that can, in any given case, justify almost any result.

To use several commonplace illustrations, a judge committed to judicial restraint is unlikely to adopt Justice Anthony Kennedy's view that the right to choose whether to have an abortion is embedded in a broader constitutional right to "define one's own concept of existing, of meaning, of the universe and of the mystery of life." That doesn't help me to figure out how any particular case should be decided and it won't really help Justice Kennedy either. Stripped of the pretty language, it is a simply a warrant for him—and other judges—to do whatever seems right.

Judges practicing restraint will exhibit sensitivity for the role of other branches of government. They will refrain from overly detailed prescriptions to the executive and overweening reexamination of the policy choices of the legislature. They will not feel compelled to "solve problems" that the political branches have "ignored" or to "update" the statutes. They will be reluctant to base decisions upon judicial divination of the "will of the people"—something that is best left with the political branches.

But judicial activism is not synonymous with striking down statutes. Nor does restraint always require letting them stand. If a statute violates a constitutional command, then it is a form of activism, i.e., of making, rather than applying, the rules, to let it stand notwithstanding its inconsistency with the people's foundational document.

Judicial restraint is also not synonymous with following precedent. Once made, error is not immune from correction. Although notions of judicial restraint do not preclude overruling prior decisions, they do suggest a certain circumspection about doing so. A presumption of adherence to precedent not only serves as a further source of judicial discipline, but enhances predictability and strengthens the public perception of judicial legitimacy, serving the cause of judicial independence.

The Wisconsin Supreme Court: Moving in an activist direction?

Public commentary about the Wisconsin Supreme Court as "activist" began in earnest following the 2004-2005 term, the first following the resignation of Justice Sykes (appointed to the Seventh Circuit by President Bush) and her replacement by Justice Louis Butler. Milwaukee County Circuit Judge Michael Brennan wrote that the court's decisions raised "concern about the proper exercise of judicial authority under the state's constitution."[2] Susan Steingrass, a law professor at the University of Wisconsin, observed that "[i]t's an interesting court to watch now. Nothing's for sure"[3] The Dean of my law school, Joseph Kearney, observed that "[b]y any measure, this was an extraordinary year at the Wisconsin Supreme Court." According to Kearney, "[f]rom tort law to criminal law, the court was willing to depart from what had seemed to be settled approaches."

[T]he court has managed to transform two fairly straightforward and recently passed constitutional amendments in ways that are, at best, tangentially related to what the voters adopted.

Most dramatically, Judge Sykes, delivering the Tenth Annual Hallows lecture at Marquette University Law School, discerned "a dramatic shift in the court's jurisprudence, departing from some familiar and long-accepted principles that normally operate as constraints 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."[4]

Judicial activism on the Wisconsin Supreme Court

Departure from binding sources of authority. In recent years, the court has managed to transform two fairly straightforward and recently passed constitutional amendments in ways that are, at best, tangentially related to what the voters adopted.

In 1998, for example, the voters of Wisconsin amended the state constitution to guarantee "the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."[5] Since passage of the amendment, the court has struggled to pave this broad constitutional right in order to preserve Wisconsin's pre-existing statute which, in its own description, "completely ban[s] the carry of concealed weapons by all citizens in all circumstances," a circumstance that the court has characterized as "anomalous, if not unique."[6]

It certainly is anomalous if you want to save the statute from invalidation by what is a fairly clear constitutional command. Rather than conclude that the state's concealed carry law is unconstitutionally overbroad, the court has attempted to balance a citizen's interest in bearing firearms against the state's purpose in prohibiting concealed carry.

For example, in *State v. Fisher*,[7] the defendant was an owner of a tavern who kept a gun in his vehicle because he transported large amounts of cash after closing (although he was not doing this at the time of his arrest). The court continued its practice of reading the amendment's specified *examples* of a "lawful purpose" *as limitations* on the broad right

enacted by the amendment and applying those restrictions in a fairly aggressive way. Not only, it seems, must you need concealed carry for security purposes, you must really need it. In *Fisher*, a majority concluded, the tavern keeper was undeserving.

How this narrow construction of Article I, sec. 25 can be reconciled with its broad language is unclear unless we believe that use of the phrase "lawful purpose" conferred upon the court a relatively unfettered power to decide when there is and is not a right to bear arms. A more straightforward reading might be that there is a right to bear arms as long as one does not do so to accomplish an unlawful end. While the voters—however imprudently—may have thought they were passing a relatively broad right, the court has "found" a severely constricted one.

In 1993, Wisconsin voters amended the state's constitution to ban casino-type gambling. Prior to the amendment, the state had entered into a series of compacts that authorized Indian tribes to conduct some—but not all—casino-type gaming on reservations. The compacts had been entered into between 1991 and 1992 and were limited to five years in duration, although each automatically renewed unless terminated by either the tribe or the state.

In *Panzer v. Doyle*[8] the court, in a 4-3 decision, had held that amendments to the compacts in 2003 to add new casino-type games were prohibited by the new amendment. This seems unexceptional. If casino-type gambling is now prohibited in the state, actually expanding it would seem to be clearly impermissible.

But, two years later, in *Dairyland Greyhound Park v. Doyle*,[9] a majority accepted the Governor's invitation to revisit this issue. The three *Panzer* dissenters (Justices Bradley, Crooks and Chief Justice Abrahamson) joined by Justice Butler (who had now replaced Justice Sykes, a member of the *Panzer* majority) reversed *Panzer*, reasoning that application of the 1993 constitutional amendment to the original contracts was both unintended and that the parties "rights" to not only renew, but to *amend* the original compacts were protected by the Contract Clauses of the Wisconsin and United States Constitutions.

Because the parties to the 1991-1992 compacts *believed* that they would be able to negotiate for new casino games in the future, the court held that it would be an impairment of contractual obligation to construe the 1993 amendment to defeat that expectation. This holding not only grandfathers pre-amendment casino gaming, but permits *the addition of entirely new games.*

Without getting into detail, the idea that there is an unconstitutional impairment of contract whenever a change in the law frustrates someone's hope that they may some day convince the other side to amend a contract is simply not good constitutional law. We'll never see it again.

Having voted to restrict the expansion of gaming, the state's residents now find that they have conferred a monopoly on the tribes to engage in any type of gaming that the governor might agree to and that is permitted by federal law.

Transformation of rules into unlimited grants of power. The Wisconsin Constitution grants the Wisconsin Supreme Court superintending authority over the courts. While the precise contours of this authority have been the subject of debate, most of the uses of such authority have been limited to the regulation of the litigation process to ensure the vindication of clear legal rights. The Supreme Court can do many things related to the conduct of litigation, but it has not typically used this authority to fashion new rights or to manage the conduct of non-judicial officers.

State v. Jerrell C.J.,[10] involved an appeal from an adjudication of delinquency for armed robbery, party to a crime. The juvenile appellant argued that his confession was involuntary and the court agreed, ordering that it be excluded. But it did much more than that. Although not necessary to decide the case before it, the court decreed that, from now on, all custodial interrogation of juveniles be electronically recorded. Any evidence obtained

from unrecorded custodial interrogations will be excluded.

Recording these interrogations may be a good idea. (I happen to believe that it is.) But the court based this new rule, not on the notion that unrecorded interrogations are unlawful or unconstitutional, but by exercising its superintending authority to "tackle" what it deemed to be the "false confession issue."

The majority maintained that it was not mandating law enforcement practices, but fashioning a rule of evidence. In its view, the police presumably remain "free" to record or not record these interrogations as long as they do not insist upon actually prosecuting juveniles who confess to a crime.

Justifying such regulation because it is implemented through a rule of admissibility (and, therefore, can be called a rule "governing the courts") establishes a principle with no obvious stopping point. Could the court, for example, exclude the admissibility of all consumer contracts unless they were formed with an array of extrastatutory "notices," "cooling off periods" and court-mandated disclosures—justified as a "rule of evidence" on the proof of unconscionability or lack thereof? Might a more conservative majority adopt a rule excluding all uncorroborated allegations of racial discrimination in the interest of "tackling the false accusation" issue?

Usurping the role of the legislature. Although both the state and federal constitutions guarantee equal protection of the law, it is not unusual for the law to draw distinctions between classes of people. Children may not drive. Non-lawyers may not practice law. Those with hefty incomes are taxed at higher rates than those who earn less. It is hard to imagine a world in which everyone was treated in exactly the same way.

Recognizing this, courts are normally quite deferential to those distinctions chosen by the legislature, upholding them as long as they have some rational basis. Only those classifications that are drawn on the basis of some "suspect" classification such as race or gender or, less frequently, upon whether or not a person has exercised some fundamental right (such as laws imposing special taxes upon those who vote or exercise their right of free speech) are subject to more rigorous judicial examination. Absent such special circumstances, courts normally disrupt legislative distinctions only if they are not rationally related to a legitimate governmental purpose.

[I]t is not unusual for the law to draw distinctions between classes of people.

This may no longer be the case in Wisconsin. *Ferdon v. Wisconsin Patients Compensation Fund*[11] involved an equal protection challenge to a statute capping noneconomic damages in medical malpractice personal injury cases, i.e., compensation for things like pain and suffering or loss of society and companionship, at $450,000. According to the court, the cap drew a distinction between the more and less severely injured because the former would presumably recover a lower percentage of the noneconomic damages than they have "actually suffered."

The court rejected the idea that it should conduct some form of heightened review. The cap, it insisted, is a garden variety legislative distinction and is subject to only "rational basis" scrutiny.

But "rational basis" scrutiny, the court announced, need not be as deferential as has typically been the case. It made clear that it now intends to apply a rational basis test "with

teeth" and "with bite" that is "not a toothless one." Applying this new standard, the court concluded that the damages cap was "irrational" and could not stand.

The precise contours of this carnivorous form of review are not clear. What is clear is that the court conducted an unusually detailed reexamination of the legislature's judgment that the damages cap will help reduce malpractice premiums and restrain the cost of health care. As Judge Sykes observed, it took the majority "seventy nine paragraphs . . . chockfull of state and national studies" to conclude that the damages cap was not rationally related to these legislative ends. As she put it, "if a law were truly irrational, it would be simpler to explain why. . . ."

Ferdon is one of the most extraordinary in the court's history and, if it does not prove to be an aberration, has profound implications for a variety of constitutional questions. It may not be a wholesale rejection of the idea of judicial restraint, but it is most certainly a strong first step in that direction. After *Ferdon*, it is hard to imagine the statute that could not be a target for a successful equal protection challenge.

Conclusion

This is a critical juncture. The court is now more or less evenly divided between two groups of justices who have dramatically different notions of the role of the judiciary. It is the purpose of this white paper to facilitate a discussion about this important trend and to foster a dialogue about the proper role of the courts in our state. It is the hope of its author that it begins now—in earnest.

Notes

1. John Roberts' opening statement, Senate Judiciary Committee Hearing, September 12, 2005.
2. Michael Brennan, "Are Courts Becoming Too Activist: Wisconsin's Supreme Court Has Shown a Worrisome Turn In That Direction." *Milwaukee Journal Sentinel*, October 2, 2005, at 1J.
3. Bill Leuders, "Under Fire," *Milwaukee Magazine*, December 2005.
4. Diane S. Sykes, "Reflections On The Wisconsin Supreme Court," 89 *Marquette Law Review* 723 (2006).
5. Wis. Const. Art. I, § 25.
6. *State v. Hamdan*, 2003 WI 113, ¶ 51, 264 Wis.2d 433, 665 N.W.2d 785.
7. 2006 WI 44, 290 Wis.2d 121, 714 N.W.2d 495.
8. 2004 WI 52, 271 N.W.2d 295, 680 N.W.2d 666.
9. 2006 WI 107, 719 N.W.2d 408.
10. 2005 WI 105, 283 Wis.2d 145, 699 N.W.2d 110.
11. 2005 WI 125, 284 Wis.2d 573, 702 N.W.2d 440.