STATE COURT

Docket Watch®

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Reflections on the Wisconsin Supreme Court

By The Honorable Diane S. Sykes

Editor's Note: This article is excerpted from the Hallows Lecture that was given by the Honorable Diane S. Sykes on March 7, 2006 at Marquette University Law School. Diane Sykes is a Judge on the United States Court of Appeals for the Seventh Circuit. Please note her closing paragraph which is completely in spirit with the goals of **State Court Docket Watch.**

My focus today, however, will not be on the court during my tenure but the court's 2004-2005 term, which was, by any measure, a watershed. In a series of landmark decisions, the court:

- rewrote the rational basis test for evaluating challenges to state statutes under the Wisconsin Constitution, striking down the statutory limit on noneconomic damages in medical malpractice cases;[1]

- eliminated the individual causation requirement for tort liability in lawsuits against manufacturers of lead-paint pigment, expanding "risk contribution" theory, a form of collective industry liability;[2]

- expanded the scope of the exclusionary rule under the state constitution to require suppression of physical evidence obtained as a result of law enforcement's failure to administer *Miranda* warnings;[3]

- declared a common police identification procedure inherently suggestive and the resulting identification evidence generally inadmissible in criminal prosecutions under the state

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A FOCUS ON:

Washington Supreme Court

Reg'l Transit Auth. v. Miller, 156 Wn.2d 403 (Wash. 2006) was the occasion for the Washington Supreme Court's latest decision involving state eminent domain power and citizens' private property rights. The Court's 5-4 vote constituted another significant ruling in favor of government interests over private property owners.

Primarily at issue in *Miller* were statutory and administrative requirements for public notice that condemning authorities must follow in order to initiate proceedings

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THIS ISSUE

FROM THE

EDITORS

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents this second issue of *State Court Docket Watch* in 2006. This newsletter is one component of the Society's State Courts Project. *Docket Watch* presents original research on state court jurisprudence, illustrating new trends and ground-breaking decisions in the state courts. The articles and opinions reported here are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in assiduously tracking state court jurisprudential trends.

In the June 2006 issue, we feature the transcript of the Hallows Lecture given by the Honorable Diane S. Sykes of the Seventh Circuit on March 7, 2006 at Marquette University Law School. In her speech, she focuses on many of the controversial decisions handed down by the Wisconsin Supreme Court during the 2004-2005 term.

Also included in the issue are articles on eminent domain in Washington state, a look at a ruling by the Tennessee Supreme Court whereupon the court rejected a challenge to term limits, and an analysis of a New York Court of Appeals decision that held that two undocumented aliens working illegally in the state could recover lost wages in tort actions they had filed.

State Court Docket Watch invites its readers to submit articles on cases in their respective states. Please contact Kenneth Wiltberger at 202-822-8138 or kenw@fed-soc.org for more information.

CASES IN

FOCUS

Tennessee Supreme Court Rejects Challenge to Term Limits

In *Bailey v. County of Shelby*, No. W2005-01508-SC-R11-CV, 2206 Tenn. LEXIS 208 (Tenn. March, 29, 2006), the Tennessee Supreme Court held that term limits contained in county charters are authorized by both the Tennessee Code and by Tennessee's constitution. In 1986, the voters of Shelby County, Tennessee, voted to adopt a charter form of government. Under state law, a charter county is required to have a legislative body. The plaintiffs were three members of the Shelby County Board of Commissioners who would each complete two consecutive terms as commissioners in 2006. The plaintiffs challenged a provision of the Shelby County charter, which had been adopted by voters in 1994, which imposes a term limit of two consecutive four-year terms upon commissioners. The trial court held that there was no statutory or constitutional bar to term limits. The Tennessee Court of Appeals, however, found that the statute in question conflicted with Tennessee's constitution. The Tennessee Supreme Court addressed the issues in this case on an expedited appeal.

In seeking to avoid imposition of the term limits, the plaintiffs made three arguments. First, the plaintiffs contended that Tenn. Code Ann. § 5-1-210(4) did not grant a county charter, such as the Shelby County charter, the authority to establish term limits. The statute states that county charters shall provide for the "size, method of election, *qualification for holding office*, method of removal, and procedures of the county legislative body…" (emphasis added). The plaintiffs claimed that status of prior election to the county commission was not a "qualification for holding office" that could be determined by a county charter. Plaintiffs argued that Article VII of Tennessee's constitution prohibited term limits as a qualification because Article VII specifically proscribed county commissioners to four-year terms. The Tennessee Supreme Court rejected this argument, reasoning that Article VII only set a duration of four years for a term as commissioner. Article VII was silent as to whether a commissioner could serve multiple terms. Accordingly, the Court

found that term limits are a "qualification for office" within the meaning of the statute and that the statute authorized the imposition of term limits.

Next, the plaintiffs argued that § 5-1-210(4) was unconstitutional under Article VII because Article VII granted only legislatures, not voters, the power to set term limits. The Court rejected this argument, noting that Article VII grants broad authority to the citizens of a county that goes so far as to allow the citizens to replace a county government. Accordingly, the Court reasoned that a chartered county may establish the qualifications for its own legislative body. The Court also noted that Article I of Tennessee's constitution states that the people have an "unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper." Adopting the plaintiffs' position they suggested would have required the Court to ignore the fundamental principle of self-government stated in Article I.

Finally, the plaintiffs cited Tennesseee Attorney General opinions, debates from the Constitutional Convention of 1977, and Tenn. Code Ann. § 5-1-210(12) as authority that the positions of county officers could not be abolished nor could duties of the office be diminished. The Supreme Court rejected this argument, holding that the plaintiffs' positions were not being either abolished or diminished. Because both the Tennessee Code and Tennessee Constitution permitted term limits for chartered counties, the Court denied the plaintiffs' request to enjoin the imposition of term limits.

New York Court Limits Preemption of State's Labor Law

Distinguishing the United States Supreme Court's decision in *Hoffman Plastic Compounds Inc. v. National Labor Relations Board*, wherein the Court prohibited an award of back pay to an undocumented alien because such an award conflicts with the federal Immigration Reform and Control Act, on February 11, 2006, a divided New York Court of Appeals declined to have federal law preempt New York's Labor Law and permitted two undocumented aliens working illegally in the state to recover lost wages in their respective state tort actions.

Gorgonio Balbuena entered the U.S. without permission, and in April 2000 was employed by third party defendant Taman Management Corp. at a site owned and managed by defendants IDR Realty LLC and Dora Wechler. In his action against defendants, Balbuena alleged he fell from a ramp while pushing a wheelbarrow, sustaining debilitating injuries, leaving him unable to work. He and his wife sued defendants for 1) common law negligence and 2) violations of Labor Law "240(1) and 241(6). Defendant Taman argued that federal law, as construed in *Hoffman*, preempts New York's Labor Law, inasmuch as an award of lost wages to Balbuena would undermine national immigration policies. The Supreme Court denied defendants' collective motion for partial summary judgment, finding *Hoffman* inapplicable to tort actions brought under the state law. The Appellate Division, First Department modified the decision by granting Taman's motion for partial summary judgment, indicating that *Hoffman* required the Court to dismiss Balbuena's claim to the extent he sought damages based on wages he might have earned in the United States. Nonetheless, the Court determined Balbuena may seek lost wages based on income he might have earned in his native country.

Stanislaw Majlinger came to the U.S. on a travel visa but remained in the country to work after his visa expired. In January 2001 he was employed by J&C Home Improvement, subcontractor to a project developed by defendants. In his complaint, he alleged he fell from scaffolding approximately 15 feet off the ground, sustaining injuries which left him incapacitated. He brought suit under Labor Law "200, 240(1) and 241(6). The Supreme Court granted partial summary judgment to defendants and dismissed Majlinger's claim for lost wages on constraint of *Hoffman*. The Appellate Division, Second Department, reversed and reinstated Majlinger's claim for lost wages, concluding that state tort law is not preempted by federal immigration law because neither federal statutes nor *Hoffman* prohibit an undocumented alien from recovering lost wages in a personal injury action.

The central question before the Court of Appeals was whether an undocumented alien working illegally in the U.S. and injured on the job as a result of his employer's

state Labor Law violations is precluded from recovering lost wages due to the alien's illicit immigration status; the Court answered in the negative.

The power to regulate immigration rests exclusively with the federal government. In 1986 Congress adopted the Immigration Reform and Control Act (IRCA), which created an employment verification system, requiring an employer, before hiring an alien, to verify the alien's identity and work eligibility. An employer who knowingly violates the employment verification requirements, or who unknowingly hires an illegal alien but subsequently learns the alien's status and fails to immediately terminate the employment relationship, is subject to civil or criminal prosecution and penalties. IRCA also made it a crime for an alien to provide a potential employer with documents falsifying the alien's eligibility for employment, although IRCA does not penalize an alien for attaining employment without having proper work authorization, so long as the alien does not engage in fraud, such as presenting false documentation to secure the employment. Congress expressly provided that IRCA would preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

In the wake of IRCA the United States Supreme Court decided *Hoffman Plastic Compounds Inc. v. National Labor Relations Board* (535 U.S. ___, 2002). In *Hoffman*, the Court considered whether an illegal alien, who, in violation of IRCA, gained employment by presenting falsified work authorization documents, could be awarded back pay by the National Labor Relations Board (NLRB) after the worker was terminated for engaging in union-organizing activities. The Court concluded such an award was prohibited because it would conflict with the purpose of the IRCA. The Court determined that awarding back pay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations because the alien would qualify for an NLRB award only by remaining inside the United States illegally and could not mitigate damages ... without triggering new IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore IRCA and hire illegal workers.

Balbuena's and Majlinger's defendants argued that IRCA, as construed in *Hoffman*, precludes an undocumented alien from recovering lost wages in a state personal injury action inasmuch as such an award is a penalty upon the employer, expressly preempted by IRCA. Plaintiffs argued that an undocumented alien should be allowed to recover for earning capacity lost as a result of defendants' failure to adhere to the work place safety requirements established by the state's Labor Law. Plaintiffs suggested that precluding an illegal alien's lost wages claim would make it more financially attractive to employers to hire illegal aliens, thereby undercutting the central goal of IRCA, and also would provide less of an incentive for employers to comply with state labor requirements, contrary to the purposes of Labor Law "200, 240 (1) and 240 (6).

"... if the statute does not provide expressly that its violation will deprive the parties of their right to sue on contract, and the denial of relief is wholly out of proportion to the requirements of public policy ... the right to recover will not be denied."

The majority concurred with plaintiffs' argument, suggesting any award under the Labor Law represented merely compensation to the plaintiff, rather than a penalty upon the defendant-employer. In distinguishing plaintiffs' cases from *Hoffman*, the majority held that in the absence of proof an illegal alien presented false work authorization documents to obtain employment, IRCA does not bar his claim for lost wages. The majority suggested any conflict with IRCA's purposes that may arise from permitting an illegal alien's lost wages claim may be alleviated by permitting a jury to consider the alien's illegal status as one factor in the jury's determination of the damages, if any, warranted under the Labor Law.

Dissenting Judge Robert S. Smith identified any such recovery as barred by the rule of New York law forbidding courts to aid in achieving the purposes of an illegal transaction, and instructed, in the alternative, that if New York law does permit such a recovery, it is preempted by federal immigration law as interpreted in *Hoffman*.

Citing multiple New York decisions, to include *Szerdahely v. Harris* (67 N.Y.2D 42, 1986) and *Stone v.*

Freeman (298 NY 268, 1948), Judge Smith observed that it is the settled law of New York that a party to an illegal contract cannot ask a court of law to help him carry out his illegal object. Judge Smith described the *Stone* decision as based on the premise that courts show insufficient respect for themselves and for the law when they help a party to benefit from an illegal activity. He dismissed as inappropriate the majority's inclination to balance the benefit and harm, either to public or private interests, that would follow from such an award, and instructed that the law required the court to dismiss any claim in which the plaintiff seeks the benefit of an illegal bargain, though doing so may give a windfall to a defendant who has also acted illegally. Judge Smith described Balbuena's and Majlinger's claims to recover lost wages from employment barred by IRCA as claims to obtain the benefit of illegal bargains, and concluded New York law bars recovery.

Judge Smith conceded an exception to the rule that courts do not award the benefit of illegal bargains, noting, "if the statute does not provide expressly that its violation will deprive the parties of their right to sue on contract, and the denial of relief is wholly out of proportion to the requirements of public policy ... the right to recover will not be denied." He declined, however, to apply the exception to permit Balbuena and Majlinger to recover lost wages. Judge Smith suggested the argument in favor of plaintiffs' recovery might be persuasive if plaintiffs sought to recover wages for work for which their employers had refused to pay them, and made reference to decisions both in New York and in federal courts holding that undocumented aliens may recover at least some compensation for work they have actually performed. He noted, however, that neither Balbuena nor Majlinger sought compensation for work actually performed, nor did either even sue his employer but instead sued third parties—the construction site owner and/or general contractors—who had no involvement with any violation of the immigration laws. Thus, Judge Smith insisted, dismissing Balbuena's and Majlinger's claims would hardly have given a windfall to any defendant at least as guilty of wrongdoing as the plaintiffs.

Quoting *Hoffman*, Judge Smith instructed, "Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations, subjecting the employer to civil or criminal prosecution and penalties under federal law." Judge Smith advised that *Hoffman* makes clear that prohibiting the employment of undocumented aliens is the critical policy of IRCA, and the wrong for which Balbuena and Majlinger sought compensation in the form of lost earnings is that their injuries prevented them from working in the United States - exactly the result that IRCA was intended to accomplish.

"The only instruction that is not, as best, a bit embarrassing to the system is one that says in substance: You may not award any damages for lost earnings from employment that would have violated the immigration laws."

Judge Smith criticized the majority's suggestion to instruct a jury that it may consider plaintiffs' immigration status as one factor in the jury's determination of damages. He cautioned that such an instruction sends the message, "The plaintiff's damages depend on his chances of getting caught; the more likely he is to evade the authorities, the more damages you may award." Judge Smith also observed, "if the jury is supposed to decide how much weight to give the IRCA policies, then the message is: A violation of the law is only as important as you want it to be." He concluded, "The only instruction that is not, as best, a bit embarrassing to the system is one that says in substance: You may not award any damages for lost earnings from employment that would have violated the immigration laws."

As an award of lost earnings based on employment prohibited by IRCA would carry out the purpose of an illegal transaction and, therefore, be impermissible under the principles of New York law, Judge Smith determined the majority's discussion of preemption to be unnecessary. He addressed the issue nonetheless, dismissing the majority's attempts to save the Labor Law from preemption by depicting *Hoffman* as dependant on it facts and distinguishing *Hoffman* on the grounds that *Hoffman*'s employee, unlike plaintiffs Balbuena and Majlinger, presented his employer with documents falsifying his ability to work legally in the United States. Judge Smith

conceded the *Hoffman* court emphasized the fact that the employee used falsified documentation, but noted the Court "conspicuously" failed to indicate that it would or might have ruled differently if *Hoffman*'s employee had not presented falsified work authorization.

Judge Smith concluded that preemption depended not on whether plaintiffs committed criminal violations of IRCA (such as by presenting falsified documentation) but on whether awarding them lost earnings undermined IRCA's policy. He maintained that *Hoffman* made clear that an award of back pay—indistinguishable from an award for lost wages—undermines that policy. He ultimately concluded *Hoffman* indeed controlled the Court's decision with respect to plaintiffs' cases, and federal immigration law preempted any New York law otherwise permitting a lost earnings award to either plaintiff.

Washington (cont. from pg. 1)

against a private property owner. The Central Puget Sound Regional Transit Authority (Sound Transit) was statutorily required to adopt a procedure for notifying the public of agency hearings involving consideration of condemnatory actions. RCW 35.22.288 provides: "Such procedure may include, but not be limited to, written notification to the city's official newspaper, publication of a notice in the official newspaper, posting of upcoming council meeting agendas, or such other processes as the city determines will satisfy the intent of this requirement." The Sound Transit Board's implementing resolution states: "Whenever feasible, the Board Administrator shall furnish the Agenda for meetings of the Board and Committees to one or more local newspapers of general circulation in advance of such meetings." However, Sound Transit never notified any newspaper or otherwise physically posted any information concerning its upcoming meeting at which it approved condemnation of petitioner Millers' property for a future bus parking lot. Instead, Sound Transit simply posted a message on its website about an upcoming meeting where the Sound Transit Board would consider acquiring certain property. The web posting did not specify what particular parcels of property would be considered.

The *Miller* majority's opinion, penned by Justice Mary Fairhurst and joined by Justices Bobbi Bridge, Charles Johnson, Barbara Madsen and Susan Owens, was the first court decision in the nation to hold web posting sufficient under such circumstances. The majority discussed in a footnote consideration of Sound Transit's compliance with its own statutorily-required notice procedures. The majority maintained that "the dissent does not cite any authority to support a claim that the internal procedures govern our analysis." The majority also rejected the need for identifying particular parcels of property to be considered for condemnation. The majority also rejected dissenting Justice James Johnson's insistence that trial courts enter written findings of fact and conclusions of law that form the basis of their decision. Finally, the majority reiterated a standard of judicial review in eminent domain cases that should show "great deference to legislative determinations."

Chief Justice Gerry Alexander filed a dissent taking exception to the majority's construction of the public notice statutes. Joined by Justice Tom Chambers, the Chief Justice concluded that "Sound Transit did not adequately inform affected parties before authorizing condemnation" and that internet-only posting did not satisfy the public notice statute. The Chief Justice wrote: "Due process demands that government err on the side of giving abundant notice when it seeks to take property."

Justice James Johnson filed a lengthier and stronger dissent, joined by Justice Richard Sanders. (Also joined in result only by Justice Chambers). Looking to the statute, Justice Johnson insisted that the term "posting" always referred to the posting of notice in a physical place or affected area, but not to virtual posting on a website. His dissent also took strong exception to the lack of any specific mention of the Miller property in the website posting.

Justice Johnson also insisted that Sound Transit cannot ignore its own procedures because they were statutorily required. "Agencies and municipal corporations *must* comply with internal procedures that

are promulgated pursuant to statutory requirement. Compliance is a necessary implication of a statutory mandate."

Justice Johnson's dissent likewise took aim at the majority's standard of judicial deference to condemning authority decision-making. He opined that the majority's standard flies in the face of the Washington Declaration of Rights' clear provision: "Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public."

Justice Johnson criticized the majority for overlooking erroneous factual assertions made by Sound Transit during the condemnation process. For example, the Justice suggested that Sound Transit officials had previously and incorrectly claimed condemnation of the Millers' property was necessary because the property was contaminated and had Superfund issues.

Additionally, Justice Johnson suggested the lack of specific written findings supporting public necessity of the condemnation by either the Sound Transit Board or the trial court judge at the condemnation hearing. Justice Johnson insisted that written findings should be required in light of the importance of public property rights. He concluded that "[d]eference of the courts to agency decisions which are procedurally flawed and based on facts known to be false diminishes public confidence in government and in the courts."

The *Miller* majority contained five justices. In late 2005, a seven-member majority sided with the condemning authority and deferential standards of judicial review for public use in *HTK Management, L.L.C. v. Seattle Popular Monorail Authority* (Wash. 2005). Whether *Miller* constitutes a future shifting of eminent domain jurisprudence for Chief Justice Alexander and Justice Chambers (both of whom were in the HTK majority), is an open question. Justices Sanders and James Johnson were the dissenters in *HTK*.

The Millers have filed a motion for reconsideration. Such motions are rarely granted. The Court's decision on the Millers' motion is pending at the time of this publication. Also pending as of this publication is the Court's decision in *Utility Dist. No. 2 of Grant County v. North American Foreign Trade Zone Industries, L.L.C., et al.* The *Grant County* case involves most of the same public notice and public use issues that were present in *Miller*.

In the recently decided case of *Larson v. Seattle Popular Monorail Auth.* (Wash. 2006), a majority of the Washington Supreme Court upheld the taxing authority of the Monorail against several constitutional challenges. Seattle voters recently voted to dissolve the Monorail authority, but the Court's decision in *Larson* let stand the Monorail Board's application of taxing power.

Justice Barbara Madsen wrote the Court's majority opinion, joined by Chief Justice Gerry Alexander and Justices Bobbi Bridge, Tom Chambers, Mary Fairhurst, Charles Johnson and Susan Owens. Justice Madsen's opinion for the majority concluded that Monorail's Board could properly wield taxing power even though only two of its nine members were subject to popular elections. According to the majority, the legislature may delegate taxing power to municipal corporations that are not elected so long as there are other procedural safeguards in place. Here, the majority claimed that the statutorily-defined purpose of the Monorail, the tax-rate ceiling provided in the Board's enabling legislation and procedures concerning the collection of the tax were sufficient.

Justice James Johnson filed a dissent, joined by Justice Richard Sanders. In his dissent, Justice Johnson zeroed in on the delegation of taxing authority to the Monorail Board. He concluded the unelected Board inappropriately wielded legislative taxing power, violating the separation of powers principle of "no taxation without representation."

Citing the American Revolution, the Declaration of Independence and early U.S. Supreme Court opinions, James Johnson insisted that taxation has been understood as a strictly legislative function. He then traced through early Washington Supreme Court precedents establishing that citizens may not be taxed by local authorities that do not have jurisdiction over them and are not subject to their vote. Furthermore, Justice Johnson wrote that, under the Washington Constitution, "the legislature may make such delegation only to *elected* bodies that are directly accountable to citizens" (emphasis in original). In his dissent, Justice Johnson insisted that the taxing power cannot be wielded by unelected bodies even if

those bodies are created by a popular vote because that power would impermissibly bind future generations.

Justice Johnson then cited Justice Sanders' dissenting opinion in the Washington Supreme Court's last case implicating improper delegation of taxing power, *Granite Falls Library Capital Facility Area v. Taxpayers of Granite Falls* (1998). In that case, Justice Sanders insisted that "taxation without representation was not popular with the colonists then and is unconstitutional today." Justice Johnson took the Granite Falls dissent a step further by insisting on a bright-line standard: only elected officials may wield taxing power. Popular elections is the only sufficient safeguard to protect the people from abusive taxation, not various other items delineated devised by the court post hoc. Justice Madsen and Chief Justice Alexander had joined the Granite Falls dissent. By their respective authoring and concurring with the majority opinion in Larson they appear to have changed their position.

Additionally, Justice Johnson questioned the validity of the Monorail's vehicle tax as a genuine excise tax, as opposed to an impermissible ad valorem tax. The Court had more directly addressed this precise question in *Sheehan v. Central Puget Sound Regional Transportation Authority* (Wash. 2005). Justice Johnson dissented in that case (being joined by Justice Sanders), and in Larson he simply reiterated his wariness of the Monorail's vehicle excise tax in that regard. Furthermore, Justice Johnson challenged the majority's upholding of the Monorail's taxing schedule. He contended the schedule was inflated far above the market value, which voters would have expected when approving the measure created the Monorail authority. Monorail had even stipulated to this public expectation at trial. In addition, Justice Johnson concluded that the schedule should have been repealed when the state's voters decided to do away with that same schedule for state tax collection purposes in the same election where Seattleites voted to establish the Monorail Authority.

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constitution's due process clause;[4] and

- invoked the court's supervisory authority over the state court system to impose a new rule on law enforcement that all juvenile custodial interrogations be electronically recorded.[5]

The importance of these decisions can scarcely be overstated. Considered individually, each represents a significant change in the law, worthy of close analytical attention from the bench, bar, and legal scholars. 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 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. I will concede (as I must) that a court of last resort has the power to throw off these constraints, revise the rules of decision, and set the law on a new course. But when it does so, we ought to sit up and take notice, and question whether that power has been exercised judiciously.

And yet there has been surprisingly little published commentary from the Wisconsin legal community about the groundbreaking developments of the court's last term.[6] This lack of critical analysis—pro or con—does a disservice to the orderly development of the law, which depends in no small part upon the active engagement of the bar and the legal academy in evaluating the work of precedent-writing courts. So, in the spirit of sparking a debate, my purpose this afternoon is to identify the prominent themes in the most important cases of the court's last term and consider what those cases might tell us about the court's current view of the proper uses of its power. This is not intended to be a comprehensive analysis of the reasoning, rhetoric, or results of these cases, but a broader look at the interpretive philosophy and judicial behavior that characterize the court's most recent work.

In *Ferdon v. Patients Compensation Fund*,[7] the Wisconsin Supreme Court invalidated the statutory limitation on noneconomic damages in medical

malpractice cases. The damages cap was enacted as part of a broad legislative initiative to address a developing medical malpractice crisis in Wisconsin. The original 1975 law established a comprehensive patients' compensation system, including mandatory health care provider insurance and a patients' compensation fund that guarantees full coverage of all economic damages for medical malpractice while limiting recovery of noneconomic damages for less quantifiable harms, such as pain and suffering. The legislature made explicit and detailed findings when it adopted the system, citing the effects of rising malpractice judgments and settlements on the cost and availability of medical liability insurance, health care costs, and the practice of medicine in Wisconsin. Recovery of economic damages was unlimited under the statutory system and guaranteed by the patients' compensation fund; only noneconomic damages were subject to the statutory cap. The noneconomic damages cap at issue in *Ferdon* was set in 1995 at $350,000 and adjusted annually for inflation; by 2005, when *Ferdon* was decided, the inflation-adjusted cap was just under $450,000.

The plaintiff in *Ferdon* asserted a broad-spectrum challenge to the damages cap under the Wisconsin Constitution, arguing that it denied equal protection, trial by jury, right to a remedy, and due process, and also that it violated separation of powers principles. The court took up only the equal protection challenge. In a decision spanning more than 100 pages of the official reports—188 paragraphs, 248 footnotes, 6 separate Roman-numbered sections (one further subdivided into four lettered subsections), plus a "roadmap" for navigating the opinion (helpfully provided in the introduction)—the court struck down the statutory damages cap.

Just a year earlier the court had rejected a similar equal protection challenge to the statutory cap applicable to noneconomic damages in medical malpractice wrongful death cases in *Maurin v. Hall*.[8] The majority in *Ferdon* began its analysis by dismissing the *Maurin* precedent as irrelevant, reasoning that medical malpractice injury cases are less likely to arouse jury passion than medical malpractice death cases. Why this difference should justify completely disregarding a recent and closely analogous precedent is not explained.

Moving on, the *Ferdon* majority recites the standard presumption that statutes are constitutional, but does not apply it; pronounces the usual rule of judicial deference to legislative acts, but does not defer; and settles on rational basis scrutiny as the appropriate standard of review, but redefines the standard upward so that it effectively functions as a heightened or intermediate level of scrutiny. Before *Ferdon,* legislative acts not implicating a fundamental right or creating a racial or other suspect classification received ordinary rational basis review; in other words, a statute would survive an equal protection challenge unless shown to be "patently arbitrary" with "no rational relationship to a legitimate government interest."[9] This test is deliberately hard to flunk, to guard against the judiciary's substitution of its own policy preferences for those of the legislature. Equal protection does not require that all statutes treat all persons identically, only that differences in treatment be rationally related to the legislative goals underlying the statute.

Not any longer. With *Ferdon*, Wisconsin has a new rational basis test, referred to variously by the court as rational basis "with teeth," rational basis "with bite," and "meaningful rational basis." What this terminology means as a legal matter is not entirely clear, but the new standard plainly calls for more probing judicial inquiry into the relationship between legislative means and ends than ordinary rational basis review. Apparently, the point of the redefined standard is to authorize the court to make a policy-laden value judgment about the tendency of a statute to effectively achieve its objectives, and invalidate the statute if the court believes that tendency to be insufficient to justify the statutory classification.

That the court felt it necessary to rewrite the long-standing law of rational basis review is telling; the implication is that ordinary rational basis scrutiny would not produce the result the majority wanted to reach. The reconstituted rational basis test—what Justice Prosser in dissent calls the rational basis "makeover"—permits the *Ferdon* majority to declare the damages cap unconstitutional. It takes the court seventy-nine paragraphs to get there (you'd think if a law were truly irrational, it would be simpler to explain why); those seventy-nine paragraphs are chock-full of citations to state and national studies on the relative effectiveness of damages caps at reducing malpractice insurance rates and health care costs, protecting the financial viability of the patients' compensation fund, and ensuring quality health care. Justice Prosser (joined in dissent by Justices Wilcox and Roggensack) criticizes the majority's use of these studies as selective and misleading, and provides a

lengthy analysis of existing empirical support for the damages cap.

What is readily apparent from all the back-and-forth about what the studies do or do not show is that the court's majority is making a political policy judgment, not a legal one. Fundamental to separation of powers is the 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 are appropriate to the circumstances. The court's responsibility of judicial review is not a warrant to displace legislative judgments. It remains to be seen whether the court will apply its new, souped-up iteration of rational basis review to all future equal protection challenges or only some, and if the latter, how it will go about deciding which statutes qualify for heightened *Ferdon* scrutiny. Either way, *Ferdon* represents a major departure from long-accepted constitutional principles that operate to maintain the balance of power between the legislative and judicial branches.

Now let's move to *Thomas v. Mallett*,[10] the court's most consequential common law decision of the last term. In *Thomas*, the court extended "risk contribution" theory to the lead-paint industry, allowing a childhood lead-paint claim to go forward to trial against lead-pigment manufacturers despite the plaintiff's inability to identify which manufacturers caused his injury. Steven Thomas lived in three different Milwaukee homes during the early 1990s and sustained lead poisoning by ingesting paint from paint chips, flakes, and dust in the homes. He received settlements from two of his three landlords and pursued claims against seven lead-paint pigment manufacturers—conceding, however, that he could not causally link any specific manufacturer to his injury.

A basic premise of our tort liability system has been the requirement that a plaintiff prove the defendant was at fault and caused his injury before liability attaches. Over time the fault requirement has been relaxed, perhaps most notably in the development of strict products liability theory. The causation requirement, however, has generally been maintained as a fundamental feature of our liability law; new doctrines adjusting or eliminating proof of cause in fact have not been widely accepted. Against this backdrop, the trial court dismissed Thomas's negligence and strict liability claims against the pigment manufacturers based on the absence of proof of causation.

The Wisconsin Supreme Court reversed, becoming the first court in the nation to allow such a case to go forward. The court's decision in *Thomas* eliminates the causation requirement in lead-paint cases in favor of a form of collective liability based on mere participation in the lead-pigment industry. More than twenty years earlier, in *Collins v. Eli Lilly Co.*,[11] the court adopted a form of collective industry liability for use in cases alleging injuries from *in utero* exposure to the antimiscarriage drug diethylstilbestrol ("DES"). The "risk contribution" theory recognized in *Collins* allowed liability on proof that the defendant drug company produced or marketed DES, regardless of whether the plaintiff could identify the drug company that caused her injury. The burden was placed on each drug company to prove that it did not produce or market DES during the time period the plaintiff was exposed or in the relevant geographic marketplace. Liability would be apportioned among the drug companies that could not exculpate themselves under this burden-shifting formula on the basis of a nonexclusive list of factors, including market share and the degree to which the company tested for and warned of hazardous side effects.

The court in *Collins* reasoned that each drug company contributed to the risk of harm to the general public and, therefore, the risk of injury to individual plaintiffs; unless the court relieved the DES plaintiff of the burden of proving causation, she would have no remedy for her injury. The court concluded that each drug company "shares, in some measure, a degree of culpability in producing or marketing" a drug with potentially harmful side effects, and "as between the injured plaintiff and the possibly responsible drug company, the drug company is in a better position to absorb the cost of the injury."[12]

The form of risk contribution liability recognized in *Collins* was not pure "market share" liability of the type that had been adopted a few years earlier by the California Supreme Court in *Sindell v. Abbott Laboratories*.[13] It was, nonetheless, a substantial departure from traditional liability norms, and until *Thomas*, had not been expanded in this state. In *Thomas*, the court was not confronted with a plaintiff who would

otherwise lack a remedy without the ability to sue under risk contribution theory—remember that Thomas had already received settlements from his landlords. But the court expanded risk contribution liability anyway, authorizing the negligence and strict liability claims to go forward without proof of causation.

As applied to the lead-paint industry, risk contribution theory is substantially more difficult to administer than in DES cases and very likely will function as a form of absolute liability, as Justices Wilcox and Prosser noted in strongly worded dissents. In DES cases each drug company has at least in theory a meaningful opportunity to defend against liability by proving it did not produce or market the drug either where the plaintiff lived or during the specific nine-month period she was exposed.

In lead-paint cases, in contrast, the opportunity for the defendant manufacturers to exculpate themselves is almost nonexistent. The majority in *Thomas* made it clear that the relevant time period for lead-paint risk contribution liability is not the time period of the plaintiff's exposure but the entire time period each house with lead paint existed. In *Thomas*, the lead paint present in the three houses where the plaintiff lived could have been applied at any time between 1900 and 1978 (when most lead-based paint was banned). Apportioning risk contribution liability among manufacturers of lead pigment based on market share and relative culpability over a 78-year period of time is nearly impossible as a purely factual matter.

Apportionment of tort liability in a comparative fault regime is by nature somewhat imprecise, but some imprecision is acceptable when the defendants whose conduct is being compared have been proven to be causally at fault for the plaintiff's injury. Apportionment of liability in a system that dispenses with the requirement of individualized causation asks the jury to assess and fix relative blame across an entire industry, not for the harm sustained by the plaintiff who will recover but for generalized harm to the public at large.

This is, then, 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 an admittedly serious public health problem. As Justice Wilcox observed in his dissent, "[t]he end result of the majority opinion is that the defendants, lead pigment manufacturers, can be held liable for a product they may or may not have produced, which may or may not have caused the plaintiff's injuries, based on conduct that may have occurred over 100 years ago when some of the defendants were not even part of the relevant market."[14] The majority's response: "[T]he problem of lead poisoning from white lead carbonate is real; it is widespread; and it is a public health catastrophe that is poised to linger for quite some time."[15]

The extension of risk contribution theory in *Thomas* may signal the court's willingness to modify the causation requirement in other contexts. If so, it will represent a major reordering of the purposes of our tort system from adjudicating individual remedies for private civil wrongs to finding funding sources to address broad public policy problems. True, the common law is all about judicial policy judgments, but it develops best when developed incrementally. The discretion of a common law court does not precisely parallel the discretion of a legislature; differences in institutional constraints and competence generally favor leaving the more sweeping proposals to alter liability rules to the legislative branch of government. A court is limited to the facts and arguments in the case before it; the public and nonparty stakeholders have no say—no opportunity to participate and attempt to influence the court's decision, as they would the legislature's. The court's decision in *Thomas* may well turn out to be an isolated response to the problem of lead-paint poisoning. If the opposite is true, and the court extends risk contribution theory to other industries, the case will have substantial implications for the stability and predictability of our liability system, and the stability of the state's economy as well.

Now let's consider the court's 2004-2005 criminal docket. In *State v. Knapp,*[16] the Wisconsin Supreme Court adopted a new rule of state constitutional law requiring suppression of physical evidence derived from the failure of police to deliver *Miranda* warnings to a suspect in custody. Matthew Knapp was seen drinking with Resa Brunner a few hours before she was found beaten to death with a baseball bat. Police investigating the murder learned that Knapp was on parole, and because his consumption of alcohol was a violation of his terms of supervision, his parole officer issued an apprehension warrant. When police arrived at Knapp's apartment to arrest him, they could see Knapp through the door and announced that they had a warrant for his arrest. Knapp

picked up a phone to try to call his attorney but then hung up the phone and let the police in. An officer told Knapp he had to go to the police station but deliberately did not deliver *Miranda* warnings at the scene of the arrest. The officer followed Knapp as he went into his bedroom to put on some shoes. In the bedroom the officer asked Knapp what he had been wearing the prior evening, and Knapp pointed to some clothing on the floor. The officer seized the clothing, which included a bloody sweatshirt; DNA tests established that the blood on the sweatshirt was Resa Brunner's.

Knapp was charged with Brunner's murder, and his case was first before the Wisconsin Supreme Court in 2003 on an interlocutory appeal of the denial of Knapp's motion to suppress the sweatshirt. The court ordered the sweatshirt suppressed as the fruit of the officer's intentional withholding of *Miranda* warnings. Because the decision was premised on federal constitutional law, the State petitioned for certiorari in the United States Supreme Court.

In the meantime, the United States Supreme Court issued its decision in *United States v. Patane*,[17] rejecting the very suppression argument the Wisconsin Supreme Court had accepted in *Knapp*. The Supreme Court held in *Patane* that a police officer's failure to provide the warnings required by *Miranda* did not require suppression of nontestimonial physical evidence derived from a defendant's unwarned but voluntary statements. The Court explained that "[b]ecause the *Miranda* rule protects against violations of the [Fifth Amendment's] Self-Incrimination Clause, which, in turn, is not implicated by the introduction at trial of physical evidence resulting from voluntary statements," the "fruit of the poisonous tree" doctrine did not apply.[18] In other words, the core constitutional right *Miranda* was designed to protect—the right against compulsory self-incrimination—simply was not affected by the introduction of the nontestimonial physical fruits of the failure to give *Miranda* warnings. As long as the defendant's unwarned statements are excluded, as *Miranda* requires, application of the exclusionary rule to derivative physical evidence—usually highly probative and reliable—could not be justified by reference to any deterrence effect on law enforcement related to the underlying constitutional right against compulsory self-incrimination.

Following *Patane*, the United States Supreme Court summarily granted certiorari in *Knapp*, vacated the Wisconsin court's decision, and remanded for reconsideration in light of the decision in *Patane*. Although Matthew Knapp had not based his earlier suppression arguments on the Wisconsin Constitution, the Wisconsin Supreme Court directed further briefing in light of the remand and took up the question of whether the state constitution's self-incrimination clause required suppression even though the Fifth Amendment to the federal constitution did not.

Before *Knapp*, the Wisconsin Supreme Court had repeatedly 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. The language of the state constitutional right against compulsory self-incrimination is virtually identical to the Self-Incrimination Clause of the Fifth Amendment; the court had declined many previous invitations to interpret the state right more expansively than its federal counterpart.

Not this time. In round two of *Knapp*, the court accepted the defendant's invitation to—as the court put it—"utilize . . . the Wisconsin Constitution to arrive at the same conclusion as in *Knapp I*."[19] This language is revealing for its pure, unvarnished result orientation. The court's decision rests not on the language or history of the state constitution's self-incrimination clause but on the court's own policy judgment flowing from an expansive view of the deterrence rationale of the exclusionary rule. The court reasoned that a police officer's intentional withholding of *Miranda* warnings is "particularly repugnant and requires deterrence" in order to prevent the judicial process from being "systemically corrupted."[20]

But the court made no effort to explain how the failure to comply with a requirement imposed as a matter of federal constitutional law should give rise to a more expansive exclusionary remedy under the state constitution than the federal constitution. An answer, of sorts, is found in a concurrence by Justice Crooks, joined by the other three members of the *Knapp* majority, making it the majority's view. Justice Crooks explains that the court's decision "serves to reaffirm Wisconsin's position in the 'new federalism' movement."[21] The concurrence invokes United States Supreme Court Justice William Brennan's famous 1977 *Harvard Law*

Review article encouraging state supreme courts to continue the Warren Court's rights revolution under the auspices of state constitutional interpretation.[22] Justice Brennan called on state supreme courts to "step into the breach" created by the emergence of a more conservative United States Supreme Court.[23] After almost thirty years of resisting the temptation to answer Justice Brennan's call, the Wisconsin Supreme Court has finally succumbed.

The "new federalism" battle cry was sounded by the Wisconsin high court more than once last term. In *State v. Dubose*,[24] 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. For many years the court followed the general framework established by the United States Supreme Court in *Manson v. Brathwaite*[25] and *Neil v. Biggers*[26] for determining the admissibility of eyewitness identification evidence. *Brathwaite* and *Biggers* require an evaluation of the suggestiveness of the identification procedure used by the police as well as the reliability of the resulting identification. In *Dubose* the court changed course and declared the police identification procedure known as the "showup" to be inherently suggestive and generally inadmissible under the state constitution's due process clause.

A "showup" is police nomenclature for a common out-of-court identification procedure in which a suspect is presented one-on-one to a crime victim or eyewitness, usually soon after and at or near the scene of the crime. The United States Supreme Court subjects showup identifications to the same test for suggestiveness and reliability as any other police identification procedure; until *Dubose,* the Wisconsin Supreme Court followed suit. The showup procedures at issue in *Dubose* included a one-on-one presentation of an armed robbery suspect to the victim at the scene within minutes of the crime, and a one-on-one presentation of the suspect to the victim through a one-way mirror at the police station shortly thereafter.

To justify abandoning reliability as the touchstone for admissibility, the *Dubose* court cited what it referred to as "extensive studies on the issue of identification evidence" and broadly asserted that "[t]hese studies confirm that eyewitness testimony is often 'hopelessly unreliable.'"[27] On the basis of this "new information," the court declared itself convinced that showups "present[ ] serious problems in Wisconsin criminal law cases."[28] On the basis of these undifferentiated "serious problems"—not problems specific to the facts of the case but "problems" generally—the court concluded that showup identifications are "inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary."[29] The court cautioned, however, that a showup will not be deemed "necessary" unless the police lack probable cause for an arrest or "as a result of other exigent circumstances, could not have conducted a lineup or photo array."[30]

The majority opinion in *Dubose* holds that the due process clause of the Wisconsin Constitution "necessitates" this new approach to eyewitness identification evidence but makes no effort to explain why.[31] Instead, the opinion devolves into a reiteration of "new federalism" and the court's power to interpret the state constitution to "provide greater protections than its federal counterpart."[32] In other words, the existence of the power justifies its exercise. Again, Justices Wilcox, Prosser, and Roggensack dissented (as they had in *Knapp*), not disputing the court's premise—that it has the power and the duty to interpret the state constitution—but questioning its method for doing so. Justice Wilcox was especially troubled by the court's departure from well-established precedent on the basis of data from social science studies presented by advocacy groups. "Not only is such data disputed," he said, "but, more importantly, it is not a valid basis to determine the meaning of our constitution. The majority fails to adequately explain how the meaning of the text of the constitution can change every time a new series of social science 'studies' is presented to the court. If the text is so fluid, then our constitution is no constitution at all, merely a device to be invoked whenever four members of this court wish to change the law."[33] To this the majority had no response.

And, finally, in *In re Jerrell,*[34] the Wisconsin Supreme 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 "without exception when questioning occurs at a place of detention" and "where feasible" when questioning occurs elsewhere. *Jerrell* involved a custodial interrogation of a fourteen-year-old armed robbery suspect. The court held the juvenile's confession involuntary based on his age, intelligence, and experience; the five-hour duration of the interrogation; and the

officers' use of a "strong voice" to accuse the juvenile suspect of lying, which "frightened" him.[35] Normally, throwing out the confession would have ended the court's review. But the majority went on to announce an electronic-recording requirement for custodial juvenile interrogations. The majority articulated several policy justifications for the new rule: to enhance the accuracy and reliability of juvenile interrogations, to reduce the number of disputes over *Miranda* and voluntariness, to protect law enforcement officers wrongly accused of improper tactics, and to protect the rights of the accused.

These justifications are uncontroversial as matters of policy; that the court resorted to its supervisory power for the authority to impose the new rule was extraordinary and unprecedented. The Wisconsin Constitution vests the Supreme Court with "superintending and administrative authority over all courts."[36] Never before has the superintending 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 majority attempted to characterize its decision as merely controlling "the flow of evidence in state courts," but by this interpretation the court's superintending power is almost limitless.

Again, Justices Prosser and Roggensack dissented, joined by Justice Wilcox. The dissenters did not take issue with the benefits of tape-recorded interrogations but objected to the majority's assumption that the court has the power to regulate police conduct that violates neither the constitution nor a statute. Justice Prosser decried the extreme breadth of the majority's view of the court's power: "If the majority opinion represents a proper use of the court's 'superintending . . . authority,' then, logically, there is no practical reason why the court could not dictate any aspect of police investigative procedure that is designed to secure evidence for use at trial. The people of Wisconsin have never bestowed this kind of power on the Wisconsin Supreme Court."[37]

There is much more that could be said about these cases, but by now some common themes should be evident. The first is that the Wisconsin Supreme Court is quite vigorously asserting itself against the other branches of state government. When the court decides cases on the basis of the state constitution its power is at its peak, because legislative correction is impossible and the constitution is difficult to amend. Three of these five cases involved interpretations of the Wisconsin Constitution, and a fourth, *Jerrell*, represents an extraordinary expansion of the court's constitutional superintending power. The terms "modesty" and "restraint"—the watchwords of today's judicial mainstream—seem to be missing from the Wisconsin Supreme Court's current vocabulary. Instead, the court has adopted a more aggressive approach to judging.

A related phenomenon is the court's apparent strong preference for its own judgment over that of either the Wisconsin legislature or the United States Supreme Court. Only one of the decisions discussed today is capable of being modified by the state legislature, and none can be reviewed by the Supreme Court. The present Wisconsin Supreme Court is plainly disinclined to defer to the judgment of those elected to represent the people of this state, even though the structure of state government and the court's precedents require it to do so. The court has lowered the threshold for invalidating statutes by adopting a heightened standard for evaluating their constitutionality. The court is quite willing to devise and impose its own solutions to what it perceives to be important public policy problems—civil and criminal—rather than deferring to the political process.

The court has also manifested a cavalier, almost dismissive attitude toward the sources of legal interpretation generally thought to be most authoritative: the text, structure, and history of the constitution and laws, and the court's own precedents. Despite their heft, most of the opinions discussed today are notable for their failure to meaningfully engage in the usual analysis of applicable legal texts and court precedents. Instead, long-standing legal standards are rewritten or simply disregarded 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. Judges who are sensitive to some limits on the scope of judicial authority and competence generally try to confine themselves to authoritative and objective sources of interpretation—the law's language, structure, logic, and history—and are skeptical of broad appeals to the court's policy judgment. Among other things, this approach has the virtue of constraining the judges to behave like judges rather than legislators.

The Wisconsin Supreme Court has enormous influence over the legal order and the political, social, and economic future of this state. These cases from the last term reflect a court quite willing to agressively assert itself to implement the statewide public policies it deems to be most desirable. The court is loosening the usual constraints on the use of its power, freeing itself to move the law essentially as a legislature would, except that its decisions are for the most part not susceptible of political correction as the legislature's would be. Time will tell whether the court will continue the extraordinary activism of its 2004-2005 term, will adjust its pace, or take a breather. In the meantime—and this is true regardless of whether the trends of the last term continue or abate—the court's work deserves closer attention from the legal community and the public.

In closing, please allow me to emphasize that I offer these views not just as a former member of the court but as one who has been privileged to serve the Wisconsin legal system for more than twenty years as a lawyer in private practice and as a trial and appellate court judge. I recognize that others—perhaps many others—may disagree. But the court's work is so important to the people of this state that I urge all—both those who might agree with me and those who might not—to discuss and debate these issues. My thanks to Marquette Law School for providing this forum and to all of you for your kind attention this afternoon.[38]

Footnotes

[1] *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440.

[2] *Thomas ex rel. Gramling v. Mallett*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523.

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

[4] *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582.

[5] *In re Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110.

[6] One notable exception is the following: Hon. Michael B. Brennan, Op-Ed, *Are Courts Becoming Too Activist? Wisconsin's Supreme Court Has Shown a Worrisome Turn in That Direction,* Milwaukee Journal Sentinel, Oct. 2, 2005, at 1J.

[7] *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440.

[8] *Maurin v. Hall*, 2004 WI 100, 274 Wis. 2d 28, 682 N.W.2d 866.

[9] *Id.* ¶ 106, 274 Wis. 2d 28, ¶ 106, 682 N.W.2d 866, ¶ 106 (quotations omitted).

[10] *Thomas ex rel. Gramling v. Mallett*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523.

[11] *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 342 N.W.2d 37 (1984).

[12] *Id.* at 191-92, 342 N.W.2d at 49.

[13] *Sindell v. Abbott Labs.*, 607 P.2d 924, 26 Cal. 3d 588, 163 Cal. Rptr. 132 (1980).

[14] *Thomas*, 2005 WI 129, ¶ 177, 285 Wis. 2d 236, ¶ 177, 701 N.W.2d 523, ¶ 177.

[15] *Id.* ¶ 133, 285 Wis. 2d 236, ¶ 133, 701 N.W.2d 523, ¶ 133.

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

[17] *United States v. Patane*, 542 U.S. 630 (2004).

[18] *Id.* at 634.

[19] *Knapp*, 2005 WI 127, ¶ 56, 285 Wis. 2d 86, ¶ 56, 700 N.W.2d 899, ¶ 56.

[20] *Id.* ¶¶ 75, 81, 285 Wis. 2d 86, ¶¶ 75, 81, 700 N.W.2d 899, ¶¶ 75, 81.

[21] *Id.* ¶ 84, 285 Wis. 2d 86, ¶ 84, 700 N.W.2d 899, ¶ 84.

[22] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

[23] *Id.* at 503.

[24] *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582.

[25] *Manson v. Brathwaite*, 432 U.S. 98 (1977).

[26] *Neil v. Biggers*, 409 U.S. 188 (1972).

[27] *Dubose*, 2005 WI 126, ¶¶ 29-30, 285 Wis. 2d 143, ¶¶ 29-30, 699 N.W.2d 582, ¶¶ 29-30.

[28] *Id.* ¶¶ 29, 32, 285 Wis. 2d 143, ¶¶ 29, 32, 699 N.W.2d 582, ¶¶ 29, 32.

[29] *Id.* ¶ 33, 285 Wis. 2d 143, ¶ 33, 699 N.W.2d 582, ¶ 33.

[30] *Id.* ¶ 45, 285 Wis. 2d 143, ¶ 45, 699 N.W.2d 582, ¶ 45.

[31] *Id.* ¶39, 285 Wis. 2d 143, ¶ 39, 699 N.W.2d 582, ¶ 39.

[32] *Id.* ¶ 41, 285 Wis. 2d 143, ¶ 41, 699 N.W.2d 582, ¶ 41.

[33] *Id.* ¶ 65, 285 Wis. 2d 143, ¶ 65, 699 N.W.2d 582, ¶ 65.

[34] *In re Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110.

[35] *Id.* ¶ 35, 283 Wis. 2d 145, ¶ 35, 699 N.W.2d 110, ¶ 35.

[36] WIS. CONST. art. VII, § 3.

[37] *Jerrell*, 2005 WI 105, ¶ 155, 283 Wis. 2d 145, ¶ 155, 699 N.W.2d 110, ¶ 155.

[38] I would also like to thank Marquette law student Jeffrey Ruidl for his research assistance on this lecture.

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