A COURT UNBOUND? THE RECENT JURISPRUDENCE OF THE WISCONSIN SUPREME COURT

Rick Esenberg

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*by Rick Esenberg**

A Preliminary Word About Judicial Activism and Restraint

In assessing whether the Wisconsin Supreme Court has moved in the direction of "activism" or "restraint," it is helpful to define terms. While it is common to hear that one judge's activism is another's restraint, this paper will presume that these terms, while lacking scientific precision, do have meanings upon which reasonable people—even those of differing sentiments—can agree.

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. In a democracy, this source should be rooted, at some point, in the formal consent of the governed. As Chief Justice John Roberts has put it, "[j]udges are like umpires. Umpires don't make the rules; they apply them…."[1]

To apply rules (as opposed to making them), one needs not only to base them in something other than one's own conscience, but also to approach them as concepts that are sufficiently concrete to be applied and not continuously "defined."

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 any results.

To use several commonplace illustrations, a judge committed to judicial restraint would certainly acknowledge the existence of the Ninth Amendment, but may regard it as too ephemeral to serve as an independent source of judicially recognized rights. She might accept the notion that the equal protection clause has applications other than those that led to its passage, but decline to adopt a method of interpretation that does not provide sufficient guidance as to just what those applications are. A restraintist judge might be reluctant to adopt a test for determining whether government action constitutes an establishment of religion that requires the balancing of numerous conflicting and incomparable factors.[2] Such a test, he may conclude, provides too little guidance in future cases, leaving the courts free to do literally anything.

Judges practicing restraint will exhibit a sensitivity for the role of other branches of government. They will refrain from overly detailed prescriptions to the executive and overweening re-examination 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.

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 and, therefore, serves the cause of judicial independence.

Such a working definition, while far from perfect, avoids a number of common traps. For example, judicial activism is not synonymous with striking down statutes. If a statute violates a constitutional command, then it is a form of activism i.e., of making the rules, to let it stand notwithstanding its inconsistency with the people's foundational document.

Nor is judicial restraint synonymous with "pro-business" or "anti-liability" decisions. Although our recent judicial history may be comprised largely of "activist" decisions advancing what may be seen as the goals of the political left, there is nothing inherently "liberal" or "conservative" in this view of restraint, as our not so distance past demonstrates.[3]

* *Rick Esenberg graduated summa cum laude from University of Wisconsin-Milwaukee and magna cum laude from Harvard Law School, where he served as an editor of the Harvard Law Review. A veteran litigator, he is currently general counsel for a global manufacturing firm and an adjunct professor of law at Marquette University Law School. Mr. Esenberg writes and speaks frequently on questions of law and public policy.*

Although many proponents of judicial restraint adhere to some form of "originalism," the exercise of restraint, for our purposes, need not involve limiting constitutional or statutory provisions to their precise historical contours. The plain meaning, for example, of a prohibition against unreasonable searches and seizures might compel its application to technologies not heard of at the time it was written. On the other hand, application of a constitutional provision in a way that its authors quite clearly did not intend—unless, perhaps, compelled by its clear and unambiguous language—is, from the perspective of restraint, problematic.

Finally, as Justice Scalia points out, judicial restraint (or, in his parlance, "textualism") is not synonymous with "strict construction." He writes that "[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."[4]

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.

Restricting itself to 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.

Regarding the presence or absence of judicial restraint on the Wisconsin Supreme Court, in the Tenth Annual Hallows lecture at Marquette Law School, Federal Judge Diane Sykes, a former Justice of the Wisconsin Supreme Court, commented on five decisions from the court's 2004-05 term, observing that "[t]ogether 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."[5]

Is she right? If so, has the trend continued?

The Wisconsin Supreme Court: Moving in an Activist Direction?

Public commentary about the Wisconsin Supreme Court as "activist" began in the wake of the 2004-05 term, the first term following the resignation of Justice Sykes (appointed to the Seventh Circuit by President Bush) and her replacement by Justice Louis Butler, a trial court judge in Milwaukee and former public defender, by Democratic Governor Jim Doyle. After a series of decisions expanding the ability of plaintiffs to recover damages in various ways, the *Wall Street Journal* ran an editorial referring to Wisconsin as "Alabama North," a magnet for trial lawyers.[6] Anticipating the remarks of Judge Sykes, 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."[7] A national advocacy group led by Dick Armey, former majority leader of the U.S. House of Representatives called Wisconsin a "Tort Hell Tundra."[8] 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."[9]

Although our recent judicial history may be comprised largely of "activist" decisions advancing what may be seen as the goals of the political left, there is nothing inherently "liberal" or "conservative" in this view of restraint, as our not so distance past demonstrates.

Laudable or not, something was happening. Joseph Kearney, Dean of Marquette University Law School, observed that "[b]y any measure, this was an extraordinary year at the Wisconsin Supreme Court."[10] According to Kearney, "[f]rom tort law to criminal law, the court was willing to depart from what had seemed to be settled approaches."[11]

Although the 2005-06 term drew less attention, several of the court's decisions reflected what might be considered to be comparably strong applications of judicial power. Over both terms, as Judge Sykes put it, the court was at times willing to depart from "long accepted principles that normally operate as constraints on the court's use of its power."

The Presumption of Constitutionality: Expanding (and Collapsing) Scrutiny— Raising the bar of rationality

It would be an overstatement to suggest that the court has abandoned the presumption of constitutionality or that it will engage in an aggressive reexamination of legislative policy choices in every instance. However, in at least two recent cases, it has adopted forms of constitutional analysis that, whenever followed, could invalidate virtually any law.

Ferdon: Raising the bar of rationality. The court's decision in *Ferdon v. Wisconsin Patients Compensation Fund* [12] 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.

Ferdon involved an equal protection challenge to legislation capping noneconomic damages in medical malpractice *personal injury cases* at $450,000. The plaintiff, through his guardian ad litem, alleged malpractice during his delivery resulting in a partially paralyzed and disformed right arm. He was awarded $700,000 in non-economic damages. Just one year earlier, in *Maurin v. Hall*[13] the court had upheld the cap on noneconomic damages in medical malpractice *wrongful death* cases.

Ferdon began with a discussion of *stare decisis* and found it not particularly constricting. Existing law, the court observed, should not be abandoned lightly, but "[w]e have stated that *stare decisis* is not mechanical in application, nor is it a rule to be inexorably followed."[14]

[I]n at least two recent cases, [the court] has adopted forms of constitutional analysis that, whenever followed, could invalidate virtually any law.

The court certainly did not "inexorably follow" *Maurin*. Instead, the court stated that a desire to curb jury passion, while a constitutionally permissible concern in wrongful death cases, may not support a damages cap in injury cases.[15]

The court went on to consider the presumption of a statute's constitutionality. It regarded the damages cap as drawing 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."[16] The court considered, but rejected, the idea that this distinction should be subjected to some form of heightened scrutiny. The distinction, it insisted, is subject to only rational basis scrutiny.[17]

But "rational basis scrutiny," the court concluded, need not be all that deferential. Although the court rehearsed some standard propositions about rational basis review, it made clear that it intends to apply a rational basis test "with teeth" and "with bite" that is "not a toothless one."[18] It referred repeatedly to a 1972 law review article by Gerald Gunther[19] and to the view of Justices Brennan Marshall and Blackmun that there ought not to be a "rigid approach" to equal protection analysis.[20]

The precise contours of this carnivorous form of review are not clear.[21] What is clear is the court went on to an unusually detailed reexamination of the posited connection of legislative ends and means presented by the damages cap. It considered —and rejected—the legislature's empirical judgment regarding that connection. Judge Sykes observed that, in concluding that the damages cap was not rationally related to legislative ends, "[i]t takes the court seventy-

Even if the Ferdon *analysis is rarely used, its existence provides something to be pulled out and put away as may be required to invalidate a troublesome statute.*

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 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."[22]

The court justified its inquiry, in part, by stating that a statute that is rational when enacted may be made irrational by events and presuming that policing this "devolving rationality" is a judicial responsibility.[23] The dissent argued that the majority's use of statistics was selective,[24] but, for our purposes, the point is that the decision entailed a thorough going reassessment of legislative choices.

How significant *Ferdon* will prove to be is uncertain. Only two weeks before it was decided, the court employed garden variety equal protection analysis in rejecting an equal protection challenge to a statute of repose protecting only those whose liability is predicated upon an improvement to real property.[25] Justice Butler, joined by Chief Justice Abrahamson, dissented but without reference to any nontraditional standard of review. Even if the *Ferdon* analysis is rarely used, its existence provides something to be pulled out and put away as may be required to invalidate a troublesome statute.

If the majority in *Ferdon* meant what it said and intends to repeat what it did, then it is difficult to say that there remains a presumption of constitutionality. After *Ferdon*, it is hard to imagine the statute that could not be a target for a successful equal protection challenge. Aggressive scrutiny of legislative fact finding and a more demanding view of what is and is not rational limits the notion of judicial deference to legislative policy choices.

Dairyland: Expanding the contracts clause. The decision in *Dairyland Greyhound Park v. Doyle* is a further illustration of the reformulation of constitutional doctrine, in this case used to justify particular construction of a state constitutional amendment.[26]

In 1993, Wisconsin voters amended Article IV, Section 24 of the state's constitution to ban casino-type gambling in the state. 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.

Two years earlier in *Panzer v. Doyle*, the court, in a 4-3 decision, had held that amendments to the compacts in 2003 to add new casino-type games were proscribed by Article IV, Section 24 and were unconstitutional.[27] This seems unexceptional. If casino-type gambling is now prohibited in the state, actually expanding it would seem to be quite apparently impermissible.

Not surprisingly, the complaint in *Dairyland* did not raise again the constitutionality of the 2003 amendments to the compacts. Rather, the plaintiff, a dog track whose business was purportedly threatened by casino gaming, argued that Article IV, Section 24 mandated non-renewal of the *original* compacts. All seven justices agreed that it did not. The merits of that conclusion are not our concern.[28]

One would expect that to be the end of the case, but it was not. A majority accepted the Governor's invitation to revisit the issue decided in *Panzer*, i.e., the state's ability to amend the compacts to add games prohibited by Article IV, Section 24.[29] The three *Panzer* dissenters (Justices Bradley, Crooks and Chief Justice Abrahamson) joined by Justice Butler (who had replaced Justice Sykes, a member of the *Panzer* majority) reversed the court's two-year old decision, reasoning that, application of the 1993 constitutional amendment to the original contracts was both unintended and that the parties rights to renew *and 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-type games in the future (the compacts provided

for amendment), 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*.

It is difficult to believe that the majority means its analysis in *Dairyland* to establish a general principle governing the impairment of contracts. As Justice Roggensack pointed out in her dissent/concurrence, the state had no obligation to renew the compacts or to add new games:

> If the contractual right to nonrenew gaming compacts would not have impaired the compacts, how could a refusal by the State to agree to four *new* games that the tribes never had—in violation of the Wisconsin Constitution, state criminal statutes, and what the State viewed as the "essence" of the compact—impair the compacts?[30]

It seems unlikely that the court really intends to find an unconstitutional impairment of contract whenever someone's hope for a favorable contractual amendment is frustrated by subsequent legislation.

The use of a constitutional analysis unlikely to be applied elsewhere, combined with the court's willingness to reach an issue that need not have been decided to resolve the case before it,[31] raised questions concerning restraint and whether the court had adopted a "results-oriented" approach. Justice Prosser dissented from the court's resolution of the impact of Article IV, Section 24 on amendments to add new forms of gaming, and further suggested that the result is a "constitutional crisis." 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.

[G]iven Wisconsin's bifurcated process, the court has gone beyond requiring that the limitations placed upon a parent by incarceration be considered at disposition, but has, instead, fashioned a rule that incarceration—no matter how lengthy and damaging—can never be the basis for termination without consideration of a myriad of "other relevant facts and circumstances."

<u>*Max G.W.: Changing the legislative balance*</u>. *In re Termination of Parental Rights to Max G.W.*[32] the issue before the court was the termination of Jodie W.'s parental rights to her son, Max W. The basis for termination was Jodie's inability to comply with state imposed "conditions of return," in this case, her inability to provide a suitable residence for Max because she was incarcerated.

Wisconsin statutes call for a bifurcated approach to the termination of parental rights. In the first stage, the court determines whether there is cause for termination ("the grounds phase") and, in the second, whether termination will serve the best interests of the child ("the dispositional phase").[33]

Jodie had entered a plea of no-contest in the "grounds" phase, i.e., to the allegation that there were grounds for termination. She was, therefore, unable to raise the issue of impossibility in the course of the hearing on disposition.

The majority held that the plea, although advised by counsel, and expressly reserving her right to contest disposition, was not "voluntarily, knowingly and intelligently entered."[34] It went on to hold that Jodie had a substantive due process right not to have her parental rights terminated "based solely on the parent's failure to meet an impossible condition of return."[35]

In recognizing a fundamental liberty interest in the relationship of a parent with his or her child, the court hardly broke new ground, and a number of courts have held that termination may not be based on incarceration alone.[36] But, given Wisconsin's bifurcated process, the court has gone beyond requiring that the limitations placed upon a parent by incarceration be considered at disposition, but has, instead, fashioned a rule that incarceration—no matter how lengthy and damaging—can never be the basis for termination without consideration of a myriad of "other relevant facts and circumstances."[37] For the dissent, this will

result in the children of incarcerated parents "serving a concurrent sentence in limbo."[38]

This, according to Justice Wilcox, frustrates legislative intent with respect to the protection of children:

> In its effort to protect incarcerated parents, the majority inadvertently imposes on the children of incarcerated parents a sentence in limbo. This contradicts the stated purpose of the Children's Code, which 'recognize[s] the importance of eliminating the need for children to wait unreasonable periods of time for their parents to correct the conditions that prevent their safe return to the family.[39]

This frustration of legislative purpose may have been avoided had the court not proceeded by the formulation of a broad constitutional command that appears to rule out incarceration as a grounds for termination.

Separation of Powers And the Issue of Deference

While these cases above suggest a willingness to aggressively re-examine legislative choices and place a strikingly limiting interpretation in a state constitutional amendment, the court has also adopted a rather broad view of the use of its superintending authority to manage the activities of the executive branch.

Jerrell C.J.: Blurring the distinction between the judiciary and the executive. *State v. Jerrell C.J*. involved an appeal from an adjudication of delinquency for armed robbery, party to a crime.[40] The juvenile had been held for approximately seven hours and, although he was given his *Miranda* rights, was not permitted to call his parents.[41] At several times during the interrogation, the questioning officer raised his voice. The young man ultimately confessed to participation in an armed robbery, but subsequently argued that his confession was involuntary. The court agreed, ordering its exclusion on remand. However, the court went on to do much more than that.

This frustration of legislative purpose may have been avoided had the court not proceeded by the formulation of a broad constitutional command that appears to rule out incarceration as a grounds for termination.

Although the court declined the petitioner's invitation to adopt a per se rule of exclusion of all confessions by children under sixteen who have not been given an opportunity to consult with a parent or interested adult, the court did order that, henceforth, "all custodial interrogation of juveniles in future cases be electronically recorded where feasible, and without exception when questioning occurs at a place of detention."[42] Presumably any evidence obtained from unrecorded custodial interrogations will be excluded.

Because the court quite readily determined that *Jerrell C.J.'s* confession was involuntary without the aid of a recording, this new rule was not necessary to resolve the matter. The court based its promulgation of this rule not on the notion that such interrogations are unlawful or unconstitutional, but pursuant to the superintending authority of the courts. It proceeded to "tackle" what it deemed to be the "false confession issue."[43] In deciding that there was such an issue to be "tackled," it referred, not to the facts in the matter before it or in the court's prior cases, but to social science evidence, adduced by a long list of *amici*, suggesting that innocent people confess.

Not surprisingly, given that the new rule was not adopted as part of the resolution of the case before it, the majority described that superintending authority as "unlimited in extent" and "indefinite in character"[44] and "as broad as necessary to control litigation and the rights of litigants."[45]

In contrast, the minority saw the superintending power as limited to those circumstances where the ordinary processes of action, appeal and review are inadequate to protect the existing rights of a litigant.[46] It criticized the majority's mandate as regulation of "police conduct that is neither unconstitutional nor violative of a statute" and argued that this constitutes a "leap from supervising lower courts to supervising law enforcement."[47] The *Jerrell* court's use of the superintending authority, in the minority's view, was extraordinary:

In other words, the court's concern went beyond problems of proof (that were themselves not present in the case before it) to substantive judgments about how interrogations should be conducted that were rooted in neither the constitution nor the statutes.

Somehow the court's superintending authority over all courts has been transformed into broad authority to mandate desirable policy ostensibly related to judicial proceedings but extending far beyond the litigants in a specific case. The power is being employed during normal appellate review, so that there is no intervention into a lower court proceeding because of an exigency. The court is not protecting a clear legal right; rather, it is creating new procedures that are not even deemed "rights." It is not acting because alternate remedies are inadequate. It requires no grave hardship because Jerrell C.J.'s adjudication of delinquency has been reversed. In other words, the court's use of its superintending authority to effect an arguably desirable policy violates every principle of our express but limited constitutional power.[48]

The majority maintained that it was not mandating law enforcement practices, but fashioning a new rule of evidence.[49] That is, of course, formally true. The court's justification for the rule was based, in part, upon adjudicative concerns, i.e., the belief that electronic recording would make it easier for courts to decide questions of the voluntariness of juvenile confessions. (Although not in the case of Jerrell C.J. himself as to whose interrogation and confession there were no factual disputes.)

But the court's justification for its rule ranged more broadly into contentions about which interrogation practices will best protect police officers, enhance the effectiveness of interrogations and best protect the rights of the accused. In other words, the court's concern went beyond problems of proof (that were themselves not present in the case before it) to substantive judgments about how interrogations should be conducted that were rooted in neither the constitution nor the statutes.

Justifying such regulation because it is implemented through a rule of admissibility (and is, therefore, 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?

The notions of case-by-case adjudication and limitation of the superintending authority only to the vindification of clear legal rights that cannot be otherwise protected are ways in which courts usually limit themselves. In *Jerrell C.J.*, the court has made clear that whether or not it will do so is a matter of "judicial policy rather than one relating to the power of this court."[50] That the court adopted the rule in a case in which it was not necessary to resolution of the dispute before it and without reference to any prior instances of the "false confession" issue having arisen in cases before it, suggests an increased appetite for, as Judge Sykes put it, the imposition of "broad-brush judicial solutions to difficult social problems."

Judicial Solutions To Broad Policy Concerns

<u>Thomas: The death of proximate cause?</u> *Thomas v. Mallett*[51] involved application of the risk contribution theory adopted in *Collins v. Eli Lilly Co.*[52] to claims against manufacturers of white lead carbonate pigment. *Collins* had involved a claim by a plaintiff whose mother had taken DES during pregnancy, allegedly resulting in the onset of cervical cancer in the plaintiff during adulthood. The plaintiff could not identify the manufacturer of the DES taken by her mother, but the court permitted her to sue all of the manufacturers of DES during the relevant nine month period with apportionment of liability to be based upon a multi-faceted notion of risk contribution.

In *Thomas*, the question was whether to extend *Collins* to permit suit by a plaintiff who alleged that he suffered lead poisoning from lead based paints applied,

at some point over the past ninety years, in a series of older homes in which he had lived. As in *Collins*, the plaintiff could not identify which companies had manufactured the paint to which he had been exposed. The court, by a vote of 4-2, agreed to apply *Collins* under these circumstances.

There were difficulties with the application of risk-contribution or market-share theory to manufacturers of lead paint. The *Collins* court had emphasized the unique nature of DES. It was a generic product made and used in the same way. It produced a "signature injury" unlikely to have been caused by something else, and the duration of possible exposure (i.e., the timeframe which a defendant had to prove it could not have contributed to the risk) was relatively brief (i.e., the nine months during which the plaintiff's mother was pregnant). Perhaps most fundamentally, the plaintiffs in *Collins* would be left wholly without recovery in the absence of some form of industry-wide liability.

The defense in *Thomas* argued that none of these factors are present in the case of lead paint pigments. The composition of lead pigments differed. There are alternative sources of lead poisoning, and poisoning from lead paint lacks a signature injury. In *Thomas* there was a lengthier period of time during which a manufacturer could have contributed to the risk (as long as seventy-five years in the case before the court), and third parties were involved in either enhancing or minimizing the risk. Paint manufacturers, for example, would decide how much pigment to mix into the paint. In addition, because lead paint is dangerous only when it peels and flakes, there can be no harm unless the property owner fails to maintain painted surfaces. These concerns had caused every other court in the country to have considered the issue to decline to permit such recovery.[53]

In order to allow recovery in *Thomas*, the majority opinion devoted seventy paragraphs (well over a third of its opinion) to the hazards of lead paint and the industry's alleged knowledge (and lack of response to and even "cover up") of those hazards. While recognizing that there were factual disputes and competing inferences, the court continued with a consideration of whether different pigments which, unlike DES, were not chemically identical, nevertheless all presented the same risk. This discussion was characterized by Justice Wilcox in his dissent as "over 50 pages of so-called 'facts' in order to construct an intricate tapestry of malfeasance and culpability on the part of the lead paint industry as a whole."[54]

After Thomas, *it is now unclear what factors could limit the extension of such liability to any case in which the plaintiff cannot identify the manufacturer of a product alleged to have caused harm.*

A number of these disputed facts were central to the court's adoption of *Collins*. For example, the defendants had argued that, unlike DES, lead paint pigments differed in the degree of risk presented.[55] The court dismissed the concerns about the length of time for which the defendants could be held "responsible" and the involvement of third parties in enhancing or minimizing the risk by pointing to the industry's "knowledge" and "cover-up" of the risk.[56]

While such an approach is standard in determining whether an issue of material fact exists, the court did not make its application of *Collins* contingent upon the establishment of these facts at trial. On remand, *Thomas* was not required to prove any of the facts relied upon by the court in concluding that lead paint pigment was enough like DES, or that the industry's conduct was really sufficiently blameworthy, to warrant application of *Collins*.

One of the dissenters observed:

> It is often said that bad facts make bad law. Today's decision epitomizes that ancient legal axiom. The 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. Even though the injury in this case is tragic, the plaintiff cannot demonstrate that he was lead poisoned as a result of white lead carbonate, much less the type of white lead carbonate produced by any of the respective defendants. More importantly, he cannot prove *when* the supposed

> white lead carbonate that allegedly poisoned him was manufactured or applied to the houses in which he was supposedly lead poisoned. However, none of these facts seem to matter to the majority.[57]

After *Thomas*, it is now unclear what factors could limit the extension of such liability to any case in which the plaintiff cannot identify the manufacturer of a product alleged to have caused harm.

Moreover, apart from future imposition of some form of "market share" liability, the majority's suggestion that the result was somehow mandated—or at least affirmatively supported by—Article I, section 9 of the Wisconsin Constitution may also be significant. That section provides:

> Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.[58]

Collins had relied on Article I, section 9 because, had plaintiff been unable to sue the DES manufacturers en masse, she would have been left completely without a remedy.

The same concern was not present in *Thomas*. The plaintiff was able to sue—and had, in fact, recovered from—those landlords who had failed to maintain the places in which he had lived. The court rejected the idea that this meant Article I, section 9 precluded recovery, observing that "it does not apply only to ensure that plaintiff has a remedy against someone for something," i.e., it is not a shield from liability.[59]

Most significant is the court's suggestion—present in *Collins* but in virtually no other cases—that Article I, section 9 might *compel* a remedy not otherwise available under common law. *Amicus* Civil Trial Counsel of Wisconsin had argued, based upon the great run of prior cases, that Article I, section 9's only purpose is to ". . . entitle a litigant to a remedy as it existed at common law. It does not create rights. The legislature may change that common law, but these charges must be reasonable to pass scrutiny under Article I, section 9."[60] In other words, Article I, section 9 subjects legislative limitation or elimination of remedies in derogation of the common law to a test of reasonableness, but does not itself empower the court to "refashion" the common law.

The *Thomas* majority rejected that argument. Although its view of the precise contours of Article I, section 9 remains unclear, its suggestion that the constitutional provision maintaining that Article I, section 9 "does allow for a remedy through the existing common law"[61] suggests that it believes that Article I, section 9 imports into the common law a constitutional imperative for a "remedy" whenever there is a "wrong," whether or not recognized at common law. The court acknowledged amicus' argument that such a broad constitutional command cannot be "maintained in some principled way thereby creating uncertainty in a number of cases,"[62] but pronounced itself untroubled:

Although this criticism carries facial appeal, the goal of providing certainty is not necessarily achievable and that is not necessarily a bad thing. The common law develops to adopt to the changing needs of society. This is, as it has been called, its genius.[63]

The majority was equally untroubled by the dissent's view that a mere imperative for "a remedy" is results oriented, dismissing its allegations of judicial activism as "sensationalized judicial rhetoric" that is "regrettably becoming more common" but which does "nothing more than obscure the issue to be answered in the instant case."[64]

The New Federalism

<u>*Knapp & Dubose: The New Federalism*</u>. Both *Dubose*[65] and *Knapp*[66] departed from the Wisconsin Supreme Court's longstanding adherence to the framework for judging due process challenges to the admissibility of evidence in criminal matters under the Wisconsin Constitution in accordance with the United States Supreme Court's interpretation of parallel provisions in the federal constitution.

In *Knapp*, a detective had not read the defendant his *Miranda* warnings before asking the defendant about the clothes he had been wearing the night before. The defendant pointed to a pile of clothes on the floor that were subsequently found to be stained with the blood of a murder victim. The detective admitted that he had deliberately chosen not to provide the *Miranda* warnings. The court initially concluded that physical evidence obtained as a direct result of a *Miranda* violation

must be excluded, basing its decision on what it viewed to be the requirements of the Fifth Amendment to the United States Constitution.[67] This was consistent with the court's longstanding view that the right against self incrimination afforded by Article I, Section 8 of the Wisconsin Constitution was to be interpreted "in lock-step" with the Fifth Amendment.[68]

Knapp I was vacated and remanded by the United States Supreme Court in light of *United States v. Patane*,[69] in which a plurality concluded that the fruit of poisonous tree doctrine does not extend to derivative evidence discovered as a result of a defendant's voluntary statements obtained without *Miranda* warnings. Despite *Patane*, on remand, the Wisconsin Supreme Court abandoned its "lock step" interpretation of Article I, Section 8 and held, again, that the blood stained clothes must be excluded. One can certainly defend this as a logical—if somewhat attenuated —extension of *Miranda*. But the court did depart from a long-established way of interpreting the relevant state constitutional provision.

In *State v. Dubose*, Dubose was convicted of armed robbery.[70] In brief, a man named Hiltsley had recognized Dubose as a regular customer at a liquor store where he worked and invited Dubose to his residence to smoke marijuana. At the residence, Dubose had held a gun to Hiltsley's head and robbed him. Several hours later, Dubose was arrested and placed in the back of a squad car where Hiltsley was asked to identify him.

The court held that this "show-up" procedure was inherently suggestive and that the eyewitness identification should have been suppressed. In so doing, it declined to follow the approach taken by the United States Supreme Court[71] (and in previous decisions of the Wisconsin Supreme Court)[72] in which the court first determined whether an identification was impermissibly suggestive and, if so, whether under the totality of circumstances the identification was nevertheless reliable. Rather, it held that "evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of circumstances, the procedure was necessary."[73]

The court relied on a social science evidence establishing, in its view, that eyewitness testimony is often 'hopelessly unreliable.'"[74] In dissent, Justice Roggensack argued that this evidence (or at least the majority's interpretation of it) was disputed.[75]

In proceeding in this way, the court elided the facts of the case to new policy. It may have been unlikely that Hiltsley's identification of a man that he knew prior to the crime and invited back to his apartment and who then held a gun to his head was unreliable. The court in *DuBose*, like *Jerrell C.J.*, reached out to create a broad rule regarding what law enforcement procedures should be permitted in response to concerns that were not presented by the case before it.

Justice Wilcox observed that "[t]he 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."[76]

Although one could argue that neither of these decisions nor the idea that similar provisions in the state and federal constitutions may be interpreted differently is, in and of itself activist, both cases represent a departure from the way in which the court had generally handled such questions reflecting, perhaps, a diminished weight placed upon precedent. And as we have seen, *Ferdon* and *Dairyland* reversed very recent decisions, calling into question the extent to which anything can be regarded as settled other than by the type of head counting normally associated with political prognostication.

Just as significantly, when deciding an issue under the Wisconsin Constitution, the court is at the height of its power because its decision may not be reviewed. Whether or not it is "activist," the New Federalism imbues the court with substantial authority.

The court in DuBose, *like* Jerrell C.J., *reached out to create a broad rule regarding what law enforcement procedures should be permitted in response to concerns that were not presented by the case before it.*

Judicial Policymaking

Fisher: Rewriting the concealed carry statute. In *State v. Fisher*,[77] the court was faced with reconciling a conviction for concealed carry with the Wisconsin's

constitution's guarantee of "the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."[78]

The court has struggled to reconcile this broad constitutional right (adopted in 1998) with Wisconsin's pre-existing statute "completely banning the carry of concealed weapons by all citizens in all circumstances,"[79] a juxtaposition that the court has characterized as "anomalous, if not unique."[80]

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. In *State v. Hamdan*, for example, it concluded that a citizen's "desire to exercise the right to keep and bear arms for purposes of security is at its apex when undertaken to secure one's home or privately owned business."[81] Thus, the court held that a store owner could not be constitutionally prosecuted for carrying a handgun in his pocket at a grocery store that he owned and operated in a high crime area in Milwaukee.[82] His constitutional right to keep and bear arms for security purposes could be overcome only by demonstrating that he had an unlawful purpose.[83]

In *Fisher*, 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). By a 4-3 vote, the court upheld the conviction rejecting the trial court's conclusion that the defendant's car was an extension of his place of business and, therefore, within *Hamdan's* "apex" of constitutional protection. In so doing, it engaged in a rather extensive assessment of the comparative risks faced by Fisher in his low crime community of Black River Falls as opposed to those faced by Hamdan in Milwaukee's central city.[84]

The court continued its practice of reading the specified examples of a "lawful purpose" for which there are constitutional rights to bear arms as limitations on its exercise and to apply those restrictions in a fairly aggressive way. Whether this narrow construction of Article I, sec. 25 accurately reflects the public's intent in adopting it or whether the court has properly balanced the interests of the state and individual gun owner is not our concern. Rather, what is significant is the court's decision to resolve a high degree of conflict between a legislative proscription and a constitutional command by engaging in its own detailed analysis of the facts and policy judgments involved on a case-by-case basis.

[W]hen deciding an issue under the Wisconsin Constitution, the court is at the height of its power because its decision may not be reviewed. Whether or not it is "activist," the New Federalism imbues the court with substantial authority.

This implicates restraintist principles in two ways. First, it absolves the legislature of the need "to determine how to make the statute conform to the requirements of the constitution as amended," as would be the case had it held the concealed carry statute to be unconstitutionally overbroad.[85]

Second, by determining itself how the legislature can be made to conform to a new constitutional requirement, the court is necessarily unconcerned with the discernment of legislative intent because, of course, the legislature was unaware of that requirement at the time it acted and its clearly expressed policy choice (i.e., a virtually absolute ban on concealed carry) is not constitutionally permissible. Proceeding in this way, moreover, maximizes legal uncertainty (when may the statute be constitutionally applied?) and involves the court in a necessarily detailed re-examination of the factual findings and judgments to which appellate courts have traditionally deferred.[86]

A Divided Court

What emerged during the Wisconsin Supreme Court's 2004-2005 term was a fairly solid bloc consisting of Justices Abrahamson, Bradley and Butler that achieved some success in attracting Justice Patrick Crooks as a fourth vote. The cases discussed here generally involved a sharply divided court. With Justice Butler's appointment to the court, Chief Justice Shirley Abrahamson was not the most frequent dissenter for only the second time in recent years. Justice Crooks was most frequently in the majority and, in nineteen cases decided by a 4-3 vote, was in the majority in all but three.

In each of those nineteen cases, Justices Abrahamson, Bradley and Butler voted together in every one and were in the majority in twelve. Justices Wilcox and Roggensack dissented in each of the twelve cases in which Chief Justice Abrahamson and Justices Bradley and Butler provided three of a four vote majority. Likewise, Justices Wilcox and Roggensack were in the majority in each of the cases in which Chief Justice Abrahamson and Justices Bradley and Butler constituted the dissent. The other swing justice was David Prosser.

The two justices most likely to concur were Abrahamson and Bradley followed by Wilcox and Roggensack.[87]

A recent study prepared by the Judicial Evaluation Institute and Sequoyah Information Systems further confirmed sharp divisions on the court. The study attempted to "score" the Justices on whether or not their decisions "have had the effect of restraining liability." The higher the score, the more "anti-liability" the Justice. As noted earlier, this is, at best, a very imprecise proxy for judicial restraint. Nevertheless, the analysis revealed three strongly "pro-liability" justices: Chief Justice Abrahamson (19%); Justice Butler (22%); and Justice Bradley (24%). One Justice was moderately "pro-liability:" Justice Crooks (43%). Three were moderately "anti-liability:" Justice Roggensack (59%); Justice Prosser (61%); and Justice Wilcox (64%). This data is useful in confirming voting blocs on the Wisconsin Supreme Court more than anything else.

CONCLUSION

We have seen that a number of the Wisconsin Supreme Court's recent decisions have involved an aggressive re-examination of legislative fact-finding (*Ferdon*) or the rooting of a decision in facts that are controverted (*Thomas*) or outside of the record (*Jerrell C.J., DuBose*). We have seen the court engage in a judicial reformulation of legislation (*Fisher*) and adopt doctrine that it is unlikely to follow in future cases (*Ferdon*, *Dairyland*).

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.

Endnotes

1 John Roberts' opening statement, Senate Judiciary Committee Hearing, September 12, 2005.

2 One example might be Justice Breyer's recent description of the proper construction of the United State's Constitution's guarantee of the right to freely exercise, and its prohibition of the establishment of, religion. These clauses, he says, are to promote "the fullest scope of religious liberty" and "tolerance for all." They seek to avoid "divisiveness" by maintaining "separation of church and state." But interpretation of the clauses must manage not to "purge from the public sphere all that in any way partakes of the religious" because that, too, would "promote the kind of social conflict the Establishment Clause seeks to avoid." The government must not "engage in or compel," or do anything resulting in excessive "interference with, or promotion of" religion. It must, moreover, maintain this Solomonic neutrality not only among "sects" but between "religion and nonreligion." Not surprisingly, Justice Breyer can conceive of no test that might tell us whether government has strayed from the narrow path to which it must keep. Van Orden v. Perry, 125 S.Ct. 2854, 2868 (2005) (Breyer, J., concurring). *See* Richard M. Esenberg, *You Cannot Lose If You Choose Not To Play: Toward A More Modest Establishment Clause*, 12 Roger Williams L. Rev. 1, 26 (2006) ("One tires just reading his description of the requisite rigor.").

3 *See, e.g.,* Lochner v. New York, 198 U.S. 45 (1905).

4 Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 23 (1997). Nor is judicial restraint a mechanical process. To extend the umpire analogy, there are inevitably judgment calls and an umpire can only "call them as he sees them."

5 Diane S. Sykes, *Reflections On The Wisconsin Supreme Court*, 89 Marq. L. Rev. 723 (2006).

6 Editorial, *Alabama North*, Wall St. Journal, August 9, 2005.

7 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.

8 Bill Leuders, *Under Fire*, Milwaukee Magazine, December 2005.

9 *Id.*

10 David Ziemer, *Crooks emerges as court's key swing vote*, Wisconsin Law Journal, August 24, 2005.

11 *Id.*

12 2005 WI 125, 284 Wis.2d 573, 702 N.W.2d 440.

13 2004 WI 100, 274 Wis.2d 28, 682 N.W.2d 866.

14 2005 WI 125, at ¶ 30, 284 Wis.2d at 597, 701 N.W.2d at 453.

15 *Id.* at ¶ 36. Maurin was expressly overruled—by a 4-3 vote—in *Bartholomew v. Wisconsin Patients Compensation Fund*, 2006 WI 91, 293 Wis.2d 38, 717 N.W.2d 216, albeit on nonconstitutional grounds.

16 *Id.* at ¶ 40.

17 *Id.* at ¶ 65.

18 2005 WI 125 at ¶ 78.

19 Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972).

20 City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 478 (Marshall, J. concurring in part and dissenting in part) (criticizing "focusing obsessively on the appropriate label to give" the standard of review).

21 Although the *Ferdon* court, citing *Gunther*, suggested that "rational basis with teeth" differs from the heightened tiers of "strict" and "intermediate" scrutiny in that it focuses on means without second guessing legislative ends, 2005 WI 125 at ¶ 79, it is not clear that this accurately describes those decisions of the United States Supreme Court that the *Ferdon* court offered as examples of "rational basis with bite."

The most recent U.S. Supreme Court cases it cited as examples of this form of scrutiny are Justice O'Connor's concurrence in *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) and *Romer v. Evans*, 517 U.S. 620, 35 (1996) 2005 WI 125, ¶ 78, n. 93; 284 Wis.2d at 615, n. 93. Both Justice O'Connor's *Lawrence* concurrence and the majority opinion in *Romer* were marked by dismissal of certain legislative ends, i.e., the expression of certain moral judgments regarding homosexuality. *See, e.g., Lawrence*, 539 U.S. at 583 ("Moral disapproval of a group cannot be legitimate government interest….") Romer, 517 U.S. at 634 (declaring that constitutional amendment prohibiting antidiscrimination laws reflects a "bare… desire to harm" homosexuals and this cannot constitute a legitimate government interest). *Cf.* Romer, 517 U.S. at 636 ("The Court has mistaken a Kulturkampf for a fit of spite.") (Scalia, J., dissenting).

22 Sykes, *supra* note 5, at 728.

23 2005 WI at ¶ 114.

24 *Id.* at ¶ 210, 247-310 (Prosser, J., dissenting).

25 Kohn v. Darlington Community Schools, 2005 WI 99, 283 Wis.2d 1, 698 N.W.2d 794.

26 2006 WI 107, 719 N.W.2d 408.

27 2004 WI 52, 271 N.W.2d 295, 680 N.W.2d 666.

28 The Dairyland minority maintained that the 1993 constitutional amendment did not mandate nonrenewal and held that some less significant amendments in 1998 that did not add new types of casino games were sufficiently within the scope of the original compacts to pass constitutional muster.

29 2006 WI 107, at ¶ 2.

30 *Id.* at ¶ 265. Justice Roggensack also argued that the 1993 amendments were an exercise of the state's police power and, thus, immune from impairment analysis.

31 The majority dismissed the notion that it ought to have declined to revisit Panzer observing that "when the Wisconsin Supreme Court elects to hear only ten percent of the cases presented to it for review, the public expects and deserves that the court 'take cases to decide the substantive issues presented and provide meaningful analysis and guidance on important issues, not to avoid deciding them by judicially created avoidance doctrines.'" 2006 WI 110, at ¶ 94, n. 75.

32 2006 WI 93, 716 N.W.2d 845.

33 Wis. Stats. § 48.427.

34 2006 WI 93, at ¶ 38. The dissent criticized the majority for relieving Jodie of what may have been a poor strategic decision, effectively establishing a rule that an otherwise valid plea of no contest "will be deemed invalid if he or she challenges the disposition," *id.* at ¶ 71, requiring lower courts "to advise a parent that pleading no contest at the grounds phase is inadvisable. Id. at ¶ 84.

35 *Id.* at ¶ 56.

36 *Id.* at ¶ 48.

37 *Id.* at ¶ 56.

38 *Id*. at ¶ 59 (Wilcox, J., dissenting).

39 *Id*. at ¶ 85 (Wilcox, J., dissenting), citing Wis. Stat. § 48.01(a).

40 2005 WI 105, 283 Wis.2d 145, 699 N.W.2d 110.

41 Miranda v. Arizona, 384 U.S. 436 (1966).

42 2005 WI 105, at ¶ 59.

43 2005 WI 105 at ¶ 57.

44 2005 WI 105, at ¶ 40.

45 *Id*. at ¶ 91 (Abrahamson, C.J., concurring).

46 *Id*. at ¶ 145.

47 *Id*. at ¶¶ 47-48 (Roggensack, J., dissenting in part and concurring in part).

48 *Id*. at ¶ 146. (Prosser, J., concurring in part and dissenting in part).

49 *Id*. at ¶¶ 47-48.

50 2005 WI 105 at ¶ 41, 283 Wis.2d at 165 (quoting State v. Jennings, 2002 WI 44, ¶ 15, 252 Wis.2d 228, 647 N.W.2d 142).

51 2005 WI 129, 285 Wis.2d 236, 701 N.W.2d 523.

52 116 Wis.2d 166, 342 N.W.2d 37 (1984).

53 Sykes, supra note 5, at 729.

54 2005 WI 129, at ¶ 181 (Wilcox, J., dissenting).

55 *Id*. at ¶ 136, n. 44.

56 *Id*. at ¶ 135, 152, 160.

57 *Id*. at ¶ 177 (Wilcox, J., dissenting).

58 Wis. Const., art. I, sec. 9.

59 2005 WI 129, at¶ 122.

60 *Id*. at ¶ 126.

61 *Id*. at ¶ 129.

62 2005 WI 129 at ¶ 129.

63 2005 WI 129, at ¶ 130.

64 2005 WI 129, at ¶ 130 n. 42.

65 2005 WI 126, 285 Wis.2d 143, 699 N.W.2d 582.

66 2005 WI 127, 285 Wis.2d 86, 700 N.W.2d 899.

67 State v. Knapp, 2003 WI 121, 265 Wis.2d 278, 666 N.W.2d 881 (Knapp I).

68 *See, e.g.,* State v. Sorensen, 143 Wis.2d 226, 421 N.W.2d 77 (1988).

69 542 U.S. 630 (2004).

70 2005 WI 126, 285 Wis.2d 143, 699 N.W.2d 582.

71 Manson v. Brathwaite, 432 U.S. 98 (1977); Neil v. Biggers, 409 U.S. 188 (1972).

72 State v. Wolverton, 193 Wis.2d 234, 533 N.W.2d 167 (1995); Fells v. State, 65 Wis.2d 525, 223 N.W. 2d 507 (1974).

73 2005 WI 126, at ¶ 33.

74 *Id*. at ¶ 30, citing Commonwealth v. Johnson, 420 Mass. 458, 650 N.E.2d 1257, 1262 (1995).

75 *Id*. at ¶ 89-91 (Roggensack, J., dissenting).

76 2005 WI 126, at ¶ 65.

77 2006 WI 44, 290 Wis.2d 121, 714 N.W.2d 495.

78 Wis. Const. Art. I, § 25.

79 State v. Hamdan, 2003 WI 113, ¶ 51, 264 Wis.2d 433, 665 N.W.2d 785.

80 *Id*.

81 *Id*. at ¶ 67.

82 *Id*. at ¶ 84.

83 *Id*. On the same day it decided Hamdan, the court upheld the concealed carry conviction of a defendant who could offer nothing but a generalized concern for his security as justification for carrying a firearm in the glove compartment of his vehicle. State v. Cole, 2003 WI 112, 264 Wis.2d 520, 665 N.W.2d 328.

84 Fisher, 2006 WI at ¶¶ 41-44.

85 Hamdan, 2003 WI at ¶ 113 (Crooks, J., concurring in part and dissenting in part).

86 2006 WI 44, ¶ 74, 290 Wis.2d at 156 ("As it did in Hamdan, the majority holds that the determination of the facts is to be done as a matter of law rather than decided by the trier of fact—usually a jury.") (Crooks, J., joined by Wilcox and Roggensack, JJ., dissenting).

87 The statistics are drawn from an analysis done by David Ziemer in the August 24, 2005 edition of the *Wisconsin Law Journal*.

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1015 18th Street, N.W., Suite 425
Washington, D.C. 20036