Everyone's Business: Emerging Issues in the Wisconsin Supreme Court

by Rick Esenberg

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Last year, I wrote a white paper, *A Court Unbound?: The Recent Jurisprudence of the Wisconsin Supreme Court*, in which I suggested that the Court had recently become less likely to follow certain interpretive and decisional practices that traditionally serve to cabin judicial discretion and to ensure an appropriate judicial modesty in relation to the executive and legislative branches.[1] Echoing the comments of other observers, I argued that the court is at a critical juncture, "more or less evenly divided between two groups of justices who have dramatically different notions of the role of the judiciary."

Since the release of *A Court Unbound?,* Justice John Wilcox, commonly regarded as a "restraintist" or (if you prefer) a "conservative," has been replaced by the newly elected Justice Annette Ziegler, a jurist widely thought to essentially share Justice Wilcox' jurisprudential outlook. As this paper goes to press, there is yet another election, this time pitting an incumbent against a challenger thought to have a materially different judicial philosophy.

The purpose of this paper is not to rehearse the arguments that I made last year, but to examine a series of issues that are likely to come before the court in the near future. Of course, doing so is something of an educated guess. The Court's calendar is a function of the choices of litigants and the Court's responses to the cases that it is asked to review. These issues may not present themselves and it is almost certain that other important questions—including some that have not occurred to me—will come before the court. My purpose here is to simply suggest some potential judicial frontiers as we once again debate the role of the Wisconsin Supreme Court in the midst of an election.

This isn't easy in a judicial campaign. We don't want candidates to promise how they will decide any particular case. Legal questions and court decisions are complicated and often require specialized knowledge—and careful study—to understand. They will, at times, be oversimplified and even misstated in the course of a campaign in which candidates must communicate to lay people in ways that can be understood and to which busy voters will pay attention.

But this is just a particularized—and perhaps aggravated—example of a problem that exists in all campaigns. We generally believe that the best remedy for bad speech is more speech, with some allowance for the special obligations of lawyers to, for example, refrain from knowingly misstating the law.

Because the issues in judicial campaigns—particularly those involving the highest court in a state—are so vital, a free and robust debate is essential. The types of issues that I outline here are seen by good and honest judges in different ways. Voters are entitled to know something of those differences.

Educational Finance

The constitutionality of the systems of financing education in the various states have long been the subject of litigation seeking judicial mandates that would compel additional funding or equalize spending among school districts.[2] There have been three such cases in Wisconsin and, while none have resulted in a judicial order mandating a change in the way in which education is funded in the state, the Court has developed constitutional principles that are pregnant with the possibility for an ultimately successful challenge.

Two state constitutional provisions are implicated in these cases. The first—and the one that has been the most significant in attracting judicial support for constitutional mandates in the area of educational financing—is the state's educational uniformity clause, providing that "[t]he Legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable…."[3] The state's equal protection guarantee has also been urged as a basis for judicially mandated school finance reform.[4]

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In *Kukor v. Grover*, the Wisconsin Supreme Court held that the then-current state education finance system did not violate the uniform education or equal protection provisions of the state constitution.[5] The Court concluded that the state was under no obligation to provide additional funding to poorer school districts and that any funding discrepancies that might arise from a district's willingness and ability to spend more than other districts was not unconstitutional.

In *Vincent v. Voight*,[6] the Court held that the educational uniformity clause requires that Wisconsin students have the right to "an equal opportunity for a sound basic education [which] will equip students for their roles as citizens and enable them to succeed economically and personally"[7] and defined that right to include "the opportunity for students to be proficient in mathematics, science, reading and writing, geography, and history, and... receive instruction in the arts and music, vocational training, social sciences, health, physical education and foreign language."[8] It is, the Court observed, the constitutional duty of the legislature to provide "sufficient resources" to ensure that such an education is available to every student in Wisconsin.

The *Vincent* majority, moreover, departed from *Kukor's* conclusion that the state constitution does not require greater funding for poorer districts or those that may be regarded as requiring additional money to accomplish these educational objectives. Writing for the majority, Justice Crooks observed that "[a]n equal opportunity for a sound basic education acknowledges that students and districts are not fungible and takes into account districts with disproportionate numbers of disabled students, economically disadvantaged students, and students with limited language skills."[9] The uniformity required by the constitution, he emphasized, requires "a standard that will equalize outcomes, not merely inputs."[10]

Four justices (Crooks, Bablitch, Bradley and Chief Justice Abrahamson) joined in the announcement of this new constitutional standard. Three justices (Sykes, Wilcox and Prosser) rejected it. Despite the adoption of a constitutional mandate of some adequate and sufficiently compensatory standard of educational financing, no modification of the system was ordered. While the Chief Justice and Justices Bablitch and Bradley would have remanded for further proceedings on that issue, Justice Crooks concluded that the plaintiffs had not presented evidence that students were being denied this opportunity.

Although the composition of the Court has changed since *Vincent*, it seems likely that, should a new challenge present itself, the justices would remain evenly divided on the nature of the constitutional standard and its application to the state's system of school funding. It seems, then, that the constitutionality of the state's educational finance system may well be in play.[11]

The issues in such a case would be quite important from a legislative standpoint. In 2002, the Institute for Wisconsin's Future conducted an "adequacy" study of the state's schools and concluded that a 32% increase in educational funding would be required to meet what it posited as the minimal requirements for a "sound basic education" called for by *Vincent.*[12]

The Meaning of Marriage

In the fall of 2006, Wisconsin voters amended the state's Constitution to provide that:

> Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.[13]

The validity of the amendment is currently being challenged in Dane County Circuit Court.[14] The plaintiff alleges that the amendment, in prohibiting both same sex marriage and, at least, civil unions which contain most of the legal attributes of marriage, violated the requirements of the state constitution that "if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately."[15] While the challenge would seem to face an uphill battle, the issue is likely to eventually reach the Wisconsin Supreme Court.[16]

Assuming that the amendment was validly enacted, there are significant interpretive issues that are likely to arise. The campaign for its ratification featured conflicting claims about what legal arrangements it would and would not affect. Ironically (although understandably, given the political dynamics),

opponents of the amendment argued that it would have a broad impact, invalidating efforts on the part of state and local governments—and perhaps even private employers—to grant fringe benefits, such as health insurance, to domestic partners. They argued that it might prevent unmarried persons who cohabitate from owning property together and invalidate the application of domestic violence statutes to cohabiting couples. In short, they suggested that the marriage amendment might invalidate a number of laws or legal arrangements creating rights or obligations that may constitute one of the attributes otherwise associated with marriage.

Proponents of the amendment argued for a much narrower impact, often expressly denying that the amendment could be read to have any of the broader impacts suggested by its opponents. They tended to say that only a law or legal arrangement that created a set of rights or obligations that constituted all or most of the attributes associated with marriage would be affected by the amendment.

This is all more pertinent than it might otherwise be because of the counterintuitive way in which the Wisconsin Supreme Court interprets constitutional amendments. A fairly standard precept of legal construction is that, in attempting to interpret language, *e.g.,* a statute or contract, one starts with the words. Although actual practice (if not doctrine) is not so easily described, it is customary to say that, if the plain language of whatever we are interpreting answers the question we are asking, our inquiry is at an end. Thus, the plain meaning of a statute or contract controls and only if there is no plain meaning, *i.e.,* the language is ambiguous and does not answer our question, may we consider extrinsic evidence as to what the legislature or parties to the contract intended.[17]

This is not so when it comes to the interpretation of constitutional amendments. When interpreting a constitutional amendment, the rule of construction is that "the intent of the provision 'is to be ascertained, not alone by considering the words of any part of the instrument, but by ascertaining the general purpose of the whole[....]'"[18] Courts are to examine, not only the language of the provision, but the legislative history of its adoption by the legislature and "the information used to educate voters during the ratification campaign."[19] They are also to consider the first pertinent legislative enactments after the amendment's adoption.[20]

The rationale behind this less restrained mode of interpretation is to give effect to the intent of the framers and the people who adopted it. It seems based on the belief that the voters, unlike legislative draftsmen or the scriveners of contracts, cannot as readily be presumed to have intended only that which can be derived from or supported by the four corners of the constitutional language adopted. Perhaps there is also a sense that a constitutional amendment, which cannot be altered once submitted to the voters and which, after adoption, is more difficult to change, ought to be afforded a more flexible construction.

None of this is obviously correct. One could just as easily argue that the elevated authority of, and difficulty in changing, constitutional amendments requires that they be strictly construed. It is far from obvious, moreover, that ascertaining a collective intent of "the people" (or, for that matter, a legislative body) is a judicially manageable task. But, whatever its merits, this is our rule.

However it may be justified, it is a rule that expands, rather than constrains, judicial discretion, freeing the Court from the plain (if it is plain) language of the adopted text. It makes the process of interpretation more discretionary and its outcome more indeterminate.

As I noted in *A Court Unbound?*, this approach has led to some rather intriguing results in recent years. In interpreting an amendment which, on its face, bans all casino gaming in Wisconsin, the Court has, in effect, conferred a monopoly on certain Indian tribes to engage in any type of casino gaming at any level that the Governor might agree to and which is permitted by federal law.[21] Having passed a facially unqualified constitutional guarantee of the right to bear arms, the Court has handed down decisions upholding broad enforcement of Wisconsin's preexisting statute prohibiting concealed carry.[22] Does it prevent public entities from recognizing same sex marriages from other jurisdictions?[23]

Apart from the appropriate interpretive methodology, the marriage amendment is likely to raise a number of questions. To return to the debate over the amendment's ratification, does the amendment only prohibit the state from creating or recognizing a

status that has substantially all of the legal attributes of marriage or does it also bar legal status that have only some of those attributes?

Although it would seem unlikely that the amendment could be interpreted to prohibit private firms from offering health insurance and other benefits to same sex domestic partners of their employees, does it prohibit the state and local units of government from doing so?

Public debate over the amendment may clarify these questions, although, as noted above, much of it consisted of sponsors and supporters of the amendment arguing that it would have a narrow impact and opponents arguing that it would—or could—be broadly interpreted. Which is the Court to presume that voters believed?

In addition, the amendment raises questions regarding its interaction with and the interpretation of other constitutional provisions. For example, in *Helgeland, et al., v. Department of Employee Trust Funds, et al.*, lesbian state employees have brought an equal protection challenge to the state government's limitation of spousal benefits to the wife or husband of state employees.[24]

The plaintiffs bring their challenge on state equal protection grounds. Even if the marriage amendment does not, as many of its proponents argued, prohibit the extension of benefits to same sex partners, it may well have an impact on whether the state's equal protection guarantee mandates such an extension. In altering the organic law of the state, the marriage amendment may well foreclose an argument that a distinction between married and unmarried couples (whether heterosexual or homosexual) is irrational or otherwise insufficiently compelling to survive equal protection scrutiny. It may be difficult to argue that the same constitution that restricts marriage and substantially equivalent relationships to opposite sex couples contains an equal protection guarantee that prohibits the state from drawing a distinction between those couples and other domestic arrangements.[25]

To offer another example, the Wisconsin Supreme Court has held that courts may find that there is a parent-child relationship between a child and the same-sex partner of his or her mother and, based upon that relationship, to order visitation and similar relief.[26] Does the marriage amendment require a reexamination of this?

New Federalism

In *A Court Unbound?*, I noted the Court's reinvigoration of New Federalism, the notion that state supreme courts should feel free to interpret provisions in state constitutions differently than the United States Supreme Court interprets identical or substantially similar provisions in the United States Constitution. During the Wisconsin Supreme Court's 2004-05 term, it departed from the United States Supreme Court's approach to the admissibility of "show up" identifications of criminal defendants[27] and from what seemed to be the views of a majority of the justices on the United States Supreme Court regarding the admission of the physical fruits of a *Miranda* violation.[28]

New Federalism does not fit easily along the spectrum from judicial activism to restraint. That debate has more to do with interpretive method than with the relationship between the federal and state constitutions. Jurists and academics differ on the advisability of state courts departing from the lead of the United States Supreme Court in interpreting cognate state constitutional provisions. Some argue that doing so is in keeping with federalism generally and contributes to constitutional dialogue.[29] Others contend that, given the increased homogeneity of the various states and the origin of many state bills of rights in the federal constitution, that New Federalism is a meaningless exercise.[30]

Still others suggest that, if state courts are to differ from the federal reading of cognate provisions, they ought to be able to point to something unique in the language or history of the relevant state constitutional provision or in the political or legal culture of the state.[31] This view does seek to invoke, at least, certain principles of restraint to limit judicial discretion and to require something other than mere disagreement if a state supreme court is to depart from the federal rule.

Further consideration of this debate is beyond the scope of this paper. In its decisions that embrace New Federalism, the Wisconsin Supreme Court does sometimes attempt to explain its departure from the approach of the United States Supreme Court by resort to what are allegedly unique things about Wisconsin

and its Constitution.[32] Other times, it does not.[33] For our purposes, it is sufficient to note that, when invoking New Federalism and independently construing cognate state constitutional provisions, the Wisconsin Supreme Court acts at the height of its power. Its decisions may not be reviewed by the United States Supreme Court.

We should also recognize that New Federalism remains the exception rather than the rule on the Wisconsin Supreme Court. It is still most often the case that the Court will follow the direction of the United States Supreme Court and either limit its discussion to pertinent federal constitutional provisions[34] or refer to the state and federal constitution without distinction.[35]

But the doctrine is not dead. In *State v. Bruski*, the Court considered the extent of a defendant's expectation of privacy in a vehicle in which he was present (but did not own) and in a travel case that he had placed in the vehicle.[36] A majority held that he enjoyed neither, observing that "we continue to follow the [the United States Supreme] Court's interpretation of the Fourth Amendment when construing Article I, Section 11 of the Wisconsin Constitution."[37]

Dissenting, Justice Ann Walsh Bradley, joined by Chief Justice Shirley Abrahamson, disagreed, asserting that the Court is not required to follow the United States Supreme Court and that "Article I, Section 11 may afford greater protections than the Fourth Amendment." [38]

That very proposition is currently before the Court in *State v. Ramon Lopez Arias*.[39] In that case, the defendant seeks to suppress certain evidence obtained as a result of a "sniff" by a dog trained to detect uncontrolled substances. The United States Supreme Court has held that a dog sniff from outside of a vehicle does not constitute a search and can, therefore, be performed without reasonable cause or suspicion.[40]

The Court of Appeals certified to the Court whether this is also the rule under Article I, Section 11 of the Wisconsin Constitution.[41] Apart from the question of the circumstances under which "dog sniff" searches can be permitted, it also seems probable that each departure from the United States Supreme Court's interpretation of the rights of criminal defendants makes it easier to depart from those interpretations in the future. If one believes that New Federalism is justified only—or especially when—it can be rooted in something unique about Wisconsin's constitutional tradition, then each case holding that the Wisconsin Constitution confers a more expansive view of the rights of criminal defendants than the United States Constitution provides more support for future expansive readings.[42]

Liability

In last year's white paper, I noted an increasing concern on the part of some that the Wisconsin Supreme Court had begun to tilt the state's liability law toward the plaintiff's side of tort cases.[43] Much of the controversy centered on two cases.

In *Thomas v. Mallett*, the Wisconsin Supreme Court became the first (and only) court in the country to adopt a form of enterprise liability for the manufacturers of lead paint pigments.[44] Under *Thomas*, a plaintiff need not show who manufactured the pigments to which he or she was allegedly exposed. Although it presumably based the decision in state common law, the majority opinion at least implied that a state constitutional provision guaranteeing a remedy for wrongs, which has generally not been held to create causes of action or otherwise modify the common law, contributed to its holding.[45] Apart from the reasoning that lead to *Thomas*' modification of the common law, that principle, if applied in future cases, might significantly expand liability.

In *Ferdon v. Patients Compensation Panel*, the Court adopted a new and aggressive form of equal protection analysis to strike down legislation imposing limits on the recovery of non-economic damages in medical malpractice personal injury cases.[46] This new standard, termed "rational basis scrutiny with bite," could, if applied in the future, greatly expand the circumstance under which the Court might invalidate laws and other government actions.

In the intervening year, neither *Ferdon* nor *Thomas* has been extended. No equal protection case has applied "rational basis scrutiny with bite." There are no cases currently on the docket in which I expect it to do so,[47] although it may be important in the *Helgeland* case should the merits of that litigation ever reach the Court.[48]

There are other potential applications of the new form of scrutiny as well. The Wisconsin legislature

enacted new higher medical malpractice caps and it seems almost certain that they will be challenged.[49] Lower court challenges to Wisconsin's minimum markup law for retail sellers of gasoline are also working their way through the system.[50]

Nevertheless, there are some significant cases in the general area of liability. Most important may be *Richards v. Badger Mutual Insurance Company*, in which the Court is to interpret the scope of Wis. Stat. § 895.045.[51] That statute was enacted in 1995 to reform old state law in which, essentially, all defendants whose negligence contributed to the plaintiff's injury and whose apportionment of causal negligence was greater than that apportioned to the plaintiff would be jointly and severally liable. This created anomalous situations in which defendants found to have very little responsibility for an injury would be forced to pay all or most of the damages if the defendant who had greater responsibility was unable to do so.[52]

Under the new law, defendants are not jointly and severally liable unless their percentage of causal negligence is 51% or more or they act in accordance "with a common scheme or plan." In *Richards*, two underage defendants, Zimmerlee and Schrimpf, decided to buy some beer. They enlisted the support of Patchett, who was over 21. With Schrimpf riding along, Zimmerlee drove Patchett to the liquor store and she bought beer for the two underage boys. After Patchett bought the beer, he and Schrimpf drank the beer, Zimmerlee, again with Schrimpf riding along, drove while intoxicated and ran a stop sign, killing Christopher Richards.

The jury allocated 72% of causal negligence to Zimmerlee who settled. The question before the Court is whether Schrimpf, who was allocated 14%, is jointly and severally liable with Patchett who was also allocated 14%. (Schrimpf was insured and Patchett was not.) As noted above, joint and several liability is proper only if, in the words of the statute, Schrimpf and Patchett engaged in a common scheme or plan. If so, they are jointly and severally liable for the damage resulting from "the action."

Badger Mutual argues that the statute only creates joint and several liability for damage arising from the common plan or scheme itself. Because the common plan or scheme was limited to the acquisition of the beer, it argues, Schrimpf is not responsible for Patchett's share of causal negligence. Richards, on the other hand, argues for a broader interpretation of the statute, contending that any (at least) foreseeable damage caused by the common plan arises as a "result of the action" even if it is not part of the plan itself.

Should Richards prevail, the Court will have greatly expanded the carve-out from the safe harbor created by § 895.045.

In *Nichols v. Progressive Northern Insurance Company*, the Court is considering the liability of parents who failed to prevent an underage drinking party at their home.[53] One of the drinking minors drove away intoxicated and injured the plaintiff in a car accident. A divided panel found that a cause of action against the parents exists. Judge David Deininger, dissented, observing:

> What the Supreme Court has to say about the circumstances under which the courts may find a duty of care and when public policy is consistent with the extension of liability for a violation of that duty will be significant, not only for the liability of parents for the conduct of their children and their children' friends, but for the general development of tort law in the state.

Apart from the scope of parental liability for their failure to prevent wrongdoing by their minor children and the friends of those children, the case raises issues concerning the definition of duty in tort law and the extent to which liability may be limited by considerations of public policy.

In *Hornback v. Archdiocese of Milwaukee*, the Court may revisit two of its precedents governing claims against churches for the wrongdoing of their clergy.[54] Across the country, Roman Catholic dioceses have faced numerous claims based upon sexual abuse by pedophile or ephebeophile priests. Several have been forced into bankruptcy and the Milwaukee Archdiocese is in severe financial straits.[55]

Two lines of authority have limited the liability of churches with an episcopal hierarchy in Wisconsin. In *John BBB Doe v. Archdiocese of Milwaukee*,[56] the Court held that a plaintiff who knew, or should have known, that he was injured at the time of the sexual assault cannot rely on the discovery rule to toll the applicable period of limitations he was unaware of the negligence of the archdiocese.[57] In *Pritzlaff v. Archdiocese*

of Milwaukee, the Court, in addition to finding such a claim time-barred, held that holding a religious organization liable for the negligent hiring, retention, training or supervision of clergy would run afoul of the First Amendment.[58] Both issues are before the Court for reexamination in *Hornback*.

In recent years, the Court has repeatedly returned to the economic loss doctrine, the rule that one cannot recover in tort for economic loss attributable to the failure of goods to conform to a contract, thereby avoid any contractual or contract law limitations on recovery. In *Stuart v. Weisflog's Showroom Gallery, Inc.*,[59] the Court will consider application of the doctrine to a home remodeling contract, involving both the provision of goods and services but where the primary object was the provision of goods.[60] In *Below v. Norton*,[61] it will address application of the doctrine to a claim for misrepresentation against the seller of residential real estate,[62] determining whether it applies in a noncommercial or residential real estate context or for violation of Wisconsin statutory law imposing liability for fraud. Because the purpose of the economic loss doctrine is to preserve the distinction between contract and tort, its further development will continue to define the capacity of individuals to contractually allocate risk.

Another significant case, *Novell v. Migliaccio*,[63] raises the issue of whether a plaintiff seeking to make a claim under Wisconsin's false advertising statute must establish reasonable reliance on the allegedly false statement.[64] Should the Court conclude that it is unnecessary to do so, it will have, given the breadth of the statute, significantly expanded the circumstances under which recovery can be had for misrepresentation.

CONCLUSION

The Wisconsin Supreme Court remains sharply divided on a variety of significant issues, and these issues will have a profound impact on the state. This state of affairs points to the need for vigorous and open debate, not only on the qualifications, but over the proper role of the judiciary in this state.

Endnotes

1 Richard M. Esenberg , A Court Unbound: The Recent Jurisprudence of the Wisconsin Supreme Court (2007).

2 See the map at www.schoolfunding.info.

3 Wisconsin Constitution, Art. X, Sec. 3.

4 Wisconsin Constitution, Art. I, § 1.

5 148 Wis.2d 469, 436 N.W.2d 568 (1989).

6 236 Wis.2d 588, 614 N.W.2d 388 (2000).

7 614 N.W.2d 396.

8 *Id*. at 396-97.

9 *Id*. at 397.

10 *Id*. at 408.

11 In a debate at Marquette University Law School on March 3, 2008 between incumbent Milwaukee City Attorney Grant Langley and challenger Rep. Pedro Colon, Langley stated, in response to Colon's promise to look into litigation to enforce the constitutional requirement that education be adequately funded, said that he was meeting with officials from the Milwaukee Public Schools to explore litigation regarding school finance. (Podcast available at http://law.marquette.edu/cgi-bin/site.pl?213088pageID3012, statement at 0:38-43-0:39:15).

12 Jack Norman, Funding Our Future: An Adequacy Model for Wisconsin School Finance. (Institute for Wisconsin's Future, 2002).

13 Wisconsin Constitution, Art. I, sec. 13.

14 McConkey v. Doyle, et al., Case No. 2007CV002657 (Circuit Court for Dane County).

15 Wisconsin Constitution, Article XII, sec. 1.

16 *See, e.g.,* Milwaukee Alliance Against Racist and Political Repression v. Elections Board, 106 Wis.2d 593, 317 N.W.2d 420 (1982) (several distinct propositions may be submitted as one constitutional amendment if they relate to the same subject matter and are designed to accomplish one general purpose.)

17 *See, e.g.,* State ex rel Kalal v. Circuit Court for Dane County, 2004 WI 58 at ¶ 46, 271 Wis.2d 633, 681 N.W.2d 110.

18 Dairyland Greyhound Park v. Doyle, 2006 WI 107, ¶ 24.

19 *Id.* at ¶ 37.

20 *Id*. at ¶ 19.

21 *Dairyland Greyhound Park*, *supra*, note 13

22 *See, e.g.,* State v. Fisher, 2006 WI 44, 290 Wis.2d 121, 714 N.W.2d 495.

23 While it may be clear that Wisconsin law may not treat same-sex couples as "married" in this state, does the amendment prevent public entities from conferring any benefits predicated upon marital status to same-sex couples? Recently, an employee

of the Sheboygan Area School District attempted to claim paid leave under a provision of a collective bargaining agreement permitting an employee paid leave for his or her marriage or that of an immediate family member. The employee sought the leave in order to marry her same-sex partner in Canada. The district denied her request. (Erick Luke, School District denies grievance over time off for same-sex union, Sheboygan Press, March 6, 2008). The grievance was denied, based upon, among other things, the Wisconsin Marriage amendment. (Letter from Mark Manci to Sane Gerwyn dated March 4, 2008, *available at* http://www.sheboygan-press.com/assets/pdf/v010212636.pdf).

24 This limitation is compelled by Wis. State. § 40.02(20). Although the circuit court has not ruled on the merits, the Wisconsin Supreme Court has considered a procedural issue in the case. Helgeland, et al., v. Department of Employee Trust Funds, et al., 2008 WI 9. The Court, by a 4-3 vote, recently affirmed the denial of a request to intervene by certain municipalities who claimed they would be affected by a decision striking down the limitation. The decision drew sharp dissent by Justice David Prosser who criticized the majority for a "crimped legal analysis" that denied vitally interested parties an opportunity to be adequately heard on one of the "great social and political issues of our time." *Id.* at ¶ 154.

25 One can imagine an equal protection argument that casts the state's interest in extending benefits as a simple desire to assist its employees in caring for those with whom they have entered into a relationship of mutual responsibility or dependency without regard to whether the relationship is like marriage. But that approach would not seem to permit a successful equal protection challenge that limited the constitutionally mandated extension of benefits to conjugal relationships.

26 *In re* Custody of H.S.H.-K., 193 Wis.2d 649, 533 N.W.2d 419 (1995) (circuit court may determine whether visitation is in a child's best interest if the petitioner first proves that he or she has a parent-like relationship with the child and that a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent).

27 State v. DuBose, 2005 WI 126, 285 Wis.2d 143, 699 N.W.2d 582.

28 State v. Knapp, 2005 WI 127, 285 Wis.2d 86, 700 N.W.2d 899.

29 *See, e.g.,* Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 Harv. L. Rev. 1147 (1993).

30 *See, e.g.,* James A. Gardner, *The Failed Discourse of State Constitutionalism,* 90 Mich. L. Rev. 762 (1992).

31 Charles Fried, *Reflections on Crime and Punishment*, 30 Suffolk L. Rev. 681, 711 (1997); *Developments In the Law- The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324, 1357 (1982).

32 *E.g.,* State v. Knapp, *supra*, note 28 at ¶¶ 63-69.

33 *E.g.,* State v. DuBose, *supra*. note 27.

34 *E.g.,* State v. Jensen, 2007 WI 26, 299 Wis.2d 267, 727 N.W.2d 518.

35 *E.g.,* State v. Post, 2007 WI 60, 301 Wis.2d 1, 733 N.W.2d 634.

36 2007 WI 25, 299 Wis.2d 177, 727 N.W.2d 503.

37 *Id*. at ¶ 22.

38 *Id*. at ¶ 51 n. 1 (Bradley, J., dissenting).

39 2007 WL 105, 1431 (Wis. App. April 5, 2007).

40 Illinois v. Caballes, 543 U.S. 405, 408-10 (2005).

41 State v. Ramon Lopez, 2007 WL 105, 1431 (Wis. App. April 5, 2007).

42 In the area of the rights of criminal defendants, departures from federal readings will always be more expansive – or "liberal" – because the interpretation of cognate federal provisions will provide a floor of constitutional protection under the Supremacy Clause.

43 A Court Unbound, *supra*, note 1 at nn. 5-11.

44 2005 WI 129, 285 Wis.2d 236, 701 N.W.2d 523.

45 *Id*. at ¶ 129-30.

46 2005 WI 125, 284 Wis.2d 573, 702 N.W.2d 440.

47 The Court is reviewing the decision in *State v. Quintana*, 2007 WI App. 29, 299 Wis.2d 234, 729 N.W.2d 776, rejecting an equal protection challenge to state law enhancing penalties for violent crimes committed in a school zone.

48 In fact, both the U.S. Supreme Court cases relied upon by the *Ferdon* majority in support of "rational basis scrutiny with bite" involved distinctions drawn on the basis of sexual preference. *See, e.g.,* Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring); Romer v. Evans, 517 U.S. 620 (1996).

49 2005 WIS ACT 183. Wis. Stat. § 655.017 provides that non-economic damages for the acts or omissions of a health care provider or the employee of a provider occurring after April 6, 2006 are not limited by §§ 893.55(4)(d) and (f). These provisions cap such damages at $750,000, subject to the lower limits set forth in the generally applicable wrongful death statute, §895.04(4).

50 Bhandari v. Nilsestuen, Case No. 2007 CV 002226 (Dane County Circuit Court) (Text of complaint on line at http://www.wispolitics.com/1006/070626BhandariComplaint.pdf).

51 2006 WI App. 285, 297 Wis.2d 699, 727 N.W.2d 69, petition for review granted, No. 2005 AP 2796 (argued October 4, 2007)

52 *See, e.g.,* Chart v. General Motors, 80 Wis.2d 91, 258 N.W.2d 680 (1977).

53 2007 WI App. 110, 300 Wis.2d 580, 730 N.W.2d 460 (petition for review granted, No. 2006 AP 364).

54 2007 WI App. 298, Wis.2d 248, 726 N.W.2d 357 (petition

for review granted, No. 2006 AP 291)

55 Tom Heinen, "Church facing wave of trouble," Milwaukee Journal Sentinel, February 3, 2008.

56 211 Wis.2d 312, 365 N.W.2d 94 (1997).

57 In *John Doe 1 v. Archdiocese of Milwaukee*, 2007 WI 95, 303 Wis.2d 34, 734 N.W.2d 827, the Court did permit the discovery rate to toll the running of the litigation period of a fraud claim in which the plaintiff alleged affirmative misrepresentations by the archdiocese with respect to its knowledge of a priest's history of abuse.

58 194 Wis.2d 302, 533 N.W.2d 780 (1995).

59 2006 WI App. 109, 293 Wis.2d 668, 721 N.W.2d 127, petition for review granted, No. 2008 AP 886 (argued September 5, 2007).

60 The economic loss doctrine does not apply to contracts for services. Insurance Co. of North America v. Cease Electric, Inc., 2004 WI 139, 276 Wis.2d 361, 688 N.W. 2d 462.

61 2007 WI App. 9, 297 Wis.2d 781, 728 N.W.2d 156 (decision below).

62 Courts have applied the doctrine to commercial real estate transactions, Kailin v. Armstrong, 2002 WI App. 70, 252 Wis.2d 676, 643 N.W.2d 132, and the Wisconsin Supreme Court has applied it to claims of intentional misrepresentation unless the misrepresentation induced the party to contract and was unrelated to the contract's subject matter. Kaloti Enterprises v. Kellogg Sales Co., 2005 WI 111, 283 Wis.2d 555, 699 N.W.2d 205.

63 2006 WI App. 244, 297 Wis.2d 584, 724 N.W.2d 703, petition for review granted, No. 2005 AP 2852, (argued February 29, 2008).

64 The statute covers any "untrue, deceptive or misleading" statement made to the public (including, apparently, individual customers) "relating to the purchase of merchandise." Wis. Stat. § 100.18.

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