Marquette Law Review

Volume 91
Issue 2 *Winter 2007*

Article 2

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MARQUETTE LAW REVIEW

Volume 91 Winter 2007 Number 2

EXERCISING JUDICIAL POWER: A RESPONSE TO THE WISCONSIN SUPREME COURT'S CRITICS

THE HONORABLE LYNN ADELMAN*

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I. INTRODUCTION

In recent years, legal conservatives in Wisconsin have strongly criticized the performance of the Wisconsin Supreme Court. A former member of the court, Diane Sykes, now a judge on the United States Court of Appeals for the Seventh Circuit, warned that the court had undergone a "dramatic shift," "depart[ed] from . . . familiar and long-accepted" constraints on its power, and failed to exercise its power judiciously.[1] She called on Wisconsin lawyers to "sit up and take notice."[2] Milwaukee County Circuit Court Judge Michael B. Brennan echoed Judge Sykes's criticisms, stating that the court's actions raised concerns "about the proper exercise of judicial authority under the state's constitution and laws."[3] And Milwaukee lawyer Rick Esenberg published a paper under the aegis of the Federalist Society, quoting former congressman Dick Armey for the proposition that the court had

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1. Diane S. Sykes, *Reflections on the Wisconsin Supreme Court*, 89 MARQ. L. REV. 723, 725–26 (2006).

2. *Id.* at 726.

3. Michael B. Brennan, *Are Courts Becoming Too Activist?*, MILWAUKEE J. SENTINEL, Oct. 2, 2005, at 1J.

turned the Badger State into a "Tort Hell Tundra."[4]

The critics did not flinch from using the dreaded "A" word to describe the direction of the court—they agreed that the court had become "activist." In support of their attack, the critics relied primarily on five recent decisions: *State v. Knapp*,[5] *State v. Dubose*,[6] *In re Jerrell C.J.*,[7] *Ferdon v. Wisconsin Patients Compensation Fund*,[8] and *Thomas v. Mallett*.[9] Judge Brennan stated that each of the five cases exhibited one of four "objective indicators of judicial activism": (1) "[f]lexible adherence to precedent"; (2) "[i]nsufficient deference to political decision-makers"; (3) "[b]road holdings and opinions"; and (4) "[b]road judicial remedies."[10] Judge Sykes agreed that the decisions displayed "extraordinary activism" and claimed that the justices rendering them had behaved like legislators.[11] Esenberg concurred.[12] In criticizing the court's performance, the critics made clear that in their view the court should play a narrow role in public life—it should not make policy, attempt to ameliorate social problems, or establish new rules.[13]

Judge Sykes expressed the hope that her criticism would spark a debate.[14] Unfortunately, that debate has not yet occurred; rather, the discussion has remained decidedly one-sided. The absence of a debate may be due to the fact that the decisions at issue have little in common and are thus difficult to analyze together. Three of the decisions involve criminal procedure and two are tort cases. Of the criminal procedure cases, two present constitutional issues and one involves the supreme court's power to supervise the state's judicial system. Of the tort cases, one involves judicial review of the constitutionality of a statute and the

4. RICK ESENBERG, A COURT UNBOUND? THE RECENT JURISPRUDENCE OF THE WISCONSIN SUPREME COURT 2 (2007) (Federalist Society White Paper), *available at* http://www.fed-soc.org/doclib/20070329_WisconsinWhitePaper.pdf.

5. 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899.

6. 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582.

7. 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110.

8. 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440.

9. 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523.

10. Brennan, *supra* note 3.

11. Sykes, *supra* note 1, at 738.

12. *See generally* ESENBERG, *supra* note 4.

13. *See, e.g.*, *id.* at 1 (stating that courts should "apply rules," "as opposed to making them"); *id.* at 2 (stating that if judges decide "which set of policies are best," then they cease to act as judges); Sykes, *supra* note 1, at 737 (stating that the court should not solve "policy problems"); Brennan, *supra* note 3 (stating that judges should act as "non-partisan legal technicians," that should "find specific answers to legal questions in the text, structure and history of the law, or . . . not rule at all").

14. Sykes, *supra* note 1, at 726.

other is a common law case. Each case presents a discrete issue with a distinct legal history and raises a different set of policy considerations.

Responding to Judge Sykes's call for a debate is also difficult because the critics operate at a high level of generality. Ultimately, their arguments come down to an assertion that, in each decision, the court simply did too much, went too far. The generality of the critiques, combined with the decisions' lack of similarity, blurs what exactly the critics found objectionable about each decision. Of course, on one hand, this makes it fairly easy for would-be responders to charge that the critics simply objected to the decisions' results and the policies that the court endorsed. And certain of their comments reinforce this impression. For example, Judge Sykes objected to *Thomas*, a tort case, partly because it may adversely affect "the stability of the state's economy,"[15] and Esenberg spent several pages discussing which supreme court justices are "pro-liability" and which are "anti-liability."[16] On the other hand, the critics' broad brush makes it difficult to challenge both the narrow view of the judicial role that they advocate and to meaningfully address each decision.

Despite these challenges, a substantive response is worth attempting, both because the critics' view of the supreme court's role is objectionable and because the critics have thus far framed public debate about the court. In 2007, candidates for an open seat on the court set a record for campaign spending in a state judicial race, due in no small part to an effort by business interests to overturn or at least limit *Ferdon* and *Thomas*.[17] During the race, in debating the court's proper role, the candidates and others discussed Judge Sykes's and Esenberg's commentaries.[18] In 2008, Governor Jim Doyle's only appointee to the court, Justice Louis Butler, will seek election.[19] Observers expect his

15. *Id.* at 731.

16. ESENBERG, *supra* note 4, at 11–12.

17. Patrick Marley, *Pricey Court Race Might Set New Pace: '08 Campaign Could Surpass the $6 Million Spent This Time*, MILWAUKEE J. SENTINEL, Apr. 6, 2007, at B1.

18. Dee J. Hall, *Who's the "Activist" in Court Race*, WIS. ST. J. (Madison), Apr. 1, 2007, at A1 (discussing Esenberg's critique of the court and using it to compare the two candidates for supreme court justice); JAMES A. BUCHEN, THE WISCONSIN SUPREME COURT 2007: WHAT'S AT STAKE FOR WISCONSIN? 4 (Wis. Mfrs. & Commerce Campaign 2007), *available at* http://www.wmc.org/pdffiles/supremecourt_07overview.pdf (stating that *Ferdon v. Wisconsin Patients Compensation Fund* and *Thomas v. Mallet* will negatively affect Wisconsin's economy and citing Judge Sykes for the proposition that the supreme court not only hurt the state's "business climate," but also upset the state government's balance of power).

19. Marley, *supra* note 17 (Justice Butler filled the seat vacated by Judge Sykes.).

race to set a new spending record—in part because he authored *Thomas* and supported the other criticized cases.[20] The critics' view will likely resurface in Justice Butler's campaign.

This article is an attempt to provide a different point of view in the discussion of the court. It does not engage the critics' charge of activism, inasmuch as activism is "little more than a rhetorically charged shorthand for decisions the speaker disagrees with."[21] Rather, it disputes the critics' view of the court's proper role and provides a different perspective on the five criticized decisions. The article begins by summarizing the decisions to which the critics object and the criticisms. It then argues that the role the critics envision for the state supreme court is unreasonably narrow. Finally, without reaching any conclusion about the merits of each case, it points to several legal developments in the decisions that, fairly characterized, are very positive. It concludes by expressing the hope that the court will not become inappropriately timid in the face of the recent attacks.

II. THE DECISIONS AND THE CRITICISMS

A. The Criminal Procedure Cases

1. *In re Jerrell C.J.*

In *Jerrell*, the court considered a motion to suppress the confession of a fourteen-year-old armed robbery suspect who confessed only after police officers interrogated him at length and denied his repeated requests to call his parents.[22] The court unanimously held that based on the totality of the circumstances, the lower court should have suppressed the youth's confession.[23] But a majority went further, ruling that in the future, lower courts may not admit a juvenile's confession in evidence unless the interrogators record it electronically.[24] The court based the new rule on its "superintending and administrative authority over all

20. *Id.*

21. KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM, MAKING SENSE OF SUPREME COURT DECISIONS 3 (2006).

22. *In re* Jerrell C.J., 2005 WI 105, ¶¶ 5–15, 283 Wis. 2d 145, ¶¶ 5–15, 699 N.W.2d 110, ¶¶ 5–15.

23. *Id.* ¶ 36, 283 Wis. 2d 145, ¶ 36, 699 N.W.2d 110, ¶ 36.

24. *Id.* ¶ 58, 283 Wis. 2d 145, ¶ 58, 699 N.W.2d 110, ¶ 58. When an interrogation outside of a place of detention produces a confession, the confession may be admissible notwithstanding the lack of a recording if recording was not feasible. *Id.* ¶ 3, 283 Wis. 2d 145, ¶ 3, 699 N.W.2d 110, ¶ 3.

state courts" conferred by the Wisconsin Constitution.[25]

The court noted that the supreme courts of two other states had adopted the same rule and that one court based its decision on its supervisory authority over the state's judicial system.[26] The court also pointed out that it had previously fashioned rules governing the admissibility of certain types of unreliable evidence, such as polygraph evidence and hypnotically-affected testimony.[27] The court found that recording interrogations of children would reduce disputes over the voluntariness of confessions and enable judges to more accurately determine (and in less time) what had occurred during the interrogations.[28] Further, it found that the new rule would promote effective law enforcement and protect the constitutional rights of the accused.[29]

The partial dissenters argued that the court interpreted its superintending authority too broadly and declared the decision illegitimate.[30] Chief Justice Shirley Abrahamson wrote a concurrence in which she discussed the history of the court's supervisory power and defended the court's use of such power to create an evidentiary rule.[31] She argued that it could not be reasonably disputed that the constitution authorized the court to use its supervisory authority to require that interrogations be recorded to be admissible and that the dissenters merely disagreed with the result of the decision on policy grounds.[32]

Judge Brennan found in *Jerrell* two of his indicators of activism—a broad remedy and insufficient deference to the political branches.[33]

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25. *Id.* ¶ 40, 283 Wis. 2d 145, ¶ 40, 699 N.W.2d 110, ¶ 40; *see also* WIS. CONST. art. VII, § 3, cl. 1.

26. *In re Jerrell*, 2005 WI 105, ¶¶ 44, 49, 283 Wis. 2d 145, ¶¶ 44, 49, 699 N.W.2d 110, ¶¶ 44, 49.

27. *Id.* ¶ 48, 283 Wis. 2d 145, ¶ 48, 699 N.W.2d 110, ¶ 48.

28. *Id.* ¶¶ 51–52, 283 Wis. 2d 145, ¶¶ 51–52, 699 N.W.2d 110, ¶¶ 51–52.

29. *Id.* ¶¶ 50, 53–55, 283 Wis. 2d 145, ¶¶ 50, 53–55, 699 N.W.2d 110, ¶¶ 50, 53–55.

30. *Id.* ¶¶ 132–33, 283 Wis. 2d 145, ¶¶ 132–33, 699 N.W.2d 110, ¶¶ 132–33 (Prosser, J., concurring in part and dissenting in part) ("[T]he court is attempting to dictate the practices of law enforcement agencies under the guise of 'superintending' state courts."); *id.* ¶ 167, 283 Wis. 2d 145, ¶ 167, 699 N.W.2d 110, ¶ 167 (Roggensack, J., concurring in part and dissenting in part) ("[T]he supreme court does not have the authority to regulate how law enforcement, a part of the executive branch of government, accomplishes its official duties.").

31. *Id.* ¶¶ 60–95, 283 Wis. 2d 145, ¶¶ 60–95, 699 N.W.2d 110, ¶¶ 60–95 (Abrahamson, C.J., concurring).

32. *Id.* ¶ 65, 283 Wis. 2d 145, ¶ 65, 699 N.W.2d 110, ¶ 65 (Abrahamson, C.J., concurring).

33. Brennan, *supra* note 3. As to insufficient deference, Judge Brennan suggested that the court inappropriately usurped the executive branch's authority to regulate law enforcement. *Id.*

Judge Sykes criticized the court for stepping on the other branches' toes and faulted its "almost limitless" interpretation of its superintending authority.[34] Esenberg criticized the court for attempting to "tackle" the false confession issue,[35] and cited Sykes for the proposition that the court should not use its supervisory authority to find solutions to "difficult social problems" such as the problem of innocent people confessing.[36]

2. *State v. Dubose* and *State v. Knapp*

The court issued *Dubose* and *Knapp* on the same day and announced in them that it would no longer interpret the Wisconsin Constitution's criminal procedure protections in lock-step with the Supreme Court's interpretation of the parallel protections in the United States Constitution. In *Dubose*, relying on the Wisconsin Constitution, the court announced a new rule governing the admissibility of "showup" eyewitness identification evidence.[37] The court rejected the United States Supreme Court's approach as founded on a flawed and outdated understanding of the reliability of eyewitness identifications and of a court's ability to gauge such reliability. Under the rule established by the United States Supreme Court, courts must suppress an eyewitness identification made under suggestive conditions unless they find that based on the totality of the circumstances, the identification is nevertheless reliable.[38] The United States Supreme Court established that in assessing reliability, courts must consider the following factors: (1) "the opportunity of the witness to view the [defendant] at the time of the crime"; (2) "the witness'[s] degree of attention"; (3) "the accuracy of the witness'[s] prior description of the [defendant]"; (4) "the level of certainty demonstrated by the witness at the confrontation"; and (5) "the length of time between the crime and the confrontation."[39]

The Wisconsin Supreme Court noted the vagueness of this multi-factor test and pointed out that in recent years, social scientists had

34. Sykes, *supra* note 1, at 736.

35. ESENBERG, *supra* note 4, at 6 (citing *In re Jerrell*, 2005 WI 105, ¶ 57, 283 Wis. 2d 145, ¶ 57, 699 N.W.2d 110, ¶ 57).

36. *Id.* at 6–7 (citing Sykes, *supra* note 1, at 725).

37. State v. Dubose, 2005 WI 126, ¶ 2, 285 Wis. 2d 143, ¶ 2, 699 N.W.2d 582, ¶ 2. "A 'showup' is an out-of-court pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes." *Id.* ¶ 1 n.1, 285 Wis. 2d 143, ¶ 1 n.1, 699 N.W.2d 582, ¶ 1 n.1 (quoting State v. Wolverton, 193 Wis. 2d 234, 263 n.21, 533 N.W.2d 167, 177 n.21 (1995)).

38. Neil v. Biggers, 409 U.S. 188, 199–200 (1972).

39. *Id.*; *see also* Manson v. Brathwaite, 432 U.S. 98, 107 (1977) (reaffirming *Biggers*).

found that eyewitness testimony was often "hopelessly unreliable"[40] and that DNA exonerations had shown that "eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined."[41] The court also noted that research had shown that it is difficult, if not impossible, to distinguish a reliable eyewitness identification from an unreliable one and that showup identifications are particularly unreliable.[42] As such, the court announced in *Dubose* that "an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary."[43]

In *Knapp*, the court examined whether courts should suppress physical evidence obtained as the result of a non-Mirandized statement under the "fruit of the poisonous tree" doctrine.[44] In *Knapp*, a police officer questioned a suspect without providing *Miranda* warnings because he feared that if he provided warnings, the suspect might ask for a lawyer and refuse to answer questions.[45] The suspect then led the officer to physical evidence.[46] In 2003, the Wisconsin Supreme Court found such evidence inadmissible as fruit of a poisonous tree,[47] but the United States Supreme Court vacated the ruling in light of *United States v. Patane*, in which a plurality of that Court concluded that the United States Constitution did not require such a result.[48] On remand, the state supreme court found that, notwithstanding the requirements of the United States Constitution, the Wisconsin Constitution independently supported its original decision.[49]

Prior to *Knapp* and *Dubose*, the court ordinarily interpreted

40. *Dubose*, 2005 WI 126, ¶ 30, 285 Wis. 2d 143, ¶ 30, 699 N.W.2d 582, ¶ 30 (quoting Commonwealth v. Johnson, 650 N.E.2d 1257, 1262 (Mass. 1995)).

41. *Id.* ¶ 30, 285 Wis. 2d 143, ¶ 30, 699 N.W.2d 582, ¶ 30.

42. *Id.* ¶¶ 31–32, 285 Wis. 2d 143, ¶¶ 31–32, 699 N.W.2d 582, ¶¶ 31–32.

43. *Id.* ¶ 33, 285 Wis. 2d 143, ¶ 33, 699 N.W.2d 582, ¶ 33. As to how to conduct a showup, the court endorsed but did not mandate the recommendations of the Wisconsin Innocence Project. *Id.* ¶ 35, 285 Wis. 2d 143, ¶ 35, 699 N.W.2d 582, ¶ 35.

44. State v. Knapp, 2005 WI 127, ¶ 1, 285 Wis. 2d 86, ¶ 1, 700 N.W.2d 899, ¶ 1. "Fruit of the poisonous tree" refers to evidence gathered with the aid of information obtained illegally. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 488 (1963).

45. *Knapp*, 2005 WI 127, ¶¶ 13–14, 285 Wis. 2d 86, ¶¶ 13–14, 700 N.W.2d 899, ¶¶ 13–14.

46. *Id.* ¶¶ 13–14, 285 Wis. 2d 86, ¶¶ 13–14, 700 N.W.2d 899, ¶¶ 13–14.

47. State v. Knapp, 2003 WI 121, ¶ 79, 265 Wis. 2d 278, ¶ 79, 666 N.W.2d 881, ¶ 79.

48. Wisconsin v. Knapp, 542 U.S. 952 (2004) (citing United States v. Patane, 542 U.S. 630 (2004)).

49. *Knapp*, 2005 WI 127, ¶ 2, 285 Wis. 2d 86, ¶ 2, 700 N.W.2d 899, ¶ 2.

Wisconsin's citizen protections consistently with the United States Supreme Court's interpretation of the parallel clauses of the Federal Constitution.[50] However, in both *Knapp* and *Dubose*, the court noted that it never disclaimed its authority to do otherwise, that the United States Supreme Court had repeatedly stated that each state's highest court could interpret its own constitution independently, and that other state supreme courts had determined that their state constitutions provided criminal defendants with increased protections in the same areas.[51] In *Knapp*, the court explained that courts created the exclusionary rule as a means of implementing a constitutional protection and that it had done so nearly forty years before the United States Supreme Court.[52] Further, the court stated that the "'lock-step' theory of interpreting the Wisconsin Constitution no broader than its federal counterpart" rested on concerns about uniformity but that countervailing factors overcame such concerns.[53]

The *Jerrell* dissenters also dissented in *Dubose* and *Knapp*.[54] They criticized the majority for abandoning precedent regarding the relationship of the state constitution to the United States Constitution[55] and for relying on social science data in deciding constitutional issues.[56] One of the dissenters went so far as to suggest that the United States Supreme Court was more capable of deciding constitutional issues than the state supreme court, and therefore the state supreme court should defer to its judgment.[57] On the other side, one member of the *Knapp* majority wrote a concurrence confirming that "the majority opinion

50. *Id.* ¶ 58, 285 Wis. 2d 86, ¶ 58, 700 N.W.2d 899, ¶ 58.

51. *Id.* ¶¶ 58–62, 285 Wis. 2d 86, ¶¶ 58–62, 700 N.W.2d 899, ¶¶ 58–62; State v. Dubose, 2005 WI 126, ¶¶ 40–42, 285 Wis. 2d 143, ¶¶ 40–42, 699 N.W.2d 582, ¶¶ 40–42.

52. *Knapp*, 2005 WI 127, ¶¶ 22–23, 65, 285 Wis. 2d 86, ¶¶ 22–23, 65, 700 N.W.2d 899, ¶¶ 22–23, 65.

53. *Id.* ¶ 59, 285 Wis. 2d 86, ¶ 59, 700 N.W.2d 899, ¶ 59.

54. *Id.* ¶¶ 95, 107, 285 Wis. 2d 86, ¶¶ 95, 107, 700 N.W.2d 899, ¶¶ 95, 107 (Wilcox, J., dissenting) (joined by Justice Roggensack); *id.* ¶ 108, 285 Wis. 2d 86, ¶ 108, 700 N.W.2d 899, ¶ 108 (Prosser, J., dissenting); *Dubose*, 2005 WI 126, ¶ 54, 285 Wis. 2d 143, ¶ 54, 699 N.W.2d 582, ¶ 54 (Wilcox, J., dissenting); *id.* ¶ 68, 285 Wis. 2d 143, ¶ 68, 699 N.W.2d 582, ¶ 68 (Prosser, J., dissenting); *id.* ¶ 79, 285 Wis. 2d 143, ¶ 79, 699 N.W.2d 582, ¶ 79 (Roggensack, J., dissenting).

55. *Knapp*, 2005 WI 127, ¶¶ 96–102, 285 Wis. 2d 86, ¶¶ 96–102, 700 N.W.2d 899, ¶¶ 96–102 (Wilcox, J., dissenting); *Dubose*, 2005 WI 126, ¶¶ 58–64, 285 Wis. 2d 143, ¶¶ 58–64, 699 N.W.2d 582, ¶¶ 58–64 (Wilcox, J., dissenting).

56. *Dubose*, 2005 WI 126, ¶¶ 65–66, 285 Wis. 2d 143, ¶¶ 65–66, 699 N.W.2d 582, ¶¶ 65–66 (Wilcox, J., dissenting); *id.* ¶¶ 89–93, 285 Wis. 2d 143, ¶¶ 89–93, 699 N.W.2d 582, ¶¶ 89–93 (Roggensack, J., dissenting).

57. *Id.* ¶ 76, 285 Wis. 2d 143, ¶ 76, 699 N.W.2d 582, ¶ 76 (Prosser, J., dissenting).

serves to reaffirm Wisconsin's position in the 'new federalism' movement."[58]

The conservative critics had nothing good to say about *Dubose* and *Knapp*. Judge Brennan said that the decisions displayed his first indicator of judicial activism—deviation from past precedent.[59] Judge Sykes echoed this criticism and also accused the *Knapp* court of "unvarnished result-orientation" by first basing its conclusion on both the United States and Wisconsin Constitutions and subsequently on the state constitution.[60] Judge Sykes further suggested that the "new judicial federalism" movement, which encourages state courts to independently examine their state constitutions, merely enabled liberal courts to avoid the rulings of a conservative United States Supreme Court.[61] Esenberg stated that the new judicial federalism "imbues the court with substantial authority," suggesting that for that reason alone it could not be trusted.[62]

B. The Tort Cases

1. *Ferdon v. Wisconsin Patients Compensation Fund*

In *Ferdon*, the court addressed the issue of whether legislation capping non-economic damages at $350,000 in medical malpractice cases violated the Wisconsin Constitution's equal protection clause.[63] The court considered five possible objectives of the cap: (1) "[e]nsur[ing] adequate compensation for victims of medical malpractice with meritorious . . . claims"; (2) "[e]nabl[ing] health care insurers to charge lower malpractice insurance premiums"; (3) protecting the financial health of the state's Patient Compensation Fund; (4) "[r]educ[ing] overall health care costs for consumers"; and (5) "[e]ncourag[ing] health care providers to practice in Wisconsin."[64] It then determined that the

58. *Knapp*, 2005 WI 127, ¶ 84, 285 Wis. 2d 86, ¶ 84, 700 N.W.2d 899, ¶ 84 (Crooks, J., concurring).

59. Brennan, *supra* note 3.

60. Sykes, *supra* note 1, at 733 (chiding *Knapp* for resting "not on the language or history of the state constitution's self-incrimination clause but on the court's own policy judgment flowing from an expansive view of the deterrence rationale of the exclusionary rule").

61. *Id.* at 733–34.

62. ESENBERG, *supra* note 4, at 10.

63. Ferdon v. Wis. Patients Comp. Fund, 2005 WI 125, ¶ 8, 284 Wis. 2d 573, ¶ 8, 701 N.W.2d 440, ¶ 8.

64. *Id.* ¶¶ 91–95, 284 Wis. 2d 573, ¶¶ 91–95, 701 N.W.2d 440, ¶¶ 91–95.

$350,000 cap did not rationally relate to any of them. As to the first objective, the court found that the cap failed to provide those claimants with damages greater than the cap amount (and thus likely younger and more grievously injured) with adequate compensation.[65] The court also found that the cap did not advance the other objectives.[66] Thus, the court concluded that the cap's classification system violated equal protection principles and did not reach the plaintiff's other arguments.[67] The same three dissenters argued that the decision usurped the role of the legislature and accused the majority of ignoring research showing that the cap advanced its stated objectives.[68]

The critics had strong words for *Ferdon*. They all agreed that the decision was insufficiently deferential to the legislative branch.[69] Judge Sykes accused the court of altering the rational basis review standard in order to get to a desired result and sniped that "[t]he court's responsibility of judicial review is not a warrant to displace legislative judgments."[70] Esenberg lamented that "[a]ggressive 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."[71]

2. *Thomas v. Mallett*

In *Thomas*, the court faced a minor plaintiff with serious disabilities allegedly caused by white lead carbonate pigment, a kind of lead paint.[72] The plaintiff alleged that homes in which he lived contained lead paint applied sometime between 1900 and the 1970s. However, he could not identify the brand of paint applied in each home.[73] The court examined

65. *Id.* ¶¶ 98–100, 284 Wis. 2d 573, ¶¶ 98–100, 701 N.W.2d 440, ¶¶ 98–100.

66. *Id.* ¶¶ 184–87, 284 Wis. 2d 573, ¶¶ 184–87, 701 N.W.2d 440, ¶¶ 184–87.

67. *Id.* ¶¶ 187–88, 284 Wis. 2d 573, ¶¶ 187–88, 701 N.W.2d 440, ¶¶ 187–88. One concurring justice stated that a higher malpractice cap could pass constitutional scrutiny, making the precise constitutional basis for the decision somewhat unclear. *See id.* ¶¶ 191–92, 284 Wis. 2d 573, ¶¶ 191–92, 701 N.W.2d 440, ¶¶ 191–92 (Crooks, J., concurring).

68. *Id.* ¶ 204, 284 Wis. 2d 573, ¶ 204, 701 N.W.2d 440, ¶ 204 (Prosser, J., dissenting) (in which Justice Wilcox and Justice Roggensack joined); *id.* ¶ 347, 284 Wis. 2d 573, ¶ 347, 701 N.W.2d 440, ¶ 347 (Roggensack, J., dissenting) (in which Justice Prosser and Justice Wilcox joined).

69. ESENBERG, *supra* note 4, at 4; Sykes, *supra* note 1, at 728; Brennan, *supra* note 3.

70. Sykes, *supra* note 1, at 728.

71. ESENBERG, *supra* note 4, at 4.

72. Thomas v. Mallett, 2005 WI 129, ¶¶ 5–11, 285 Wis. 2d 236, ¶¶ 5–11, 701 N.W.2d 523, ¶¶ 5–11.

73. *Id.* ¶¶ 5, 13, 17, 285 Wis. 2d 236, ¶¶ 5, 13, 17, 701 N.W.2d 523, ¶¶ 5, 13, 17.

whether the plaintiff could sue one or more lead paint manufacturers under the risk-contribution theory.[74]

The court first concluded that lead paint constituted a serious public health hazard and that lead paint manufacturers had downplayed the product's risks and continued to market the product long after they knew of such risks.[75] It then discussed the risk-contribution theory of liability, first recognized in 1984 in *Collins v. Eli Lilly Co.*[76] In *Collins*, the plaintiff suffered injury as a result of exposure to a drug (DES) while in utero but could not identify the drug's manufacturer.[77] The court found that the plaintiff could recover against any DES manufacturer under either a negligence or strict liability theory by showing that such manufacturer contributed to a public risk that caused her injury.[78] It found this modification of existing common law equitable because all DES manufacturers created a public health risk and could pay for injuries more easily than the plaintiff; also, requiring them to do so would encourage manufacturers to more adequately test drugs before marketing them.[79] Under the risk-contribution theory, each individual manufacturer could defend by showing that it could not have caused the plaintiff's injury because it did not produce or market DES either during the exposure period or in the relevant geographic area.[80]

The *Thomas* defendants first argued against applying the risk-contribution theory on the ground that the *Collins* court fashioned the theory pursuant to the state constitution's remedy clause and not as an ordinary common law development.[81] Because the *Thomas* plaintiff could sue his landlords, they argued that the remedy clause did not

74. *Id.* ¶ 149, 285 Wis. 2d 236, ¶ 149, 701 N.W.2d 523, ¶ 149.

75. *Id.* ¶¶ 29–98, 285 Wis. 2d 236, ¶¶ 29–98, 701 N.W.2d 523, ¶¶ 29–98.

76. *Id.* ¶ 99, 285 Wis. 2d 236, ¶ 99, 701 N.W.2d 523, ¶ 99 (describing Collins v. Eli Lilly Co., 116 Wis. 2d 166, 342 N.W.2d 37 (1984)).

77. *Collins*, 116 Wis. 2d at 174–75, 342 N.W.2d at 41–42.

78. *Id.* at 193, 342 N.W.2d at 50. Specifically, the plaintiff could prove negligence by showing that: (1) she was exposed to DES; (2) DES caused her subsequent injuries; (3) the defendant produced or marketed the type of DES exposed to; and (4) "the defendant's conduct in producing or marketing the DES constituted a breach of a legally recognized duty to the plaintiff." *Id.* She could prove strict products liability by showing that: (1) DES was defective when it left the defendant's possession; (2) DES was unreasonably dangerous; (3) DES caused the plaintiff's injuries; (4) the defendant actively marketed or produced DES; and (5) the defendant expected DES to reach consumers without undergoing significant changes. *Id.* at 195–96, 342 N.W.2d at 51.

79. *Id.* at 191–92, 342 N.W.2d at 49–50.

80. *Id.* at 197–98, 342 N.W.2d at 52.

81. *Thomas*, 2005 WI 129, ¶ 112, 285 Wis. 2d 236, ¶ 112, 701 N.W.2d 523, ¶ 112.

apply.[82] Second, the defendants argued that *Collins* did not govern because the risk of lead paint differed from that of DES.[83] Finally, the defendants argued that the court could not constitutionally apply *Collins* to them.[84] The court rejected the defendants' first two arguments and declined to decide their constitutional argument prior to trial.[85] Two justices dissented, arguing that lead poisoning differed from the DES injury and that the decision expanded tort liability disproportionately to culpability.[86]

The critics agreed with the dissenters. Judge Brennan said that *Thomas* exhibited his third indicator of activism—a broad holding.[87] Judge Sykes criticized the decision, stating that it would likely harm Wisconsin's economy and that the defendants would be unable to defend against the claims.[88] She conceded that common law "is all about judicial policy judgments," but argued that it "develops best when developed incrementally."[89] Esenberg expressed concern about the decision's discussion of the state constitution's right to a remedy.[90]

III. THE COURT'S PROPER ROLE

The conservatives' critiques all argue that the Wisconsin Supreme Court should play a very narrow role in state affairs, suggesting that it (and other courts) should avoid taking action whenever a case raises a significant public policy issue.[91] They advocate a modest and restrained

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82. *Id.* ¶ 112, 285 Wis. 2d 236, ¶ 112, 701 N.W.2d 523, ¶ 112. The *Thomas* plaintiff could, and did, sue his landlords for failure to abate the hazard posed by lead paint. *Id.* ¶¶ 15–16, 285 Wis. 2d 236, ¶¶ 15–16, 701 N.W.2d 523, ¶¶ 15–16.

83. *Id.* ¶¶ 150–60, 285 Wis. 2d 236, ¶¶ 150–60, 701 N.W.2d 523, ¶¶ 150–60.

84. *Id.* ¶ 165, 285 Wis. 2d 236, ¶ 165, 701 N.W.2d 523, ¶ 165.

85. *Id.* ¶¶ 150–60, 166, 285 Wis. 2d 236, ¶¶ 150–60, 166, 701 N.W.2d 523, ¶¶ 150–60, 166.

86. *Id.* ¶¶ 177–80, 285 Wis. 2d 236, ¶¶ 177–80, 701 N.W.2d 523, ¶¶ 177–80 (Wilcox, J., dissenting); *id.* ¶¶ 277–81, 285 Wis. 2d 236, ¶¶ 277–81, 701 N.W.2d 523, ¶¶ 277–81 (Prosser, J., dissenting).

87. Brennan, *supra* note 3. This criticism is difficult to understand given that *Thomas*'s holding is quite narrow; it applies only to plaintiffs injured by white lead carbonate pigment. Presumably, Judge Brennan meant to say that the case could have broad effects or that the court applied risk-contribution theory to a fact situation to which it was inapplicable.

88. Sykes, *supra* note 1, at 730–31. Judge Sykes's discussion of the Wisconsin Supreme Court's earlier DES case suggests that she believed the court wrongly decided that case as well. *See id.* at 729–30.

89. *Id.* at 731.

90. ESENBERG, *supra* note 4, at 9.

91. *See, e.g.*, *id.* at 1 (stating that courts should "apply rules," "as opposed to making them"); *id.* at 2 (stating that if judges decide "which set of policies are best" then they cease to act as judges); Sykes, *supra* note 1, at 727–31 (stating that the court should not solve "policy problems"); Brennan, *supra* note 3 (stating that judges should act as "non-partisan legal

court that defers to the other branches of government.[92] Certainly, in many situations the court should behave with restraint and deference. However, the commentaries take little note of the fact that the state constitution confers on the court a broader role than the one they advocate, and they never grapple with the difficult issue of when restraint and deference must yield to other concerns. As such, they refuse to entertain the possibility that in certain situations, the court best serves justice by exercising its constitutional power boldly and innovatively.[93]

This section discusses the court's constitutional power and then takes issue with the views underlying the critics' discussion of the five decisions—that a court must always defer, should always follow precedent, and should not establish remedies applicable to future cases.

A. The Court's Constitutional Power

The Wisconsin Constitution vests the state's judicial power in a unified court system with the supreme court as its head.[94] The constitution does not limit the supreme court's power, although the court itself limits judicial authority to the resolution of actual controversies,[95] subject to limited exceptions.[96]

The critiques imply that the court should avoid resolving policy issues as a matter of constitutional principle. However, in resolving controversies, Wisconsin courts, particularly the supreme court, the

technicians," that should "find specific answers to legal questions in the text, structure and history of the law, or . . . not rule at all").

92. *See, e.g.*, ESENBERG, *supra* note 4, at 1–2 (defining "judicial restraint"); Sykes, *supra* note 1, at 737 (lamenting that the words "modesty" and "restraint" are "missing from the Wisconsin Supreme Court's current vocabulary"); Brennan, *supra* note 3 (stating that an activist court shows "insufficient deference to political decision-makers" and that courts should act as "legal technicians").

93. To slightly rephrase Barry Goldwater's famous call to arms, modesty in the pursuit of justice is not always a virtue. *See* Bart Barnes, *Barry Goldwater, GOP Hero, Dies*, WASH. POST, May 30, 1998, at A1 (citing Goldwater's famous line: "extremism in the defense of liberty is no vice and . . . moderation in the pursuit of justice is no virtue").

94. WIS. CONST. art. VII, § 2.

95. Hogan v. City of La Crosse, 104 Wis. 106, 107, 80 N.W. 105, 105 (1899).

96. The court may "decide an otherwise moot issue if it is of great public importance or arises frequently enough to warrant a definitive decision to guide the circuit courts." State *ex rel.* Riesch v. Schwarz, 2005 WI 11, ¶ 12, 278 Wis. 2d 24, ¶ 12, 692 N.W.2d 219, ¶ 12; Carlyle v. Karns, 9 Wis. 2d 394, 397, 101 N.W.2d 92, 93 (1960). The court invokes this exception, for example, when a party challenges the constitutionality of a statute. State *ex rel.* La Crosse Tribune v. Cir. Ct., 115 Wis. 2d 220, 229, 340 N.W.2d 460, 464 (1983); Doering v. Swoboda, 214 Wis. 481, 488, 253 N.W. 657, 659 (1934).

state's "preeminent law-developing court,"[97] regularly define and make law. Courts make law, often very important law, when they fashion common law rules.[98] Further, when courts promulgate exclusionary rules in the area of constitutional criminal procedure, they both examine the policy choices of the state's constitution and make new rules consistent with such choices.[99] Finally, even when they interpret statutes or apply statutes or settled common law to novel facts, courts must weigh the policy implications of any reasonable interpretation.[100]

Because the Wisconsin Supreme Court heads the state's justice system, it possesses special powers related to ensuring that the courts operate effectively. The state constitution vests the supreme court with superintending and administrative authority over lower state courts, and the court interprets this power broadly.[101] Within a few years of the state's formation, the court stated that its superintending authority

> is a grant of power. It is unlimited in extent. It is undefined in character. It is unsupplied with means and instrumentalities. The constitution leaves us wholly in the dark as to the means of exercising this clear, unequivocal grant of power. It gives, indeed, the jurisdiction, but does not pretend to intimate its instruments or agencies.[102]

Further, in the court's view, its exercise of this power "'is shaped, not by

97. Hilton v. Dep't of Natural Res., 2006 WI 84, ¶ 54, 293 Wis. 2d 1, ¶ 54, 717 N.W.2d 166, ¶ 54.

98. *See, e.g.*, Fandrey v. Am. Family Mut. Ins. Co., 2004 WI 62, ¶¶ 9–17, 272 Wis. 2d 46, ¶¶ 9–17, 680 N.W.2d 345, ¶¶ 9–17 (discussing the relationship between public policy and proximate cause in Wisconsin tort law). The Wisconsin courts' robust common law-making function is, of course, in contrast to the federal judiciary, which has a very limited common law function.

99. *See* State v. Eason, 2001 WI 98, ¶ 43, 245 Wis. 2d 206, ¶ 43, 629 N.W.2d 625, ¶ 43. The critics mistakenly suggest that courts lift exclusionary rules directly from the language of a constitution. *See* Sykes, *supra* note 1, at 733; ESENBERG, *supra* note 4, at 9. On the contrary, Wisconsin's exclusionary rule is a judge-made remedy designed to safeguard constitutional rights through deterrence. *Eason*, 2001 WI 98, ¶ 43, 245 Wis. 2d 206, ¶ 43, 629 N.W.2d 625, ¶ 43 (citing Conrad v. State, 63 Wis. 2d 616, 636, 218 N.W.2d 252, 262 (1974)).

100. *See* State *ex rel.* Kalal v. Circuit Court (*In re* Criminal Complaint), 2004 WI 58, ¶¶ 43–52, 271 Wis. 2d 633, ¶¶ 43–52, 681 N.W.2d 110, ¶¶ 43–52 (discussing statutory interpretation).

101. Flynn v. Dep't of Admin., 216 Wis. 2d 521, 548, 576 N.W.2d 245, 256 (1998).

102. Attorney Gen. v. Blossom, 1 Wis. 277, 283 (1853), *quoted in In re* Jerrell C.J., 2005 WI 105, ¶ 75 n.18, 283 Wis. 2d 145, ¶ 75 n.18, 699 N.W.2d 110, ¶ 75 n.18 (Abrahamson, C.J., concurring).

prior usage, but by the continuing necessity that this court carry out its function as a supreme court'" and is a matter of policy, rather than permission.[103] In addition to its superintending powers, the Wisconsin Supreme Court possesses inherent powers, i.e., powers necessary to fulfill its "'constitutionally or legislatively mandated functions.'"[104] Thus, the Wisconsin Constitution created a powerful judiciary with a strong supreme court and contains no language justifying the critics' avowed preference for the "political branches."[105]

However, the constitution also imposes checks on the judiciary.[106] Wisconsin's judicial branch depends on the legislature for funding, space, and the definition of its appellate jurisdiction.[107] It depends on the executive branch to enforce its judgments.[108] Perhaps most importantly, Wisconsin citizens may also check the power of the judiciary. The Wisconsin constitution provides for an entirely elected judiciary,[109] and it is relatively easy to amend Wisconsin's constitution.[110] Thus, the notion that courts are anti-democratic, which is implicit in the critics' distrust of the judiciary, is misplaced.

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103. *In re* Kading, 70 Wis. 2d 508, 519, 235 N.W.2d 409, 413 (1975), *quoted in In re Jerrell*, 2005 WI 105, ¶ 88, 283 Wis. 2d 145, ¶ 88, 699 N.W.2d 110, ¶ 88 (Abrahamson, C.J., concurring).

104. *Flynn*, 216 Wis. 2d at 548, 576 N.W.2d at 256 (quoting State *ex rel.* Friedrich v. Circuit Court, 192 Wis. 2d 1, 16, 531 N.W.2d 32, 37 (1995)). The court has invoked its inherent power to create the Code of Judicial Ethics, determine whether attorney fees were reasonable, clarify judges' power to remove their judicial assistants, and procure adequate space for trials. *Id.* at 550–51, 576 N.W.2d at 257.

105. The critics appear to use the term "political branches" to imply that the judiciary is elitist and unaccountable. *See* THE FEDERALIST No. 78 (Alexander Hamilton) (discussing this concern regarding an appointed judiciary); JOSEPH A. RANNEY, TRUSTING NOTHING TO PROVIDENCE: A HISTORY OF WISCONSIN'S LEGAL SYSTEM 52–53 (1999). *See generally* MARK KOZLOWSKI, THE MYTH OF THE IMPERIAL JUDICIARY: WHY THE RIGHT IS WRONG ABOUT THE COURTS (2003).

106. *See* RANNEY, *supra* note 105, at 49–69 (discussing the drafting of the Wisconsin Constitution).

107. *See* WIS. CONST. arts. V & VII; Gross v. Midwest Speedways, Inc., 81 Wis. 2d 129, 142 n.5, 260 N.W.2d 36, 42 n.5 (1977).

108. *See* WIS. CONST. art. VII; *see also* THE FEDERALIST NO. 78, *supra* note 105 (stating that the judiciary is the least dangerous branch, as it has "neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments") (emphasis omitted).

109. WIS. CONST. art. VII, §§ 4, 5 & 7. Indeed, over the years, some have raised concerns that Wisconsin's elective system causes judges to be *too* concerned with the public will. *See* RANNEY, *supra* note 105, at 52–53 (discussing concerns about the elective system at the drafting); Jason J. Czarnezki, *Voting and Electoral Politics in the Wisconsin Supreme Court*, 87 MARQ. L. REV. 323, 323–24 (2003) (discussing contemporary concerns).

110. *Compare* WIS. CONST. art. XII *with* U.S. CONST. art. V.

B. Deference to Political Branches

The critiques advocate an almost limitless deference by Wisconsin's courts to the other branches regarding any major, politically charged issue. They argue that the courts should allow the other branches to exercise their discretion without interference. In certain situations, courts should of course defer to the legislature. However, the state judiciary is a coequal branch of government, and no generally applicable rule requires that it be deferential.[111]

In many cases, references to judicial deference or judicial modesty simply make no sense. For instance, in developing the common law, courts look at the other branches only to ensure that the legislature has not already spoken on an issue; they then seek to create workable public policy.[112] Further, in stating what the state constitution requires, Wisconsin's courts do not seek guidance from the other branches.[113] Rather, they use well-established rules of constitutional interpretation to determine a particular provision's application to a new set of facts. In constitutional cases involving exclusionary rules, the critics advocate deference to the executive branch.[114] In determining whether a new rule is appropriate or how to interpret an existing rule, the state supreme court defers to the executive in the sense that it balances the need to prevent official misconduct with the practicalities of law enforcement.[115] However, where the former outweighs the latter, the court may appropriately decide what is ultimately an evidentiary and constitutional issue in favor of the criminal defendant.[116]

When the legislature expresses a constitutional policy choice, though, courts indeed must defer to the legislature.[117] For this reason,

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111. Attorney Gen. *ex rel.* Bashford v. Barstow, 4 Wis. 567, 598 (1855); *see also* Clinton v. Jones, 520 U.S. 681, 699 (1997).

112. *See* Fandrey v. Am. Family Mut. Ins. Co., 2004 WI 62, ¶¶ 9–17, 272 Wis. 2d 46, ¶¶ 9–17, 680 N.W.2d 345, ¶¶ 9–17; State v. Eason, 2001 WI 98, ¶ 43, 245 Wis. 2d 206, ¶ 43, 629 N.W.2d 625, ¶ 43.

113. State *ex rel.* Wis. Senate v. Thompson, 144 Wis. 2d 429, 436–37, 424 N.W.2d 385, 387 (1988).

114. ESENBERG, *supra* note 4, at 6; Sykes, *supra* note 1, at 736; Brennan, *supra* note 3.

115. *See Eason*, 2001 WI 98, ¶ 43, 245 Wis. 2d 206, ¶ 43, 629 N.W.2d 625, ¶ 43.

116. *See id.*

117. Harry Crow & Son, Inc. v. Indus. Comm'n, 18 Wis. 2d 436, 442 n.7, 118 N.W.2d 841, 844 n.7 (1963). A court also sometimes properly defers to an executive branch decision, such as the decision of an administrative agency. Racine Harley-Davidson, Inc. v. State Div. of Hearings & Appeals, 2006 WI 86, ¶ 14, 292 Wis. 2d 549, ¶ 14, 717 N.W.2d 184, ¶ 14. Such deference arises out of the court's obligation to defer to the legislature's policy choices. *Id.* ¶ 18, 292 Wis. 2d 549, ¶ 18, 717 N.W.2d 184, ¶ 18 (citing UFE Inc. v. Labor & Indus. Review

when a court interprets a statute, it attempts to ascertain the legislature's intent.[118] Further, while the legislature may overrule common law by enacting a statute, a court cannot choose common law over a statute.[119] However, there is a significant limit to the legislature's discretion. A court need only defer to *constitutional* policy choices, and the judicial branch ultimately determines whether legislative choices, even politically charged ones, are constitutional.[120] In doing so, the judiciary does not defer to the legislature's judgment as to the constitutionality of its own acts.[121] Indeed, an overly deferential court could undermine the central premise of judicial review—that the government is not above the law.[122]

To some extent, the critiques' use of the term judicial deference does not refer to deference generally, but rather refers to the critics' contention that the supreme court misstated and erroneously applied substantive constitutional law in *Ferdon*.[123] Under clearly established precedent, a court examining whether an ordinary statute violates the equal protection clause questions only whether such statute is *rationally* related to *legitimate* state interests.[124] The critics are correct that this test is deferential to the legislature. However, defining the contours and application of the rational basis test is among the more difficult and

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Comm'n, 201 Wis. 2d 274, 286–87, 548 N.W.2d 57, 63 (1996)).

118. *See* State *ex rel.* Kalal v. Circuit Court (*In re* Criminal Complaint), 2004 WI 58, ¶¶ 43–52, 271 Wis. 2d 633, ¶¶ 43–52, 681 N.W.2d 110, ¶¶ 43–52. In interpreting a statute, the court often considers policy, but it considers policy as expressed by the state constitution and the legislature, rather than in a broader sense.

119. *Harry Crow & Son, Inc.*, 18 Wis. 2d at 442 n.7, 118 N.W.2d at 844 n.7.

120. State *ex rel.* Wis. Senate v. Thompson, 144 Wis. 2d at 436–37, 424 N.W.2d at 387 (stating that the court has a responsibility to decide constitutional questions, "notwithstanding the fact that the case involves political considerations or that final judgment may have practical political consequences"). In reviewing a statute, the court generally states that it presumes that a statute is constitutional. *See, e.g.*, State v. Laxton (*In re* Laxton), 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784. This language is somewhat imprecise, as it could be read to indicate that the judiciary defers to the legislature's judgment as to the constitutionality of its own acts. *See* Davis v. Grover, 166 Wis. 2d 501, 564 n.13, 480 N.W.2d 460, 485 n.13 (1992) (Abrahamson, J., dissenting) (referring to the confusing nature of referring to a "presumption" of constitutionality). However, this "presumption" indicates only that a court will not declare the statute unconstitutional unless it is confident that it is unconstitutional. However, if a litigant persuades the court that a statute is unconstitutional, the court owes the legislature no deference and must strike down the act. Attorney Gen. *ex rel.* Bashford v. Barstow, 4 Wis. 567 (1855); *see also* Marbury v. Madison, 5 U.S. 137 (1803).

121. *Thompson*, 144 Wis. 2d at 437, 424 N.W.2d at 387.

122. *See* THE FEDERALIST NO. 78, *supra* note 105.

123. ESENBERG, *supra* note 4, at 3–4; Sykes, *supra* note 1, at 728; Brennan, *supra* note 3.

124. Ferdon v. Wis. Patients Comp. Fund, 2005 WI 125, ¶ 73, 284 Wis. 2d 573, ¶ 73, 701 N.W.2d 440, ¶ 73.

contentious areas in constitutional law, and courts have failed to resolve contradictory decisions on the issue.[125] The critics attempted to resolve this difficult issue simply by ignoring the precedent cited in *Ferdon*, citing contradictory cases, and declaring that *Ferdon* was wrong. This article will not debate their cursory discussion of complex law. However, even under a very deferential version of the rational basis test, the court retains the power of judicial review and there is a meaningful limit on the legislature's discretion.

C. Adherence to Precedent

The critiques accuse the court of betraying the doctrine of stare decisis, which directs courts to generally follow precedent. As applied by a lower court to a higher court's decision, the doctrine of stare decisis is rigid.[126] However, as the critics well know, as applied to a court's own decisions, stare decisis is fairly flexible because a court may always correct itself.[127] Thus, criticism of a court for failing to follow precedent generally says only that the critic dislikes the decision that modified or overturned the precedent.

As the state's highest court, the Wisconsin Supreme Court may, as Judge Sykes put it, "throw off . . . constraints, revise the rules of decision, and set the law on a new course."[128] And the court does so if it concludes that: (1) changes or developments in the law have undermined a decision's rationale; (2) newly ascertained facts require a new rule; (3) coherence and consistency require a new rule; (4) the prior decision is legally unsound; and (5) the prior decision is practically unworkable.[129] The court also considers "whether [the precedent] has produced a settled body of law."[130] Practically, the stare decisis doctrine means that when it wants to, the Wisconsin Supreme Court can state that it "is bound by its own precedent" and leave it at that.[131]

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125. *See, e.g.*, James E. Fleming, *"There Is Only One Equal Protection Clause": An Appreciation of Justice Stevens's Equal Protection Jurisprudence*, 74 FORDHAM L. REV. 2301 (2006); Stephen E. Gottlieb, *Tears for Tiers on the Rehnquist Court*, 4 U. PA. J. CONST. L. 350, 359 (2002); Michael Herz, *Nearest to Legitimacy: Justice White and Strict Rational Basis Scrutiny*, 74 U. COLO. L. REV. 1329 (2003).

126. *See* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.06 (3d ed. 2007).

127. *See id.*

128. Sykes, *supra* note 1, at 725–26.

129. Bartholomew v. Wis. Patients Comp. Fund, 2006 WI 91, ¶ 33, 293 Wis. 2d 38, ¶ 33, 717 N.W.2d 216, ¶ 33. *Compare id. with* MOORE ET AL., *supra* note 126, § 134.06.

130. *Bartholomew*, 2006 WI 91, ¶ 34, 293 Wis. 2d 38, ¶ 34, 717 N.W.2d 216, ¶ 34.

131. *See, e.g.*, Progressive N. Ins. Co. v. Romanshek, 2005 WI 67, ¶ 41, 281 Wis. 2d 300, ¶

Alternatively, when the court concludes that it should change existing law, it will note that stare decisis is "not a mechanical formula of adherence to the latest decision" and then proceed to embark on what it views as a wiser course.[132]

The doctrine's flexibility has led some to speculate that it has "the predictability of a lightning bolt: it will strike on occasion, but when and where can only be known after the fact."[133] However, normative judgments on the lack of predictability are difficult because the decision whether to apply stare decisis involves competing policies, all of which are fundamental to the rule of law—stability, legitimacy, accuracy, practicality. Frank Easterbrook, Chief Judge of the Court of Appeals for the Seventh Circuit, puts it this way: the "possibility of improvement makes precedent unstable. It ought to be unstable, provided we can focus judges' attention and bring to the case sufficient care to be sure that our information exceeds that of the judges who acted earlier."[134]

D. Broad Rules and Remedies

Looking particularly but not exclusively to *Jerrell*, the critiques argue that the court inappropriately set remedies aimed at future conduct rather than setting remedies case by case.[135] Because the legislature is the primary policy maker, courts generally remedy only the dispute before them and leave the prevention of future disputes to the legislative branch. However, constitutional criminal procedure is a unique area of law that sometimes requires courts of last resort to play a more active role in preventing future disputes.

Constitutional criminal procedure is unique for several reasons. First, in the context of criminal prosecutions, the federal and state constitutions express a particular concern about restraining the discretion of the executive branch.[136] This concern reflects the fact that

41, 697 N.W.2d 417, ¶ 41. For this line's federal counterpart, see *Randall v. Sorrell*, 126 S. Ct. 2479, 2489 (2006) (stating that the "principle has become settled").

132. *Bartholomew*, 2006 WI 91, ¶ 31, 293 Wis. 2d 38, ¶ 31, 717 N.W.2d 216, ¶ 31. For this line's federal counterpart, see *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

133. Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 390 (1981).

134. Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 423 (1988).

135. *See, e.g.*, Brennan, *supra* note 3 ("An activist court would not only declare certain acts unconstitutional but also would mandate that future actions by the parties acknowledge court-ordered requirements."); ESENBERG, *supra* note 4, at 7 (endorsing "case-by-case adjudication").

136. *See* U.S. CONST. amends. IV–VI; WIS. CONST. art. I, §§ 7–8.

executive branch officials have sometimes abused their powers in this area and that abuse is always a potential problem. Second, criminal cases and the constitutional questions that they often raise clog state courts.[137] Third, legislatures have historically failed to regulate the conduct of law enforcement and thereby prevent constitutionally questionable conduct from entering the court system.[138] Thus, when they observe a string of abuses, courts of last resort act appropriately when they create rules designed to keep evidence procured by such abuses out of state courtrooms. In doing so, they guide law enforcement as to how to stay within the law, ease the burden on the lower courts, and encourage the other branches to take action to prevent further abuses.[139]

A state's highest court is even more justified in making rules in the area of constitutional criminal procedure than the United States Supreme Court. A state supreme court need not concern itself with problems of federalism. In addition, the constitutions of most states, including Wisconsin, confer rule-making power on the states' highest courts, thus authorizing them to regulate the admissibility of evidence.[140] At least one commentator has argued that state high courts should use their rule-making powers to entirely overhaul the United States Supreme Court's complex and confusing balancing approach to many admissibility questions that arise in the area of constitutional criminal procedure in order to provide more meaningful guidance to police and

137. Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1149 n.28 (1985) (referring to the volume of Wisconsin's criminal cases and the percentage of those cases involving constitutional questions).

138. Donald A. Dripps, *Constitutional Theory for Criminal Procedure:* Dickerson, Miranda, *and the Continuing Quest for Broad-but-Shallow*, 43 WM. & MARY L. REV. 1, 46 (2001).

139. *Id.* at 39–46. Professor Dripps refers to *Miranda v. Arizona* as the quintessential example of proper constitutional rule making. *Id.* at 9–21 (citing *Miranda*, 384 U.S. 436 (1966)). Prior to *Miranda*, the Supreme Court determined whether a criminal defendant's confession was voluntary case by case, leading to significant confusion among executive officials, lower courts, and commentators. *Id.* at 10–11. As such, most abuses went unchecked and law enforcement officials lacked an incentive to curb abusive behavior. *Id.* at 11. In *Miranda*, the Court insisted that officials inform a suspect of his rights prior to a custodial interview and thereby clarified this area and effectuated the due process clause. *Id.* at 13–21.

140. Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged, Prophylactic Rule*, 59 N.Y.U. ANN. SURV. AM. L. 283, 308–09 (2003). *Compare* WIS. CONST. art. VII, § 3 *with* Dickerson v. United States, 530 U.S. 428, 438 (2000) (stating that the Supreme Court lacks supervisory authority over state courts, and thus it may only announce rules dictated by the Constitution itself).

lower courts.[141]

IV. POSITIVE LEGAL DEVELOPMENTS

The critics are correct on at least one count—the five decisions discussed here are worthy of notice. The court took bold steps in new directions and announced that it is unwilling to blindly stand by precedent or follow the lead of other jurisdictions if it concludes that the precedent is irrelevant or unworkable or that the other jurisdictions are incorrect. This section moves beyond the criticism of the court and discusses some of the positive legal developments found in the cases. As previously indicated, this article takes no position with respect to the holdings of each of the five decisions. However, this section asserts that several of the currents running through some or all of the decisions—if applied consistently and appropriately—promise to positively impact the development of Wisconsin law.

A. Protecting the Integrity and Efficacy of the Courts

As stated above, each criticized decision differs from the others. However, the decisions share a common trait—the question presented by each case, in different ways, implicated the integrity of the judiciary, the functioning of the court system, or both. And in each case, the court carefully considered the possible effects of the case and took action aimed at strengthening and improving the state's judiciary.

The criminal procedure cases implicated both the integrity of the court and administrative concerns relevant to the functioning of the courts. In *Jerrell*, *Knapp*, and *Dubose*, the court established rules to keep evidence obtained through objectionable practices out of the courtroom. As the branch of government that presides over criminal trials, the judiciary is particularly competent to make such rules, and in doing so, it protects the integrity of the courts and the criminal justice system. In *Jerrell* and *Dubose*, the court further attempted to protect the integrity of the judiciary by taking steps toward preventing wrongful convictions. Wrongful convictions represent a unique and increasingly visible threat to public perception of the judiciary. Esenberg sneered at *Jerrell*'s statement that "it is time for Wisconsin to tackle the false confession issue."[142] He utterly failed to recognize that Wisconsin's

141. Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 NOTRE DAME L. REV. 1065, 1092–96 (1997).

142. *See* ESENBERG, *supra* note 4, at 6 (referencing *In re* Jerrell C.J., 2005 WI 105, ¶ 52, 283 Wis. 2d 145, ¶ 52, 699 N.W.2d 110, ¶ 52)).

judicial system is the instrument of injustice for the state's wrongfully convicted. As such, it is both responsible for preventing wrongful convictions and arguably more capable of doing so than the other branches. Contrary to the critics, the problem of wrongful convictions is not simply a "difficult social problem" that the state supreme court is powerless to alleviate.[143] Rather, it is a problem that in part stems from the courts themselves and demands court action.

As to administrative issues, in *Jerrell* and *Dubose* the court attempted to simplify the complicated and unwieldy process by which courts determine the admissibility of evidence in certain criminal cases. In doing so, the court sought to enable lower courts to more efficiently and accurately adjudicate difficult constitutional questions.

The facts underlying the supreme court's tort decisions also implicated the functioning of the judicial system. In *Ferdon*, a jury determined that a serious injury resulted from negligence and that the plaintiff was entitled to damages exceeding the statutory cap.[144] Thus, the court faced more than an equal protection question; the case also implicated the judicial system's capacity to provide an adequate remedy and the right to a jury trial.[145] In *Thomas*, the court examined a case in which each of the defendants manufactured a product that (the court assumed, for summary judgment purposes) injured a wholly innocent plaintiff.[146] The facts raised the possibility that the innocent plaintiff would be left with no compensation from the industry that actually harmed him. Thus, in *Ferdon* and *Thomas*, the court ensured that the doors of the courthouse remained open.

The Wisconsin Supreme Court must sometimes act with deference

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143. *See id.* at 7 (quoting Sykes, *supra* note 1, at 725).

144. Ferdon v. Wis. Patients Comp. Fund, 2005 WI 125, ¶¶ 2–3, 284 Wis. 2d 573, ¶¶ 2–3, 701 N.W.2d 440, ¶¶ 2–3.

145. The court never reached the constitutional questions of whether the statute implicated these rights. However, it suggested that practical concerns about remedies and the right to a jury trial played some role in its assessment of the rationality of the statute. *See id.* ¶ 101, 284 Wis. 2d 573, ¶ 101, 701 N.W.2d 440, ¶ 101 ("[W]hen the legislature shifts the economic burden of medical malpractice from insurance companies and negligent health care providers to a small group of vulnerable, injured patients, the legislative action does not appear rational."). For an interesting discussion of the role of courts in reviewing medical malpractice cases, see Howard Alan Learner, Note, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 HARV. J. ON LEGIS. 143, 187–88 (1981).

146. Thomas v. Mallett, 2005 WI 129, ¶ 133, 285 Wis. 2d 236, ¶ 133, 701 N.W.2d 523, ¶ 133. Of course, Steven Thomas had not yet shown that white lead carbonate pigment manufactured by one or more of the defendants caused his condition. *Id.* ¶¶ 17–20, 285 Wis. 2d 236, ¶¶ 17–20, 701 N.W.2d 523, ¶¶ 17–20.

and restraint; however, when a case may affect the judiciary's capacity to fulfill its constitutional role, it may act more boldly. In the cited cases, the court conducted a searching analysis of the facts and law underpinning the cases and considered innovative remedies. To the extent that this represents a legal development in which the court engages in a deeper analysis when the judiciary's integrity and efficacy are on the line, it is a positive one.

B. Using Available Knowledge to Address Wrongful Convictions

In *Jerrell* and *Dubose,* the court examined court rules and constitutional standards in light of up-to-date research on wrongful convictions and sought to craft new rules that would prevent future miscarriages of justice.[147]

The purpose of a criminal trial is to determine the defendant's innocence or guilt.[148] Constitutional rules regarding eyewitness identification and involuntary confessions serve this purpose; they prevent the admission of unreliable evidence and evidence procured through government misconduct.[149] However, recent post-conviction DNA exonerations show that these rules are not keeping out unreliable evidence—as of 1999, false confessions and erroneous eyewitness identifications together accounted for eighty-four percent of documented wrongful convictions.[150] Moreover, as to eyewitness

147. In these respects, the court placed itself squarely within two of Wisconsin's salutary legal traditions—the University of Wisconsin's signature "law in action" approach to teaching, which rejects a wholly theoretical view of the law and asks how law actually affects individuals and institutions on the ground, and the "Wisconsin Idea," which refers to the state government's reliance on research coming out of the state university in addressing difficult problems. *See* Stewart Macaulay, *Wisconsin's Legal Tradition*, 24 GARGOYLE, at 6, 6–10 (1994), *available at* http://law.wisc.edu/facstaff/macaulay/papers/wisconsin_legal_tradition.pdf; Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645, 699 (noting the University of Wisconsin Law School's commitment "to supporting research about the way law interacts with real-world institutions," which allows for "meaningful partnerships between academics and policymakers to flourish in the state"); The Wisconsin Idea, http://www.wisc.edu/wisconsinIdea/ (last visited Oct. 6, 2007).

148. State v. Moeck, 2005 WI 57, ¶ 155, 280 Wis. 2d 277, ¶ 155, 695 N.W.2d 783, ¶ 155.

149. Due process concerns about eyewitness identifications are clearly all about reliability. *See* Manson v. Braithwaite, 432 U.S. 98, 114 (1977). The test regarding involuntary confessions is more closely related to the specificity of the right against self-incrimination and the prevention of police misconduct. *See* Jackson v. Denno, 378 U.S. 368, 384 n.11 (1964). However, there is no question that involuntary confessions in fact implicate reliability. *See* BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 92 (2000) (referring to the proof of false confessions).

150. SCHECK ET AL., *supra* note 149, at 73.

identifications, social science research indicates why—the test utilized by the United States Supreme Court includes reliability indicators that are irrelevant to reliability.[151] As to confessions, research does not establish that the test for determining admissibility is flawed, but the test is quite difficult to apply.

In *Dubose* and *Jerrell*, the Wisconsin Supreme Court wisely rejected the dissenting justices' argument that a court has no business examining this reality. According to the dissenters, and to the critics, only the text of the constitution can resolve constitutional questions.[152] Thus, they viewed the court's consideration of information emerging from exonerations and from the academy as irresponsible. However, the federal constitutional rules that the court examined are not based on the plain text of the Constitution. The Supreme Court has interpreted the Due Process Clause as requiring plainly unreliable evidence to be excluded from criminal trials.[153] The rules rest on practical questions left unanswered by this interpretation: What evidence is unreliable? And how can courts best ensure that unreliable evidence is kept out of the courtroom? The text of the Due Process Clause is of absolutely no value in answering these questions. In contrast, DNA exonerations and relevant social science data have tremendous value in this area.

Thus, courts have a choice. They may stubbornly refuse to examine this evidence out of fear that the social science data may one day change again. Or they may modify the present, demonstrably ineffectual rules. The Wisconsin Supreme Court took the sensible course—it examined the relevant data and it changed direction. Only time will tell if its new tests are an improvement. However, if the court had, as the dissenters and critics wished, simply turned a blind eye to the lessons of the DNA exonerations, it would have effectively shirked its responsibility to oversee the administration of justice in the state.

C. Reviving State Constitutional Law

The court's move in *Knapp* and *Dubose* away from interpreting the individual rights provisions of the Wisconsin Constitution in lock-step

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151. Timothy P. O'Toole & Giovanna Shay, Manson v. Brathwaite *Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 120–22 (2006).

152. State v. Dubose, 2005 WI 126, ¶¶ 65–66, 285 Wis. 2d 143, ¶¶ 65–66, 699 N.W.2d 582, ¶¶ 65–66 (Wilcox, J., dissenting); *id.* ¶¶ 89–93, 285 Wis. 2d 143, ¶¶ 89–93, 699 N.W.2d 582, ¶¶ 89–93 (Roggensack, J., dissenting); ESENBERG, *supra* note 4, at 1; Sykes, *supra* note 1, at 734–35.

153. *See, e.g.*, *Braithwaite*, 432 U.S. at 114.

with the United States Supreme Court's interpretations of the United States Constitution's parallel provisions is also a positive development and contains much promise for improving the law in Wisconsin.

It has always been clear that the Wisconsin Supreme Court *could* interpret the Wisconsin Constitution independent of the United States Supreme Court's interpretation of the Federal Constitution. In the early part of the twentieth century, it actively did so.[154] But, as in most states, the Warren Court's incorporation of much of the Bill of Rights into the Fourteenth Amendment, making its protections enforceable against the states, more or less stopped the development of Wisconsin constitutional law in its tracks.[155] In the past thirty years, the court has occasionally signaled a change, such as when it stated that it never abdicated its authority to independently interpret the state constitution and it would "not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded."[156] In general, though, prior to *Knapp* and *Dubose*, the court vacillated on the issue. Different cases expressed very different sentiments regarding the relationship of the state constitution to its federal counterpart, with the difference presumably attributable to the prevailing majority in each case.[157]

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154. *See, e.g.*, Hoyer v. State, 180 Wis. 407, 193 N.W. 89 (1923) (recognizing the exclusionary rule long before *Mapp v. Ohio*, 367 U.S. 643 (1961)); Carpenter v. County of Dane, 9 Wis. 249, 253 (1859) (finding, more than one hundred years prior to *Gideon v. Wainwright*, 372 U.S. 335 (1963), that the State must provide all indigent criminal defendants with counsel); *see also* Abrahamson, *supra* note 137, at 1144–46 (discussing the Wisconsin Supreme Court's early constitutional jurisprudence).

155. Abrahamson, *supra* note 137, at 1147–48; Junaid H. Chida, Comment, *Rediscovering the Wisconsin Constitution: Presentation of Constitutional Questions in State Courts*, 1983 WIS. L. REV. 483, 493.

156. State v. Doe, 78 Wis. 2d 161, 172, 254 N.W.2d 210, 216 (1977).

157. *Compare* State v. Jennings, 2002 WI 44, ¶ 42, 252 Wis. 2d 228, ¶ 42, 647 N.W.2d 142, ¶ 42 (written by then-Justice Sykes) (stating that absent a "meaningful difference between the state and federal" constitutions, the court would follow its federal counterpart), *and* State v. Sorenson, 143 Wis. 2d 226, 260, 421 N.W.2d 77, 90 (1988) ("[T]here can be no logical argument that the state constitutional provision creates a broader right since the language of the Wisconsin Constitution is certainly no stronger than that used in the United States Constitution"), *with* State v. Ward, 2000 WI 3, ¶ 59, 231 Wis. 2d 723, ¶ 59, 604 N.W.2d 517, ¶ 59 ("Although we generally conform art. 1, § 11 to Fourth Amendment jurisprudence, it would be a sad irony for this court to exhort magistrates to act as something more than 'rubber stamps' when issuing warrants, and to then act as mere rubber stamps ourselves when interpreting our Wisconsin Constitution. It is our responsibility to examine the [s]tate [c]onstitution independently."), *and Doe*, 78 Wis. 2d at 172, 254 N.W.2d at 216.

Knapp and *Dubose* definitively announced the Wisconsin Supreme Court's commitment to independent interpretation of the state constitution. This is a positive development for several reasons. First, the United States Supreme Court's exclusionary rules arise out of the Constitution, but they do not rest on its plain "text," as discussed above.[158] Thus, the similarity between the text of the federal and state constitutions should not end the discussion.[159] Further, the United States Supreme Court is not infallible, and its decisions should not be treated as such. In fact, with regard to criminal procedure, state supreme courts see far more criminal cases than the United States Supreme Court and thus are arguably *better* able to recognize recurring constitutional violations and create workable solutions.[160]

In addition, the theoretical justification for pegging the development of the state constitution to that of the United States Constitution—uniformity—is weak and growing weaker. The nation's federalist system contemplates variation among the several states in virtually every area of law. There has never been a good reason to think that the benefits of uniformity concerning the legality of police conduct is stronger than the benefits of uniformity concerning the legality of any other conduct.[161] The uniformity rationale is growing weaker because many state courts have found that their state constitutions provide greater citizen protections than the Federal Constitution, and thus there is no uniformity.[162]

In contrast, the theoretical justification for independent interpretation is strong. As *Knapp*'s concurring justice noted, "When a state court interprets the constitution of its state merely as a restatement of the Federal Constitution, it both insults the dignity of the state

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Prior to *Knapp* and *Dubose*, the Wisconsin Supreme court actually found a greater right in the Wisconsin Constitution only once. State v. Eason, 2001 WI 98, ¶ 63, 245 Wis. 2d 206, ¶ 63, 629 N.W.2d 625, ¶ 63 (regarding the "good faith exception" to the warrant requirement).

158. Dickerson v. United States, 530 U.S. 428, 441 (2000).

159. *But see* Sykes, *supra* note 1, at 737.

160. *See* Abrahamson, *supra* note 137, at 1149 n.28.

161. In fact, the benefits of uniformity would be much greater for, say, substantive criminal statutes. One state's prosecution of conduct that is legal in another, or one state's use of a penalty (such as the death penalty) barred in another, speaks to basic concerns about human liberty and fairness. And law enforcement officials generally work in a single state and have ample opportunity to learn any applicable differences in constitutional law.

162. State v. Knapp, 2005 WI 127, ¶ 87, 285 Wis. 2d 86, ¶ 87, 700 N.W.2d 899, ¶ 87 (Crooks, J., concurring) (quoting Davenport v. Garcia, 834 S.W.2d 4, 12 n.21 (Tex. 1992)) (stating that between 1970 and 1989, about 600 published opinions found that a state constitution provided protections beyond that of the Federal Constitution).

charter and denies citizens the fullest protection of their rights."[163] Independent interpretation promotes the founders' federalist ideals and treats a state as a state.

V. CONCLUSION

The decisions discussed by the critics and in this article are notable, but it is still too early to know exactly where they will lead. The court has continued to challenge the state's medical malpractice legislation caps, finding in 2006 that the caps on damages in wrongful death suits, like those relating to injuries, are unconstitutional.[164] The court has also continued to use its supervisory authority to establish tests designed to ease the lower courts' burden in determining the rights of litigants.[165] However, the court has noticeably backed away from *Knapp* and *Dubose.* In three recent cases, the court simply suggested that its interpretation of the state constitution is tied to the United States Supreme Court's interpretation of the United States Constitution and then applied federal law without further discussion.[166] This is contrary to the federalist notion that a state court should independently interpret the state constitution in every case—even when it ultimately finds that a state protection is coexistent with, or weaker than, a federal

163. *Id.* ¶ 87, 285 Wis. 2d 86, ¶ 87, 700 N.W.2d 899, ¶ 87 (Crooks, J., concurring) (quoting *Davenport*, 834 S.W.2d at 12).

164. *See generally* Bartholomew v. Wis. Patients Comp. Fund, 2006 WI 91, 293 Wis. 2d 38, 717 N.W.2d 216.

165. *See* State v. Ernst, 2005 WI 107, ¶¶ 1–2, 283 Wis. 2d 300, ¶¶ 1–2, 699 N.W.2d 92, ¶¶ 1–2 (Wilcox, J., concurring). In *Ernst*, the court used its supervisory authority to affirm an earlier decision mandating that lower courts engage in a colloquy with criminal defendants waiving their right to counsel. *Id.* It had to draw either from this authority or from the state constitution to affirm the earlier decision, given that the United States Supreme Court had recently clarified that the Federal Constitution did not require such a colloquy. *Id.* ¶¶ 10–21, 283 Wis. 2d 300, ¶¶ 10–21, 699 N.W.2d 92, ¶¶ 10–21. Two of the three justices who disagreed with the *Jerrell* majority's use of the court's supervisory authority assented to its use in *Ernst*. *Compare In re* Jerrell C.J., 2005 WI 105, ¶¶ 160, 177, 283 Wis. 2d 145, ¶¶ 160, 177, 699 N.W.2d 110, ¶¶ 160, 177 (Roggensack, J., dissenting) (in which Justice Wilcox joined), *with Ernst*, 2005 WI 107, ¶ 1, 283 Wis. 2d 300, ¶ 1, 699 N.W.2d 92, ¶ 1 (in which Justice Roggensack joined); *id.* ¶ 50, 283 Wis. 2d 300, ¶ 50, 699 N.W.2d 92, ¶ 50 (Wilcox, J., concurring in part and dissenting in part) (in which Justice Wilcox concurred with the majority's decision to use its supervising authority).

166. State v. Post, 2007 WI 60, ¶ 10 n.2, 301 Wis. 2d 1, ¶ 10 n.2, 733 N.W.2d 634, ¶ 10 n.2; State v. Bruski, 2007 WI 25, ¶ 20 n.1, 299 Wis. 2d 177, ¶ 20 n.1, 727 N.W.2d 503, ¶ 20 n.1; State v. Young, 2006 WI 98, ¶ 30, 294 Wis. 2d 1, ¶ 30, 717 N.W.2d 729, ¶ 30. A recent concurring opinion also ignored *Knapp* and *Dubose*. *Ernst*, 2005 WI 107, ¶ 52, 283 Wis. 2d 300, ¶ 52, 699 N.W.2d 92, ¶ 52 (Wilcox, J., concurring in part and dissenting in part).

protection.[167] As such, it is presently unclear whether *Knapp* and *Dubose* are aberrations or whether the later cases are mere hiccups in the court's development of an independent constitutional jurisprudence.

It seems certain, however, that the decisions addressed by the critics and in this article will continue to play a central part in discussion of the Wisconsin Supreme Court and the role that it should play in public life. Until now, the legal commentaries regarding these decisions have offered an unreasonably narrow and constrained view of the court's role. Hopefully, the court will continue to hold a more reasoned view of its role and will not be discouraged from continuing to explore bold solutions to vexing problems facing the judiciary and the state.

167. *See, e.g.*, Freisen, *supra* note 141, at 1069; Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1023 (1997). As an Oregon Supreme Court justice aptly put it: "The right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand." Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984).