

# Reflections on the Wisconsin

*On March 7, 2006, the Honorable Diane S. Sykes delivered the Law School's annual Hallows Lecture at the University's Helfaer Theatre. The lecture, printed below, also will appear in the Marquette Law Review.*

## Remarks of Dean Joseph D. Kearney in Introducing the Honorable Diane S. Sykes

Welcome to this year's Hallows Lecture at Marquette University Law School—or at Marquette University, and close to the Law School. It is my privilege as Dean of the Law School to introduce both the lecture and the speaker.

I wish to begin with the individual in whose memory this lecture stands. The Honorable E. Harold Hallows served as a member of the Wisconsin Supreme Court from 1958 to 1974, concluding his tenure as Chief Justice of the Court. These were years in which the legal system faced profound challenges and changes. I am referring not only to the larger societal changes, which are well known and chronicled, but also to developments in legal doctrine. Important areas of the law, including aspects of constitutional law, criminal procedure, and tort law, bore only a dim resemblance at the end of this period to what had existed in 1958. Justice Hallows played a significant role in these developments on the Wisconsin front.

But it would be incorrect to suggest that this judicial work was the extent of Justice Hallows's contribution to the Wisconsin legal system. For several decades prior to his appointment to the Wisconsin Supreme Court, Justice Hallows was Professor Hallows at Marquette University Law School. A whole generation of students took courses such as Equity from Professor Hallows. This was accompanied throughout by both a successful private practice in Milwaukee and a leadership role in the state bar and efforts to reorganize the judiciary. The career of Justice Hallows, who attended Marquette University as an undergraduate and the University of Chicago for law school, was distinguished by substantial contributions to the bar, the academy, and the judiciary.

Over the past decade the Law School has held an annual Hallows Lecture in the late Chief Justice's memory. We have brought to campus (and to Milwaukee) such individuals as Judge Guido Calabresi, Justice Antonin Scalia, and Chief Justice Shirley Abrahamson. This year's speaker is the Honorable Diane Sykes, of the United States Court of Appeals for the Seventh Circuit. Judge Sykes is well known to this community and scarcely needs elaborate introduction, but permit me to say a few words nonetheless. If they are brief, it is both because I am not the feature here and because I used up all my best lines at Judge Sykes's most recent investiture.

Diane Sykes is a native of Milwaukee, a graduate of Northwestern University with a journalism degree, and a Marquette lawyer, class of 1984. After clerking on the federal district court for one year and working

# Supreme Court

in private practice for seven years, she became Judge Sykes in 1992, by winning a contested election for a seat on the Milwaukee County Circuit Court. Judge Sykes served in this position until 1999, when the Governor of Wisconsin appointed her to the Wisconsin Supreme Court, a position to which the voters of the State then elected her in 2000 to a full term. Now-Justice Sykes was forceful and influential during this tenure. The Court was closely divided on a number of matters—many of them in the same areas as I mentioned with respect to Justice Hallows's tenure: constitutional law, criminal procedure, and tort law. These areas of the law will always be with us (and a good thing for the legal profession, I should hasten to add). I would not wish to suggest that Justice Sykes's position always prevailed, still less that she and Justice Hallows would have made much common cause had they served on the Court together. But none would doubt the significance of Justice Sykes's work on the Wisconsin Supreme Court.

In 2004, Justice Sykes became Judge Sykes again, after the United States Senate confirmed the President's nomination of her to the United States Court of Appeals for the Seventh Circuit. Judge Sykes is an increasingly national figure, frequently called upon to speak across the country, but she remembers her alma mater as well, including through the important work of permitting law school interns each semester in her chambers. We are very grateful that today, once again, she is with us at Marquette, as this year's Hallows Lecturer. Please welcome the Honorable Diane S. Sykes.



*Dean Kearney and Judge Sykes on the occasion of the Hallows Lecture.*

## Hallows Lecture by Judge Diane S. Sykes

**T**hank you. I am honored to present this year's Hallows Lecture. It is always a pleasure to visit my law school, and the invitation to deliver this particular lecture is indeed a privilege. The late Chief Justice Hallows taught a generation of Marquette law students and served the people of Wisconsin with great distinction as a Justice and Chief Justice of the Wisconsin Supreme Court. We share a connection to both Marquette Law School and the Wisconsin Supreme Court, and, by coincidence of history, were both appointed to the court by governors named Thom(p)son.

It seems fitting, then, that my topic this afternoon should be the Wisconsin Supreme Court, given that Chief Justice Hallows and I have service on that court in common, although of course my tenure was much shorter. I had the honor of serving as a Wisconsin Supreme Court justice for five years. The cases the court decides are diverse, compelling, and



very important to the people of this state. The Justices and Chief Justice are highly accomplished jurists and dedicated public servants, committed to the work of the court and the quality of justice delivered in Wisconsin's courtrooms. Although consensus was sometimes difficult and our disagreements could be sharp, I thoroughly enjoyed my time on the court and respect and value the friendship of each of my colleagues.

**M**y focus today, however, will not be on the court during my tenure but the court's 2004–2005 term, which was, by any measure, a watershed.

In a series of landmark decisions, the court:

- rewrote the rational basis test for evaluating challenges to state statutes under the Wisconsin Constitution, striking down the statutory limit on noneconomic damages in medical malpractice cases;<sup>1</sup>
- eliminated the individual causation requirement for tort liability in lawsuits against manufacturers of lead-paint pigment, expanding “risk contribution” theory, a form of collective industry liability;<sup>2</sup>
- expanded the scope of the exclusionary rule under the state constitution to require suppression of physical evidence obtained as a result of law enforcement's failure to administer *Miranda* warnings;<sup>3</sup>

- declared a common police identification procedure inherently suggestive and the resulting identification evidence generally inadmissible in criminal prosecutions under the state constitution's due process clause;<sup>4</sup> and
- invoked the court's supervisory authority over the state court system to impose a new rule on law enforcement that all juvenile custodial interrogations be electronically recorded.<sup>5</sup>

The importance of these decisions can scarcely be overstated. Considered individually, each represents a significant change in the law, worthy of close analytical attention from the bench, bar, and legal scholars. Together, these five cases mark a dramatic shift in the court's jurisprudence, departing from some familiar and long-accepted principles that normally operate as constraints on the court's use of its power: the presumption that statutes are constitutional, judicial deference to legislative policy choices, respect for precedent and authoritative sources of legal interpretation, and the prudential institutional caution that counsels against imposing broad-brush judicial solutions to difficult social problems. I will concede (as I must) that a court of last resort has the power to throw off these constraints, revise the rules of decision, and set the law on a new course. But when it does so, we ought to sit up and take notice, and question whether that power has been exercised judiciously.

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

In *Ferdon v. Patients Compensation Fund*,<sup>7</sup> the Wisconsin Supreme Court invalidated the statutory limitation on noneconomic damages in medical malpractice cases. The damages cap was enacted as part of a broad legislative initiative to address a developing medical malpractice crisis in Wisconsin. The original 1975 law established a comprehensive patients' compensation system, including mandatory health care provider insurance and a patients' compensation fund that guarantees full coverage of all economic damages for medical malpractice while limiting recovery of noneconomic damages for less quantifiable harms, such as pain and suffering. The legislature made explicit and detailed findings when it adopted the system, citing the effects of rising malpractice judgments and settlements on the cost and availability of medical liability insurance, health care costs, and the practice of medicine in Wisconsin. Recovery of economic damages was unlimited under the statutory system and guaranteed by the patients' compensation fund; only noneconomic damages were subject to the statutory cap. The noneconomic damages cap at issue in *Ferdon* was set in 1995 at \$350,000 and adjusted annually for inflation; by 2005, when *Ferdon* was decided, the

inflation-adjusted cap was just under \$450,000.

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

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

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

does not require that all statutes treat all persons identically, only that differences in treatment be rationally related to the legislative goals underlying the statute.

Not any longer. With *Ferdon*, Wisconsin has a new rational basis test, referred to variously by the court as rational basis “with teeth,” rational basis “with bite,” and “meaningful rational basis.”<sup>10</sup> What this terminology means as a legal matter is not entirely clear, but the new standard plainly calls for more probing judicial inquiry into the relationship between legislative means and ends than ordinary rational basis review. Apparently, the point of the redefined standard is to authorize the court to make a policy-laden value judgment about the tendency of a statute to effectively achieve its objectives, and invalidate the statute if the court believes that tendency to be insufficient to justify the statutory classification.

That the court felt it necessary to rewrite the longstanding law of rational basis review is telling; the implication is that ordinary rational basis scrutiny would not produce the result the majority wanted to reach. The reconstituted rational basis test—what Justice Prosser in dissent calls the rational basis “makeover”<sup>11</sup>—permits the *Ferdon* majority to declare the damages cap unconstitutional. It takes the court seventy-nine paragraphs to get there (you would think if a law were truly irrational, it would be simpler to explain why); those seventy-nine paragraphs are chock-full of citations of state and national studies on the relative effectiveness of damages caps in reducing malpractice insurance rates and health care costs, protecting the financial viability of the patients’ compensation fund, and ensuring quality health care. Justice Prosser (joined in dissent by Justices Wilcox and Roggensack) criticizes the majority’s use of these studies as selective and misleading and provides a lengthy analysis of existing empirical support for the damages cap.

What is readily apparent from all the back-and-forth about what the studies do or do not show is that the court’s majority is making a political policy judgment, not a legal one. Fundamental to separation of powers is

the principle that it is the prerogative of the legislative branch to evaluate the effectiveness of statutory solutions to social problems, and to decide whether the inevitable trade-offs are acceptable and the allocation of economic burdens and benefits appropriate to the circumstances. The court’s responsibility of judicial review is not a warrant to displace legislative judgments. It remains to be seen whether the court will apply its new, souped-up iteration of rational basis review to all future equal protection challenges or only some and, if the latter, how it will go about deciding which statutes qualify for heightened *Ferdon* scrutiny. Either way, *Ferdon* represents a major departure from long-accepted constitutional principles that operate to maintain the balance of power between the legislative and judicial branches.

Now let us move to *Thomas v. Mallett*,<sup>12</sup> the court’s most consequential common law decision of the last term. In *Thomas*, the court extended “risk contribution” theory to the lead-paint industry, allowing a childhood lead-paint claim to go forward to trial against lead-pigment manufacturers despite the plaintiff’s inability to identify which manufacturers caused his injury. Steven Thomas lived in different Milwaukee homes during the early 1990s and sustained lead poisoning by ingesting paint from paint chips, flakes, and dust in the homes. He received settlements from two landlords and pursued claims against seven lead-paint pigment manufacturers—conceding, however, that he could not causally link any specific manufacturer to his injury.

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

Thomas's negligence and strict liability claims against the pigment manufacturers based on the absence of proof of causation, and the court of appeals affirmed.

The Wisconsin Supreme Court reversed, becoming the first court in the nation to allow such a case to go forward. The court's decision in *Thomas* eliminates the causation requirement in lead-paint cases in favor of a form of collective liability based on mere participation in the lead-pigment industry. More than twenty years earlier, in *Collins v. Eli Lilly Co.*,<sup>13</sup> the court adopted a form of collective industry liability for use in cases alleging injuries from *in utero* exposure to the antimiscarriage drug diethylstilbestrol ("DES"). The "risk contribution" theory recognized in *Collins* allowed liability on proof that the defendant drug company produced or marketed DES, regardless of whether the plaintiff could identify the drug company that caused her injury. The burden was placed on each drug company to prove that it did not produce or market DES during the time period the plaintiff was exposed or in the relevant geographic marketplace. Liability would be apportioned among the drug companies that could not exculpate themselves under this burden-shifting formula on the basis of a nonexclusive list of factors, including market share and the degree to which the company tested for and warned of hazardous side effects.

The court in *Collins* reasoned that each drug company contributed to the risk of harm to the general public and, therefore, the risk of injury to individual

plaintiffs; unless the court relieved the DES plaintiff of the burden of proving causation, she would have no remedy for her injury. The court concluded that each drug company "shares, in some measure, a degree of culpability in producing or marketing" a drug with potentially harmful side effects and that "as between the injured plaintiff and the possibly responsible drug company, the drug company is in a better position to absorb the cost of the injury."<sup>14</sup>

The form of risk contribution liability recognized in *Collins* was not pure "market share" liability of the type that had been adopted a few years earlier by the California Supreme Court in *Sindell v. Abbott Laboratories*.<sup>15</sup> It was, nonetheless, a substantial departure from traditional liability norms and, until *Thomas*, had not been expanded in this state. In *Thomas*, the court was not confronted with a plaintiff who would otherwise lack a remedy without the ability to sue under risk contribution theory—remember that *Thomas* had already received settlements from his landlords. But the court expanded risk contribution liability anyway, authorizing the negligence and strict liability claims to go forward without proof of causation.

As applied to the lead-paint industry, risk contribution theory is substantially more difficult to administer than in DES cases and very likely will function as a form of absolute liability, as Justices Wilcox and Prosser noted in strongly worded dissents. In DES cases each drug company has at least in theory a meaningful opportunity

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to defend against liability by proving it did not produce or market the drug either where the plaintiff lived or during the specific nine-month period she was exposed.

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

Apportionment of tort liability in a comparative fault regime is by nature somewhat imprecise, but some imprecision is acceptable when the defendants whose conduct is being compared have been proven to be causally at fault for the plaintiff's injury.

Apportionment of liability in a system that dispenses with the requirement of individualized causation asks the jury to assess and fix relative blame across an entire industry, not for the harm sustained by the plaintiff who will recover but for generalized harm to the public at large.

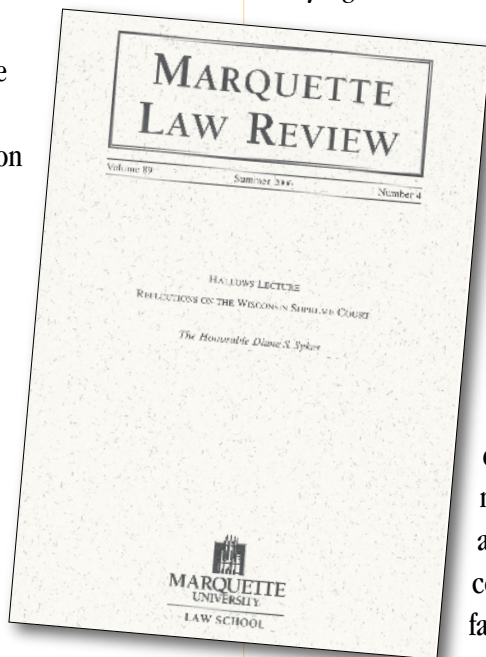
This is, then, a form of collective tort liability untethered to any actual responsibility for the specific harm asserted, imposed by the judiciary as a matter of loss-distribution policy in response to an admittedly serious public health problem. As Justice Wilcox observed in his dissent, "[t]he end result of the majority opinion is that the defendants, lead pigment

manufacturers, can be held liable for a product they may or may not have produced, which may or may not have caused the plaintiff's injuries, based on conduct that may have occurred over 100 years ago when some of the defendants were not even part of the relevant market."<sup>16</sup> The majority's response: "[T]he problem of lead poisoning from white lead carbonate is real; it is widespread; and it is a public health catastrophe that is poised to linger for quite some time."<sup>17</sup>

The extension of risk contribution theory in *Thomas* may signal the court's willingness to modify the causation

requirement in other contexts. If so, it will represent a major reordering of the purposes of our tort system from adjudicating individual remedies for private civil wrongs to finding funding sources to address broad public policy problems. True, the common law is all about judicial policy judgments, but it develops best when developed incrementally. The discretion of a common law court does not precisely parallel the discretion of a legislature; differences in institutional constraints and competence generally favor leaving the more sweeping proposals to alter liability rules to the

legislative branch of government. A court is limited to the facts and arguments in the case before it; the public and nonparty stakeholders have little say—little opportunity to participate and attempt to influence the court's decision, as they would the legislature's. The court's decision in *Thomas* may well turn out to be an isolated response to the problem of lead-paint poisoning. If the opposite is true, and the court extends risk contribution theory to other industries, the case will have substantial implications for the stability and predictability of our liability system, and the stability of the state's economy as well.



Now let us consider the court's 2004–2005 criminal docket. In *State v. Knapp*,<sup>18</sup> the Wisconsin Supreme Court adopted a new rule of state constitutional law requiring suppression of physical evidence derived from the failure of police to deliver *Miranda* warnings to a suspect in custody. Matthew Knapp had been seen drinking with Resa Brunner a few hours before she was found beaten to death with a baseball bat. Police investigating the murder learned that Knapp was on parole, and because his consumption of alcohol was a violation of his terms of supervision, his parole officer ordered an apprehension request. When police arrived at Knapp's apartment to arrest him, they could see Knapp through the door and announced that they had a warrant for his arrest. Knapp picked up a phone to call his attorney but then hung up the phone and let the police in. An officer told Knapp he had to go to the police station but deliberately did not deliver *Miranda* warnings at the scene of the arrest. The officer followed Knapp as he went into his bedroom to put on some shoes. In the bedroom the officer asked Knapp what he had been wearing the prior evening, and Knapp pointed to some clothing on the floor. The officer seized the clothing, which included a bloody sweatshirt; DNA tests established that the blood on the sweatshirt was Resa Brunner's.

Knapp was charged with Brunner's murder, and his case was first before the Wisconsin Supreme Court in 2003 on an interlocutory appeal of the denial of Knapp's motion to suppress the sweatshirt. The court ordered the sweatshirt suppressed as the fruit of the officer's intentional withholding of *Miranda* warnings.<sup>19</sup> Because the decision was premised on federal constitutional law, the state petitioned for certiorari in the United States Supreme Court.

In the meantime, the United States Supreme Court issued its decision in *United States v. Patane*,<sup>20</sup> rejecting the very suppression argument the Wisconsin Supreme Court had accepted in *Knapp*. The Supreme Court held in *Patane* that a police officer's failure

to provide the warnings required by *Miranda* did not require suppression of nontestimonial physical evidence derived from a defendant's unwarned but voluntary statements. It explained that "[b]ecause the *Miranda* rule protects against violations of the [Fifth Amendment's] Self-Incrimination Clause, which, in turn, is not implicated by the introduction at trial of physical evidence resulting from voluntary statements," the "fruit of the poisonous tree" doctrine did not apply.<sup>21</sup> In other words, the core constitutional right that *Miranda* was designed to protect—the right against compulsory self-incrimination—simply was not affected by the introduction of the nontestimonial physical fruits of the failure to give *Miranda* warnings. As long as the defendant's unwarned statements are excluded, as *Miranda* requires, application of the exclusionary rule to derivative physical evidence—usually highly probative and reliable—could not be justified by reference to any deterrence effect on law enforcement related to the underlying constitutional right against compulsory self-incrimination.

Following *Patane*, the United States Supreme Court summarily granted certiorari in *Knapp*, vacated the Wisconsin court's decision, and remanded for reconsideration in light of the decision in *Patane*.<sup>22</sup> Although Matthew Knapp had not based his earlier suppression arguments on the Wisconsin Constitution, the Wisconsin Supreme Court directed further briefing in light of the remand and took up the question of whether the state constitution's self-incrimination clause required suppression even though the Fifth Amendment to the federal constitution did not.

Before *Knapp*, the Wisconsin Supreme Court had repeatedly held that in the absence of a meaningful difference in language, intent, or history, the state constitution's Declaration of Rights should be interpreted in conformity with the United States Supreme Court's interpretation of parallel provisions in the Bill of Rights. The language of the state constitutional right



against compulsory self-incrimination is virtually identical to the Self-Incrimination Clause of the Fifth Amendment; the court had declined many previous invitations to interpret the state right more expansively than its federal counterpart.

Not this time. In round two of *Knapp*, the court accepted the defendant's invitation to—as the court put it—“utilize . . . the Wisconsin Constitution to arrive at the same conclusion as in *Knapp I*.”<sup>23</sup> This language is revealing for its pure, unvarnished result-orientation. The court's decision rests not on the language or history of the state constitution's self-incrimination clause but on the court's own policy judgment flowing from an expansive view of the deterrence rationale of the exclusionary rule. The court reasoned that a police officer's intentional withholding of *Miranda* warnings is “particularly repugnant and requires deterrence” in order to prevent the judicial process from being “systemically corrupted.”<sup>24</sup>

But the court made no effort to explain how the failure to comply with a requirement imposed as a matter of federal constitutional law should give rise to a more expansive exclusionary remedy under the state constitution than the federal constitution. An answer, of sorts, is found in a concurrence by Justice Crooks, joined by the other three members of the *Knapp* majority, making it the majority's view. Justice Crooks explains that the court's decision “serves to reaffirm Wisconsin's position in the ‘new federalism’ movement.”<sup>25</sup> The concurrence invokes United States Supreme Court Justice William Brennan's famous 1977 *Harvard Law Review* article encouraging state supreme courts to continue the Warren Court's rights revolution under the auspices of state constitutional interpretation.<sup>26</sup> Justice Brennan called on state supreme courts to “step into the breach” created by the emergence of a more conservative United States Supreme Court.<sup>27</sup> After almost thirty years of resisting the temptation to answer Justice Brennan's call, the Wisconsin Supreme Court has finally succumbed.

The “new federalism” battle cry was sounded by the Wisconsin high court more than once last term. In *State v. Dubose*,<sup>28</sup> the court departed from the longstanding reliability standard for due process challenges to eyewitness identification evidence and fashioned a stricter rule of admissibility under the Wisconsin Constitution. For many years the court followed the general framework established by the United States Supreme Court in *Manson v. Brathwaite*<sup>29</sup> and *Neil v. Biggers*<sup>30</sup> for determining the admissibility of eyewitness identification evidence. *Brathwaite* and *Biggers* require an evaluation of the suggestiveness of the identification procedure used by the police as well as the reliability of the resulting identification. In *Dubose* the court changed course and declared the police identification procedure known as the “showup” to be inherently suggestive and generally inadmissible under the state constitution's due process clause.

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

To justify abandoning reliability as the touchstone for admissibility, the *Dubose* court cited what it referred to as “extensive studies on the issue of identification evidence” and broadly asserted that “[t]hese studies confirm that eyewitness testimony is often ‘hopelessly unreliable.’”<sup>31</sup> Invoking this “new information,” the court declared itself convinced that showups

“presen[t] serious problems in Wisconsin criminal law cases.”<sup>32</sup> On the basis of these undifferentiated “serious problems”—not problems specific to the facts of the case but “problems” generally—the court concluded that showup identifications are “inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary.”<sup>33</sup> The court cautioned, however, that a showup will not be deemed “necessary” unless the police lack probable cause for an arrest or, “as a result of other exigent circumstances, could not have conducted a lineup or photo array.”<sup>34</sup>

The majority opinion in *Dubose* holds that the due process clause of the Wisconsin Constitution “necessitates” this new approach to eyewitness identification evidence but makes no effort to explain why.<sup>35</sup> Instead, the opinion simply invokes “new federalism” and the court’s power to interpret the state constitution to “provide greater protections than its federal counterpart.”<sup>36</sup> In other words, the existence of the power justifies its exercise. Again, Justices Wilcox, Prosser, and Roggensack dissented (as they had in *Knapp*), not disputing the court’s premise—that it has the power and the duty to interpret the state constitution—but questioning its method for doing so. Justice Wilcox was especially troubled by the court’s departure from well-established precedent on the basis of data from social science studies presented by advocacy groups. “Not only is such data disputed,” he said, “but, more importantly, it is not a valid basis to determine the meaning of our constitution. The majority fails to adequately explain how the meaning of the text of the constitution can change

every time a new series of social science ‘studies’ is presented to the court. If the text is so fluid, then our constitution is no constitution at all, merely a device to be invoked whenever four members of this court wish to change the law.”<sup>37</sup> To this the majority had no response.

And, finally, in *In re Jerrell C.J.*,<sup>38</sup> the Wisconsin Supreme Court invoked its supervisory authority over the state court system to adopt a rule requiring law enforcement to electronically record all custodial interrogations of juveniles “without exception when questioning occurs at a place of detention” and “where feasible” when questioning occurs elsewhere.<sup>39</sup> *Jerrell* involved a custodial interrogation of a fourteen-year-old armed robbery suspect. The court held the juvenile’s confession involuntary based on his age, intelligence, and experience; the five-hour duration of the interrogation; and the officers’ use of a “strong voice” to accuse the juvenile suspect of lying, which “frightened” him.<sup>40</sup> Normally, throwing out the confession would have ended the court’s review. But the majority went on to announce an electronic-recording requirement for custodial juvenile interrogations. The majority articulated several policy justifications for the new rule: to enhance the accuracy and reliability of juvenile interrogations, to reduce the number of disputes over *Miranda* and voluntariness, to protect law enforcement officers wrongly accused of improper tactics, and to protect the rights of the accused.

These justifications are uncontroversial as matters of policy; that the court resorted to its supervisory

**Time will tell whether the court will continue the extraordinary activism of its 2004–2005 term, will adjust its pace, or take a breather. In the meantime—and this is true regardless of whether the trends of the last term continue or abate—the court’s work deserves closer attention from the legal community and the public.**

power for the authority to impose the new rule was extraordinary and unprecedented. The Wisconsin Constitution vests the Supreme Court with “superintending and administrative authority over all courts.”<sup>41</sup> Never before has the superintending power been interpreted so expansively—in essence, to permit the court to reach beyond supervision of the court system to regulate the practices and procedures of another branch of government. The majority attempted to characterize its decision as merely controlling “the flow of evidence in state courts,”<sup>42</sup> but by this interpretation the court’s superintending power is almost limitless.

Again, Justices Prosser and Roggensack dissented, joined by Justice Wilcox. The dissenters did not take issue with the benefits of tape-recorded interrogations but objected to the majority’s assumption that the court has the power to regulate police conduct that violates neither the constitution nor a statute. Justice Prosser decried the extreme breadth of the majority’s view of the court’s power: “If the majority opinion represents a proper use of the court’s ‘superintending . . . authority,’ then, logically, there is no practical reason why the court could not dictate any aspect of police investigative procedure that is designed to secure evidence for use at trial. The people of Wisconsin have never bestowed this kind of power on the Wisconsin Supreme Court.”<sup>43</sup>

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

Supreme Court’s current vocabulary. Instead, the court has adopted a more aggressive approach to judging.

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

The court has also manifested a cavalier, almost dismissive attitude toward the sources of legal interpretation generally thought to be most authoritative: the text, structure, and history of the constitution and laws, and the court’s own precedents. Despite their heft, most of the opinions discussed today are notable for their failure to meaningfully engage in the usual analysis of applicable legal texts and court precedents. Instead, longstanding legal standards are rewritten or simply disregarded at will, either by reference to less authoritative decisional resources—such as disputed social science research—or simply the court’s own subjective policy judgment and raw power to render a binding statewide decision. Judges who are sensitive to some limits on the scope of judicial authority and competence generally try to confine themselves to authoritative and objective sources of interpretation—the law’s language, structure, logic, and history—and are skeptical of broad appeals to the court’s policy judgment. Among other things, this approach has the virtue of constraining the judges to behave like judges rather than legislators.

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

continue or abate—the court's work deserves closer attention from the legal community and the public.

In closing, please allow me to emphasize that I offer these views not just as a former member of the court but as one who has been privileged to serve the Wisconsin legal system for more than twenty years as a lawyer in private practice and as a trial and appellate court judge. I recognize that others—perhaps many others—may disagree. But the court's work is so important to the people of this state that I urge all—both those who might agree with me and those who might not—to discuss and debate these issues. My thanks to Marquette Law School for providing this forum and to all of you for your kind attention this afternoon.<sup>44</sup> •

#### Notes

1. *Ferdon v. Wisconsin Patients Comp. Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440.
2. *Thomas v. Mallett*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523.
3. *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899.
4. *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582.
5. *In re Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110.
6. One notable exception is the following: Hon. Michael B. Brennan, Op-Ed, *Are Courts Becoming Too Activist? Wisconsin's Supreme Court Has Shown a Worrisome Turn in That Direction*, MILWAUKEE JOURNAL SENTINEL, Oct. 2, 2005, at 1J.
7. 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440.
8. 2004 WI 100, 274 Wis. 2d 28, 682 N.W.2d 866.
9. *Id.* ¶ 106, 274 Wis. 2d at 75, 682 N.W.2d at 890 (quotations omitted).
10. *Ferdon*, 2005 WI 125, ¶¶ 78, 80, 284 Wis. 2d at 613-15, 701 N.W.2d at 460-61.
11. *Id.* ¶ 214, 284 Wis. 2d at 684, 701 N.W.2d at 495 (Prosser, J., dissenting).
12. 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523.
13. 116 Wis. 2d 166, 342 N.W.2d 37 (1984).
14. *Id.* at 191-92, 342 N.W.2d at 49.
15. 26 Cal. 3d 588, 607 P.2d 924 (1980).
16. *Thomas*, 2005 WI 129, ¶ 177, 285 Wis. 2d at 328, 701 N.W.2d at 567-68 (Wilcox, J., dissenting).
17. *Id.* ¶ 133, 285 Wis. 2d at 307, 701 N.W.2d at 558.
18. 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899.
19. *State v. Knapp*, 2003 WI 121, 265 Wis. 2d 278, 666 N.W.2d 881.
20. 542 U.S. 630 (2004).
21. *Id.* at 634.

22. *Wisconsin v. Knapp*, 542 U.S. 952 (2004) (per curiam).
23. *Knapp*, 2005 WI 127, ¶ 56, 285 Wis. 2d at 112, 700 N.W.2d at 912.
24. *Id.* ¶¶ 75, 81, 285 Wis. 2d at 124, 129, 700 N.W.2d at 918, 921.
25. *Id.* ¶ 84, 285 Wis. 2d at 130, 700 N.W.2d at 922.
26. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).
27. *Id.* at 503.
28. 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582.
29. 432 U.S. 98 (1977).
30. 409 U.S. 188 (1972).
31. *Dubose*, 2005 WI 126, ¶¶ 29-30, 285 Wis. 2d at 162-63, 699 N.W.2d at 591-92.
32. *Id.* ¶¶ 29, 32, 285 Wis. 2d at 162, 164, 699 N.W.2d at 591, 592-93.
33. *Id.* ¶ 33, 285 Wis. 2d at 166, 699 N.W.2d at 594.
34. *Id.* ¶ 45, 285 Wis. 2d at 177, 699 N.W.2d at 599.
35. *Id.* ¶ 39, 285 Wis. 2d at 172, 699 N.W.2d at 597.
36. *Id.* ¶ 41, 285 Wis. 2d at 173-74, 699 N.W.2d at 597.
37. *Id.* ¶ 65, 285 Wis. 2d at 185-86, 699 N.W.2d at 603-04 (Wilcox, J., dissenting).
38. 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110.
39. *Id.* ¶ 58, 283 Wis. 2d at 172, 699 N.W.2d at 123.
40. *Id.* ¶ 35, 283 Wis. 2d at 163, 699 N.W.2d at 119.
41. WIS. CONST. art. VII, § 3.
42. *Jerrell*, 2005 WI 105, ¶ 49, 283 Wis. 2d at 168, 699 N.W.2d at 121.
43. *Id.* ¶ 155, 283 Wis. 2d at 220, 699 N.W.2d at 147 (Prosser, J., dissenting).
44. I would also like to thank Jeffrey R. Ruidl, Marquette Law School Class of 2006, for his research assistance on this lecture.