



## A Bibliography of Criticism of the Butler Era

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### Introduction

In 2000, the people of Wisconsin chose incumbent Justice Diane Sykes for another 10 years on the Wisconsin Supreme Court over then-municipal court judge Louis Butler by a margin of 2 to 1. Recognizing her commendable qualities as a judge, President Bush elevated her to the U.S. Court of Appeals for the Seventh Circuit. Governor Doyle filled the ensuing vacancy by elevating Judge Louis Butler to the state's highest court.

The switch from Justice Sykes to Justice Butler had a tremendous impact on the direction of the Wisconsin Supreme Court. The 2004-2005 term of the Court represents a marked divergence from the Court's prior path of judicial restraint and modesty. During Justice Butler's three terms, the Court has chosen activism over restraint, assertiveness over modesty, and arrogance over deference. Many of these activist decisions have been decided by a one-vote margin: Justice Butler's vote.

This briefing collects short excerpts from over twenty essays, editorials, and op-eds by scholars, pundits, and analysts evaluating the jurisprudence of the past three terms, which I label "the Butler era" due to the decisive influence of his vote. I organize these excerpts under four headings: Academic, Business, Health Care, and Public Safety. You can find the full text of many of the pieces online; look for links in the footnotes.

## Academic and Scholarly Critiques

“Public commentary about the Wisconsin Supreme Court as ‘activist’ began in earnest following the 2004-2005 term, the first following the resignation of Justice Sykes ... and her replacement by Justice Louis Butler.”<sup>1</sup>

Rick Esenberg, Visiting Asst. Prof. of Law, Marquette Univ. Law School, 2007

“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. ... 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.”<sup>2</sup>

Diane S. Sykes, U.S. Court of Appeals for the Seventh Circuit, 2006

“Are courts becoming too activist? Wisconsin’s Supreme Court has shown a worrisome turn in that direction. ... [T]he reasoning that led to the results, now part of Wisconsin’s case law and presumably binding in future cases, warrants substantial debate.”<sup>3</sup>

Michael B. Brennan, Milwaukee County Circuit Court, 2005

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<sup>1</sup> Richard Esenberg, *A Court Unbound? The Recent Jurisprudence of the Wisconsin Supreme Court*, The Federalist Society, available at [http://www.fed-soc.org/doclib/20070329\\_WisconsinWhitePaper.pdf](http://www.fed-soc.org/doclib/20070329_WisconsinWhitePaper.pdf) (2007). *The definitive work for readers who want a full understanding of the Court's 04-05 and 05-06 terms.* Summary published at *Activist v. Restraint: Where is Wisconsin’s Court Headed?*, Wisconsin Interest, Vol. 16 No. 3, available at <http://www.wpri.org/WIInterest/Vol16No3/Esenberg.16.3/Esenberg16.3.html> (2007). *A nice summary and overview of the Court’s work for the interested reader and voter.*

<sup>2</sup> Diane S. Sykes, *Hallows Lecture: Reflections on the Wisconsin Supreme Court*, 89 Marquette Law Review 723, available at <http://law.marquette.edu/lawreview/Summer%202006/Sykes%2002.pdf> (2006). *Though it covers fewer cases than Prof. Esenberg’s White Paper, it is equally an important read for students of the Court.* Summary published at *A New Direction for the Wisconsin Supreme Court*, Wisconsin Interest, Vol. 16 No. 3, available at <http://www.wpri.org/WIInterest/Vol16No3/DSykes.16.3/DSykes16.3.html> (2007). *A nice summary and overview of the Court’s work for the interested reader and voter.*

<sup>3</sup> Michael B. Brennan, “Are Courts Becoming Too Activist? Wisconsin's Supreme Court Has Shown a Worrisome Turn In That Direction,” Milwaukee Journal Sentinel, Oct. 2, 2005, available at <http://www.jsonline.com/story/index.aspx?id=359831>. *This is the third and final piece that is highly recommended for interested voters looking for an introductory critique of the 2004-2005 term.*

“By any measure, [2004-2005] was an extraordinary year at the Wisconsin Supreme Court. From tort law to criminal law, the court was willing to depart from what had seemed to be settled approaches.”<sup>4</sup>

Joseph D. Kearney, Dean and Prof. of Law, Marquette Univ. Law School, 2005

“The removal of the cap on noneconomic damages in medical malpractice cases renders Wisconsin’s medical malpractice liability climate, which had been comparatively stable, more unpredictable. The *Ferdon* decision could lead to increased malpractice premiums, rising numbers of malpractice claims, migration of providers from Wisconsin, more limited access to care, and increased health care costs, despite the *Ferdon* majority’s findings that the cap is not rationally related to these concerns.”<sup>5</sup>

Robyn Shapiro, Prof. of Bioethics, Medical College of Wisconsin, 2005

“Plaintiffs urge us to adopt the views expressed in a recent opinion of the Wisconsin Supreme Court in which it struck down a statute imposing limits on awards in medical malpractice lawsuits. In the course of its opinion, that court stated, “neither our respect for the legislature nor the presumption of constitutionality allows for absolute judicial acquiescence to the legislature’s statutory enactments.’ *Ferdon* ... We are fully cognizant of our judicial responsibilities and our obligation not to ignore them in favor of the legislative branch of government. We are, however, equally cognizant of the proper limitations of judicial review of legislative actions. In our judgment, if we were to adopt the approach urged here by plaintiffs, we would ignore those limitations and substitute our judgment for that of the Legislature. That we cannot do.”<sup>6</sup>

New Jersey Superior Court, Appellate Division, 2006

“[T]he *Ferdon* case has turned medical malpractice law upside-down in Wisconsin, and done so in an interesting if not threatening way. The willingness of courts to look at the effectiveness of certain laws to determine the validity of those laws is troubling, and may not be the proper role for the judiciary.”<sup>7</sup>

Michael S. Kenitz, *Marquette Law Review*, 2006

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<sup>4</sup> Quoted in David Ziemer, “Crooks emerges as court’s key swing vote,” *Wisc. Law Journal*, Aug. 24, 2005.

<sup>5</sup> Robyn Shapiro (in her capacity as an attorney for GCD) and Julie Rusczyk, Gardner Carton & Douglas, LLP (now Dinker Biddle & Reath LLP), “Uncertainties and Limitations for Health Care Providers Created by Recent Wisconsin Supreme Court Decisions,” Undated, available at <http://www.drinkerbiddle.com/files/Publication/f862555c-90f3-4925-9596-a61eeb82ca89/Presentation/PublicationAttachment/4e35c161-1503-4e42-8bbd-78a87e79af9d/RecentWisconsinSupremeCourtDecisions.pdf>.

<sup>6</sup> *N.J. Bar Association v. State*, 902 A.2d 944, 956 (N.J. Sup. App. 2006).

<sup>7</sup> Michael S. Kenitz, *Wisconsin’s Caps on Noneconomic Damages in Medical Malpractice Cases*, 89 *Marquette Law Review* 601, 624 (2006).

“The Wisconsin Supreme Court's decision in *Thomas* is ‘junk law’ based on ‘junk science.’ It comes in the wake of another decision striking down the state's medical malpractice award caps, and the governor's veto in November of legislation to restore those caps. Now the state is becoming a mecca for lead-based paint plaintiffs, as well-known plaintiffs' firms already have filed more cases.”<sup>8</sup>

Maureen Martin, senior fellow for legal affairs at the Heartland Institute, 2006

“The *Thomas* decision was groundbreaking in tort law and, through the clear and precise definition of fungibility articulated by the *Thomas* court, risk contribution theory has the opportunity to expand well beyond the scope of DES.”<sup>9</sup>

Laura L. Worley, *Marquette Law Review*, 2006

*Thomas v. Mallet* is “the single most radical departure from the principals of tort law in recent decades. It is a decision that puts Wisconsin dramatically out of line with the law of any other state in the country.”<sup>10</sup>

Donald Gifford, former dean of the University of Maryland Law School, 2005

## **Battering the Business Climate**

“In a series of landmark cases, the Wisconsin Supreme Court has decided to toss the business community overboard in furtherance of its own social agenda of expanding liability. They are creating law as Wisconsin’s self appointed ‘super legislature.’ In doing so, they invent legal theories out of whole cloth and disregard well-established limitations on their powers.”<sup>11</sup>

James A. Buchen, Vice President, Wisconsin Manufacturers & Commerce, 2007

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<sup>8</sup> Maureen Martin, Comment on *Thomas v. Mallet* and SB 402, Heartland Institute, Dec. 27, 2005, available at <http://www.heartland.org/Article.cfm?artId=18212&CFID=10625311&CFTOKEN=36613777>. See also Maureen Martin, Wisconsin Court’s Foolish Inconsistency on Medical Malpractice, Heartland Institute, July 20, 2006, available at <http://www.heartland.org/Article.cfm?artId=19503&CFID=10625311&CFTOKEN=36613777>.

<sup>9</sup> Laura L. Worley, The Iceberg Emerged: Wisconsin’s Extension of Risk Contribution Theory Beyond DES, 90 *Marquette Law Review* 383, 405 (2006).

<sup>10</sup> Donald G. Gifford, Testimony before the Legislature Judiciary Committees Joint Hearing in Support of LRB-3756/LRD-3851, October 20, 2005. See also Donald G. Gifford, The Death of Causation, 41 *Wake Forest Law Review* 943, 985-88, available at <http://www.law.wfu.edu/prebuilt/Gifford.pdf> (2006) and Donald G. Gifford and Paolo Pasicolan, Market Share Liability Beyond DES Cases, 58 *South Carolina Law Review* 115, available at [http://digitalcommons.law.umaryland.edu/fac\\_pubs/49/](http://digitalcommons.law.umaryland.edu/fac_pubs/49/) (2006).

<sup>11</sup> James A. Buchen, What’s at Stake for Wisconsin?, Wisconsin Manufacturers & Commerce, available at [http://www.wmc.org/pdf/supremecourt\\_07overview.pdf](http://www.wmc.org/pdf/supremecourt_07overview.pdf) (2007).

These decisions have “caused many leaders in the economic development community to elevate ‘litigation atmosphere’ (or ‘tort climate’) to the top of the list of economic development issues facing the state. ... [D]evelopments over the past two years have created a negative reputation for Wisconsin’s tort climate. This is a very serious economic development problem... Wisconsin’s litigation atmosphere has been changed to one fostering apprehension among existing and prospective employers.”<sup>12</sup>  
Roger M. Nacker, Ph.D., Wisconsin Economic Development Institute, 2006

“These developments open the door to a potential flood of litigation, and reverse the state’s recent successes in projecting Wisconsin as business friendly. The court also upset the delicate balance between two of the branches of government by acting as a ‘super legislature.’ Wisconsin’s civil justice system is, arguably, in a state of crisis.”<sup>13</sup>  
Jim Hough and Bob Fassbender, The Hamilton Consulting Group, LLC, 2005

“[*Ferdon*] reduces the ability of small business owners to provide quality, affordable health-care coverage for themselves, their employees and their families. In yet another ruling that stunned the business community, the court held [in *Thomas*] that a plaintiff may sue virtually an entire industry for injuries even when it can't be proven the manufacturer actually produced the allegedly defective product. ...”<sup>14</sup>  
Bill Smith, Wisconsin director of the National Federation of Independent Business, 2005

“Business is serious about what it believes is a huge threat to the Wisconsin economy. The good accomplished by cutting taxes and reducing regulation can be undone if companies are hurt by lawsuits that push the envelope of existing law. When judicial opinions actively expand on legislative intent, it's only natural that business would ask the Legislature to tighten the law.”<sup>15</sup>  
Tom Still, president of the Wisconsin Technology Council, 2005

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<sup>12</sup> Roger M. Nacker, *The Growing Threat to Economic Development: Wisconsin's Immediate and Critical Need for Legal Reform*, Wisconsin Economic Development Association, available at [http://www.weda.org/about/legislative/pdf/civil\\_justice\\_legal\\_reform\\_paper\\_09\\_06.pdf](http://www.weda.org/about/legislative/pdf/civil_justice_legal_reform_paper_09_06.pdf) (2006).

<sup>13</sup> Jim Hough and Bob Fassbender, *Wisconsin’s Civil Justice System: A State of Crisis?*, Civil Trial Counsel of Wisconsin, available at <http://www.ctcw.org/legislative/CTCW%20Civil%20Justice%20Paper%2008%2011%2005.doc> (2005).

<sup>14</sup> Bill G. Smith, “Keep one eye on the game, one on the court docket,” *Wisconsin State Journal*, Oct. 1, 2005.

<sup>15</sup> Tom Still, “Businesses Should Watch Wisconsin’s Supreme Court,” *Wisconsin State Journal*, Sept. 1, 2005, available at <http://wistechnology.com/article.php?id=2036>.

“[*Thomas*] would be a precedent in Wisconsin and I think a very bad precedent for the law of torts. I tend to look at things from a public policy position. Market share is bad enough. This risk contribution theory is really fundamentally unfair.”<sup>16</sup>

Bonnie J. Campbell, former attorney general of Iowa and industry spokeswoman, 2005

“This decision [*Thomas v. Mallett*] is the first of its kind in the country and establishes a dangerous precedent. It dispenses with the traditional legal standard for torts – which is to establish actual connections between wrongdoing and injury – and replaces it with a chain of speculation and conjecture...”<sup>17</sup>

Wall Street Journal editorial board, 2005

“[*Thomas*] will let injured people cast too wide of a net for alleged wrongdoers ... The ruling is a blow for Wisconsin manufacturers because any of them could be liable by association. Even if their competitor created a product that may have injured someone, they could be sued for making a similar product that injured no one. ... [M]anufacturers who didn't make the product that caused the injury shouldn't be unfairly roped into lawsuits. This would harm them and our economy that depends on them.”<sup>18</sup>

Wisconsin State Journal editorial board, 2005

“In an overzealous attempt to protect the public, the court went out on a limb so perilously thin that it leaves companies that may be innocent in product liability lawsuits vulnerable to economically damaging suits.”<sup>19</sup>

Milwaukee Journal Sentinel editorial board, on *Thomas*, 2005

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<sup>16</sup> Molly McDonough, “Risky Business,” ABA Journal, February 2005.

<sup>17</sup> “Alabama North,” Wall Street Journal, Aug. 9, 2005, available at <http://online.wsj.com/article/SB112354398666108112.html>.

<sup>18</sup> “‘Risk’ Ruling Risky for Business,” Wisconsin State Journal, Aug. 28, 2005.

<sup>19</sup> “Fixing the Burden of Proof,” Milwaukee Journal Sentinel, Nov. 7, 2005

## Health Care Accessibility and Affordability at Risk

"[Justice] Crooks recently sided with the trial lawyers in voting with a thin majority of justices to lift a reasonable cap on medical malpractice awards. The cap was only for non-economic loss, such as pain and suffering. It didn't limit awards for such things as lifelong medical expenses and lost wages. The decision will increase insurance costs for doctors, and those costs will undoubtedly find their way down to patients. Just as bad, great doctors could leave the state or steer clear of performing risky procedures if some kind of cap isn't restored."<sup>20</sup>

Wisconsin State Journal editorial board, 2005

"Now we face the prospect of increasing numbers of lawsuits, unpredictable awards, rising insurance premiums and doctors choosing to retire early or stop performing high-risk procedures - all of which lead to less access to care for patients. ... If the troubling access to care conditions in states without caps are any indication, the Supreme Court has now relegated rural patients to second-class status, soon forced to drive long distances for prenatal or specialty care, if they can find it at all."<sup>21</sup>

Dr. Mark Belknap, president, Wisconsin Medical Society, 2005

"Wisconsin communities could well look back on July 14, 2005, - the day the Wisconsin Supreme Court eliminated the cap on non-economic damages here - as the beginning of our own crisis, one that has the potential of disrupting patient access to the full course of health care services that are now readily available."<sup>22</sup>

Steve Brenton, president, Wisconsin Hospital Association, and Dr. Susan Turney, CEO, Wisconsin Medical Society, 2005

"The health care professionals at St. Mary's Hospital and Dean Health System are extremely concerned about the impact a recent Wisconsin Supreme Court ruling will have on physician recruitment and access to medical care. Our strong history of providing community-based health care with access to high-risk specialties is in serious jeopardy. ... [Thomas] could thrust Wisconsin into the same liability crisis that has plagued Illinois and 19 other states."<sup>23</sup>

Drs. Frank Byrne and Allen Kemp, St. Mary's Hospital and Dean Health System, 2005

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<sup>20</sup> "Wanted: Supreme Court Candidates," Wisconsin State Journal, Dec. 28, 2005.

<sup>21</sup> Mark Belknap, "Medical Liability Award Limits were Good for Wisconsin," Madison Capital Times, July 25, 2005.

<sup>22</sup> Steve Brenton and Susan Turney, "Malpractice Cap Protects Access," Wisconsin State Journal, July 22, 2005.

<sup>23</sup> Frank Byrne and Allen Kemp, "Ruling Jeopardizes Patients," Wisconsin State Journal, Aug. 5, 2005

## **PUBLIC SAFETY**

“While the *Dubose* and *Knapp II* decisions can be viewed as problematic for police, they could have a much more significant long-term impact on Wisconsin law. ... For years – and until this summer – the Wisconsin Supreme Court has expressly chosen to interpret the Wisconsin constitution in a manner consistent with the U.S. constitution. This has facilitated consistency, and the creation of clear rules for officers to follow. Many states have chosen to interpret their state constitutions as providing additional protections beyond the U.S. constitution. This can create significant confusion for officers, as State courts are not bound by U.S. Supreme Court decisions if they base a decision on a state constitution. So, a state court can effectively ignore a U.S. Supreme Court decision by basing its decision on its state constitution.

“The *Dubose* and *Knapp II* decisions (both 4-3) expressly rejected years of precedent and chose to interpret the Wisconsin constitution as providing additional protections beyond the U.S. constitution. This could potentially impact many areas of police decision-making in the future; increasing confusion among officers and creating inconsistency between Wisconsin law and Federal law. ...

“It remains to be seen how the *Dubose* and *Knapp II* rulings will affect future Wisconsin state court decisions. However the potential for a flood of challenges to police actions (that the U.S. Supreme Court has concluded are permitted by the federal Constitution) under the Wisconsin constitution certainly exists.”<sup>24</sup>

Lt. Victor Wahl, Madison Police Department, 2005

## **Conclusion**

Evaluating these essay excerpts, several key themes emerge. First, many well respected scholars believe that the Court has taken an activist turn with the addition of Justice Butler. This activism cuts across the Court’s calendar, including tort and criminal cases. According to those who will be most affected by the decisions, this activism makes it harder for businesses to create jobs here, harder for doctors to practice medicine here, and harder for police to keep our neighborhoods safe.

Perhaps such policy impacts would be acceptable if the decisions that prompt them were firmly based in the Constitution and laws of this state. However, as the scholars and analysts point out, these decisions depart from the law and instead impose the personal views of a majority of the Court. Wisconsin voters should carefully consider these criticisms from a variety of respected voices as they vote in April.

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<sup>24</sup> Victor Wahl, Legal Update, Madison Police Department, Summer 2005, available at [http://www.ci.madison.wi.us/POLICE/PDF\\_Files/Summer%202005.pdf](http://www.ci.madison.wi.us/POLICE/PDF_Files/Summer%202005.pdf).