

# To Begin a Conversation on Judicial Independence

Patience Drake Roggensack

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

Patience Drake Roggensack, *To Begin a Conversation on Judicial Independence*, 91 Marq. L. Rev. 535 (2007).  
Available at: <http://scholarship.law.marquette.edu/mulr/vol91/iss2/5>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

# **TO BEGIN A CONVERSATION ON JUDICIAL INDEPENDENCE\***

THE HONORABLE PATIENCE DRAKE ROGGENSACK\*\*

When I was in private practice and won a case, I had little concern with anything other than the bottom line of the decision. I always thought the judge or justices were brilliant in those cases. Of course when I lost, my view of the scholarship of the members of the court was not so enthusiastic. I did not study trends of the court's decision making unless I was writing a brief and exploring the edges of a given legal issue. I imagine that many practicing lawyers are much the same now as I was then. However, today I am asking you to look beyond the bottom line of court decisions so that we may begin a conversation on judicial independence. It is an important consideration to all citizens of Wisconsin, but it is particularly important to those of us who work in the judicial branch, on both sides of the bench.

Judicial independence is a highly prized quality, at least according to the judiciary. The public also values judicial independence, but often as a more abstract principle. It has been said that most of the respect the public accords to judicial decisions emanates from public perception that a court's decision is an independent determination of what the rule of law requires.

Judicial accountability is also a quality that is widely valued, but it is most often addressed by those outside of judicial circles. There is a natural tension between judicial independence and judicial accountability. I shall attempt a limited exploration of both concepts as we begin what I hope will be an ongoing conversation.

## **I. HISTORIC PERCEPTIONS OF JUDICIAL INDEPENDENCE**

Judicial independence is a concept that has been around for a long time. In discussing the principles of our tripartite system of government, the founding fathers focused on the need for judicial independence. It was critical to their structuring of the federal government and the

---

\* This speech was presented to the American Constitution Society for Law and Policy, Milwaukee Chapter, on January 25, 2007.

\*\* Patience Drake Roggensack is a justice of the Wisconsin Supreme Court.

establishment of the United States Constitution. During the debates preceding the adoption of the Federal Constitution, the judicial branch of government was seen as a bulwark against “encroachments and oppressions of the representative body [Congress]” and as “the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.”<sup>1</sup> The judiciary was often referred to as the “least dangerous” branch because it had neither the purse of the legislative branch nor the sword of the executive branch.<sup>2</sup> Those involved with the debate and creation of the Federal Constitution were very concerned that an independent judiciary be part of the structure of the federal government. The separation of powers of the three branches of government was thought to be central to the preservation of liberty for the people. As Alexander Hamilton explained, “there is no liberty, if the power of judging be not separated from the legislative and executive powers.’ . . . [L]iberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments . . . .”<sup>3</sup>

The founding fathers’ concept of an independent judiciary also expected that the judges would not “substitute their own pleasure to the constitutional intentions of the legislature.”<sup>4</sup> Rather, the courts were expected to interpret the law and not to “exercise WILL instead of JUDGMENT.”<sup>5</sup> The independent quality of the judiciary and the trust in the courts to exercise “judgment” about what the rule of law requires and not the “will” of those who serve in the courts remain foundational principles of judicial independence. The historic acceptance of *Marbury v. Madison*,<sup>6</sup> where the United States Supreme Court established its constitutional right to set aside laws that it concluded were unconstitutional, is grounded in part in the public’s trust in an independent judiciary. For many, myself among them, a judge’s decision counts because he or she is trusted to operate with restraint in interpreting constitutions and statutes, while employing process that is even-handedly applied to all who come before the courts.

---

1. THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

2. *Id.*

3. *Id.* at 491.

4. *Id.* at 493.

5. *Id.*

6. 5 U.S. (1 Cranch) 137 (1803).

## II. DEFINING JUDICIAL INDEPENDENCE TODAY

Much of the debate on judicial independence is confused by how various discussants define the term “judicial independence.”<sup>7</sup> However, most agree that as a general concept, judicial independence has two components: institutional independence and decisional independence.<sup>8</sup> When discussing institutional independence, the focus of the discussion is the judiciary’s ability to stand up to other branches of government.<sup>9</sup> Institutional independence is sometimes referred to as “external” independence.<sup>10</sup>

When discussing the decisional component of judicial independence, the focus is on the individual decision making of each judge or of each collegial court.<sup>11</sup> The ability of each judge or court to make independent legal determinations also may be referred to as “internal” judicial independence.<sup>12</sup> Both broad concepts are significant to the legitimacy of the judicial branch of government, and both concepts of judicial independence are applicable to state as well as federal courts.

The component of institutional independence is essential to our tripartite system of government. It requires the courts’ independence from the legislative and executive branches. Institutional independence is most often associated with the separation of powers doctrine, though in reality both decisional and institutional independence have separation of powers qualities. Institutional independence cannot be accorded the judicial branch without the respect of the executive and legislative branches for judicial decisions. At least one writer has noted, “[A]n independent judiciary requires also that [its] decisions, once given, would not be altered or ignored by the government [responsible for enforcing them].”<sup>13</sup>

However, as part of the system of checks and balances created in our tripartite system of government, there are occasions when it may be appropriate for the legislature to regulate a matter in an area of

---

7. Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 317 (1999).

8. A.B.A. COMM’N ON SEPARATION OF POWERS & JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY 11–12 (1997).

9. *Id.* at 12.

10. *Id.* at 11–12.

11. Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 INT’L REV. L. & ECON. 349, 351–52 (1993).

12. *Id.* at 351.

13. *Id.* at 352.

constitutionally shared powers or to overrule the courts in an area of exclusive legislative authority. For example, the legislature may enact a statute that affects the functioning of the courts as an institution, as it did with the statute reviewed in *State v. Holmes*.<sup>14</sup> In *Holmes*, the Wisconsin Supreme Court reviewed whether Wisconsin Statutes section 971.20, which established the peremptory right of substitution of judges, was constitutionally permissible.<sup>15</sup> Or, the legislature may enact a statute that effectively overrules prior Supreme Court statutory interpretation, as it did in regard to the court's interpretation of conditions relating to recreational immunity.<sup>16</sup>

The component of decisional independence is adherence to the rule of law in individual cases, such that decisions of a court or an individual judge are not affected by the demands of another branch of government or by other personal pressures exerted upon judges.<sup>17</sup> Decisional independence requires impartial decision making, where the rule of law is applied even-handedly and the court does not respond to external pressures such as court funding, special interest groups, political agendas, the press, campaign contributors, or an upcoming election or hoped-for appointment.<sup>18</sup>

In recent years, there have been overt attempts to politicize the judiciary through questioning in the federal appointment process and through questioning in state judicial elections. The questioning has become so detailed in the federal process that at times it appears that the power of the executive to appoint a justice or judge and the Senate's power to consent to appointments have become the power-in-fact to decide significant constitutional issues. In my view, the executive and legislative attempts to decide constitutional issues through the appointment process are inconsistent with judicial independence, which requires both independent decisions and the appearance that the decisions have been independently made.

However, it is when one begins to examine judicial accountability that one recognizes some actions of the courts may not have been judicially independent. For example, when a court disregards long-

---

14. 106 Wis. 2d 31, 41-47, 315 N.W.2d 703, 708-11 (1982).

15. *Id.* at 41, 315 N.W.2d at 708.

16. *See Verdoljak v. Mosinee Paper Corp.*, 200 Wis. 2d 624, 633-35, 547 N.W.2d 602, 605-06 (1996).

17. Salzberger, *supra* note 11, at 351-52.

18. Jason J. Czarnecki, *Voting and Electoral Politics in the Wisconsin Supreme Court*, 87 MARQ. L. REV. 323, 327-30 (2003).

standing precedent or changes established standards of issue-analysis without a well-reasoned and fully articulated explanation of why the changes are required, the judicial independence underlying the decision should be questioned. Judicial independence is not simply permitting an individual judge or court to do whatever it wants. This is so because when the judiciary exercises its will rather than its reasoned judgment, it acts contrary to the grant of authority from the electorate that expected an independent judiciary that can be trusted to operate with self-restraint under ascertainable rules of law.

I should note here that not all jurists view judicial independence in this fashion. Some very dedicated public servants have concluded that it is part of their office to implement the policies they believe most appropriate, even when doing so is contrary to the choice the legislature has made. It has been said that policy-driven decision making assists the legislature in writing better laws.<sup>19</sup> I do not share this perspective; however, it cannot be overlooked in any conversation on judicial independence.

But be wary, the public perceives judicial independence as protecting the application of a rule of law that drives the result in each case, no matter who appears before the court or what policy the rule of law may advance. Therefore, when judges decide cases based on their own policy preferences, their actions can be destructive of the public's perception that the judiciary is an independent decision maker. There are dangers in undermining the public's perception of how judicial decision making is accomplished. It can result in the public deciding that the courts are nothing more than political bodies, and therefore, public confidence in the courts is not warranted. And finally, accepting or permitting personal policy preferences to control judicial decision making, in a worse-case scenario, can result in tyranny of the judiciary—a judiciary that operates without defined standards or rules, much like the “Hama rules” of Thomas Friedman's best seller, *From Beirut to Jerusalem*.<sup>20</sup> Under Hama rules, the rule was, there are no rules.<sup>21</sup>

It also is interesting to note the rise of a concept known as the New Federalism.<sup>22</sup> Under New Federalism, state courts interpret claimed

---

19. Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1053–55 (1991).

20. THOMAS L. FRIEDMAN, *FROM BEIRUT TO JERUSALEM* (1989).

21. *Id.* at 76–105.

22. See *State v. Knapp*, 2005 WI 127, ¶ 84 & n.1, 285 Wis. 2d 86, ¶ 84 & n.1, 700 N.W.2d 899, ¶ 84 & n.1 (Crooks, J., concurring).

rights and parse the constitutional sufficiency of statutes under state constitutions. In so doing, courts interpret the words in the state constitutions differently from the United States Supreme Court's interpretation of the same words in parallel clauses of the United States Constitution.<sup>23</sup> When a state court employs New Federalism in its decisions, it does so with the realization that its decision cannot be modified by any other governmental body, state or federal.<sup>24</sup> This is an extraordinary exercise of judicial power.

### III. ATTEMPTS TO RESTRICT THE COURTS

The history of our country shows that some have not valued judicial independence and have attempted to curb it. A ready example is President Franklin D. Roosevelt's "court-packing" plan.<sup>25</sup> In 1937, President Roosevelt proposed to add one new justice for every justice then over seventy years of age. That plan would have given him six immediate appointments and increased the size of the court from nine to fifteen justices. President Roosevelt devised "court-packing" because he believed that the United States Supreme Court was striking down too many of his "New Deal" legislative initiatives as unconstitutional laws. By adding six hand-picked Justices to the Court, President Roosevelt hoped to form a new majority that would look more favorably on his initiatives.<sup>26</sup> The plan failed, but the desire to manipulate the decision making of courts continues today.<sup>27</sup>

For example, the recent decision that upheld the right of Michael Schiavo, the husband and legal guardian of severely injured Theresa Marie Schiavo, to terminate Theresa's feeding,<sup>28</sup> resulted in Congressman Tom DeLay's suggestion that the judge who decided the case should be impeached for his decision.<sup>29</sup> There also have been

---

23. Robert M. Howard et al., *State Courts, the U.S. Supreme Court, and the Protection of Civil Liberties*, 40 LAW & SOC'Y REV. 845, 850-51 (2006).

24. *Knapp*, 2005 WI 127, ¶¶ 84-85 and accompanying notes, 285 Wis. 2d 86, ¶¶ 84-85 and accompanying notes, 700 N.W.2d 899, ¶¶ 84-85 and accompanying notes.

25. WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 132-62 (1995).

26. *Id.*

27. See KENNETH R. THOMAS, *LIMITING COURT JURISDICTION OVER FEDERAL CONSTITUTIONAL ISSUES: "COURT-STRIPPING"* 1-2 (2005).

28. See Comm. on Gov't Reform of the House of Representatives v. Schiavo, 544 U.S. 916 (2005).

29. Carl Hulse & David D. Kirkpatrick, *Even Death Does Not Quiet Harsh Political Fight*, N.Y. TIMES, Apr. 1, 2005, at A1.

proposals in Congress to restrict the jurisdiction of federal courts so that certain laws could not be subjected to judicial review.<sup>30</sup>

In recent years, efforts to restrict the decisional power of the courts have not been limited to other branches of government. In California, the electorate passed Proposition 115 in an attempt to require that California's constitutional provision that parallels the Fourth Amendment to the United States Constitution be interpreted only as the United States Supreme Court has interpreted the Fourth Amendment.<sup>31</sup> And in Wisconsin, there have been constitutional amendments that attempted to remove certain subjects from judicial review. The most recent of these is the constitutional ban on same-sex marriage.<sup>32</sup> Previously, in 1993, the Wisconsin Constitution was amended to provide a constitutional prohibition to gambling within the state.<sup>33</sup> The initiative in California and the constitutional amendments in Wisconsin appear to reflect a growing lack of trust of the judiciary by the electorate. This is not a good trend. It may evidence the public's belief that judicial independence is a myth because judges always insert their own policy preferences into decisions.<sup>34</sup>

#### IV. JUDICIAL INDEPENDENCE IN WISCONSIN'S COURT SYSTEM

Wisconsin has a three-tier state court system: the circuit court, the court of appeals, and the supreme court. In some municipalities, a fourth tier, the municipal court, also serves the public. Most of the philosophic discussion of judicial independence focuses on courts of last resort, such as the United States Supreme Court or state supreme courts. This is so, at least in Wisconsin, because it is only the supreme court that can overrule itself or the court of appeals. However, when comparing the three tiers of Wisconsin state courts, I note that far more decisions are made by circuit court judges than are made by appellate judges. We tend not to examine circuit court decisions as closely, unless they involve high-profile cases, because they affect only the parties to the litigation, while published appellate decisions affect us all.

---

30. *E.g.*, 151 CONG. REC. E214-03 (daily ed. Feb. 10, 2005) (statement of Rep. Paul).

31. *Raven v. Deukmejian*, 801 P.2d 1077, 1088 (Cal. 1990) (wherein the California Supreme Court concluded that Proposition 115 unduly restricted judicial power and therefore was an action not permitted by initiative).

32. WIS. CONST., art. XIII, § 13.

33. WIS. CONST., art. IV, § 24.

34. James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1191-92 (2006).



But query, if a supreme court justice is permitted to decide what the constitution or a statute means based on his or her personal policy preferences and then to define those decisions as judicially independent, what is to prevent a circuit court judge from doing the same thing? Most circuit court decisions are not appealed. We have approximately 241 circuit court judges in Wisconsin. Accordingly, it is possible that Wisconsin litigants could have a very significant number of differing opinions on the meaning of a given constitutional provision or statute if circuit courts had decisional latitude based on each circuit court judge's personal policy preferences.

However, few, if any, would publicly say that permitting circuit court judges to follow their own views of what the law should be rather than applying precedent established by the supreme court or court of appeals is appropriate. Why is this so? In my view, this is so because few really want a system of judicial decision making that has no rules and little if any predictability. Nevertheless, the result of defining judicial independence to include individual judges or courts applying their own policy preferences to constitutional or statutory interpretation will eventually create a system that has no readily identifiable rules. Our judicial branch will then change from courts of law to courts of men and women, where justice will depend upon those who occupy the seats in the decision-making court.

#### V. DECISIONS WHERE JUDICIAL INDEPENDENCE HAS BEEN QUESTIONED

My concerns about judicial independence are not grounded in a liberal or a conservative philosophy because they affect all persuasions. There are as many policy-driven decisions from the left as from the right. Rather, my concerns are driven by a profound respect for our judicial systems, both federal and state, and a strong belief that the power available through judicial decision making should be reviewed and discussed on a regular basis.

In Wisconsin, I am privileged to work with six exceptionally dedicated men and women, some of whom may define judicial independence differently from how I define it. I have begun this conversation because I believe that it is necessary to the preservation of judicial independence for courts and their members to be introspective as to their own modes of decision making and to publicly discuss how they believe that judicial independence relates to the people they serve.

We need an ongoing conversation that addresses the independence of the judiciary if we are to preserve the liberties we all cherish. If we do not discuss it, I fear judicial independence will be nibbled off, a bit at a time, until nothing worthwhile is left. As Mr. Justice Robert Jackson said, “[Our] traditional freedoms are less in danger of any sudden overthrow than of being gradually bartered or traded for something else on which the people place a higher current value.”<sup>35</sup> Accordingly, we must meet and converse, we must examine the work of our courts, and we must think and write about it. For me, today is a first step toward what I hope will be a public conversation about the meaning of judicial independence and its preservation in Wisconsin government.

It may be helpful to explain my concerns with concrete examples. I’d like us first to consider two opinions, *Bush v. Gore*<sup>36</sup> and *Dairyland Greyhound Park, Inc. v. Doyle*,<sup>37</sup> and lastly to consider a third opinion, *Brown v. Board of Education*.<sup>38</sup> All of the cases were decided by courts of last resort.

*Bush v. Gore* was decided during the Florida recount of voting in the 2000 presidential election. In that decision, the United States Supreme Court held that the manual recounts, as ordered by the Florida Supreme Court, violated the Equal Protection Clause of the United States Constitution in regard to securing the fundamental right to vote for President.<sup>39</sup> The Court explained that it so held because the Florida court order that directed the recount process lacked specific standards by which to discern the intent of the voters on the ballots that were recounted.<sup>40</sup> In so doing, the United States Supreme Court interpreted Florida statutes contrary to the interpretation of the Florida Supreme Court.<sup>41</sup>

*Bush v. Gore*’s conclusion that the Equal Protection Clause of the United States Constitution was violated by the recount process has none of the usual careful reasoning of the United States Supreme Court. Because there was no challenge to the constitutionality of the state statutes that were being interpreted and applied, the Court simply

---

35. Robert H. Jackson, *The Task of Maintaining Our Liberties: The Role of the Judiciary*, 39 A.B.A. J. 961, 963 (1953).

36. 531 U.S. 98 (2000).

37. 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408.

38. 347 U.S. 483 (1954).

39. *Bush v. Gore*, 531 U.S. at 103.

40. *Id.* at 106.

41. *Id.* at 120–21 (Rehnquist, C.J., concurring).

decided that the interpretation and application of Florida statutes by the Florida Supreme Court violated the Equal Protection Clause.<sup>42</sup> After reading the per curiam opinion, which is the lead opinion, one could wonder why the Florida Supreme Court's interpretation of Florida statutes is an erroneous interpretation.

Mr. Justice Stevens had grave concerns about the United States Supreme Court's interpreting the Florida Code because it is most unusual for the Court to interpret state statutes when the highest court in the state has done so.<sup>43</sup> He was also concerned because the context in which the Court took jurisdiction was in the midst of a presidential election.<sup>44</sup> He lamented that the Court's inserting itself in the process of recounts would be interpreted as a public statement that the United States Supreme Court questioned the impartiality of the Florida Supreme Court to address legal issues surrounding the recount.<sup>45</sup>

Mr. Justice Stevens may or may not have been correct to be concerned that the United States Supreme Court would be perceived as deciding as it did because it distrusted the Florida Supreme Court. However, he was right to be concerned about the questions that the decision in *Bush v. Gore* would raise. In regard to the issue of judicial independence, the most significant concern that has been voiced is whether *Bush v. Gore* evidences a United States Supreme Court that has become so politicized that it is no longer an independent judiciary.<sup>46</sup> That concern strikes at the very heart of judicial independence, which eschews politicization of the courts.

In *Dairyland Greyhound Park*, the Wisconsin Supreme Court reviewed article IV, section 24 of the Wisconsin Constitution, which was amended in 1993 to provide a constitutional prohibition on gambling in Wisconsin.<sup>47</sup> The court's review was to determine whether article IV, section 24 applied to Indian gambling that had been legally permitted before the amendment.<sup>48</sup> The Supreme Court did so in the context of its

---

42. *Id.* at 103 (per curiam opinion).

43. *Id.* at 123 (Stevens, J., dissenting).

44. *Id.* at 124–27.

45. *Id.* at 128.

46. See Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2168, 2174 (2006).

47. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 1, 295 Wis. 2d 1, ¶ 1, 719 N.W.2d 408, ¶ 1.

48. *Id.* ¶ 2, 295 Wis. 2d 1, ¶ 2, 719 N.W.2d 408, ¶ 2.

review of a 2001 Dane County Circuit Court case.<sup>49</sup> On motions for summary judgment, the circuit court dismissed Dairyland's claim that the 1993 amendment to article IV, section 24 prohibited the types of casino games that had been permitted under the 1992 gaming compacts and continued under the 1998 and 1999 compact renewals.<sup>50</sup>

*Dairyland* raised questions about the institutional independence of the court because after the case reached the Wisconsin Supreme Court, the governor asked the court to review the constitutionality of the new casino games that were added in the 2003 compacts. Those games were never before the circuit court, whose decision the supreme court was reviewing for the simple reason that the 2003 compacts did not exist in 2001 when the case was brought to the circuit court. Furthermore, the Wisconsin Supreme Court had already held in *Panzer v. Doyle*<sup>51</sup> that the games added in the 2003 compacts were prohibited by article IV, section 24 of the Wisconsin Constitution, and therefore, the Indian nations' operation of those games violated the criminal laws of Wisconsin.<sup>52</sup>

Notwithstanding the Wisconsin Supreme Court's decision in *Panzer*, the governor publicly chose not to enforce that court decision.<sup>53</sup> Instead, he repeatedly demanded that the Indian nations pay the Wisconsin government in amounts agreed upon as a quid pro quo for the new games and perpetual compacts negotiated in 2003.<sup>54</sup> In addition, through the office of the attorney general, the governor asked that in the context of the court's review of the circuit court's decision in *Dairyland* that pre-dated the 2003 compacts, the Wisconsin Supreme Court also review whether preventing the operation of the games compacted for in 2003 violated the contracts clauses of the United States and Wisconsin Constitutions.<sup>55</sup>

There are statutes and internal operating procedures that specify how and when a decision of the Wisconsin Supreme Court may be re-examined, either by a motion for reconsideration to the court or by a

---

49. *Id.* ¶¶ 10–13, 295 Wis. 2d 1, ¶¶ 10–13, 719 N.W.2d 408, ¶¶ 10–13.

50. *Id.* ¶ 292, 295 Wis. 2d 1, ¶ 292, 719 N.W.2d 408, ¶ 292 (Roggensack, J., concurring in part and dissenting in part).

51. 2004 WI 52, 271 Wis. 2d 295, 680 N.W.2d 666.

52. *Id.* ¶¶ 5, 96, 271 Wis. 2d 295, ¶¶ 5, 96, 680 N.W.2d 666, ¶¶ 5, 96.

53. *Dairyland*, 2006 WI 107, ¶ 301, 295 Wis. 2d 1, ¶ 301, 719 N.W.2d 408, ¶ 301 (Roggensack, J., concurring in part and dissenting in part).

54. *Id.* ¶¶ 258–59, 295 Wis. 2d 1, ¶¶ 258–59, 719 N.W.2d 408, ¶¶ 258–59 (Prosser, J., concurring in part and dissenting in part).

55. *Id.* ¶¶ 286–87, 295 Wis. 2d 1, ¶¶ 286–87, 719 N.W.2d 408, ¶¶ 286–87 (Roggensack, J., concurring in part and dissenting in part).

petition for review filed in the United States Supreme Court.<sup>56</sup> Neither path was taken by the governor in *Panzer*. Therefore, unless the issue arose in the context of another case, the decision that the casino games added in 2003 violated the criminal laws of Wisconsin was not subject to further review.<sup>57</sup> However, notwithstanding those statutes and rules, a majority of the court acceded to the governor's request and took up an issue that was never before the circuit court whose decision the Wisconsin Supreme Court was reviewing.<sup>58</sup> In so doing, the court drew into question its right to have the executive branch enforce its decision in *Panzer* and its institutional independence from the executive branch of government in regard to the court's own rules of procedure.<sup>59</sup>

One could assert that the decisions in *Bush v. Gore* and *Dairyland* are policy-driven decisions, and therefore, they are no less evidence of judicial independence, but rather, a different way of defining the concept. I do not join that point of view. However, I will grant that there are some policy-driven decisions that I would be compelled to join, but they are very, very limited in type. Let me explain.

*Brown v. Board of Education* is one such opinion where I believe the judiciary independently decided, on a policy basis, that separate was not equal in public education.<sup>60</sup> *Brown* was a consolidated opinion that addressed challenges to Kansas, South Carolina, Virginia, and Delaware statutes that either permitted or required racial segregation in public schools.<sup>61</sup> The segregation statutes were challenged under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.<sup>62</sup> In defending against the challenges, it was argued that the facilities accorded black students and white students were substantially equal, even though the facilities were separate.<sup>63</sup>

The Court looked to the Fourteenth Amendment and concluded that its history was unclear in regard to what may have been intended in

---

56. WIS. STAT. § 809.64 (2005–2006); *State v. Webster*, 114 Wis. 2d 418, 426 n.4, 338 N.W.2d 474, 478 n.4 (1983).

57. *Dairyland*, ¶¶ 286–87, 295 Wis. 2d 1, ¶¶ 286–87, 719 N.W.2d 408, ¶¶ 286–87 (Roggensack, J., concurring in part and dissenting in part).

58. *Id.* ¶¶ 286–87, 295 Wis. 2d 1, ¶¶ 286–87, 719 N.W.2d 408, ¶¶ 286–87 (Roggensack, J., concurring in part and dissenting in part).

59. *Id.* ¶¶ 286–87, 295 Wis. 2d 1, ¶¶ 286–87, 719 N.W.2d 408, ¶¶ 286–87.

60. 347 U.S. 483, 495 (1954).

61. *Id.* at 486.

62. *Id.* at 488.

63. *Id.*

regard to public education.<sup>64</sup> It then looked to the effect of segregation on public education.<sup>65</sup> The Court reasoned that by prohibiting one race from attending a public school that was open to another race, the state law denoted that the excluded race was inferior, which could cause a failure to learn in the excluded children.<sup>66</sup> This, the Court concluded, caused separate but equal public schools to deny the children of the minority group equal educational opportunities.<sup>67</sup> Because education was so necessary to the development of a citizen who could fully participate, a restriction on public education was held to be violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.<sup>68</sup>

*Brown* is certainly policy-driven. However, for me, the decision in *Brown* was correct because the value underlying the Supreme Court's analysis was not confined to education. Rather, it was the universal value that all men and women, no matter their race, are equal under the laws of the United States. Stated otherwise, the value at stake in *Brown* transcended the legal issue, whether separate but equal public education violated the United States Constitution, on which the Court's decision turned.

## VI. TO CONTINUE THE CONVERSATION

I have tried to set out some of the issues that underlie an examination of judicial independence, and to some degree, I have given you my take on them. However, this is a conversation where I recognize that there are many points of view on this very important subject. I'd like to hear your thoughts about judicial independence. So let us begin.

---

64. *Id.* at 489–90.

65. *Id.* at 492–93.

66. *Id.* at 494.

67. *Id.* at 493.

68. *Id.* at 495.

\* \* \*