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## Some Observations on Separation of Powers and the Wisconsin Constitution

Chad M. Oldfather

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# SOME OBSERVATIONS ON SEPARATION OF POWERS AND THE WISCONSIN CONSTITUTION

CHAD M. OLDFATHER\*

*In recent years the Wisconsin Supreme Court has decided several high-profile cases concerning the separation of powers under the state constitution. In the abstract, questions concerning the separation of powers do not seem inherently partisan, largely because the partisan balance of government will shift over time. Yet, as has been the case with many of its recent decisions, the justices' votes have broken along what most observers regard as partisan lines, and the opinions have featured heated prose including accusations of result orientation and methodological illegitimacy.*

*This Article is the initial product of an effort to read, and attempt to synthesize, the entirety of the Wisconsin Supreme Court's output relating to separation of powers dating back to the state's founding. It advances no single thesis and makes no grand claims. It instead seeks to identify some threads running through the caselaw, including with respect to the court's approaches to interpreting the state constitution, to highlight some tensions, oversights, and loose ends in the doctrine, and to suggest that the court's perceived legitimacy would benefit from more humility and less heated rhetoric.*

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## I. INTRODUCTION

This Article is the product of an effort to read, as comprehensively as I could manage, the Wisconsin Supreme Court's opinions concerning the separation of powers under the state's constitution.<sup>1</sup> The goal of that quest was not to advance a particular thesis or even to answer a specific question, but rather to follow the materials where they led, and to leverage one of the comparative advantages I enjoy as an academic—the ability to read, think, and write without being subject to the constraints imposed by having to do so under pressing time constraints or in the context of a specific dispute. I hoped to uncover themes, to notice connections and disconnections, to identify shifts in the jurisprudential currents over the 173 years separating the framing of the state's constitution and today, and to otherwise bring unnoticed or underappreciated issues to the surface.

My motivations for undertaking this project included the following. First, the court is widely perceived as having become a partisan institution. Writing in *The New Yorker*, Lincoln Caplan observed that “all of the Wisconsin justices look a lot like politicians” and characterized the court as having been transformed “from one of the nation's most respected state tribunals into a

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1. I began with a Westlaw search designed to yield every opinion in which the phrase “separation of powers” appeared, then read those in chronological order, together with other seemingly notable opinions that were cited along the way. Given the wide range of questions that have implications for the separation of powers, the set of opinions I read undoubtedly fell short of full comprehensiveness. Not all the opinions were significant, and not all of the opinions that were in some sense significant are discussed or even cited in this Article.

disgraceful mess.”<sup>2</sup> Former talk-radio personality Charlie Sykes described Wisconsin as a place where “the lines between partisan politics and the judiciary have long since been erased.”<sup>3</sup> One justice has been pilloried for not consistently voting with his perceived ideological comrades.<sup>4</sup> This is all troubling, and it seems to have obscured what ought to be a mundane observation: The rule of law means that one’s side doesn’t always win—whether “side” is defined in terms of politics, interest groups, or some other categorization.

Second, separation-of-powers issues do not, in the abstract, necessarily cleave along partisan lines. One of the purposes of separation of powers is to prevent the concentration of power, and in that sense we might, as a general matter, conclude that those who favor limited government will also tend to prefer robust separation. But that general dynamic does not so clearly extend to more specific questions. Should the governor’s partial veto power be more or less extensive? To what extent should the courts defer to the legislature’s assessments of the constitutionality of its own legislation? To what extent ought the legislature be able to continue to assert its assessment in litigation? If it is able to do so, does it matter whether the legislature’s litigation positions are directed by a committee that may not reflect the views of the legislature as a whole? Viewed without regard to the partisan affiliation of the holders of the offices at the time the questions arise, it’s not so clear which side of those issues

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2. Lincoln Caplan, *The Destruction of the Wisconsin Supreme Court*, THE NEW YORKER (May 5, 2015), <https://www.newyorker.com/news/news-desk/the-destruction-of-the-wisconsin-supreme-court> [<https://perma.cc/8LL9-QNPN>]. The sentiment isn’t limited to journalists. A few years ago, I presented at a conference held for appellate judges and justices from state courts across the country. Several times in conversations during breaks a member of another state’s judiciary would ask a version of the question, “What happened to the Wisconsin Supreme Court?” One pointedly said, “We used to look up to that court.”

3. Charles Sykes, *What’s Really Behind Wisconsin’s Election Disaster*, POLITICO (Apr. 9, 2020), <https://www.politico.com/news/magazine/2020/04/09/wisconsin-supreme-court-partisan-battleground-176292> [<https://perma.cc/M6KZ-6BTA>]; See also Dave Zweifel, *Plain Talk: Wisconsin Gets the Derision it Deserves for its Partisan Supreme Court*, THE CAPITAL TIMES (May 11, 2020), [https://madison.com/ct/opinion/column/dave\\_zweifel/plain-talk-wisconsin-gets-the-derision-it-deserves-for-its-partisan-supreme-court/article\\_605244c2-89d0-5895-bfba-132a8a0dd9ea.html](https://madison.com/ct/opinion/column/dave_zweifel/plain-talk-wisconsin-gets-the-derision-it-deserves-for-its-partisan-supreme-court/article_605244c2-89d0-5895-bfba-132a8a0dd9ea.html) [<https://perma.cc/2W46-DNSJ>].

4. See, e.g., Dan O’Donnell, *Brian Hagedorn Has Become Everything Brian Hagedorn Warned Us About*, MACIVER INSTITUTE (Dec. 9, 2020), <https://www.maciverinstitute.com/2020/12/brian-hagedorn-has-become-everything-brian-hagedorn-warned-us-about/> [<https://perma.cc/6AN9-V4KD>]. O’Donnell, a talk-radio host, describes Hagedorn as “a constitutional illiterate who twists himself into laughably unsupported knots in order to arrive at the predetermined policy outcome he personally prefers.” For an overview of the attacks on Hagedorn, see Reid J. Epstein, *A Conservative Justice in Wisconsin Says He Followed the Law, Not the Politics*, NEW YORK TIMES (Dec. 20, 2021), <https://www.nytimes.com/2020/12/20/us/politics/wisconsin-justice-brian-hagedorn.html> [<https://perma.cc/V3HJ-W8SG>].

is “conservative,” and which is “liberal,” whatever definitions of those terms one might choose.

And yet the court’s decisions in cases presenting those questions, and the voting patterns of the justices within the cases, suggest that the current partisan affiliations of the relevant office holders have influenced the court’s approach. At least on the surface, the justices’ voting patterns appear in general to reflect a crude attitudinalism—the party, whether the governor or the legislature, that shares the same perceived ideology as a given justice is overwhelmingly likely, particularly in high-profile cases, to get that justice’s vote. Indeed, the following proposition seems simultaneously unremarkable and scandalous: If the partisan affiliations had been reversed, so, too, would be the results.<sup>5</sup> To say that is not to say that the justices perceived themselves as acting in anything but good faith. But judges are humans, and human judgment can be swayed by the salient features of specific situations. As Justice Jackson famously put the point:

The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power’s validity with the cause it is invoked to promote . . . . The tendency is strong to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic.<sup>6</sup>

However, the participants in these episodes have subjectively experienced their motivations, the appearance is one of prioritizing partisan advantage over adherence to the longer-term norms and values on which our system of government depends.<sup>7</sup>

Third, there are aspects of the court’s opinions that simply seem off in ways that are more traditionally legal in nature. For example, the court purports to adhere to analytical frameworks—such as for statutory and constitutional interpretation, and for the implementation of stare decisis—that its majority opinions occasionally disregard. And often, in interpreting the Wisconsin constitution, the justices appear to reflexively assume that the United States Constitution provides the model against which its state-level counterpart should

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5. To be sure, such a counterfactual world would almost certainly have generated a different mix of cases. The interest groups involved in advancing this sort of litigation would have different sets of concerns—few are concerned by the perceived accumulation of power when it’s their side that holds the power—and brought different cases, and the court would likely have focused on different issues.

6. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

7. As Miriam Seifter has put the point in addressing these phenomena across a range of states, “These developments have in common a willingness by state officials to alter or strain the institutions of state government—the so-called ‘rules of the game’—for short-term political advantage.” Miriam Seifter, *Judging Powers Plays in the American States*, 97 TEX. L. REV. 1217, 1219 (2019).

be measured and to which it should conform. This despite the fact that the Wisconsin constitution was adopted over a half-century later and creates a facially different set of institutional arrangements for a government that occupies a different place in the federal structure and serves a different purpose.

The Article begins by tracing the history of the court's approach to the interpretation of the Wisconsin constitution. Although these interpretive questions do not implicate the separation of powers in a narrow sense, they do in the broader respect that the court's orientation to the constitution affects the space left to the legislative and executive branches for them to engage in their own interpretation. The Article then provides a critical assessment of a selection of the court's opinions addressing separation-of-powers issues from the past two decades. After doing so it considers some of the general issues raised by the court's recent cases, including the appropriateness of using federal precedent as a guide. It also returns to the court's interpretive history, which reveals that for much of the state's history, the court's approach to interpreting the constitution has been methodologically pluralistic, and that only recently has the court purported to follow an interpretive formula. Even more recently some of the justices have taken to routinely charging their colleagues with engaging in result-oriented or otherwise illegitimate decision making, which only serves to feed the impression that other factors motivated their decisions (including those of the justices who make the charges).

## II. INTERPRETING THE WISCONSIN CONSTITUTION

Although the point is not acknowledged in the case law, and appears to be the product of happenstance rather than design, the Wisconsin Supreme Court uses two, or perhaps three, interpretive frameworks when addressing questions about the meaning of the state's constitution.<sup>8</sup> The first applies in situations in which there is a textual provision to be interpreted—other than ones in the Declaration of Rights for which there is a counterpart in the federal Bill of Rights, to which the second applies. The third applies to separation-of-powers issues.

As we will see, however, the foregoing description is too simplistic in its categories and its apparent comprehensiveness. The court's opinions often confidently invoke an interpretive framework, giving the impression within

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8. I have elsewhere addressed such "methodological stare decisis" with respect to the interpretation of the federal Constitution. See Chad M. Oldfather, *Methodological Pluralism and Constitutional Interpretation*, 80 BROOK. L. REV. 1 (2014); Chad M. Oldfather, *Methodological Stare Decisis and Constitutional Interpretation*, in PRECEDENT IN THE UNITED STATES SUPREME COURT 135 (Christopher J. Peters ed., 2013). Because, as noted below, a state constitution may be a different type of thing than the federal Constitution, the analysis may not fully transfer from one context to the other.

those opinions that its approach is settled and fixed. Across the range of its decisions, however, the court's approach appears more clearly pluralistic in nature. The court on occasion departs from these frameworks to engage in a more freewheeling, ad hoc approach. Because it does not provide reasons for its departures, and has not addressed the relationship among the approaches, the impression is often one of opportunism.

#### A. *The General Approach*

The Wisconsin constitution was ratified in 1848, and the Wisconsin Supreme Court's work of interpreting the document began in January of 1849, in two cases that arose out of election disputes, and which concerned the relationship between those who held territorial office and those who would hold office under the constitution. A leading treatise on the Wisconsin constitution contends that the court used a different approach to interpretation in the two cases. "Thus, after two constitutional cases there were two methods of interpretation: one based on determining, in a very general way, the relevant constitutional provision's intent, the other based on literally reading the constitution's relevant provision."<sup>9</sup>

Careful consideration of the two opinions suggests that this reading is, at best, overstated. The opinions are short, and neither analysis is detailed or expansive. Moreover, both were written by Chief Judge Alexander Stow. Given their common authorship, the existence of differences between them suggests not the existence of two distinct approaches so much as the embrace of the methodological pluralism of the common-law judge, pursuant to which interpretation is not an ostensibly algorithmic process of plugging the available materials into a set formula but rather a task that entails selecting the right tools for the task at hand. And the task at hand was fundamentally different in the two cases.

The first of the cases is *State ex rel. Dunning v. Giles*, in which the court confronted a claim brought by the runner-up in an election for sheriff of Dane County.<sup>10</sup> Dunning, the claimant, contended that Matts, who received the most votes, was:

[R]endered ineligible either by the second section of the seventh article of the Constitution, which declares "that sheriffs shall hold no other office, and be ineligible for two years next succeeding the termination of their offices," or by the similar provision of the territorial law, which, it is said, not

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9. JACK STARK & STEVE MILLER, *THE WISCONSIN STATE CONSTITUTION* 12 (2d ed. 2019).

10. 1 Chand. 112 (1849).

being repugnant to the constitution, was continued in force by the second section of the constitutional schedule.<sup>11</sup>

In other words, Dunning argued that because the adoption of the constitution brought Matts's term under the territorial law to a conclusion, he was ineligible to be a candidate. The court, reasoning broadly from its understanding of the nature and function of the constitution, concluded that application of the territorial prohibition, which applied to inhabitants of the Wisconsin territory, would be repugnant to the constitution, which applied to citizens of the state of Wisconsin, even though (as the court acknowledged) both provisions were identical:

The constitution did not perpetuate or modify any of the political rights of the inhabitants of the territory, for, properly speaking, they had none; but it created those rights for the citizens of the state—for all citizens—without preference or exclusion. All were alike its framers, and were equally enfranchised by it; and it seems to me harsh and invidious to say that some five-and-twenty of its citizens should be excluded from any of its privileges by the circumstance of their happening to hold, at the time of its adoption, a particular office under the expiring government.<sup>12</sup>

Because the text of the constitution did not speak to the question, textual interpretation could not supply the answer. The analysis instead required extra-constitutional reasoning—drawing conclusions about the very nature of the document, the obligations it created, and the rights it conferred, and to whom and at what times.

The second case, *State ex rel. Bond v. French*,<sup>13</sup> likewise arose out of an election contest. The winner of the election for probate judge in Racine County sought a writ of mandamus compelling the holder of the position under the territorial government, who maintained the job was still his, to “deliver the books and muniments of the office.”<sup>14</sup> The incumbent's first argument was that elections for probate judges were not properly authorized by the statute providing for the state's first general election.<sup>15</sup> The court concluded that the best reading of the constitution and statute allowed for the election.<sup>16</sup> But it also added this:

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11. *Id.* at 169.

12. *Id.* at 170 (emphasis omitted).

13. 1 Chand. 130 (1849).

14. *Id.* at 131.

15. *Id.*

16. *Id.* at 133.



But did the matter admit of a doubt in the first instance, that doubt should be regarded as removed by the action which has been had under this act. While this Court will never allow its judgements to be influenced by popular opinion, the united understanding and action of the whole State, in a matter of great public interest, is a guide that any tribunal may safely follow.<sup>17</sup>

The second argument was that the constitution did not authorize the election of probate judges as part of a general election.<sup>18</sup> Here, in contrast to *Dunning*, there was an applicable bit of text to interpret. Article VII, § 9 of the constitution provided, “There shall be no election for a judge or judges at any general election, for state or county officers, nor within thirty days either before or after such election.”<sup>19</sup> The question thus was whether probate judges fell within the scope of the word “judge” as used in that provision. The court opened its analysis with the proposition that interpretation of the constitution is to “be governed by the same general rules of interpretation which prevail in relation to statutes.”<sup>20</sup> A few pages earlier the court had described that process one in which the meaning of a statute is to be determined “not only by its own words, but by a reference to the supposed object of the Legislature in passing it, and the subject of Legislation.”<sup>21</sup> And indeed the court rejected the incumbent’s claim based not so much on a formalistic analysis of the text as its conclusions about the function the text was meant to serve:

If [the incumbent’s argument] be so, it necessarily follows that all officers who are, for any purpose, made judges by the Constitution, are Judges within the provision under consideration; a construction which would prohibit the election of Senators and Assemblymen (who are *judges* of the election of their own members,) at a general election—a proposition that no one would probably venture to advance. Again, by a similar process of reasoning it might be contended, that the Judges of the Supreme Court, which after five years, the Legislature is authorized to establish, might be elected at a general election; because, in the Constitution, they are not called Judges, but a Chief Justice and Associate Justices; and yet it is presumed that no person can entertain such an idea.<sup>22</sup>

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17. *Id.* at 134.

18. *Id.*

19. WIS. CONST. art. VII, § 9.

20. *French*, 1 Chand. at 135.

21. *Id.* at 132.

22. *Id.* at 135.

Seven years later, the court confronted another election dispute, this time over the governorship, in *Attorney General ex rel. Bashford v. Barstow*.<sup>23</sup> Both Barstow, the incumbent, and Bashford, the challenger, claimed victory, with Bashford credibly claiming that fraudulent votes accounted for Barstow's apparent victory.<sup>24</sup> Bashford asked the court to disregard the suspect votes and declare him the winner, and Barstow responded by arguing that the court lacked the power to hear the case.<sup>25</sup> More specifically, Barstow contended that separation of powers entailed complete independence, and that the granting of executive power to the governor meant "that the person filling the office of governor had the authority to determine his right to the office."<sup>26</sup> The court, however, was "unable to find anything in the constitution, or in the nature of executive power, which can be relied upon to sustain this position."<sup>27</sup> Its reasoning included some consideration of the text of the constitution, but also the nature and location of sovereignty and of the powers of the government in general.<sup>28</sup> The court's analysis ultimately reduces to no pat methodology, no running of materials through some decisional algorithm, but rather a thorough exploration and assessment of the pertinent legal materials. The goal—to determine the meaning of the state constitution<sup>29</sup>—defines the task, and the court's job is to sift through and weigh the evidence that assists in its completion.

A pair of opinions by Chief Justice Dixon further illustrates the approach. In 1860, in *Lumsden v. Cross*,<sup>30</sup> he wrote:

It is our duty to give such a construction to the constitution as will make it consistent with itself, and will harmonize and give effect to all its various provisions. To do this, we have only to suppose that the convention used language with reference to its popular and received signification; and applied it as it had been practically applied for a long series of years.<sup>31</sup>

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23. 4 Wis. 567 (1855).

24. For a brief description of the events, see JOSEPH A. RANNEY, WISCONSIN AND THE SHAPING OF AMERICAN LAW 28 (2017).

25. *Attorney General ex rel. Bashford*, 4 Wis. at 567.

26. *Id.* at 671.

27. *Id.*

28. *Id.* at 674.

29. *Id.* at 656–57 (placing the resolution of the question before the court in the state constitution itself).

30. 10 Wis. 282 (1860).

31. *Id.* at 287–88.

Fourteen years later, in *State v. West Wisconsin Railway Co.*,<sup>32</sup> the court rejected a claim that it should regard the scope of its jurisdiction as defined according to the common law writ of quo warranto, the precise use and contours of which the court regarded as lost to the mists of time:

The futility and unreasonableness of all such interpretations of the constitution are apparent. It is as impossible to believe that the framers of the constitution were looking back over the period of three or four hundred years into the middle ages, designing to give this court such jurisdiction, and only such, as was then exercised in virtue of the writ of *quo warranto*, as it is that they intended to confine the court to that antiquated and useless process. The framers of the constitution were practical men, and were aiming at practical and useful results.<sup>33</sup>

In 1874, the court also decided *Attorney General v. Chicago and Northwestern Railway Company*, a case in which the attorney general sought to enjoin two railroad companies from charging rates in excess of those mandated by statute.<sup>34</sup> Among the questions before the court was whether the constitution gave it original jurisdiction over the case.<sup>35</sup> In an opinion by Chief Justice Ryan, who had been a delegate to the 1846 constitutional convention, the court began by parsing the language of the pertinent constitutional provision.<sup>36</sup> The problem was technical, and one that is largely unfamiliar to modern ears. The constitution gave the court jurisdiction over cases involving certain writs, all but one of which, under the common law, “were prerogative writs, issuing on behalf of the state only.”<sup>37</sup> Injunctions, by contrast, were judicial writs. “And the difficulty arises wholly from placing this nonjurisdictional writ . . . amongst original writs; this equitable writ of vague and varied application amongst common law writs of sharp and terse significance; this confusion of equitable and legal jurisdiction.”<sup>38</sup> This placement raised a host of questions, and, the court lamented, “The writ does not of itself, like the rest of the group of writs given, furnish an answer to these questions.”<sup>39</sup>

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32. 34 Wis. 197 (1874).

33. *Id.* at 212.

34. 35 Wis. 425 (1874).

35. *Id.* at 512.

36. *Id.* (considering Article VII, § 3, cl. 4 of the Wisconsin constitution, which gave the court original jurisdiction and power “to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial writs”).

37. *Id.* at 513.

38. *Id.*

39. *Id.* at 514.

The court considered the parties' arguments and found them wanting.<sup>40</sup> It considered the text, it considered the implications of the structure created by the text and the role of the court within that structure, it drew on its own past opinions and those "of other courts on kindred subjects,"<sup>41</sup> and it drew upon authoritative statements of common law principles. And it concluded that the constitution had done something entirely new:

For, in our view of its use, the injunction given to this court seems to become a *quasi* prerogative writ, and founds jurisdiction as if it were an original writ. It is certainly competent for the constitution to give new writs, or to put old writs to new uses; to make any writ, by the use to which it puts it, prerogative or original; and to found jurisdiction on any writ, as in case of a prerogative or original writ. And this it appears to have done, in effect, with the injunction which it gives to this court.<sup>42</sup>

History mattered, but history did not constrain. The constitution might use old language, but it could put it to new uses.

The 1892 case of *State v. Cunningham*,<sup>43</sup> though, reminds of the need to be mindful of the constitution's plain language:

It is to be remembered that even praiseworthy objects cannot be rightfully attained by a violation of law. Every effort to fritter away the plain language of the constitution, by way of construction or otherwise, even to secure a desirable end, is nothing less than an insidious attempt to undermine the fundamental law of the state, and hence to that extent destructive of good government, besides being vicious in its tendencies.<sup>44</sup>

A pair of cases, both from 1896, provide additional perspective. Both *Dowling v. Lancashire Insurance Company*<sup>45</sup> and *In re Village of North Milwaukee*<sup>46</sup> involved the nondelegation doctrine. In both cases the court's legal analysis centered on surveying cases from courts in other states. The implicit understanding seemed to be that the pertinent task was to draw upon a sort of state constitutional common law rather than to engage in a sustained way

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40. *Id.* at 514–16.

41. *Id.* at 516.

42. *Id.* at 520.

43. 82 Wis. 39, 51 N.W. 1133 (1892).

44. *Id.* at 48.

45. 92 Wis. 63, 65 N.W. 738 (1896).

46. 93 Wis. 616, 67 N.W. 1033 (1896).

with the language of the Wisconsin constitution (which is sparse when it comes to the separation of powers) or with its history.

That there are broad similarities in the approaches taken by the court across this range of cases should not surprise us. It would be strange to expect anything less from fully situated members of a professional community engaged in variations on the same task.<sup>47</sup> But what's clearly not present in the opinions is any consensus that there is a single, correct methodology by which to approach questions of constitutional interpretation, or any sense that the absence of such a consensus somehow imperils the legitimacy of the enterprise. To derive a single method from these cases would be to impose a pattern on a world that resists it. The explanation may be that these were all judges familiar with the workings of the common law and with the accordingly ad hoc (which is not to say unconstrained) way by which such judges selected analytical tools appropriate, in their professional judgment, to the task at hand. Or it may be something else. The phenomenon's explanation is less important than its existence.

Perhaps the best encapsulation of the spirit of this history, which might serve as the Wisconsin Supreme Court's version of "we must never forget, it is a *constitution* we are expounding,"<sup>48</sup> comes via the following quote:

Much less should those state officials upon whom rests the duty of interpreting the state Constitution derive from the words of that Constitution implications which impair the authority of the state to exercise the just and ordinary powers usually possessed by governments, and which implications would recognize within the state persons or corporations not subject to or capable of ordinary regulation by the state, and presuppose that by the adoption of the Constitution the state so manacled itself as to be helpless to exercise old and well-known governmental powers, or to apply such powers to new problems or new conditions. Such construction would make the mere implications of the Constitution greater than the Constitution itself, and would lose sight of the main and paramount purpose of the creation of the state and the adoption of its Constitution. A Constitution so construed would last only so long as it took to bring about an amendment or a new Constitution, made possibly in the heat of conflict, and therefore in all probability less wise and equitable than the old Constitution properly construed. This is called by counsel the

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47. For a brief discussion of this idea, see Chad M. Oldfather, *Aesthetic Judging and the Constitution (Or, Why Supreme Court Justices are Less Like Umpires and More Like Figure-Skating Judges)*, 72 FLA. L. REV. 291, 401–03 (2020).

48. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

doctrine of expediency; but we think it the doctrine of common sense, that forbids implications from an instrument which tend to render nugatory or to destroy that instrument.<sup>49</sup>

What matters, on this view, is that a constitution is meant to create a government that is adequate to the task of governing. It recognizes that the nature of that task will change over time in ways that are both foreseeable and not.<sup>50</sup> The committed originalist will, at this point, raise some version of the argument that to treat the constitution other than as a document whose meaning is to be extracted through an originalist approach is to treat it as something other than law. But, the response runs, surely those justices who interpreted the constitution in the early decades of statehood understood themselves to be engaged in a fundamentally legal activity, and they had just as good an idea (and arguably quite a better one) of the nature of the state constitution and what it means to treat the Wisconsin constitution as law as any member of the legal profession today.

Whatever the implications, it is clear that in the early decades of the state, the Wisconsin Supreme Court neither purported to follow some uniform methodology for interpreting the state constitution nor justified its decisions with reasoning that implicitly adhered to some unstated framework. Consider, by contrast, Thomas Cooley's *Constitutional Limitations*, first published in 1868 and unquestionably the leading treatise on state constitutional law throughout its many editions.<sup>51</sup> Cooley's stated aim was descriptive. As he put it, "the author further stated that he had faithfully endeavored to give the law as it had been settled by the authorities, rather than to present his own views."<sup>52</sup> Cooley's work provides the best evidence of the general state of state constitutional law<sup>53</sup> at the time the Wisconsin constitution was adopted.

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49. *Minneapolis, St. P. & S.S.M. Ry. Co. v. R.R. Comm'n of Wis.*, 136 Wis. 146, 159, 116 N.W. 905, 910 (1908).

50. *State ex rel Sachtjen v. Festge*, 25 Wis.2d 128, 130 N.W.2d 457, 463 (1964) ("We recognize, of course, that many provisions in a constitution must be interpreted in the light of changing social conditions and circumstances and the emergence of new problems. Illustrations are readily found in the broad concepts which are put into words as 'due process of law,' 'equal protection of the laws,' and 'power . . . to regulate commerce with foreign nations and among the several states' found in the Federal constitution.").

51. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868).

52. *Id.* at v. No such endeavor can be entirely successful, of course, because any effort to make sense of a mass of information, whether judicial opinions or otherwise, will be influenced by an author's predilections, whether consciously or not. Cooley implicitly acknowledges as much toward the beginning of his discussion of constitutional interpretation, where he notes the existence of "sound" versus "altogether arbitrary or fanciful" and "important" versus other rules of construction. *Id.* at 38–39.

53. See *infra* Section II.

In its outlines, the methodology that Cooley describes parallels the earliest versions of what we now describe as originalism.<sup>54</sup> Cooley assumes that a state constitution is in all relevant respects just another written legal instrument, and that therefore the rules for dealing with other written instruments apply to state constitutions as well.<sup>55</sup> A constitution's meaning is accordingly fixed, it "is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable."<sup>56</sup> The measure by which to gauge that meaning is intent: "In the case of all written laws, it is the intent of the lawgiver that is to be enforced."<sup>57</sup> If possible, that intent must be extracted from the words of the document itself, with pertinent language to be examined both on its own terms and in light of the document as a whole.<sup>58</sup> Yet in doing so both history<sup>59</sup> and the common law<sup>60</sup> are to be accounted for. General grants of power are to be read as implying subsidiary powers.<sup>61</sup> And only if ambiguity remains after consideration of the foregoing is it appropriate to resort to "extrinsic" evidence of meaning—things like the purpose of the provision in question,<sup>62</sup> the

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54. For an argument that the Wisconsin Supreme Court should employ an interpretive approach to the state constitution that in its general contours parallels that described by Cooley, see Daniel R. Suhr, *Interpreting the Wisconsin Constitution*, 97 MARQ. L. REV. 93 (2013). In contrast to Cooley, Suhr makes a normative argument, which is grounded in a utilitarian or pragmatic claim that the court's current methodology provides an insufficiently reliable approach to uncovering the intent behind the document. *Id.* at 95. For a sophisticated exploration of the connection between Cooley's treatise and contemporary originalist theory, see Lawrence B. Solum, *Cooley's Constitutional Limitations and Constitutional Originalism*, 18 GEO. J.L. & PUB. POL'Y 49 (2020).

55. COOLEY, *supra* note 51, at 38–39.

56. *Id.* at 54.

57. *Id.* at 55.

58. *Id.* at 57.

59. *Id.* at 58–59 ("But it must not be forgotten, in construing our constitutions, that in many particulars they are but the legitimate successors of the great charters of English liberty, whose provisions declaratory of the rights of the subject have acquired a well-understood meaning, which the people must be supposed to have had in view in adopting them.").

60. *Id.* at 60–61 ("By this we do not mean that the common law is to control the constitution, or that the latter is to be warped and perverted in its meaning in order that no inroads, or as few as possible, may be made in the system of common-law rules, but only that for its definitions we are to draw from that great fountain, and that, in judging what it means, we are to keep in mind that it is not the beginning of law for the State, but that it assumes the existence of a well-understood system, which is still to be remain in force and be administered, but under such limitations and restrictions as that instrument imposes.").

61. *Id.* at 63–64 ("Under every constitution, implications must be resorted to, in order to carry out the general grants of power. A constitution cannot from its very nature enter into a minute specification of all the minor powers naturally and obviously included in and flowing from the great and important ones which are expressly granted.").

62. *Id.* at 65.

proceedings of the constitutional convention,<sup>63</sup> and contemporaneous or longstanding construction.<sup>64</sup> It seems likely that the framers of the Wisconsin constitution and early members of the court were aware of the approach Cooley outlines, and that the justices were aware of his treatise when it appeared. And yet the court's opinions do not reflect that approach.

In contrast to the practice in its early decades, the current Wisconsin Supreme Court purports to follow a consistent framework when interpreting the state constitution. The court first adopted that framework in *Busé v. Smith*,<sup>65</sup> in which it portrayed itself as “committed to the method of analysis” used in its opinion from two years prior in *Board of Education v. Sinclair*.<sup>66</sup> This was a curious beginning, since nothing about the opinion in *Sinclair* suggests that the court regarded itself as operating according to some sort of one-size-fits-all analysis, much less as creating the foundation for an analytical framework that would endure for decades. Indeed, the *Sinclair* court's analysis is striking for the complete lack of authority it provides for approaching the question before it in the way that it does. A reader of the opinion who did not know how it would be used in the future would have no reason to regard it as anything other than another in a line of somewhat ad hoc approaches to the interpretation of the constitution, and not even an especially good exemplar of that.

Yet from this perhaps accidental beginning emerged a method that entails consideration of three sources of information:

- (1) The plain meaning of the words in the context used;
- (2) The historical analysis of the constitutional debates and of what practices were in existence in 1848, which the court may reasonably presume were also known to the framers of the 1848 constitution; and
- (3) The earliest interpretation of [the pertinent section of the constitution] by the legislature as manifested in the first law passed following the adoption of the constitution.<sup>67</sup>

Over time the framework has taken on a fourth element, which involves consideration of “the prevailing practices when the provision was adopted.”<sup>68</sup> If these factors do not provide an answer, “the meaning of a constitutional

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63. *Id.* at 66–67.

64. *Id.* at 67–71.

65. 74 Wis.2d 550, 568, 247 N.W.2d 141, 149 (1976).

66. 65 Wis.2d 179, 222 N.W.2d 143 (1974).

67. *State v. Cunningham*, 82 Wis. 39, 51 N.W. 1133 (1892) (citations omitted).

68. *State v. Kerr*, 2018 WI 87, ¶ 19, 383 Wis. 2d 306, 913 N.W.2d 787.



provision may be determined by looking at the objectives of the framers in adopting the provision.”<sup>69</sup>

*B. Lockstep Interpretation of the Declaration of Rights*

There are at least two situations in which the court has consistently departed from the framework outlined in the preceding section. The first, which I will only briefly address, is with respect to state constitutional rights that have a counterpart in the federal Bill of Rights, even where there is a difference in the language of the two provisions. There, the court has said, “decisions from the United States Supreme Court interpreting analogous provisions in the federal constitution ‘are eminent and highly persuasive, but not controlling, authority.’”<sup>70</sup> Yet when “the language of the provision in the state constitution is ‘virtually identical’ to that of the federal provision or where no difference in intent is discernible, Wisconsin courts have *normally construed* the state constitution consistent with the United States Supreme Court’s construction of the federal constitution.”<sup>71</sup> The justification for what the court typically refers to as its “lockstep” approach is primarily pragmatic, that interpreting the rights in the Wisconsin constitution as having identical content to their federal counterparts promotes the value of uniformity<sup>72</sup>—which, by implication, the court regards as sufficient to override the values underlying its otherwise applicable approach. This, then, represents an acknowledgement of the proposition that pragmatic considerations are an appropriate component of constitutional interpretation. Other justifications include a sense that there is nothing unique about the state’s values that would justify providing greater protection than already provided for under the federal constitution,<sup>73</sup> and that it is simply easier to rely on federal law because there is so much built-up caselaw

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69. *State v. Beno*, 116 Wis. 2d 122, 138, 341 N.W.2d 668, 676 (1984).

70. *State v. Knapp*, 2005 WI 127, ¶ 57, 285 Wis. 2d 86, 700 N.W.2d 899 (quoting *McCauley v. Tropic of Cancer*, 20 Wis. 2d 134, 139, 121 N.W.2d 545 (1963)).

71. *Id.* ¶ 58 (quoting *State v. Jennings*, 2002 WI 44, ¶ 39, 252 Wis. 2d 228, 647 N.W.2d 142 (in turn quoting *State v. Agnello*, 226 Wis. 2d 164, 180–81, 593 N.W.2d 427 (1999))).

72. *Id.* ¶ 59 (“This ‘lock-step’ theory of interpreting the Wisconsin Constitution no broader than its federal counterpart appears to be aimed at promoting uniformity in the law.”).

73. See, e.g., Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U.L. REV. 79, 83 (1998) (noting that under a view of constitutional interpretation as implementation of a polity’s values “it follows that the state charter can provide an authentic source of constitutional meaning only if the constitution rests on a distinctive state community”). For examples of cases in which state courts have concluded that their state’s values support a departure from the federal baseline, see *Sitz v. Department of State Police*, 506 N.W.2d 209 (Mich. 1993) (holding the use of sobriety checkpoints unconstitutional under the Michigan constitution); *Ravin v. State*, 537 P.2d 494 (Alaska 1975) (holding that Alaskans have a right to privacy under the state constitution that encompasses the possession and use of marijuana).

to draw upon.<sup>74</sup> It also relates to separation of powers in the sense that it represents a form of judicial deference, which in turn leaves the state legislative and executive branches the maximum available amount of flexibility to act as they see fit.<sup>75</sup>

There are strong arguments against lockstep interpretation.<sup>76</sup> The text of the rights provisions in state constitutions are more often similar rather than identical to those in the Bill of Rights, and even identically worded provisions need not be interpreted to mean the same thing. They were adopted by distinct sovereigns at different times, and often use general language that might plausibly have different application in states with differing geographies and cultures.<sup>77</sup> Moreover, the United States Supreme Court may underenforce the guarantees in the federal Bill of Rights as a product of the fact that federal guarantees must be “one-size-fits-all,” leading it to apply a “federalism discount” to its interpretations.<sup>78</sup>

### C. Nontextual “Interpretation”—Separation of Powers

The second exception to the general framework concerns constitutional questions that do not turn on an interpretation of the text, which includes, to a greater or lesser degree, most separation of powers issues. Here things get messy. The court sometimes engages in an analysis rooted in its general framework. For example, in considering the constitutionality of so-called “John Doe” proceedings, the court in *State v. Unnamed Defendant*<sup>79</sup> opened its analysis by reciting both its basic separation-of-powers approach (outlined

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74. Schapiro, *supra* note 73. The basic idea is that the two sets of sources will often lead to the same result, such that it’s not surprising that state court judges would take the easy route of following federal law rather than going through the laborious process of doing an original analysis of state materials that will almost always lead to the same conclusions. JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS* 50 (2005). There are undoubtedly resource-based constraints at work, too. State supreme court justices lack the assistance that their counterparts at the United States Supreme Court have, both in terms of their law clerks as well as, in most instances, the depth and breadth of analysis provided by party and amicus briefs.

75. Schapiro, *supra* note 73, at 84 (noting that, because all state officials are bound by federal protections of individual rights, “[a] different state constitutional standard can only impose additional limits on official conduct”).

76. For an overview of the debate, see ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 193–232 (2009).

77. See JEFFREY S. SUTTON, 51 *IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW* 174 (2018).

78. *Id.* at 175.

79. 150 Wis. 2d 352, 441 N.W.2d 696 (1989).

below) and the *Busé* framework, then noting “that not every constitutional controversy can be resolved by simple reference to the intent of the framers.”<sup>80</sup>

As Chief Justice Winslow pointed out, the state constitution was not intended to halt the race in its progress:

Where there is no express command or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of its adoption must have their due weight; but the changed social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential factors in the settlement of problems of construction and interpretation.<sup>81</sup>

Still, the court continued, the intent of the framers “has special significance when we are dealing with a matter which was demonstrably contemplated by the framers.”<sup>82</sup> Moreover, “[a]dded weight to the constitutional validity of this procedure is given by the long and continuous use of the procedure since 1848, and the uniform acquiescence in its constitutionality.”<sup>83</sup>

As is the case with its constitutional interpretation more generally, the court in its early decades did not claim adherence to a specific methodology in its separation-of-powers decisions. For example, in *Dowling v. Lancashire Ins. Co.*,<sup>84</sup> the court considered a statute purporting to delegate to the commissioner of insurance the authority to adopt a standard policy of fire insurance, which the statute required to “conform to the type and form of the New York standard fire insurance policy.”<sup>85</sup> The bulk of the court’s legal analysis involved surveying cases from other state courts, undertaken on an implicit understanding that there exists a shared notion of separation of powers under state (not federal) constitutional law, including a conception of legislative

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80. *Id.* at 699. The court in *In re Constitutionality of Section 251.18, Wis. Statutes*, 204 Wis. 501, 236 N.W. 717 (1931), considered a statute giving the supreme court the power to regulate practice and procedure in Wisconsin courts but reserving to the legislature the right to repeal or change any rules adopted by the court. It characterized its task as originalist: “The question as to what powers are essentially judicial and what legislative is to be solved by ascertaining the definition and scope of such powers at the time the Constitution was adopted.” *Id.* at 718. Its analysis, though, was only loosely originalist. It surveyed an array of cases, from the United States Supreme Court as well as from other states, before turning to the state of the law in the various territories that ultimately became Wisconsin.

81. *State v. Unnamed Defendant*, 150 Wis. 2d at 361 (quoting *Borgnis v. Falk Co.*, 147 Wis. 327, 349–50, 133 N.W. 209, 216 (1911)).

82. *Id.*

83. *Id.* at 699–700.

84. 92 Wis. 63, 65 N.W. 738 (1896).

85. *Id.* at 71.

versus not-legislative power.<sup>86</sup> The court gave little attention to the language of the Wisconsin constitution, and none to its history. Similarly, in *In re Village of North Milwaukee*,<sup>87</sup> the court resolved a challenge to a statutory scheme relating to the formation of new villages by surveying a wide range of opinions from courts in other states.

The court's opinion in *In re Revisor*,<sup>88</sup> foreshadows the court's modern framework. The case concerned the constitutionality of a statute vesting the court with responsibilities relating to the management of the state library and the power to appoint a revisor of statutes, both of which the court upheld. In doing so it noted "that between these several powers, which seem so distinct in their general character, there are great border lands of power which may be said to approach nearer and nearer until they merge gradually into each other."<sup>89</sup> More than that, it recognized the "wonderful and increasingly important place in our governmental scheme" of the "new and remarkable governmental agency known as the 'Commission.'"<sup>90</sup> "Though not named in the Constitutions, and not dreamed of by their makers,"<sup>91</sup> the court continued, these agencies:

[A]re daily doing many things which vitally affect the life, liberty, and happiness of the people, and in doing these acts they are exercising powers trenching closely on the judicial and the legislative. . . . This does not mean that the distinction between legislative, executive, and judicial functions has passed away, or that the constitutional division of powers is worn out, but simply that as a matter of fact it is impossible to say at any given place—here is a line where legislative power ends and judicial power begins—all on one side of this line is legislative and all on the other side is judicial, and no single power can be both. Each department has exclusive functions which no other department can perform, but this does not mean that there may not be functions common to all the departments.<sup>92</sup>

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86. *Id.* at 74.

87. 93 Wis. 616, 67 N.W. 1033 (1896).

88. 141 Wis. 592, 124 N.W. 670 (1910).

89. *Id.* at 597.

90. *Id.*

91. *Id.*

92. *Id.* at 597–98. These trends manifested themselves more fully in *State ex rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N.W. 929 (1928), in which the court openly engaged in "a re-examination of the decisions of this court relating to the delegation of legislative power so-called and to a study of the development of administrative law, not only in this state, but in other jurisdictions." *Id.* at 936.

Modern Wisconsin separation of powers caselaw consistently reflects this insight via the invocation of a distinction between the “core” and “shared” powers. Core powers are those assigned to a single branch, and they may not be delegated to or encroached upon by another branch. Shared powers may be exercised by different branches so long as doing so does not unduly interfere with another branch’s exercise of its powers. A representative formulation of the distinction, provided by Justice Brian Hagedorn in *Service Employees International Union v. Vos*,<sup>93</sup> provides as follows:

A separation-of-powers analysis ordinarily begins by determining if the power in question is core or shared. Core powers are understood to be the powers conferred to a single branch by the constitution. If a power is core, “no other branch may take it up and use it as its own.” Shared powers are those that “lie at the interaction of these exclusive core constitutional powers.” “The branches may exercise powers within these borderlands but no branch may unduly burden or substantially interfere with another branch.”<sup>94</sup>

As a descriptive matter this framework holds obvious appeal. It makes intuitive sense that some powers belong entirely to one branch or another. The phrase “separation of powers” implies as much. It also makes sense that there cannot be complete separation. It’s both conceptually and practically impossible to completely separate powers, at least within a set of institutional arrangements that are designed to function.

The problem is that the framework answers no questions about what sorts of things fall into the respective boxes and thus fails to provide the tools necessary to resolve any concrete dispute. Determining whether something is a “core” or “shared” power requires resort to some additional set of criteria—what Aziz Huq refers to as “separation of powers metatheory.”<sup>95</sup> Huq has identified three general scholarly accounts of separation of powers.<sup>96</sup> Though his concern is with separation of powers at the federal level, his analysis, being metatheoretical, can also illuminate practice at the state level. Analogous forms

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93. 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35.

94. *Id.* ¶ 35 (citations omitted).

95. Aziz Z. Huq, *Separation of Powers Metatheory*, 118 COLUM. L. REV. 1517 (2018).

96. *Id.* Notwithstanding the strikingly confident assertions to the contrary in some recent opinions, the more accurate view seems to be that “[t]he principles underlying American separated-powers doctrine remain murky, to put it charitably. A massive body of scholarship on the topic is riddled with disagreement, uncertainty, and conjecture.” Rogan Kersh, Suzanne B. Mettler, Grant D. Reher & Jeffrey M. Stonecash, “More a Distinction of Words than Things”: *The Evolution of Separated Powers in the American States*, 4 ROGER WILLIAMS U.L. REV. 5, 9–10 (1998). This is true, they contend, with respect to both the origins and purposes of separation of powers. *Id.* at 10–14.

of each of Huq's models have at different times appeared in the Wisconsin Supreme Court's opinions.

Huq labels his first category "separation models," which "understand each branch of government as a distinctive and stand-alone entity wielding a defined, delimited set of powers."<sup>97</sup> Under this sort of model the critical inquiry is definitional. The working understanding is that, for example, the judicial branch is the proper home for the judicial power, and that "the judicial power" refers to some fixed category of powers. There are at least two potential ways in which this definitional question might be answered. One would entail some version of originalism, pursuant to which, to continue the example, the inquiry would involve determining what those who framed or ratified the constitution intended or understood "the judicial power" to mean. The other would resort to some general, idealized notion of "the judicial power," the contours of which could conceivably shift over time.<sup>98</sup>

Huq's second set of models, which he calls "balance models," are:

[P]remised on a rejection of the possibility of deriving from either the Constitution's text or history a delimited and determinate set of powers for assignment to each branch. . . . Rather than starting with semantics, the proponents of balance models focus on the general purposes of the Constitution's design.<sup>99</sup>

It remains necessary under such an approach to begin with some notion of what the range and attributes of the required balance are, in other words some criteria by which to assess whether a given arrangement has strayed from what is constitutionally permissible. Beyond that, the inquiry is thoroughly functionalist, with the idea being, roughly speaking, to determine whether things have become unbalanced.

The third type of account Huq identifies is "exogenous models," which "renounce the task of allocating powers to distinct branches and shrug off the task of finding ways to maintain balance across the federal government. Instead, they locate benchmarks for constitutional evaluation beyond the document."<sup>100</sup> Rather than asking whether a specific power is being exercised by the appropriate branch according to some definitional formula, or whether

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97. Huq, *supra* note 95, at 1527.

98. The alternatives are not mutually exclusive. An originalist analysis might lead to the conclusion that the framers understood "the judicial power" at a high enough level of generality that the fixed concept would generate shifting applications in response to the changing nature of the world to which the concept is applied.

99. Huq, *supra* note 95, at 1530–31.

100. *Id.* at 1535.

its exercise upsets an equilibrium, the question is how well the arrangement furthers some other value that separation of powers is designed to foster.<sup>101</sup> The separation of powers exists as a design feature because it's thought to serve certain functional ends—efficiency in some respects, inefficiency in others, and certainly the preservation of liberty<sup>102</sup>—and an exogenous model might elevate one of those ends above the others. One often encounters, for example, elevated language about the role of separation of powers plays in the protection of liberty.<sup>103</sup> An exogenous approach centered on liberty might result in separation of powers doctrine being employed in a manner that would make it the functional equivalent of an unenumerated rights provision. Conceivably, in other words, a court committed to such an approach could strike down an arrangement that does not involve the exercise of power by an inappropriate branch and also does not run afoul of balance norms but that does involve some departure from the preexisting arrangement that the court finds too threatening to liberty (even as it also does not run afoul of any enumerated or otherwise developed constitutional right). On this view, separation of powers would operate in a manner analogous to the *Lochner*-era Tenth Amendment, decreeing some otherwise proper exercises of governmental power off limits based on the court's application of the exogenous criteria.

Although the distinction between core and shared powers leaves room for, and perhaps even requires, a certain amount of formalism,<sup>104</sup> until recently it was easy to place the Wisconsin approach in the balance model camp. In an opinion frequently cited by the state supreme court, the Wisconsin Court of Appeals in *J.F. Ahern Co. v. Wisconsin State Building Commission*<sup>105</sup> summarized Wisconsin's "pragmatic approach" to separation of power: "Wisconsin's constitution contains no express separation of powers provision.

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101. Here, too, there must be some method, whether a variety of originalism or something else, by which to identify the exogenous value and its contours.

102. Of course, concepts such as "liberty" and "tyranny" are hardly self-defining. See *infra* text accompanying note 352.

103. E.g., *Tetra Tech EC v. Wis. Dep't of Rev.*, 2018 WI 75, ¶¶ 45–54, 58–61, 382 Wis. 2d 496, 914 N.W.2d 21.

104. Jonathan Zasloff has characterized the California Supreme Court's core function doctrine as a hybrid of formalist and functionalist approaches: "functionalist in that it recognizes that it is impossible to hermetically seal one branch from another," but formalist because it "requires courts to distinguish between legislative, executive, and judicial actions; judges cannot determine whether one branch has intruded upon the core function of another unless they know what that core function is." Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079, 1087 (2004).

105. 114 Wis. 2d 69, 336 N.W.2d 679 (1983).

The doctrine, as developed by our supreme court, has been liberally applied.”<sup>106</sup> “The concern is with actual and substantial encroachments by one branch into the province of another, not theoretical divisions of power.”<sup>107</sup>

One of the canonical separation of powers decisions of the past half-century is *Martinez v. Department of Industry, Labor and Human Relations*,<sup>108</sup> in which the court considered the constitutionality of a statute giving the state legislature’s Joint Committee for Review of Administrative Rules (JCRAR) the ability “to temporarily suspend administrative rules pending bicameral review by the legislature and presentment to the governor for veto or other action.”<sup>109</sup> The specific challenge was to a rule that allowed employers to pay less than minimum wage to, among others, migrant workers,<sup>110</sup> which the JCRAR voted to suspend. The Department notified employers that they could ignore the JCRAR’s action, and a group of migrant workers filed suit. The Department’s arguments were that the statute providing for JCRAR suspension of rules was unconstitutional because it violated the bicameralism and presentment requirements<sup>111</sup> and that it offended the notion of separation of powers more generally.

The court opened its analysis by invoking its standard framework for the review of legislation, under which constitutionality is to be strongly

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106. *Id.* at 101. One of the arguments in *Ahern* was that the Building Commission violated separation of powers by vesting executive authority in a commission controlled by members of the legislature. In most states, such an arrangement would not be permitted. See WILLIAMS, *supra* note 76, at 242–43 (“The weight of authority, both under federal and states’ separation of powers doctrines, is that legislators and legislative appointees may not serve on executive or administrative boards and commissions.”).

107. *Ahern*, 114 Wis. 2d at 104.

108. 165 Wis. 2d 687, 478 N.W.2d 582 (1992).

109. *Id.* at 691.

110. *Id.* at 692.

111. The basic contours of this argument run as follows: The state constitution provides that “No law shall be enacted except by bill.” WIS. CONST. art. IV, § 17(2). It further provides that “Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor.” WIS. CONST. art. V, § 10(1)(a). The governor may then sign the bill or veto it in whole or, in the case of an appropriation bill, in part. WIS. CONST. art. V, § 10(2). It’s almost certainly true that the legislative power vested in the senate and assembly in Art. IV, § 1 involves a broader category of power than that of enacting laws as contemplated by Art. IV, § 17. Not only are there other powers specified in Art. IV, such as those relating to rules, contempts, and expulsions in § 8, but it also seems reasonable to conclude that the legislature enjoys incidental and implied powers, such as those necessary to gather information as a predicate to the lawmaking process. Even so, one could credibly argue that the JCRAR’s suspension of a rule ought to be regarded as lawmaking, and that it therefore is unconstitutional when performed absent the formalities of bicameralism and presentment.



presumed.<sup>112</sup> It then proceeded to articulate a doctrine of separation of powers that falls squarely within Huq's "balance model" category:

This state's separation of powers doctrine is implicitly created by the constitution. Wisconsin courts interpret the Wisconsin Constitution as requiring shared and merged powers of the branches of government rather than an absolute, rigid and segregated political design. In *State v. Washington* the court stated that "it is neither possible nor practicable to categorize all governmental action as exclusively legislative, executive or judicial." In fact, the doctrine "must be viewed as a general principle to be applied to maintain the balance between the three branches of government, to preserve their respective independence and integrity, and to prevent concentration of unchecked power in the hands of any one branch." Thus, the separation of powers doctrine allows the sharing of powers and is not inherently violated in instances when one branch exercises powers normally associated with another branch.<sup>113</sup>

The court acknowledged the existence of powers that belong exclusively to each branch but concluded that no such power was implicated in the case. In doing so it offered only the following, thin justification: "the legislative branch and the executive branch share inherent interests in the legislative creation and oversight of administrative agencies."<sup>114</sup> In other words, the court reasoned from a premise about the delegation of legislative power to an administrative agency to a conclusion about the delegation of legislative power to a legislative committee.<sup>115</sup>

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112. The court is inconsistent in its invocation of the presumption of constitutionality in separation-of-powers cases. It also did so in *State v. Holmes*, 106 Wis. 2d 31, 315 N.W.2d 703 (1982), in which it considered the constitutionality of a statute giving defendants an automatic, peremptory right to request the substitution of a judge. *Id.* at 40. Even assuming such a deferential posture to the legislature is generally appropriate, it's not so clear that it ought to hold in cases where the challenge concerns what might be regarded, from a separation of powers perspective, as legislative self-dealing. In other words, it's one thing to employ a presumption of constitutionality in the context of a rights-based challenge, or to a statute regulating judicial procedure, but arguably something else entirely to do so when the challenged law has the effect of shifting the balance of governmental powers toward the legislative branch. The court's opinions, unfortunately, leave these questions unrecognized and unaddressed.

113. *Martinez*, 165 Wis. 2d at 696 (citations omitted).

114. *Id.* at 697.

115. There certainly is a case to be made that the grant of authority to the JCRAR ought to be treated as an intrabranch delegation of the legislative power to a subset of the legislature, and it may be that the court meant to imply as much. Indeed, the court's description of its holding—"that JCRAR's suspension power is delegated to it pursuant to legitimate legislative standards, and, furthermore, sufficient procedural safeguards are available to prevent unauthorized decisions by the

Having set the problem up in that way, the court had no difficulty concluding that the temporary suspension mechanism was constitutional, though its reasoning was something of a mishmash. It opened by noting that administrative agencies have only such powers as the legislature gives them, and that the delegation of legislative power to an agency is acceptable “as long as adequate standards for conducting the allocated power are in place.”<sup>116</sup> In a curious nonsequitur, the court then proceeded to identify the statutory grounds based on which the JCRAR can suspend a rule, concluding that they “set forth adequate standards for JCRAR to follow when exercising its powers.”<sup>117</sup>

The court then turned its attention back to the agency, noting that its powers, including rulemaking powers, can be revoked by the legislature.<sup>118</sup> Without bothering to bridge the gap between this premise and what follows—without, in other words, pausing to puzzle over the fact that the power to create does not always entail the power to meddle<sup>119</sup>—the court offered its conclusion: “It is appropriate for the legislature to delegate rule-making authority to an agency while retaining the right to review any rules promulgated under the delegated power.”<sup>120</sup>

The court likewise rejected the bicameralism and presentment challenges, noting that “an administrative rule is not legislation as such” and that any change in law that followed a temporary suspension of a rule would have to be the product of the full lawmaking procedures.<sup>121</sup> Stated differently, the arrangement “further[s] bicameral passage, presentment and separation of powers principles by imposing mandatory checks and balances on any temporary rule suspension.”<sup>122</sup>

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committee”—echoes the test applicable to legislative delegations to agencies. *Id.* at 702. But the case for treating those two types of delegation as equivalent is hardly clear and must account for the constitution’s bicameralism and presentment requirements, which arguably compel the conclusion that when the legislature exercises the legislative power it must do so in the constitutionally compelled way, or at least that intrabranched delegations should be assessed under different standards than interbranch delegations. Certainly, as discussed below, any effort to institute a robust nondelegation doctrine in Wisconsin would seem to have necessarily implications for the legislature’s ability to delegate important parts of its work to committees.

116. *Id.* at 697.

117. *Id.* at 698.

118. *Id.* at 697–98.

119. It does not necessarily follow that the power to create implies the power to do so subject to any and all conditions. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (holding that even though the creation of a property interest for procedural due process purposes is a question of state law, it does not follow that a state has the ability to define a property right in such a way that no procedures are required for its deprivation).

120. *Martinez*, 165 Wis. 2d at 698.

121. *Id.* at 699.

122. *Id.*

However imprecise it might be, the court's analysis is thoroughly functionalist, unconcerned with formalistic definitional concerns, and focused on the balance of power, all of which is most fully on display in the following paragraph from near the end of the opinion:

As a matter of public policy, it is incumbent on the legislature, pursuant to its constitutional grant of legislative power, to maintain some legislative accountability over rule-making. Such legislative responsibility adheres to the fundamental political principle and design of our democracy which makes elected officials accountable for rules governing the public welfare. Section 227.26, Stats., is carefully designed so that people of this state, through their elected representatives, will continue to exercise a significant check on the activities of non-elected agency bureaucrats. Furthermore, the rule suspension process provides a legislative check on agency action which prevents potential agency over-reaching.<sup>123</sup>

As we will see, in some of its recent cases the court has taken a more formalistic approach to separation-of-powers issues. This presents a danger—the selective invocation of formalist against the backdrop of a thoroughly functionalist jurisprudence can result in a balance of power that looks very different from what likely would have resulted had formalism been the approach all along.

### III. RECENT CASES

Over the past two decades the Wisconsin Supreme Court has decided a number of high-profile cases concerning the separation of powers. This part contains a non-comprehensive survey of those cases. The goal is both to summarize and critique the opinions in light of the court's broader jurisprudence, as well as to identify themes and concerns to be addressed later in the analysis.

#### A. Kalal

The underlying issue in *State ex rel. Kalal v. Circuit Court for Dane County* involved a lawyer's efforts to recover money that she claimed her employer had stolen rather than depositing in her retirement account.<sup>124</sup> Because the district attorney had not pursued the matter, she resorted to a statutory provision that empowers circuit judges to authorize the filing of complaints in situations in which the court determines there is probable cause and "a district attorney refuses or is unavailable to issue a complaint."<sup>125</sup>

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123. *Id.* at 701.

124. 2004 WI 58, ¶ 3, 271 Wis. 2d 633, 681 N.W.2d 110.

125. WIS. STAT. § 968.02(3) (2019–20).

*Kalal* presented two separation of powers issues. One was whether it is constitutionally problematic to empower a court to arguably override an exercise of prosecutorial discretion.<sup>126</sup> The second, triggered by the need to determine what it means for a district attorney to “refuse” to issue a complaint, concerned the court’s approach to statutory interpretation, a task that inevitably concerns the division of labor between legislatures and courts.<sup>127</sup>

The court resolved the first of these issues via what can plausibly be characterized as a loose originalism. It did not invoke the *Busé v. Smith* framework and did not engage in any deep historical consideration of prevailing practices or understandings at any of the potentially relevant points in Wisconsin constitutional history. Nor did it invoke its traditional distinction between core and shared powers. But it did engage in enough historical analysis to conclude that, because magistrates held the sole authority to issue criminal complaints prior to 1945,<sup>128</sup> the power has traditionally been shared, such that the statutory arrangement did not provide grounds for a direct separation of powers challenge.<sup>129</sup> The case thus stands as an example of the general proposition that a substantial departure from prior practice—which a switch from a criminal process initiated by magistrates to one initiated by district attorneys surely is—is not itself problematic from a separation-of-powers perspective even when it results in a significant shift of power from one branch to another.

In approaching the second issue, the court’s methodology has considerably more of a common-law feel. The discussion opens by quoting a paragraph from the court’s 1976 decision in *Student Association v. Baum*<sup>130</sup> outlining “two accepted methods for interpretation of statutes,” then draws upon secondary sources and a few of the court’s more recent opinions on the way to concluding that the court’s approach to statutory interpretation has generated “some analytical confusion.”<sup>131</sup> It accordingly felt the need to provide clarification of “the general framework for statutory interpretation.”<sup>132</sup> As a prelude to doing so, the court, in a paragraph free of citation to authority, offered the following general characterization of the division of labor between the legislature and the judiciary:

It is, of course, a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature, and to do so

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126. *Kalal*, 2004 WI 58, ¶¶ 27, 30.

127. *Id.* ¶¶ 37–38, 44.

128. *Id.* ¶ 33.

129. *Id.* ¶ 35.

130. 74 Wis. 2d 283, 294, 246 N.W.2d 622, 626 (1976); *Kalal*, 2004 WI 58, ¶ 38.

131. *Kalal*, 2004 WI 58, ¶¶ 38, 43.

132. *Id.* ¶ 44.

requires a determination of statutory meaning. Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language. Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances, but is not the primary focus of inquiry. It is the enacted law, not the unenacted intent, that is binding on the public. Therefore, the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.<sup>133</sup>

The court's language in this paragraph reveals a tension that the opinion acknowledges but does not completely resolve. The court both places the intent behind statutory language at the center of the inquiry—the goal is to further the legislature's policy choices, and to give the statute its “intended effect”—but yet the court restricts itself from consideration of a category of evidence bearing on that intent. The best evidence of intent, the court tells us, is the language the legislature used. That's no doubt correct, but to say that something is the best evidence is not to say that it should be the only evidence.

If indeed the ultimate goal of statutory interpretation is to give effect to something that might plausibly be characterized as the legislature's intent,<sup>134</sup> and if it is also, as we will soon see the court repeatedly proclaiming, the duty of the courts to say what the law is,<sup>135</sup> then this regime is somewhat puzzling. Its effect is to cut the court off from consideration of a specific category of information that surely is, in the evidentiary sense, both relevant and often probative with respect to the ultimate question. The concerns, only briefly alluded to in the majority opinion, include “a mistrust of legislative history [and] cynicism about the capacity of the legislative or judicial processes to be manipulated.”<sup>136</sup> The idea is often expressed in a line attributed to Judge Harold Leventhal to the effect that being allowed to cite legislative history is like “looking over a crowd and picking out your friends.”<sup>137</sup> That logic is both

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133. *Id.*

134. Whether it's appropriate to regard a legislature or other group as having a single, collective intent is another matter. *See, e.g., Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 702–03 (1981) (Rehnquist, J., dissenting) (The other Justices “assume[] that individual legislators are motivated by one discernible ‘actual’ purpose, and ignore[] the fact that different legislators may vote for a single piece of legislation for widely different reasons.”).

135. *See infra* Section II.

136. *Kalal*, 2004 WI 58, ¶ 52.

137. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

questionable<sup>138</sup> and, as we will see, in some tension with some justices' freewheeling use of sources in discerning the meaning of the state constitution.<sup>139</sup> Various opinions since *Kalal* invoke this suggestion that its rule serves primarily as a pragmatic restraint on judges, motivated by a concern that legislative history is somehow uniquely amenable to use in result-oriented judging.<sup>140</sup> The justices are generally free to ground their reasoning in whatever sources they conclude cast light on the resolution of a problem, whether it's the court's own past cases, opinions from other jurisdictions, individual writings by judges or academics, or, were a judge to deem them appropriate sources of guidance, restaurant placemats. What they cannot do is refer to legislative history.

The opinion in *Kalal* also hints at an alternative justification. At the conclusion of its consideration of the appropriateness of looking beyond the statutory language, the court adds a different claim, relying this time on a book published by the late Justice Antonin Scalia: The legislature passed a set of words, no more and no less, and those words, and not some intention distinct from the words, are the law.<sup>141</sup> The logic here is different, and is focused less on constraining the judicial power and more on capturing the nature of legislative power, which it envisions as limited to the enactment of texts in some fairly narrow sense. Whatever the legislature, or any given subset of legislators, may have thought they were doing, what they voted on was a collection of words.<sup>142</sup> This claim raises deep questions about the nature of the judicial and legislative powers, and the two lines of justifications would seem to have different implications in terms of, to put it in familiar evidentiary terms,

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138. See Adam M. Samaha, *Looking Over a Crowd—Do More Interpretive Sources Mean More Discretion?*, 92 N.Y.U. L. REV. 554, 558 (2017) (“Logically and statistically, the power to make friends in a crowd by spinning sources overwhelms the importance of crowd size—and, crucially, the power to pick friends can generate plenty of discretion even in small crowds.”).

139. See *infra* Section II.

140. See, e.g., *Clean Wis., Inc. v. Wis. Dep’t of Nat. Res.*, 2021 WI 71, ¶¶ 84–92, 398 Wis. 2d 433, 961 N.W.2d 346 (Rebecca Bradley, J., dissenting) (drawing on a nonrepresentative sample of secondary sources to support the claim that a specific brand of textualism is the only legitimate way to interpret statutes and suggesting that resort to legislative history is uniquely conducive to judicial result-orientation).

141. *Kalal*, 2004 WI 58, ¶ 52 (quoting ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 17 (1997)).

142. This conception of the legislative power raises interesting questions. If it is appropriate to consider the text because that is the only thing that “the legislature” passed, and it is not appropriate to consider pieces of legislative history like committee reports because those are not things that “the legislature” passed, then one might wonder how it is otherwise appropriate for the legislature to empower committees to engage in legally consequential conduct—whether it be the review of administrative rules or the withholding of consent to the settlement of litigation.

the relevance, probative value, and potential prejudicial effect of legislative history, but the court does not explore them.<sup>143</sup>

*Kalal* matters for purposes of this Article not only because the issue it addresses relates in a fundamental way to the separation of powers, but also because the court's subsequent use of its test is instructive. That test—roughly, that it is appropriate to consider “extrinsic” information beyond the statutory text, such as legislative history, only when the text is ambiguous<sup>144</sup>—is one that the court has more or less consistently applied since. But there are exceptions. For example, in *State v. Luedtke*,<sup>145</sup> the court interpreted a statute criminalizing the operation of a motor vehicle with a controlled substance in one's blood in order to determine whether it created a strict liability offense. In doing so it relied on a six-factor test from *State v. Jadowski*,<sup>146</sup> a case decided shortly after *Kalal*, that expressly calls for the consideration of legislative history and other policy-infused factors that go well beyond text. Although both were statutory interpretation cases, neither even mentioned *Kalal* or any sort of similar framework.<sup>147</sup> More recently, in *Wisconsin Legislature v. Evers*,<sup>148</sup> it was Justice Ann Walsh Bradley, in dissent, rather than the majority, who relied on *Kalal*'s framework.

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143. There is a deep literature on statutory interpretation that engages with these issues (and more) that I will here only generally acknowledge. My point is not to resolve any of these questions, but instead simply to note that a court adopting a methodological framework like that in *Kalal* is traversing deep waters, and the premises on which it does so, whether they are explicit or implicit, will typically have implications that extend beyond the narrow question the court is addressing.

144. The court also allowed that “legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation,” *id.* ¶ 51, and indeed itself cited legislative history in its analysis, *id.* ¶ 56. Notably, the court does not say what should happen if the consultation of legislative history to confirm the plain meaning did not actually confirm it. And, of course, the process would never in reality proceed in that way, because a court would almost certainly have been exposed to legislative history as part of the parties' arguments before it had reached any conclusions about the plain meaning of the statutory text. The result seems to be a rule that allows for the use of legislative history to bolster a text-based conclusion (thereby confirming that legislative history can be relevant and probative) but not to undercut or qualify one.

145. 2015 WI 42, 362 Wis. 2d 1, 863 N.W.2d 592; *See also* *United States v. Franklin*, 2019 WI 64, ¶¶ 24–31, 387 Wis. 2d 259, 928 N.W.2d 545 (Abrahamson, J., concurring) (noting a similar tension between *Kalal* and an interpretive test that, to that point, had expressly called for resort to legislative history).

146. 2004 WI 68, ¶ 21 n. 15, 272 Wis. 2d 418, 680 N.W.2d 810.

147. This is not to suggest that the cases are necessarily inconsistent. A sensible explanation would be to say that because strict liability offenses are disfavored, any statute without an express mens rea element is inherently ambiguous, such that resort to extrinsic evidence is permissible under *Kalal*. But neither opinion does so.

148. No. 2020AP608-OA (Wis. Apr. 6, 2020) (per curiam), [https://www.wicourts.gov/news/docs/2020AP608\\_2.pdf](https://www.wicourts.gov/news/docs/2020AP608_2.pdf) [<https://perma.cc/TV7Y-JWR4>].

*B. Ferdon/Mayo*

A pair of recent cases concerned whether, and to what extent, the court should presume the constitutionality of a statute. The strength and nature of such a presumption has an obvious separation-of-powers dimension. Deference to the legislature's judgment about the constitutionality of its own conduct places more power in the legislature's hands than would be the case in a regime without such deference.

In *Ferdon v. Wisconsin Patients Compensation Fund*,<sup>149</sup> the court considered the constitutionality of legislation placing a cap on noneconomic damages in medical malpractice claims. Speaking through then-Chief Justice Abrahamson, the majority concluded that the cap violated the equal protection guarantee in the state constitution by affording differential treatment to those claimants whose noneconomic damages were under the cap (and who thus would be fully compensated) and those whose damages were above the cap (who would receive only partial compensation for their noneconomic loss). At the outset of its analysis the court invoked its familiar framework for review—it would apply rational basis scrutiny and would strike the statute down only upon concluding that it was unconstitutional beyond a reasonable doubt.<sup>150</sup> After elaborating on the standard for several paragraphs, and reiterating the deference due to the legislature's policy choices, the court confirmed that a role remained for it, and that it was not simply a rubber stamp:

[J]udicial deference to the legislature and the presumption of constitutionality of statutes do not require a court to acquiesce in the constitutionality of every statute. A court need not, and should not, blindly accept the claims of the legislature. For judicial review under rational basis to have any meaning, there must be a meaningful level of scrutiny, a thoughtful examination of not only the legislative purpose, but also the relationship between the legislation and the purpose. The court must “probe beneath the claims of the government to determine if the constitutional ‘requirement of some rationality in the nature of the class singled out’ has been met.”<sup>151</sup>

Rather than characterizing its analysis as simply involving the application of rational basis review, however, the court then proceeded to discuss the notion of “rational basis with teeth.”<sup>152</sup> This was a curious and probably unnecessary rhetorical choice, because the court could certainly have invoked past cases

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149. 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440.

150. *Id.* ¶¶ 67–68.

151. *Id.* ¶ 77.

152. *Id.* ¶ 78.



from Wisconsin and elsewhere in support of the idea that rational basis review is meaningful review.<sup>153</sup> Moreover, the idea was only partially developed, and was not connected in any specific way to Wisconsin constitutional history or tradition, which contributes to the impression that the discussion was tacked on simply to justify the result in the case. Nor did the court make it clear whether it regarded itself as departing from past practice by invoking this approach, whether “called rational basis, rational basis with teeth, or meaningful rational basis,”<sup>154</sup> versus simply confirming a pre-existing understanding that, deferential though it might be, the court does have a meaningful role to play in the review of legislation.

The majority’s rhetorical clumsiness did not go unnoticed. Former justice (and current federal judge) Diane Sykes, delivering the annual Hallows Lecture at Marquette University Law School, focused her attention on five cases from the court’s 2004–2005 term.<sup>155</sup> Collectively, in her estimation:

[T]hese 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.<sup>156</sup>

*Ferdon* was among the five cases, and on Judge Sykes’s reading it “redefines the [rational basis] standard upward so that it effectively functions as a heightened or intermediate level of scrutiny”<sup>157</sup> with the apparent goal being “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.”<sup>158</sup> The result, in her estimation, was “a major departure from

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153. In *City of Janesville v. Carpenter*, 77 Wis. 288, 300, 46 N.W. 128, 132 (1890), the court struck down a statute prohibiting the driving of piles into the Rock River in Rock County. The case seems to be a bit of an outlier, and the court’s reasoning has a very *Lochner*-era feel to it, with none of the solicitousness toward the legislature’s judgments of constitutionality that the “beyond a reasonable doubt” standard typically signifies. See also, *Church v. State*, 646 N.E.2d 572, 577–82 (Ill. 1995).

154. *Ferdon*, 2005 WI 125, ¶ 80.

155. Diane S. Sykes, *Reflections on the Wisconsin Supreme Court*, MARQ. LAW. 52, 54 (2006).

156. *Id.* at 54.

157. *Id.* at 55.

158. *Id.* at 56.

long-accepted constitutional principles that operate to maintain the balance of power between the legislative and judicial branches.”<sup>159</sup>

*Ferdon* was not long-lived. In the 2018 case of *Mayo v. Wisconsin Injured Patients and Families Compensation Fund*,<sup>160</sup> the court, in an opinion written by Chief Justice Patience Roggensack (who dissented in *Ferdon*), expressly overruled *Ferdon*.<sup>161</sup> The problem with *Ferdon*, the opinion asserted (more or less as fiat; the opinion does little to explain why its assertions are the correct ones<sup>162</sup>), was that it ran contrary to the “respect for a co-equal branch of government and its legislative acts” embodied in the deeply deferential beyond-a-reasonable-doubt standard to be applied to constitutional challenges, substituting instead “the [court] majority’s policy choice for Wisconsin.”<sup>163</sup>

The *Mayo* opinion likewise involves some curious choices. For one, it does not invoke the framework the court has elsewhere used in assessing whether to overrule a past decision.<sup>164</sup> Nor does it ground its conclusions in the long history of deference to the legislature that characterizes Wisconsin

159. *Id.*

160. 2018 WI 78, 383 Wis. 2d 1, 914 N.W.2d 678.

161. *Id.* ¶ 32.

162. Cf. Patience Drake Roggensack, *Elected to Decide: Is the Decision-Avoidance Doctrine of Great Weight Deference Appropriate in this Court of Last Resort?*, 89 MARQ. L. REV. 541, 545 (2006) (critiquing the Wisconsin Supreme Court’s “decision-avoidance doctrines” as “formalistic approaches to decision making that have been developed without persuasively explaining why their use in each case where they are employed better serves the public interest than does a well-reasoned opinion that describes how the application of the law to the facts of the case or the interpretation of a statute causes the result reached”).

163. *Mayo*, 2018 WI 78, ¶¶ 25–31. In overruling *Ferdon*, the court did not limit itself to the notion of rational basis with teeth:

*Ferdon* also creates new doctrine when it holds that “[a] statute may be constitutionally valid when enacted but may become constitutionally invalid because of changes in the conditions to which the statute applies. A past crisis does not forever render a law valid.” There is no law to support this extraordinary declaration and we overrule it as well as “rational basis with teeth.”

*Id.* ¶ 32 (citations omitted). The claim that there is “no law” to support the idea that changed circumstances is incorrect. The idea may well seem suspect, and contrary to a regime of judicial deference to legislative policy choices, but it is also at the heart of the U.S. Supreme Court’s decision in *Shelby County v. Holder*, 570 U.S. 529 (2013).

164. Justice Roggensack has herself authored a lengthy discussion of that framework. Bartlett v. Evers, 2020 WI 68, ¶¶ 65–89, 393 Wis. 2d 172, 945 N.W.2d 685 (Roggensack, C.J., concurring).

constitutional law.<sup>165</sup> As early as 1853, in *Dickson v. State*,<sup>166</sup> the court observed, “It is a delicate matter to set aside or declare void, a solemn enactment of an independent and co-ordinate branch of the government, and the courts will never do so unless such enactment is clearly in violation of the fundamental law of the land.”<sup>167</sup> The specific “beyond a reasonable doubt” formulation had taken shape in Wisconsin by 1906,<sup>168</sup> and it was presented as generally true of state constitutional law in Cooley’s 1868 treatise.<sup>169</sup> Still, the Wisconsin

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165. Although that deference is hardly universal. Consider, for example, *Milwaukee J. Sentinel v. Wis. Dep’t of Admin.*, 2009 WI 79, 319 Wis. 2d 439, 768 N.W.2d 700, in which the court confronted a pair of certified questions relating to whether the legislature in ratifying a collective bargaining agreement could be viewed as having amended the Public Records Law. The court concluded that the answer was no, and in setting forth its standard of review made no reference to any sort of deference to the legislature’s presumed assessment of its constitutional power to act. *Id.* ¶ 14. Later the court observed that, “While we are conscious of the substantial deference we owe to the other independent branches of government in the exercise of their constitutional responsibilities, we are also conscious of our own responsibility to determine whether the provisions of the Wisconsin Constitution have been followed.” *Id.* ¶ 33. This language, and the analysis that accompanies it, is a far cry from the “beyond a reasonable doubt” standard the court typically applies. It is, of course, possible that the court had some sort of distinction in mind with respect to cases in which the question bears on whether the legislature followed the constitutionally prescribed procedures, but the court does not say.

The opinion is potentially notable for another reason. In analyzing whether the pertinent article in the collective bargaining agreement should be regarded as law, the court opened by observing that “an act of the legislature that is not authorized by the constitution is not a law.” *Id.* ¶ 21. That in turn requires that, in order for something to be a “law,” it must “be enacted by bill” as required by Article IV, Section 17(2) of the state constitution. *Id.* ¶ 22. The legislature did enact a general bill (which the governor signed) pursuant to which it ratified the agreement, but the court concluded that this was inadequate at least in part because the bill “contain[ed] no language which might put the citizens of Wisconsin on notice that the Public Records Law is being amended.” *Id.* ¶ 24. The underlying logic is difficult to discern. The basic idea seems to be that there is some baseline notice requirement embedded in the notion of the word “bill,” but the court makes no effort to support that conclusion. Nor is there any sort of effort to discern more generally the purposes served by the bill requirement and then to engage in some sort of functionalist analysis based on that. The premises driving the reasoning are left unarticulated, and the implications of and for Wisconsin law more generally (such as, for example, for principle-of-legality doctrines in the criminal law) are unexplored. One bottom-line implication seems to be that the only way the legislature can exercise the legislative power is through the enactment of bills, which, pursued to its logical end, would seem to compel the conclusion that at least some of the work that the legislature currently does through committees is unconstitutional.

166. 1 Wis. 122 (1853).

167. *Id.* at 126.

168. *Nash v. Fries*, 129 Wis. 120, 108 N.W. 210, 211 (1906) (“It is, of course, the duty of courts to presume an intention on the part of the Legislature to act constitutionally, and, as between two constructions of a statute, one of which would be within the legislative power and the other forbidden to it, to adopt the former if at all reasonable. It is only when the unconstitutional purpose is clear beyond a reasonable doubt that a court can be justified in declaring void an act of the Legislature.”).

169. COOLEY, *supra* note 51.

Supreme Court has been something of an outlier in continuing to employ it as aggressively as it has.<sup>170</sup> In a concurring opinion, Justice Rebecca Bradley expressed her concern that the court's highly deferential posture toward the legislature's constitutional judgments "seems incompatible with our duty of ensuring the legislature does not exceed its constitutional powers" and "is an abdication of our core judicial powers."<sup>171</sup> Though the case indeed presented a good opportunity for the court to clarify the nature and scope of its review, the court provided little of substance apart from the conclusion that it rejected the notion of a more aggressive form of rational basis review.

By focusing its analysis on the deferential nature of its review, the court also neglected to address them in terms of the rights being asserted. The court implicitly adhered to its traditional lockstep approach, and thereby elected not to consider whether the distinct nature of state constitutions may also entail a

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It has been said by an eminent jurist, that when courts are called upon to pronounce the invalidity of an act of legislation, passed with all the forms and ceremonies requisite to give it the force of law, they will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt. A reasonable doubt must be solved in favor of the legislative action, and the act be sustained.

COOLEY, *supra* note 51, at 182. Cooley's formulation is more nuanced than the Wisconsin court's typical statement of the rule. He notes, for example, that "[i]f it were understood that legislators refrained from exercising their judgment, or that, in cases of doubt, they allowed themselves to lean in favor of the action they desired to accomplish, the foundation for the cases we have cited would be altogether taken away." *Id.* at 183–84. As Christopher Green observes, elected branches of government often provide little basis for a belief that they take seriously their responsibility to assess the constitutionality of their actions. Christopher R. Green, *Clarity and Reasonable Doubt in Early State-Constitutional Judicial Review*, 57 S. TEX. L. REV. 169, 171 (2015). Green also observes, "Reasonable-doubt formulations of the presumption of constitutionality do not seem to appear at all in early non-judicial materials, but they were set out in frequently cited treatises by Theodore Sedgwick in 1857 and Thomas Cooley in 1868." *Id.* at 173. This at least suggests that there is a basis for concluding that the understanding of the judicial power, and by extension other powers, was different at the time of the adoption of the Wisconsin constitution than it was when the federal constitution was adopted, such that reflexive resort to discussion of the federal judicial power as a guide to the nature of the Wisconsin judicial power is, without further work, inherently suspect even if one accepts originalism as an appropriate methodology.

170. One commentator found that the Wisconsin Supreme Court is the second-most frequent user of the standard among all state supreme courts in the period dating from 2000. Hugh Spitzer, "Unconstitutional Beyond a Reasonable Doubt"—A Misleading Mantra that Should Be Gone for Good, 96 WASH. L. REV. ONLINE 1, 14 n.86 (2021). Spitzer concludes that in Washington, at least, the standard is not used to set the high bar its language implies. *Id.* at 19.

171. *Mayo v. Wis Injured Patients & Families Compensation Fund*, 2018 WI 78, ¶ 69, 383 Wis. 2d 1, 914 N.W.2d 678. Her opinion does not cite Cooley and largely draws on authorities relating to judicial review under the federal constitution.

distinct approach to rights. As Robert Williams puts it, “State constitutional rights provisions, by contrast to the federal guarantees we think of as protecting *minority* and unpopular people, sometimes actually provide *majoritarian* protections.”<sup>172</sup> *Lochner*-style economic substantive due process may thus have a place in state constitutional adjudication, where it is “more often used to protect the majority from ‘special-interest’ legislation.”<sup>173</sup>

### C. Gabler

In *Gabler v. Crime Victims Rights Board*,<sup>174</sup> the court considered the constitutionality of a statutory scheme that gave the Crime Victims Rights Board the power “to investigate and adjudicate complaints against judges, issue reprimands against judges, and seek equitable relief and forfeitures through civil actions against judges.”<sup>175</sup> This, the court—speaking through Justice Rebecca Bradley—concluded, was an unconstitutional encroachment on the judicial branch’s exercise of its core power.<sup>176</sup>

Following a two-paragraph introduction in which the court framed the stakes as concerning “the judicial independence that serves as a bulwark protecting the people against tyranny,” it offered a section entitled “An Independent Judiciary.”<sup>177</sup> The section draws on a range of materials, all of which relate exclusively to the federal constitution until the section’s final paragraph, at which point the court asserts that the principles it extracts “inform our understanding of the separation of powers under the Wisconsin Constitution.”<sup>178</sup>

That discussion was almost certainly unnecessary to reaching its conclusion. The court might instead have extracted all that it needed from *In the Matter of Grady*,<sup>179</sup> a case in which it struck down a statute requiring circuit judges to decide matters within a prescribed time frame and calling for the withholding of a portion of their salaries if they did not do so. The court reasoned that the statute “constitutes an attempt by the legislature to coerce judges in their exercise of the essential case-deciding function of the

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172. WILLIAMS, *supra* note 76, at 33.

173. *Id.* Consider, for example, *Church v. State*, 646 N.E.2d 572, 580 (Ill. 1995), in which the Illinois Supreme Court struck down a statute that, it concluded, effectively granted existing members of the private alarm contracting business a monopoly over entry into the field.

174. 2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384.

175. *Id.* ¶ 2.

176. *Id.*

177. *Id.* at ¶¶ 2, 3.

178. *Id.* ¶ 11.

179. 118 Wis. 2d 762, 348 N.W.2d 559 (1984).

judiciary”<sup>180</sup> and thus “violates the well-established policy that the judicial branch of government must be independent in the fulfillment of its constitutional responsibilities.”<sup>181</sup>

After a second section in which it outlined the case’s factual background, which centered on Judge Gabler’s decisions regarding the timing of the sentencing of a criminal defendant, the court turned to the standard of review. Perhaps not surprisingly, given her expressed concerns in *Mayo*,<sup>182</sup> Justice Bradley did not invoke the strong presumption that legislation is constitutional, proceeding instead to the core/shared powers framework.<sup>183</sup> And this situation, the court concluded, was clearly one implicating the core powers of the judiciary, which “encompasses ‘the ultimate adjudicative authority of courts to finally decide rights and responsibilities as between individuals.’”<sup>184</sup> To allow the board to review and attach consequences to a judge’s conduct “would unconstitutionally permit an executive entity to substitute its judgment for that of the judge—effectively imposing an executive veto over discretionary judicial decision-making and incentivizing judges to make decisions not in accordance with the law but in accordance with the demands of the executive branch.”<sup>185</sup>

The result in *Gabler* seems clearly correct regardless of the approach one takes to separation of powers. Subjecting judges to post-adjudication consequences can easily be characterized as infringement on a core power or the overburdening of a shared power. As noted above, its conclusion is easily justifiable in light of past case law. Its potential significance stems from its methodology, and in particular its incorporation of and reliance on conclusions most consistent with an exogenous model that privileges the preservation of a certain conception of liberty above all else. The relationship between judicial independence and liberty is not divined via an originalist effort to locate the relevant concepts in materials tying them to 1848, but rather through an unconstrained sampling of sources relating primarily to the federal constitution.<sup>186</sup> Methodologically, then, it is an outlier. The approach is one

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180. *Id.* at 782.

181. *Id.*

182. See 2018 WI 78, ¶¶ 83–95, 383 Wis. 2d 1, 914 N.W.2d 678 (R. Bradley, J., concurring).

183. *Gabler v. Crime Victims Rights Board*, 2017 WI 67, ¶ 30, 376 Wis. 2d 147, 897 N.W.2d 384.

184. *Id.* ¶ 37 (quoting *State v. Williams*, 2012 WI 59, ¶ 36, 341 Wis. 2d 191, 814 N.W.2d 460).

185. *Id.* ¶ 36.

186. *Id.* ¶¶ 3–11. That survey includes a component of functionalist reasoning in that the court notes that its assessment of judicial independence cannot be undertaken “without paying appropriate attention to the incentives affecting individual judges.” *Id.* ¶ 8. Given this focus on incentives, particularly when coupled with the express reference to life tenure (or, at least, the fact that federal

that has been largely absent from the court's reasoning about the Wisconsin constitution, and that is inconsistent with the *Busé* framework to which the court has in recent decades purported to adhere, and in tension (at the very least) with the court's traditional use of a balance model in separation-of-powers cases.

#### D. Tetra Tech

The narrow question before the court in *Tetra Tech, Inc. v. Wisconsin Department of Revenue*<sup>187</sup> concerned the definitional scope of the word "processing" in a tax statute.<sup>188</sup> But Justice Kelly in his lead opinion also elected to take up the much broader questions of whether and to what extent the court should defer to administrative agencies' interpretations of statutes.<sup>189</sup>

Prior to *Tetra Tech*, the court's approach was one in which it would afford "great weight deference" to an agency's interpretation of a statute if the following four conditions were satisfied:

(1) the agency was charged by the legislature with the duty of administering the statute; (2) . . . the interpretation of the agency is one of long-standing; (3) . . . the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) . . . the agency's interpretation will provide uniformity and consistency in the application of the statute.<sup>190</sup>

Then, if the agency's interpretation was reasonable, the court was compelled to adopt it even if the court concluded that an alternative interpretation was better.<sup>191</sup>

If great weight deference did not apply, "due weight deference" might.<sup>192</sup> It applied in situations involving a statute that an agency was responsible for administering, but where the agency had "not developed the expertise which necessarily places it in a better position to make judgments regarding the

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judges "shall hold their Offices during good Behaviour," *id.* ¶ 9), it is notable that the court does not mention the fact that Wisconsin judges are elected. While doing so might be rhetorically counter to the theme of drawing on the federal model for precise implications about the state judiciary, the existence of another, fairly substantial, check on the judicial power provides strong support for the conclusion that the mechanism under consideration goes too far.

187. 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21.

188. WIS. STAT. § 77.52(2)(a)11 (2019–20).

189. *Tetra Tech*, 2018 WI 75, ¶¶ 2, 9–10.

190. *Id.* ¶ 14 (quoting *Harnischfeger Corp. v. LIRC*, 196 Wis.2d 650, 539 N.W.2d 98, 102 (1995)).

191. *Id.*

192. *Id.* ¶ 13.

interpretation of the statute than a court.”<sup>193</sup> In that situation a court was free to depart from the agency’s interpretation if it concluded that a different interpretation was better or, in the court’s phrasing, “more reasonable.”<sup>194</sup> In what would seem to be the highly unlikely situation in which a court could conclude that an alternative interpretation was neither more nor less reasonable than the agency’s, the agency interpretation would prevail.<sup>195</sup> If neither of the above situations applied, then neither did deference. The court would simply engage in standard de novo review, taking the agency’s interpretation and reasoning into account but in no sense regarding the fact of that interpretation itself as any sort of thumb on the scale.

In Justice Kelly’s recounting of the history,<sup>196</sup> this was another situation where the court settled on an interpretive framework through a process that was, at least when assessed by the content of the court’s opinions, more a product of happenstance than considered analysis. Its roots, Justice Kelly suggests, are in the case of *Harrington v. Smith*,<sup>197</sup> which in his recounting used “not the language of deference, but of persuasion.”<sup>198</sup> What followed was a long period

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193. *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 286, 548 N.W.2d 57, 62 (1996) (quoted in *Tetra Tech*, 2018 WI 75, ¶ 15).

194. *Tetra Tech*, 2018 WI 75, ¶ 15.

195. *Id.*

196. In recounting this history, Justice Kelly drew heavily on Patience Drake Roggensack, *Elected to Decide: Is the Decision-Avoidance Doctrine of Great Weight Deference Appropriate in this Court of Last Resort?*, 89 MARQ. L. REV. 541 (2006).

197. 28 Wis. 43 (1871).

198. *Tetra Tech*, 2018 WI 75, ¶ 20. That characterization is not so clearly correct as Justice Kelly’s opinion suggests. As noted in *Tetra Tech*, the *Harrington* court said this: “Long and uninterrupted practice under a statute, especially by the officers whose duty it was to execute it, is good evidence of its construction, and such practical construction *will be adhered to*, even though, were it *res integra*, it might be difficult to maintain it.” 28 Wis. at 68 (emphasis added) (quoted in *Tetra Tech*, 2018 WI 75, ¶ 19). Justice Kelly’s opinion then slides to language appearing two paragraphs later in the *Harrington* opinion, where the court was expressly discussing an “important fact” present “in this case,” namely the presence of the attorney general on the commission charged with giving effect to the statute. *Tetra Tech*, 2018 WI 75, ¶ 19. It is in the context of that second discussion, and not the more general discussion from two paragraphs earlier, that the court uses the language that Justice Kelly relies on in characterizing *Harrington* as being about persuasion rather than deference. *Id.* ¶ 20. To be sure, *Edwards’ Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210, 6 L.Ed 603 (1827), cited in *Harrington* and discussed by Justice Kelly, does speak of giving “very great respect” to the interpretation of those responsible for enforcement of a law, which is not the same as mandatory deference. At the same time, it also seems to call for something greater than what the *Tetra Tech* decision ultimately affords to agency interpretations. The opinion in *In re Revisor*, 141 Wis. 592, 602–03, 124 N.W. 670, 673 (1910), contains similar language suggesting more of a history of deference than Justice Kelly allows: “Lawbreaking is none the less lawbreaking because it is grayheaded with age; but when the meaning of a doubtful clause is in question, the construction placed upon it by the fathers, and concurred in



in which the court did not reflexively defer,<sup>199</sup> but then began the path toward deference by importing a federal standard to state review,<sup>200</sup> and finally, in *Harnischfeger v. Labor and Industry Review Commission*,<sup>201</sup> used language suggesting mandatory deference<sup>202</sup> and elevated the deference regime “from a canon of construction to a standard of review.”<sup>203</sup>

The doctrine having somewhat haphazardly come together, what remains is what Justice Kelly disingenuously calls “a matter of first impression,”<sup>204</sup> and a not insignificant one at that: “whether our deference doctrine is compatible with our constitution’s grant of power to the judiciary.”<sup>205</sup> The answer, Justice Kelly concludes, is that it is not compatible, that the deference doctrines place judicial power in the executive branch, and that the proper approach is to give agency interpretations the same analytical weight as an appellate court gives to a trial court’s reasoning on a question of law—it might be helpful and even persuasive, but it is in no sense binding.

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through long years without question, is strongly persuasive and *frequently will be held to be controlling.*” (emphasis added).

In addition, Cooley’s treatise—in which he conceived of state constitutions as subject to the same interpretive principles as statutes—speaks of a tradition of deference to executive interpretations of their state’s constitution:

Great deference has been paid in all cases to the action of the executive department, where its officers have been called upon, under the responsibilities of their official oaths, to inaugurate a new system, and where it is to be presumed, they have carefully and conscientiously weighed all considerations, and endeavored to keep with the letter and the spirit of the Constitution. If the question involved is really one of doubt, the force of their judgment, the force of their judgment, especially in view of the injurious consequences that may result from disregarding it, is fairly entitled to turn the scale in the judicial mind.

COOLEY, *supra* note 51, at 69. Of course, as noted in Part I, the Wisconsin Supreme Court’s early constitutional interpretation, in general, departed from that described by Cooley. But it has in the past followed this strand of the approach he describes, especially where there is an interpretation of longstanding. For example, in *Bd. of Tr. of Lawrence Univ. v. Outagamie Cnty.*, 150 Wis. 244, 136 N.W. 619 (1912), the court recognized the principle “that the uninterrupted practice of the government prevailing through a long series of years and the acquiescence of all its departments settle a constitutional interpretation in accordance with such long-continued practice.” *Id.* at 622. *See also* *State ex rel. Williams v. Samuelson*, 131 Wis. 499, 111 N.W. 712 (1907); *Schultz v. Milwaukee Cnty.*, 245 Wis. 111, 120, 13 N.W.2d 580, 584 (1944) (“The rule of practical construction as applied to constitutions has been approved many times by this Court.”).

199. *Tetra Tech*, 2018 WI 75, ¶ 22.

200. *Id.* ¶¶ 23–30.

201. 196 Wis. 2d 650, 539 N.W.2d 98 (1995).

202. *Id.* at 660–61.

203. *Tetra Tech*, 2018 WI 75, ¶¶ 32, 40.

204. *Id.* ¶ 42.

205. *Id.*

His reasoning begins with what he presents as the basics of separation of powers, which he characterizes as primarily about protecting against “tyranny” and “depredations on our liberties.”<sup>206</sup> There follows a recitation of the standard distinction between “core” and “shared” powers, which in turn requires consideration of whether the deference regime involves an abdication of something at the core of the judicial power. It does, in Justice Kelly’s assessment, because “exercising judgment in the interpretation and application of the law in a particular case is the very thing that distinguishes the judiciary from the other branches.”<sup>207</sup>

It is difficult to characterize Justice Kelly’s approach in reaching this conclusion as the product of any clear methodology. The opinion cannot credibly claim to be originalist since it makes no effort to pin down any sort of original intent or understanding<sup>208</sup> as of either the constitution’s initial drafting and adoption or the revision of the judiciary provisions in 1977. There is no mention of *Busé v. Smith*, and no effort to engage in any sort of analysis reminiscent of its purported methodological commitments. Nor does the opinion constrain itself by resorting to a common-law constitutionalism that proceeds gradually from premises extracted from past decisions. Much like in *Gabler*, the opinion instead seems to imagine that “the judicial power” exists as a singular concept applicable at all times and in all places in the United States legal tradition,<sup>209</sup> then draws upon a grab bag of authorities, ranging from past Wisconsin cases to the Federalist Papers to separate opinions (i.e., literal expressions of opinion rather than statements of law in any formal sense) by Justices Scalia, Thomas, and Gorsuch in service of reaching its preferred characterization.<sup>210</sup> It is, for a court that has largely forsaken resort to legislative

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206. *Id.* ¶ 45.

207. *Id.* ¶ 51.

208. *Cf.* Daniel R. Suhr & Kevin LeRoy, *The Past and the Present: Stare Decisis in Wisconsin Law*, 102 MARQ. L. REV. 839, 841 (2019) (stating, in phrasing that Justice Kelly’s opinion does not use, that the issue before the court was “Does agency deference comport with the original understanding of the constitution?”).

209. *Tetra Tech*, 2018 WI 75, ¶ 54 (“When we distill our cases and two centuries of constitutional history to their essence . . .”).

210. *Id.* ¶¶ 45–54, 58–61. Justice Kelly also invoked concerns about the appearance of impartiality, namely that deferring to agency’s interpretation in cases in which that very agency is likely to be a party before the court creates the appearance of a biased tribunal. *Id.* ¶¶ 63–69. That may be but creating the appearance of a maximally unbiased tribunal does not seem to have been at the top of the court’s list of recent priorities. *See, e.g.*, Christopher Terry & Mitchell T. Bard, *An Opening for Quid Pro Quo Corruption? Issue Advertising in Wisconsin Judicial Races. Before and After Citizens United*, 16 J. APP. PRAC. & PROC. 305, 309 (2015) (“Research has already documented a correlation between donations to justices in Wisconsin and favorable rulings in favor of campaign supporters in more than fifty percent of cases, as well as the reality that Wisconsin Supreme Court

history on grounds that it is too easy to pick and choose sources that support one's favored result,<sup>211</sup> remarkable stuff.<sup>212</sup>

Notice, too, the framing of the situation. In Justice Kelly's formulation,<sup>213</sup> great weight deference involves the abdication of judicial authority subject only to the "minimal" constraints imposed by the prior framework.<sup>214</sup> Yet, even assuming that situations in which "great weight deference" was applicable are at least somewhat common, it is not so clear why deference to longstanding, reasonable, executive interpretations (assuming administrative agencies in Wisconsin are indeed best considered part of the executive branch<sup>215</sup>) is any more an abdication than is the "beyond a reasonable doubt" deference given to the legislature's interpretation of the state constitution.<sup>216</sup> One might instead regard the framework as just one of many decision rules that the court, like courts generally, uses to provide some steadiness to the law and to narrow the scope of the questions before the court in a given case by fixing in advance the range of considerations that will be applicable to a given decision.<sup>217</sup> Phrased in terms of a matter considered above,<sup>218</sup> the court's *Kalal* framework could likewise be characterized as an abdication—at least in the sense that it precludes judges from drawing on the full range of materials that they might otherwise think pertinent to the proper exercise of the judicial power—or as a tool to

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justices failed to recuse themselves in at least ninety-eight percent of cases in which one or more of the participants had donated to one or more of the justices' election campaigns.”).

211. See *supra* Section II.A.

212. It is undoubtedly no coincidence that, as Craig Green puts it, “ostensibly apolitical arguments against *Chevron* [deference to agency interpretations of statutes] are actually part of a recent phenomenon that has mirrored changes in partisan politics.” Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 621 (2021).

213. As was the case in the essay by Justice Roggensack that he drew upon. See Roggensack, *supra* note 162 (consistently describing the doctrines under consideration as “avoidance” doctrines).

214. *Tetra Tech*, 2018 WI 75, ¶ 56.

215. See *supra* Section II.

216. See *supra* Section II.B.

217. There is, additionally, the fact that the mere existence of a power does not entail the wisdom of its use. Consider, for example, *In re Guardianship of Eberhardy*, 102 Wis. 2d 539, 307 N.W.2d 881 (1981), in which the court took up the question of whether circuit courts have the authority to approve parental consent to the surgical sterilization of a child. The court reasoned that while the scope of the judicial power in Wisconsin is certainly broad enough to encompass such authority, the mere fact that jurisdiction exists does not mean that it is appropriate for a court to exercise it, due largely to the policy-soaked nature of the inquiry. *Id.* at 573–76. The situations are, of course, not identical. But to the extent that deference to executive interpretations turns on considerations like the ability to “marshal informed persons to give an in-depth study to the entire problem and [to] secure the advice of experts in the field,” *id.* at 570–71, then the logic of *Eberhardy* stands in tension with the court's conclusions in *Tetra Tech*.

218. See *supra* Section II.A.

generate decisions that are more accurate, more consistent with separation of powers principles, or otherwise more desirable. My point here is not to contend that there is some sort of specific equivalence between the *Kalal* framework and the deference framework jettisoned in *Tetra Tech*, but instead simply to point out that it is not at all unusual for courts to impose limits on themselves even when doing so might result in decisions that are less accurate than might be the case under a regime in which decision-making was unfettered by such constraints.<sup>219</sup>

It may well be that the result in *Tetra Tech* is an appropriate or even the correct one. What is striking about it is not so much its result as that so much of the reasoning Justice Kelly offers is abstract and unconnected to the workings of Wisconsin government. For all its length, the opinion makes no effort to situate the question within the existing doctrinal framework or the institutional structure created by the Wisconsin constitution. Should it matter that the Wisconsin legislature exercises comparatively tight control over administrative rulemaking, such that rules ought to be regarded as products of the legislature as well as the executive? Might that have been what previous iterations of the court were hinting at when they characterized agencies as part of the legislative branch?<sup>220</sup> Ought the structural differences between the federal government and Wisconsin's government have some effect on the analysis? Is there any reason to conclude that the separate opinions by Justices Scalia, Thomas, and Gorsuch—in which they were speaking for themselves rather than through opinions that were products of the necessarily moderating processes needed to produce an actual statement of law in a majority opinion—are appropriate guides to the resolution of questions under the Wisconsin constitution? We simply do not know.

In the end, Justice Kelly's lengthy opinion gained a majority of votes for its conclusions but not its rationale. Justice Ann Walsh Bradley, joined by Justice Abrahamson, concurred with the result on the narrow interpretive question before the court.<sup>221</sup> Justice Ziegler, joined by Chief Justice Roggensack, criticized Justice Kelly for unnecessarily reaching constitutional questions.<sup>222</sup>

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219. As I have suggested elsewhere, appellate courts' extreme deference to jury and trial court factfinding provides another example of a situation in which accuracy is sacrificed in the name of expediency. Chad Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437 (2004).

220. See, e.g., *City of Milwaukee v. Wroten*, 160 Wis. 2d 207, 218, 466 N.W.2d 861, 865 (1991) (“[A]dministrative agencies are a part of the legislative branch of government that created them . . . .”); *Schmidt v. Dep’t of Res. Dev.*, 39 Wis. 2d 46, 56, 158 N.W.2d 306, 312 (1968) (“The legislative agency or director is, in fact, an arm or agent of the legislature itself.”).

221. *Tetra Tech*, 2018 WI 75, ¶ 109.

222. *Id.* ¶ 135.

And Justice Gableman likewise disagreed with the need for Justice Kelly's constitutional analysis.<sup>223</sup> Notwithstanding this lack of consensus as to its rationale, the court subsequently confirmed its abandonment of its deference regime.<sup>224</sup>

*E. Koschkee & Koschkee*

In *Koschkee v. Evers*,<sup>225</sup> the court considered a preliminary motion in which it was required to determine whether the Department of Public Instruction (DPI) and its Superintendent were entitled to counsel of their own choosing in litigation claiming that the DPI had not complied with requirements applicable to agency rulemaking. The governor and the Department of Justice (DOJ) contended that was entitled to take over the representation.

In an unsigned order, the court drew upon its superintending authority over the court system to conclude that DPI could reject representation by DOJ. Those powers, it reasoned, gave it power over the practice of law, which extends to matters concerning the representation of a client.<sup>226</sup> The court cited two reasons underlying its ultimate conclusion:

First, accepting DOJ's argument would foist upon Evers and DPI an attorney they do not want (and have discharged), taking a position with which they do not agree. This could have ethical implications for DOJ attorneys. Second, accepting DOJ's argument would give the attorney general breathtaking power. It would potentially make the attorney general a gatekeeper for legal positions taken by constitutional officers, such as the governor or justices of this court sued in their official capacity. DOJ's position would not allow a constitutional officer to take a litigation position contrary to the position of the attorney general.<sup>227</sup>

The issue undoubtedly raises constitutional questions concerning the division of labor within the executive branch, which would necessarily have separation-of-powers implications, as well as questions relating to the allocation of responsibilities among the branches, such as whether and when the legislature or judiciary can opt for their own counsel. This is a complicated set of issues and the court, perhaps wisely, does not engage with them at that level.

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223. *Id.* ¶ 159.

224. *Myers v. Wis. Dept. of Nat. Res.*, 2019 WI 5, ¶ 17, 385 Wis.2d 176, 922 N.W.2d 47.

225. 2018 WI 82, 382 Wis. 2d 666, 913 N.W.2d 878.

226. *Id.* ¶¶ 8–11.

227. *Id.* ¶ 13.

In dissent, Justice Rebecca Bradley contended that the majority's decision not to allow DOJ to control the litigation threatened separation of powers.<sup>228</sup> She reached this conclusion by way of an analytically prior conclusion that, because the state constitution provides that the "qualifications, powers, duties, and compensation" of the superintendent and other officers of the DPI "shall be prescribed by law,"<sup>229</sup> the DPI and its superintendent have no authority at all unless the legislature provides it, and here the legislature had not provided it.<sup>230</sup> This is by no means an obvious conclusion. On that view the constitutional status of the superintendent would be meaningless—the voters would get to choose who occupied the role, but the role might have no authority at all. The legislature could pass a statute defining the duties of the superintendent as serving as custodian of the legislative chamber or doing crossword puzzles and that would be that. But it seems hard to believe that the constitutional provisions creating distinct executive officers to be selected by statewide elections should, under any conception of constitutional meaning, be regarded as simply giving the voters the chance to select the identity of people who may or may not actually exercise authority. The fact that an office is created in the constitution suggests a set of reasons for why it was created, which in turn implies a set of powers, responsibilities, and obligations.<sup>231</sup> The implication of Justice Bradley's opinion is arguably to elevate the will of the people as mediated through the legislature over the will of the people as manifested in their selection of the superintendent.<sup>232</sup>

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228. *Id.* ¶ 27 (Bradley, J., concurring in part, dissenting in part).

229. WIS. CONST. art. X, § 1.

230. *Koschkee v. Evers*, 2018 WI 82, ¶ 37.

231. An analogous debate concerns Congress' ability to strip the federal courts of jurisdiction. Nothing in the federal Constitution requires the creation of lower federal courts. Does that automatically mean that Congress could simply eliminate them, or take away their jurisdiction to entertain certain sorts of claims? Under a thin literalism, yes. But the question is hardly free from debate, and there's a compelling case to be made that stripping federal courts of all or some substantial portion of their jurisdiction would violate federal separation of powers principles. *See, e.g.*, Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) (arguing that the Constitution's grant of power to subject the Supreme Court's appellate jurisdiction to "exceptions" and "regulations" "must not be such as will destroy the essential role of the Supreme Court in the constitutional plan").

232. Justice Bradley characterizes the court as exercising its power "in a manner that elevates the interests of public officials over the interests of the people who elect them." *Koschkee v. Evers*, 2018 WI 82, ¶ 41. The point is simply asserted rather than justified. And it overlooks the reality that, due to gerrymandering, the superintendent arguably has a greater claim to represent the will of the whole people of the state than does the legislature. *See* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733 (2021).

The underlying case made its way to the court as *Koschkee v. Taylor*,<sup>233</sup> in which the question was whether the superintendent must comply with a legislatively imposed requirement to get approval from the governor before drafting or promulgating an administrative rule. The court concluded that it must. This time the court approached the case as presenting a question squarely within the sphere of the separation of powers.

In doing so, the court proceeded from a definition of the legislative power—at a general level, “to make laws, but not to enforce them”<sup>234</sup>—to conclude that “when administrative agencies promulgate rules, they are exercising legislative power that the legislature has chosen to delegate to them by statute.”<sup>235</sup> Agencies thus have no inherent power to engage in rulemaking and “remain subordinate to the legislature” in doing so.<sup>236</sup> The court continued: “Because the legislature has the authority to take away an administrative agency’s rulemaking authority completely, it follows that the legislature may place limitations and conditions on an agency’s exercise of rulemaking authority, including establishing the procedures by which agencies may promulgate rules.”<sup>237</sup>

The court’s analysis of the superintendent’s function—which it undertook by reference to the *Buse* factors—revealed to it that that function was executive in nature.<sup>238</sup> Because the state constitution gives the superintendent no legislative authority, and because rulemaking is a legislative rather than executive act, the court reasoned, “it is of no constitutional concern whether the governor is given equal or greater legislative authority than the [superintendent] in rulemaking.”<sup>239</sup>

The court’s analysis here is very formalistic, its purported concern simply with how the constitution divides power. It does not conceive of the case in separation of powers terms by, for example, considering how requiring the involvement of two parts of the executive branch affects the overall balance of power between the legislative and executive branches. And while the court acknowledges the practical necessity of delegation to administrative

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233. 2019 WI 76, 387 Wis. 2d 552, 929 N.W.2d 600.

234. *Id.* ¶ 11 (quoting *Schuetz v. Van De Hey*, 205 Wis. 2d 475, 480–81, 556 N.W.2d 127, 129 (Ct. App. 1996)).

235. *Id.* ¶ 12.

236. *Id.* ¶ 18.

237. *Id.* ¶ 20. Stated in such general terms, the point seems correct. But it does not follow that there are no limits on the nature of the limitations and conditions the legislature may apply. *See, e.g.*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1984).

238. *Koschkee*, 2019 WI 76, ¶¶ 25–29.

239. *Id.* ¶ 34.

agencies,<sup>240</sup> practical considerations play no role in its analysis. In other words, what drives the court is simply the conclusions it reaches about what kind of power is at stake, rather than consideration of the consequences of the requirement, whether assessed in terms of the balance of powers or according to some exogenous measure.

Justice Rebecca Bradley, by contrast, was quite happy to consider the practical effects. She does not understate her concerns: “The concentration of power within an administrative leviathan clashes with the constitutional allocation of power among the elected and accountable branches of government at the expense of individual liberty.”<sup>241</sup> The idea that the administrative state is a practical necessity, she asserts—relying heavily on a set of concurring opinions written by Justices Gorsuch and Thomas and otherwise reasoning primarily from federal sources—relies on “discredited principles.”<sup>242</sup> Justice Bradley stated that: “Underlying the movement toward a burgeoning administrative state was the governing class’s sneering contempt for the people who elect its members, along with impatience at any resistance of the people to the views of the enlightened.”<sup>243</sup> There is no discernable methodology at work in her analysis. It cannot be originalism because she does not attempt to discover what the framers and ratifiers of the Wisconsin constitution might have understood about legislative delegation.<sup>244</sup> The rhetoric is overheated, the arguments only superficially legal, and the attitude not one of thoughtfulness and detachment. It is, for a jurist, not shy about lobbing accusations of partisanship at her colleagues, remarkably ideological in its tone.

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240. *Id.* ¶ 17.

241. *Id.* ¶ 42 (R. Bradley, J., concurring).

242. *Id.* ¶ 43.

243. *Id.* ¶ 44.

244. Nor is there acknowledgement, much less engagement, with the growing body of scholarly work suggesting that legislative delegation was in fact something that existed at the framing of the United States Constitution. *See, e.g.,* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 280–82 (2021) (“In fact, the Constitution at the Founding contained no discernable, legalized prohibition on delegations of legislative power, at least so long as the exercise of that power remained subject to congressional oversight and control.”); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1494 (2021) (“Although the history is messy, there is significant evidence that the Founding generation adhered to a nondelegation doctrine, and little evidence that clearly supports the proposition that the Founding generation believed that Congress could freely delegate its legislative power.”); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021); Philip Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. 88 (2021); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 81–82 (2022).



### F. Bartlett v. Evers

In *Bartlett v. Evers*, the court considered a claim by a group of taxpayers who challenged four specific instances of the Governor's exercise of his partial veto power.<sup>245</sup> The court struck down three of the four, but because no rationale garnered a majority, it announced its decision in a brief per curiam opinion, which was followed by four separate opinions by Chief Justice Roggensack and Justices Ann Bradley, Kelly, and Hagedorn. At the heart of the challengers' case was a claim that the court's decisions concerning the partial veto have departed from the original meaning of the provision.

A bit of background on the partial veto is appropriate before getting to the particular vetoes under consideration. Article V, Section 10 of the Wisconsin constitution gives the Governor the power to veto legislation. It further provides: "Appropriation bills may be approved in whole or in part by the governor, and the part approved shall become law."<sup>246</sup> The corresponding veto power in other state constitutions uses the word "item" rather than "part," and, based on that distinction,<sup>247</sup> the Wisconsin Supreme Court has allowed the Governor to exercise a broad ability to wield the power.<sup>248</sup> Indeed, the provision "grants to Wisconsin's governor greater veto power than that possessed by any other governor."<sup>249</sup> The scope of that power is perhaps best appreciated by consideration of the limitations that have been imposed upon its exercise by subsequent amendments to the state constitution: "In approving an appropriation bill in part, the governor may not create a new word by rejecting individual letters in the words of the enrolled bill, and may not create a new sentence by combining parts of 2 or more sentences of the enrolled bill."<sup>250</sup>

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245. 2020 WI 68, ¶¶ 1–2, 393 Wis. 2d 172, 945 N.W.2d 685.

246. WIS. CONST. art. V, § 10(b).

247. As the court put it:

[I]f, in conferring partial veto power, by the amendment of section 10, art. 5, Wis. Const. in 1930, it was intended to give the executive such power only in respect to an item or part of an item in an appropriation bill, then why was not some such term as either "item" or "part of an item" embodied in that amendment, as was theretofore done in similar constitutional provisions in so many other states, instead of using the plain and unambiguous terms "part" and "part of the bill objected to," without any words qualifying or limiting the well-known meaning and scope of the word "part"?

State *ex rel.* Wisconsin Telephone Co. v. Henry, 218 Wis. 302, 313, 260 N.W. 486, 491 (1935).

248. "Wisconsin seems to be the only state in which the item veto has been used creatively, with the approval of the Wisconsin Supreme Court, to create new law." WILLIAMS, *supra* note 76, at 308.

249. STARK & MILLER, *supra* note 9, at 161.

250. WIS. CONST. art. V, § 10(c).

In a decision in which it denied the Governor's attempt to reduce the amount of revenue bonds a bill authorized, the court reviewed its cases and identified the following parameters for the partial veto:

Certain principles emerge from the court's interpretations of this language. First, a governor may exercise the partial veto only on parts of bills that contain appropriations within their four corners. Second, the partial veto must be exercised in such a manner that the part of the bill remaining constitutes a "complete, entire, and workable law." Third, the disapproval of part of an appropriation bill may not result in a provision which is "totally new, unrelated or non-germane" to the original bill. Fourth, the partial veto authority extends to any part of an appropriation bill, not only to appropriations. Fifth, a governor may strike words or digits from an appropriation bill. However a governor "may not create a new word by rejecting individual letters in the words of the enrolled bill." Sixth, a governor may exercise the partial veto power by writing in a smaller number for a number expressing an appropriation amount.<sup>251</sup>

As a general matter, any veto power not limited to accepting or rejecting an entire piece of legislation allows a governor to exercise power of the sort that is most often associated with the legislative branch.<sup>252</sup> Wisconsin's partial veto provisions enable its governor to exercise that power to an even greater degree. To conclude that the power is therefore inherently legislative, though, requires resort to a preconstitutional, ideal form of "legislative power" that somehow exerts normative force over all actual constitutions. On this view it would be possible to rank state constitutions in terms of the extent to which their veto provisions give legislative power to the governor. But such an approach to the definition of powers is not inevitable. One might instead conclude simply that different constitutions allocate the powers of government, however they may be labelled, differently among the different branches of government. The President of the United States does not have a line-item veto, but the governors of many states do, and the governor of Wisconsin does to an even greater degree. None of that offends the basic requirement that a state have a

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251. *Risser v. Klauser*, 207 Wis. 2d 176, 183, 558 N.W.2d 108, 111 (1997) (citations omitted).

252. *State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 449, 424 N.W.2d 385, 393 (1988) (characterizing the governor's partial veto authority as "quasi-legislative"); *St. John's Well Child & Family Ctr. v. Schwarzenegger*, 239 P.3d 651, 660 (Cal. 2010) ("Case law, commentators, and historians have long recognized that in exercising the veto the Governor acts in a legislative capacity.").

republican form of government<sup>253</sup> any more than does the fact that one state has a unicameral legislature or that some states elect their judges and others do not. Put differently, the Wisconsin constitution draws the line between the legislative and the executive powers differently than do other constitutions. On that view, the “executive power” as defined in the Wisconsin constitution contains powers that are elsewhere given to the legislative branch, but that does not necessarily make them a part of “legislative power” as the power is defined in Wisconsin.

The four exercises of the partial veto at stake in the case involved deletions that had the following effects: (1) converted grants for the replacement of school buses into grants for alternative fuels; (2) changed a fund for grants for local road improvements into a generic local grant; (3) eliminated decreases in the registration fees applicable to certain vehicles; and (4) expanded the definition of “vapor products” subject to taxation.<sup>254</sup> In the estimation of one set of commentators, these vetoes “differ little from partial vetoes made regularly by governors of both political parties.”<sup>255</sup> Yet the court struck down all but the third.

As noted above, no rationale gained a majority. Writing for herself, Chief Justice Roggensack traced the history of the partial veto and the court’s opinions concerning it, concluding that “only two relevant limits”<sup>256</sup> emerge: “(1) the part approved must be a complete, entire and workable law; and (2) the part approved must be germane to the topic or subject matter of the enrolled bill before the veto.”<sup>257</sup> She then leaned heavily on stare decisis in rejecting the claimants’ invitation to overrule some of the court’s past decisions,<sup>258</sup>

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253. There certainly are some limitations imposed by the federal Constitution. As Michael Dorf has suggested, the Guarantee Clause together with other “constitutional provisions indicate that the federal Constitution implicitly assumes that state governments will be structured along lines broadly similar to the federal government.” Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 54 (1998). Carolyn Shapiro has recently noted that Congress has the authority to enforce the Guarantee Clause and argued that it should do so in order “to address democratic erosion in the states.” Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183, 188 (2020).

254. *Bartlett v. Evers*, 2020 WI 68, ¶¶ 12–24, 393 Wis. 2d 172, 945 N.W.2d 685.

255. Richard A. Champagne, Staci Duros & Madeline Kasper, *The Wisconsin Governor’s Partial Veto after Bartlett v. Evers*, 5 READING THE CONST., no. 5, July 2020, at 16, [https://docs.legis.wisconsin.gov/misc/lrb/reading\\_the\\_constitution/governors\\_partial\\_veto\\_5\\_3.pdf](https://docs.legis.wisconsin.gov/misc/lrb/reading_the_constitution/governors_partial_veto_5_3.pdf) [<https://perma.cc/8TCK-VWU9>].

256. *Bartlett*, 2020 WI 68, ¶ 38.

257. *Id.*

258. *Id.* ¶¶ 65–89. In addition, although Chief Justice Roggensack early in her analysis seems to accept the claimants’ characterization of their arguments as originalist, *id.* ¶ 67, she later identifies the characteristics of that argument that undercut its status as originalist under any but a very loose

concluding instead that the germaneness requirement she identifies in past cases provides a sufficient tool for assessing the constitutionality of these vetoes.<sup>259</sup>

Justice Kelly, in an opinion joined by Justice Rebecca Bradley, “beg[s] forgiveness for this pedantry”<sup>260</sup> as he opens his opinion with a section entitled “Schoolhouse Rock.” Based almost entirely on his inferences from the state constitution’s text about what structures and processes it creates, and with no effort to discern the original intent or understanding of those provisions, he extracts three general propositions based on which, in his view, the questions before the court should be resolved.<sup>261</sup> From there he jumps into a critique of the court’s development of the law, concluding that it was misguided because of its failure to square with these propositions.<sup>262</sup> Taken as a whole, the opinion’s analysis assumes a fixed division of power among the branches that it derives from a theoretical conception of government rather than from any effort to pin down a meaning fixed at enactment, whether in 1848, at the time of the amendments creating and later limiting the partial veto, or some combination thereof. Put differently, the opinion seems to posit the existence of some ideal form of American governmental structure—the particulars of which are nowhere stated in a precise, canonical form—against which all deviations are to be measured. Yet despite therefore not being an originalist opinion, it nonetheless leans on theories of rejecting *stare decisis* that are largely grounded in originalist reasoning.<sup>263</sup>

Justice Hagedorn, joined by Justice Ziegler, approaches the case as requiring a quest to determine the original public meaning of the relevant constitutional provisions. What his opinion lacks is much of anything in the way of evidence bearing on what those original public meanings might have been—which is, to be fair, the sort of information that is difficult to gather and assess, involving as it would consideration not only of materials relating to the basic governmental structure created in the 1848 constitution, but also of materials relating to the meaning and effect of the later amendments creating and limiting the partial veto. Some of the answers may be unknowable.

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definition of the concept: that arguments from Montesquieu and the Federalist Papers do not, without more, hold determinative force with respect to the meaning of the later-adopted Wisconsin constitution and the amendments thereto. *Id.* ¶¶ 85–88.

259. “The legislature controls whether an idea will result in an enrolled bill that will be presented to the governor for signature. A veto that does not alter legislative control of the topic or subject matter of enrolled bills has been referred to as ‘germane.’” *Id.* ¶ 91.

260. *Id.* ¶ 178.

261. *Id.* ¶¶ 175–80.

262. *Id.* ¶¶ 182–90.

263. *Id.* ¶ 205.

Perhaps as a result, Justice Hagedorn's tone is more measured, and his conclusions more tentative.<sup>264</sup>

Finally, Justice Ann Bradley, joined by Justice Dallet, assumes a largely defensive posture in an opinion in which she advocates for continued recognition of the "incredibly broad" scope of the Governor's partial veto power.<sup>265</sup> Rather than making an affirmative case for the power, or demonstrating how it is consistent with the Wisconsin constitution's conception of separation of powers, she limits herself to critique of the other opinions, focusing on the practical problems their proposed tests would create, as well as the fact that none of the opinions tracks a theory advanced by any of the parties.<sup>266</sup>

A perhaps curious feature of these opinions is that not one invokes anything like a deferential standard of review with respect to the Governor's presumed interpretation of the partial veto provisions of the state constitution. This even though the court has afforded such deference in the past,<sup>267</sup> and has more recently noted that Justice Scalia, whose words are typically afforded canonical status by some members of the court, suggested that deference to the executive is appropriate as well.<sup>268</sup> The executive, like the legislature, is a co-equal branch of government. In recent years, however, the court has given the benefit of the doubt only to the latter.

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264. *Id.* ¶ 266 (rejecting the claim that the court should overrule the bulk of its past case law but leaving open the possibility of revisiting those cases in the future).

265. *Id.* ¶ 115.

266. *Id.* ¶¶ 111–14.

267. For example, in *Ekern v. McGovern*, 154 Wis. 157, 142 N.W. 595 (1913), a case arising out of the governor's removal of the state insurance commissioner via a perfunctory hearing presided over by the Governor, the court noted: "It must not be understood that there is any want of appreciation here of the fact that much deference is due to the co-ordinate department of the government, vitalized by the Governor. It is the pleasure and the duty of the courts to pay that deference, and, perhaps, to resolve reasonable doubts as to where mere deference ends, in favor of the executive department." *Id.* at 213.

268. In *State v. Unnamed Defendant*, 150 Wis. 2d 352, 364 n.9, 441 N.W.2d 696, 701 n.9 (1989), the court noted the following in a footnote:

Justice Scalia, in a portion of his dissenting opinion that is not disputed by the majority in *Morrison v. Olson*, points out that perhaps the presumption of constitutionality attaches equally to the conduct of any party in separation of powers cases. Not only the legislature, but all branches of government are presumed to act constitutionally. There is some doubt whether the presumption is meaningful when dealing with questions of law.

(citations omitted).

## G. SEIU v. Vos

In *Service Employees International Union v. Vos*,<sup>269</sup> the court considered the constitutionality of several of the “lame duck” laws enacted by the legislature and signed into law during the waning days of the Scott Walker administration. The overall effect of these laws was to reduce the authority of the governor and attorney general while giving more to the legislature, or to legislative committees. The challenges in question were facial challenges. Because the court was split with respect to the constitutionality of the some of the provisions, there were two majority opinions.

The first majority opinion was written by Justice Hagedorn. It opened with a lengthy discussion entitled “Separation of Powers Under the Wisconsin Constitution.” In that section he begins by building off an idea introduced in the opinion’s opening paragraphs: that there are three kinds of power—legislative, executive, and judicial—and that the constitution, in order to preserve liberty, divides them up.<sup>270</sup> As a matter of rhetoric, the opinion proceeds from the assumption that those three types of power have fixed definitions. The opinion states: “Legislative power is the power to make the law, to decide what the law should be. Executive power is power to execute or enforce the law as enacted. And judicial power is the power to interpret and apply the law to disputes between parties.”<sup>271</sup> On this view, there is a natural order of things, and departures from that order are exceptions, instances in which “the Wisconsin Constitution . . . sometimes takes portions of one kind of power and gives it to another branch.”<sup>272</sup>

These premises are debatable. To say that there are three types of power, and to provide a general description of those powers, is not to answer questions about how those powers work and interrelate in specific situations, at least so long as one rejects the premise that the words legislative, executive, and judicial necessarily refer to the same powers defined in precisely the same way whether they are used in the United States, Wisconsin, or any other state’s constitution. Rather than denoting some specific, idealized form, a word such as “legislative” when used generically with the American legal system might instead refer to a range of possible powers,<sup>273</sup> in much the same way that the United States Constitution’s reference to a “republican form of government” leaves room for

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269. 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35.

270. *Id.* ¶¶ 1–2, 30–31.

271. *Id.* ¶ 1.

272. *Id.* ¶ 32.

273. See WILLIAMS, *supra* note 76, at 238 (“Concepts such as ‘legislative’ and ‘executive’ are, of course, indeterminate.”).

substantial variation from one state to the next.<sup>274</sup> We could, in other words, imagine what the opinion conceives of as, in effect, exceptions to the general arrangement, as instead being situations in which the Wisconsin constitution defines things differently. As the discussion of *Bartlett v. Evers*,<sup>275</sup> suggests, a gubernatorial item veto has legislative effect, and the Wisconsin Governor has the broadest such power. If we imagine governmental powers not as falling into just three general categories, but instead consisting of powers defined at a more precise level, then terms such as legislative and executive might simply be regarded as labels for the buckets that hold those powers, with the specific identity of the powers in the buckets varying from one jurisdiction to the next. While it might thus be descriptively accurate to say that the terms typically denote certain capabilities, it does not necessarily follow that what is descriptively true has normative force.

Justice Hagedorn's opinion nonetheless proceeds from the assumption that the idealized forms have normative power and is careful to note that "these are exceptions to the default rule that legislative power is to be exercised by the legislative branch, executive power is to be exercised by the executive branch, and judicial power is to be exercised by the judicial branch."<sup>276</sup> But the matter is more complicated than that suggests, because the powers vested via the constitution are not all of the same status—some of the powers are "core" powers that cannot be taken by or given to another branch, while others are "shared" powers that can be exercised by the other branches so long as, in doing so, they do not "unduly burden or substantially interfere with another branch."<sup>277</sup> This is all consistent with the general framework the court usually invokes. It also, without more, answers no questions.

Critical to Justice Hagedorn's approach is that the challenges in the case are facial, which means that in order to succeed "the challenging party must show that the statute cannot be enforced 'under any circumstances.'"<sup>278</sup> This approach, he explains, is itself necessary as a consequence of the separation of powers. To conclude that a statute is facially unconstitutional requires a court to imagine all possible applications, which it may be incapable of accurately doing. Judicial modesty counsels against attempting to do so.<sup>279</sup>

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274. U.S. CONST. art. IV, § 4.

275. See *supra* Section III.F.

276. *Vos*, 2020 WI 67, ¶ 33.

277. *Id.* ¶ 35 (quoting *State v. Horn*, 226 Wis. 2d 637, 644, 594 N.W.2d 772, 776 (1999)).

278. *Id.* ¶ 38 (quoting *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶ 13, 357 Wis. 2d 360, 851 N.W.2d 302).

279. *Id.* ¶ 42. Justice Dallet critiques the "no set of circumstances" approach as an overreading of the applicable doctrine, as well as the claim that judicial modesty counsels in favor of such an approach. *Id.* ¶¶ 176–87 (Dallet, J., dissenting).

The first provisions under consideration require the consent of either the legislative intervenor or the legislature's Joint Committee on Finance before the Department of Justice can "compromise or discontinue[]" civil actions prosecuted by the department or settle actions where injunctive relief or a consent decree are at stake.<sup>280</sup> The challengers argued that this was unconstitutional because it gave executive power to the legislature; the legislature responded by asserting that, because the constitution provides that the attorney general's powers are to be defined entirely by statute, the legislature is free to define them however it wants.<sup>281</sup> The court disagreed, reasoning that while the legislature may have the authority to define and limit the attorney general's powers, that does not mean that it can assume them for itself.<sup>282</sup> More palatable to the court was the legislature's argument that the statute related to the exercise of power that "is not, at least in all circumstances, within the exclusive zone of executive authority."<sup>283</sup> The court's analysis in reaching this conclusion was traditionally, if not deeply, originalist.<sup>284</sup> It considered evidence that it regarded as probative of the understanding of the constitution's division of power at the time of its enactment in 1848.<sup>285</sup> The court further drew on the legislature's interest in controlling appropriations,<sup>286</sup> and the fact that some other states allow for similar legislative intervention.<sup>287</sup> Absent from the analysis is any consideration of whether it is appropriate for the legislature to delegate these responsibilities to a committee, which is at least questionable if the court continues its formalist trend with respect to the nature and separation of governmental powers.<sup>288</sup>

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280. *Id.* ¶¶ 53 n.17.

281. *Id.* ¶¶ 55–56.

282. *Id.* ¶ 62.

283. *Id.* ¶ 63.

284. In dissent, Justice Dallet pointed out that the court has traditionally taken more of a functionalist approach to separation-of-powers issues, *id.* ¶¶ 168–69 (Dallet, J., dissenting), and likewise disputed the majority's more formalistic arguments. *Id.* ¶¶ 174–75 (Dallet, J., dissenting).

285. *Id.* ¶ 64–67.

286. *Id.* ¶ 68–69.

287. *Id.* ¶ 70.

288. I won't attempt to develop the arguments in detail, but there would seem to be an argument that the arrangement here allows for the exercise of legislative power without "the legislature" having acted via the constitutionally prescribed mechanisms for the exercise of its power. (And if different rules apply to the legislature's exercise of other branches' "shared" powers, it is not clear what they are. Presumably the legislature could not simply designate one of its members as having the authority to approve or disapprove of settlements.) Alternatively, a form of the nondelegation doctrine may be applicable, with the legislature in this case delegating its authority to an entity that only seems like it is part of the legislative branch because all its members are legislators. Whatever the specific legal form of the argument, it would seem that there ought to be something at least suspicious about a



The second concerned the process for changing security procedures at the Capitol building and involved giving a legislative committee the authority to review and, at the committee's election, approve any such changes. The court concluded that the power at issue is shared, and that "[i]t logically follows that if the legislature can control the use of legislative space, as it already does in many ways, it can also control the security measures put in place for the use of that space."<sup>289</sup> The court noted but did not address arguments that the legislative review mechanism involved "an impermissible legislative veto that violates bicameralism and presentment as well as the constitution's quorum requirement."<sup>290</sup>

The third provision,<sup>291</sup> for which Justice Hagedorn wrote the majority opinion, was one authorizing the Joint Committee on Administrative Rules to suspend administrative rules more than a single time. The mechanism allowing for initial suspension was the one approved in *Martinez v. DIHLR*,<sup>292</sup> and it authorized the committee to suspend a rule for three months, at the end of which the rule would remain in effect unless the legislature responded by passing a law through bicameralism and presentment.<sup>293</sup> Wisconsin is an outlier in allowing this sort of legislative review at all,<sup>294</sup> and so it is not surprising that the court did not look to other states or note the comparatively extraordinary nature of the mechanism, instead simply invoking *Martinez* and concluding that

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mechanism that allows a group of people who have been elected by a small subset of the state's electorate to override the decisions of executive branch authorities who were selected by statewide election, particularly for a court that consistently emphasizes the will of the people. See, e.g., *Id.* ¶ 1 ("Government actors . . . only have the power the people consent to give them.").

There is a similar dynamic at play in *Democratic National Committee v. Bostelmann*, 2020 WI 80, 394 Wis. 2d 33, 949 N.W.2d 423, in which the court addressed a question certified to it by the Seventh Circuit: "whether, under Wis. Stat. § 803.09(2m), the Wisconsin Legislature has the authority to represent the State of Wisconsin's interest in the validity of state laws." *Id.* ¶ 1. The court treated the matter as purely a statutory question, which allowed it to conclude, in so many words, that the legislature has the power because the legislature has given itself the power. *Id.* ¶ 8. The appropriateness of allowing committees to exercise that authority on behalf of the legislature, and thereby to represent the interests of "the state" even though, again, that committee's membership is unlikely to have been elected by anything approaching a majority of the state's voters, is just assumed.

289. *Vos*, 2020 WI 67, ¶ 77.

290. *Id.* ¶ 75.

291. Justice Hagedorn's opinion also resolved, in a single paragraph, a challenge to the constitutionality of a provision prohibiting agencies from seeking deference to their legal interpretations, concluding that its decision in *Tetra Tech* resolves the issues in favor of constitutionality. *Id.* ¶ 84.

292. Discussed *supra* Section II.C.

293. *Vos*, 2020 WI 67, ¶ 81.

294. See Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1203 (1999) ("Such review has been held unconstitutional in almost every state considering the issue.").

“if one three-month suspension is constitutionally permissible, two three-month suspensions are as well.”<sup>295</sup> Even so, the reasoning is notable. As discussed above,<sup>296</sup> *Martinez* was a thoroughly functionalist decision, and in that sense consistent with what had been the court’s approach to separation of powers. It stands as a contrast to the more formalistic approach taken in the rest of the *Vos* opinion, and thereby demonstrates a potential consequence of the court’s jurisprudential shift, namely that inconsistent application can lead to a pattern of results that would have been unlikely had the approach been adherent to from the start. In this case, the consequence is an accretion of more power in the legislature.

Justice Kelly wrote the second majority opinion in the case, dealing with a provision relating to “guidance documents,” which are agency-prepared documents or communications that explain or provide guidance or advice with respect to the agency’s procedures and likely application of statutes and rules.<sup>297</sup> The statutes under consideration would have required agencies to identify the law that supports any conclusion in a guidance document, and set forth a set of procedures to be followed in the creation of new guidance documents.<sup>298</sup>

The first step in Justice Kelly’s analysis was to determine whether the creation of guidance documents is a legislative or executive power. His methodology roughly tracks that he employed in prior cases. It is not originalism in any recognizable form and includes no effort to pin down the meaning of executive power as specifically placed in the Wisconsin constitution in 1848 and modified by amendments thereafter. Nor does it incorporate functional analysis, such as consideration of whether the effect of the law might be to discourage agencies from producing guidance documents, thereby driving the exercise of executive discretion underground rather than keeping it publicly available. It lacks any but a perfunctory effort<sup>299</sup> to survey past Wisconsin cases concerning the executive power and to extract from them some definition of greater or lesser generality that would resolve or at least provide guidance for the resolution of the issue before the court. Instead, the core portions of the analysis draw on law review articles, the Letters of Alexander Hamilton, and opinions from the United States Supreme Court, all of which point toward an abstraction: “At the risk of oversimplification, the legislature’s authority comprises the power to make law, whereas the

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295. *Vos*, 2020 WI 67, ¶ 82.

296. See *supra* notes 108–23 and accompanying text.

297. *Vos*, 2020 WI 67, ¶ 89.

298. *Id.* ¶ 90.

299. *Id.* ¶¶ 97 n.6, 98.

executive's authority consists of executing the law."<sup>300</sup> And because the statute in question itself states that "a guidance document does not have the force of law,"<sup>301</sup> they are not an exercise of the legislative power.<sup>302</sup> More than that, they are a core part of the executive power: "They contain the executive's interpretation of the laws, his judgment about what the laws require him to do. Because this intellectual homework is indispensable to the duty to 'take care that the laws be faithfully executed,' it is also inseparable from the executive's constitutionally-vested power."<sup>303</sup>

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300. *Id.* ¶ 95.

301. *Id.* ¶ 100 (quoting 2017 Wis. Act. 369, § 38 (WIS. STAT. § 227.112(3))).

302. *Id.* ¶ 102.

303. *Id.* ¶ 106 (citation omitted). The line of thought here is a bit hard to discern. I do not understand the court to be saying the following, though I believe it would lead to the same result: As is most evident in the case of prosecutorial discretion, enforcement discretion is a core part of executive power. (A point that could presumably be supported by way of any interpretive methodology.) Guidance documents represent efforts to inform the public about how the executive will exercise that discretion, but by doing so do not eliminate or formally constrain the exercise of that authority, in the sense that a new holder of the executive office in question could decide to exercise that discretion in a different way, and indeed an office holder could decide to change their enforcement patterns or priorities during their time in office. (That's not to suggest that there's no constraining effect, just that it is informal.) So viewed, it is perhaps easier to appreciate how the statute under consideration interfered directly in the exercise of core executive powers. The legislature can surely affect executive behavior prospectively by changing the content of the law, but here the legislature sought to regulate executive behavior midstream. One could thereby make an analogy to the aspect of judicial behavior at stake in *Gabler*. Just as the legislature could change the law to prospectively govern the sorts of decisions that Judge Gabler made, the court concluded that it was impermissible for the legislature to empower a non-judicial entity to interfere once the judicial process had commenced.

Perhaps more directly analogous is *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 166 N.W.2d 255 (1969), a case considering a mandamus action to compel a district attorney to order an inquest into a death. The court observed that "[t]he district attorney in Wisconsin is a constitutional officer and is endowed with a discretion that approaches the quasi-judicial." *Id.* at 260. Thus "a great portion of the power of the state has been placed in his hands for him to use in the furtherance of justice" and his "function, in general is of a discretionary type," even though the legislature can prospectively constrain its exercise "under particular facts." *Id.* The court's analysis seems correct, though the opinion is emblematic of so many of its opinions from this era. It states the holding of a past case in a largely conclusory way, makes no effort to extract any sort of underlying principle, then purports to apply it to the current situation as if the process were simply algorithmic. There is a case to be made for minimalism, but when the court fails to articulate the reasoning underlying it, and thereby does not commit itself to much, it leaves much to good faith and the existence of shared norms, both of which seem often to have been in short supply during the court's recent era of dysfunction.

Returning to *SEIU v. Vos*, in his dissent, Justice Hagedorn sets forth a conception of guidance documents as communications between the executive branch and the public, and therefore the sort of thing that falls outside the scope of the executive's core powers. *Id.* ¶ 191 (Hagedorn, J., dissenting). The disagreement between Justices Kelly and Hagedorn may, as much as anything, demonstrate the difficulties presented by facial challenges. The range of things that fall within the definition of guidance documents is so broad that it undoubtedly encompasses documents that fall within the core

## IV. CRITIQUES AND OBSERVATIONS

At a general level, the work of the Wisconsin Supreme Court stands open to the same basic set of critiques that commentators frequently direct at courts interpreting state constitutions: the opinions too often rely on federal constitutional case law and commentary, too rarely take into consideration the real differences between the federal and state constitutions in terms of their text, the governmental arrangements created by that text, the history behind the text, and so on,<sup>304</sup> and generally fail to explain their analyses with much depth or sophistication.<sup>305</sup> All of these observations have applied, to varying degrees at varying times over its history, to the Wisconsin court. The court has occasionally acknowledged the existence and implications of the differences between the federal and state constitutions.<sup>306</sup> But for the most part it has, as Justice Hagedorn recently observed, “simply copied and pasted federal case law and called it Wisconsin constitutional law.”<sup>307</sup>

A. *The General Inaptness of the Federal-State Parallel*

A consistent critique of state constitutional decision making is that courts too often rely on federal constitutional case law without taking into serious consideration the significant differences between the texts of the federal and state constitutions, the governmental structures and arrangements created by the respective texts, the differing histories and philosophies behind those texts, and so on.<sup>308</sup> Speaking generally about nineteenth-century state constitutions,

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of executive power as well as the completely mundane. Chief Justice Roggensack likewise dissented and made an effort to situate the guidance document requirement within the broader context of Wisconsin separation-of-powers law. *Id.* ¶ 136 (Roggensack, C.J., dissenting). She, too, framed the matter as one of interpretation, which, as I have suggested above, may not have been the best avenue of approach.

304. See WILLIAMS, *supra* note 76, at 238–39 (“Each of the states has its own, virtually unique, arrangements concerning the distribution of powers among and within the branches. Any careful analysis of a separation of powers problem in state constitutional law, therefore, must take account of the particular state’s specific arrangements.”).

305. See, e.g., GARDNER, *supra* note 74, at 15–16.

306. See, e.g., *State v. Beno*, 116 Wis. 2d 122, 341 N.W.2d 668 (1984). The court noted that “in drafting the Wisconsin Constitution the framers sought guidance not merely in the Federal Constitution but also in the common law, the experiences, the tradition, and the values of the people of the territory of Wisconsin.” *Id.* at 674. These differences, coupled with different language, led the court to conclude that constructions of the federal speech and debate clause were of limited value in construing the state clause. *Id.* at 675.

307. *James v. Heinrich*, 2021 WI 58, ¶ 65, 397 Wis. 2d 517, 960 N.W.2d 35 (Hagedorn, J., concurring).

308. See GARDNER, *supra* note 74, at 1–18. Gardner contends that critics fall into a similar trap with respect to their methodological assumptions, too often assuming that the tools used for

G. Alan Tarr describes the period as one with a clear divergence from the federal constitutional experience.<sup>309</sup> “Different issues dominated the constitutional agendas of state and nation.”<sup>310</sup> As Justice Ellen Peters observes, “even though state constitutional provisions may textually resemble those found in the federal Constitution, they may reflect distinct state identities that will result in differences in how courts apply and construe such texts.”<sup>311</sup>

Thus, even if one were to assume that the federal and state constitutions are fundamentally analogous things, it does not make sense, without further justification, to draw upon cases interpreting the federal constitution or the sources that informed the creation of the federal Constitution in interpreting the Wisconsin constitution. The factors used to justify a lockstep approach to the development and application of the rights provisions in state constitutions largely do not apply with respect to separation of powers.<sup>312</sup> And yet, as in most states, there is a long tradition of the Wisconsin courts leaning on federal cases in support of propositions relating to the separation of powers under the Wisconsin constitution. This has become more pronounced recently, and in particular a few of the justices have taken to engaging in lengthy analyses that lean heavily on a specific subset of federal sources, which tend to include heavy invocation of separate opinions (sometimes concurring, sometimes dissenting) written by Justices Gorsuch, Scalia, and Thomas rather than actual majority opinions. Those opinions also tend to include invocations of Montesquieu,

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interpretation of the federal Constitution are the same tools that ought to be employed in the interpretation of state constitutions. *Id.* at 15–16.

309. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 94 (1998).

310. *Id.* at 94–95.

311. Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1553 (1997).

Different state constitutions embody radically different visions of the relative weight of the political branches. Some state constitutions were written to allow their legislatures to dominate the processes of state government, weakening the governor by splitting executive authority among several independently elected state officials, by limiting the substantive powers of the governor, by limiting the governor to one or a few terms of office, or through other mechanisms. Other state constitutions show an obvious preference for a strong executive branch, and manifest this preference through such mechanisms as limiting legislative sessions, giving a governor extensive line-item veto authority, or through other arrangements.

John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1240 (1993).

312. Not only in the sense that the constitutions themselves are different. There are fewer federal precedents, and they are not binding on states, which together mean that the efficiency gains from working with federal caselaw are greatly diminished. Schapiro, *supra* note 73, at 93.

Locke, and other thinkers regarded as having influenced the framers.<sup>313</sup> Underlying these opinions seems to be a sense that the concepts and mechanisms of separation of powers in the American legal system exist as a brooding omnipresence<sup>314</sup> that, when divined by the appropriately attuned jurist, yields a single correct answer to questions arising under all constitutions within the system. The exercise looks less like originalism and more like a form of pre-Legal Realism common-law constitutionalism that imagines the correct answers are there to be discovered in the tea leaves left by the chosen thinkers.<sup>315</sup>

That approach would seem self-evidently incorrect even were it the case that the state and federal constitutions are fundamentally the same sort of document. But that may be incorrect as well.<sup>316</sup> It may be that it is wrong to imagine that just because both the federal and state charters bear the title “constitution” they therefore ought to be treated as the same thing for interpretive purposes.<sup>317</sup> For one thing, a state constitution is not the supreme

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313. Setting aside for now the question of the extent to which the intellectual underpinnings of the U.S. Constitution ought to serve as guidance for the interpretation and application of a state constitution, it is not clear that the justices who invoke these sources draw the correct lessons from them. The justices who do so tend to derive from them a rigid, formalistic approach to separation of powers. But Jim Rossi suggests that at the founding that was the approach of the Antifederalists, while the Federalists “recognized separation of powers but favored a blended or mixed conception of separation of powers over a more rigid interpretation that was popular in state constitutions at the time.” Rossi, *supra* note 294, at 1171. And, more broadly, William Gwyn argues that the framers “were concerned more with improving the efficiency and capabilities of the national government than with creating a system of government based on the abstract maxims of political philosophers.” William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263, 263 (1989). “The framers clearly were not functioning as political theorists, carefully distinguishing each type of power.” *Id.* at 266. Perhaps notably, Gwyn wrote in an era before these issues were as ideologically charged as they are at the moment.

314. The term originated with Justice Holmes. “The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact.” *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

315. I do not mean to suggest that such sources are not pertinent to constitutional inquiry. Making them the centerpiece of an effort to determine the meaning of a state constitution adopted in 1848, however, is a puzzling move given the professed jurisprudential commitments of the justices who tend to do so. *Cf.* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 855 (1989) (“Are the ‘fundamental values’ that replace original meaning to be derived from the philosophy of Plato, or of Locke, or Mills, or Rawls, or perhaps from the latest Gallup poll?”).

316. For an overview of what he characterizes as the “somewhat odd debate in the United States about what might be termed the ontological status of . . . state constitutions,” see Sanford Levinson, *Courts as Participants in “Dialogue”*: A View from American States, 59 KAN. L. REV. 791, 799–802 (2011).

317. Consider:

law of the land. Even if we were to assume a state constitution that created a governmental structure identical to that at the federal level, it would not necessarily follow that state separation of powers should function in the same way. In other words, the simple fact of occupying a different place in the larger governmental hierarchy might imply different relations among the branches.<sup>318</sup> So, too, the fact that state constitutions govern relationships between states and local units of government that differ from the relationship between the federal government and the states.<sup>319</sup>

More practical considerations might also have an effect. The relative smallness of most states could matter by, for example, making it easier for the branches to monitor one another. (Thus, for example, we might accordingly be more open to the judiciary taking legislative motive into account, because members of a state judiciary could reasonably be expected to know more about the members and actions of a state legislature as compared to federal judges.) The subsidiary nature of the state government could also matter. State-level officials must comply with both federal and state law, and that responsibility to an external set of commands perhaps exerts systematic pressures on the relationships among the branches that would not exist in its absence. The pressures might run in the other direction as well: A regime of state constitutional law that thwarted state-level actors from effectively providing desired services could in turn contribute to a demand for the underlying need to

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State constitutions are *sui generis*, differing from the Federal Constitution in their origin, function, and form. They originate from a very different process from that which led to the Federal Constitution. State constitutions do not look or work like the Federal Constitution. They are longer, more detailed, and cover many more topics, for example, taxation and finance, local government, education, and corporations. There are many policy decisions embedded in state constitutions.

Robert F. Williams, *Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 191 (2002). See also James Gray Pope, *An Approach to State Constitutional Interpretation*, 24 RUTGERS L.J. 985, 985 (1993) (“At bottom, the problem with state constitutionalism is . . . that state constitutions just aren’t all that *constitutional*.”); James A. Gardner, *What is a State Constitution?*, 24 RUTGERS L.J. 1025, 1025–26 (1993) (arguing that “state constitutions by and large do not fit comfortably within our standard definition of ‘constitutions.’ Typically, state constitutions do not seem to have resulted from reasoned deliberation on issues of self-governance, or to express the fundamental values or unique character of distinct polities.”).

318. As Gardner notes, “federalism assigns to each level of government a somewhat different role and, correspondingly, a set of distinct functions within the larger federal plan. Indeed, for federalism to work at all, the state and national governments must of necessity serve different functions; no sign of trouble in the federal system could be surer than the indiscriminate swapping of functions by the two levels of government.” GARDNER, *supra* note 74, at 17.

319. See WILLIAMS, *supra* note 76, at 241 (drawing on Lawrence Friedman, *Unexamined Reliance on Federal Precedent in State Constitutional Interpretation: The Potential Intra-State Effect*, 33 RUTGERS L.J. 1031 (2002)).

be met by federal regulation.<sup>320</sup> The details will vary from one state to the next, and, in Wisconsin at least, remain largely unexplored. Whatever the particulars, their existence cautions against easy resort to federal sources.

*B. Specific Differences Between Federal and State Institutions and Structures*

In addition to the reasons outlined in the preceding section for skepticism concerning the appropriateness of using federal sources for the resolution of state constitutional questions, there are the specific ways in which the governmental structure created by the Wisconsin constitution differs from that of the federal government. What follows is a noncomprehensive survey of some of those differences. Both collectively and individually there are differences that can reasonably be understood to compel caution, at the very least, with respect to the importation of federal standards.

i. Differences in the Legislative Branch

In the case of the legislature, the most significant difference is that state legislatures have the police power, while Congress is an entity with only enumerated powers.<sup>321</sup> And even though Congress's power to regulate interstate commerce has come to approach a police power in its breadth, there remains a fundamental distinction in that Congress must ask first whether it has the power to act, whereas state legislatures are regarded as having the power to act unless something in the state's constitution—perhaps a rights provision, perhaps an aspect of separation of powers—prevents it. States' constitutions are, therefore, “documents of limitation rather than documents granting powers. . . . Thus, the basic legal and political function of state constitutions differs from that of the federal Constitution.”<sup>322</sup>

In Wisconsin, in particular, the legislature enjoys more power relative to administrative agencies than is the case in the federal government and in most other states. As Jim Rossi reports, “almost every state considering the issue” has concluded that giving a legislative committee the power to suspend agency rules is unconstitutional.<sup>323</sup> But there are outliers: “Courts in Idaho and Wisconsin have explicitly authorized stronger legislative oversight than other

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320. Rossi, *supra* note 294, at 1187–88.

321. “This court has repeatedly held that the power of the state legislature, unlike that of the federal congress, is plenary in nature . . . .” State *ex rel.* McCormick v. Foley, 18 Wis. 2d 274, 277, 118 N.W.2d 211, 213 (1962). “It is also recognized that the Wisconsin Constitution is not a grant of power, but a limitation upon the powers of the legislature. Except for these limitations the power of the legislature is practically absolute.” *Id.* at 279.

322. WILLIAMS, *supra* note 76, at 27.

323. Rossi, *supra* note 294, at 1203.



states.”<sup>324</sup> As I have suggested above,<sup>325</sup> formalistic analysis of the sort the court has recently favored would seem to call this approach—and the wide range of matters the Wisconsin legislature delegates to committees more generally—into question.

## ii. Differences in the Executive Branch

The two most apparent points of contrast between the federal and Wisconsin executive branches are the partial veto and the fact that the state constitution creates several constitutional executive officers elected by statewide vote. The partial veto, which as noted above affords Wisconsin’s governor more power than any other governor,<sup>326</sup> was in part a response to the perceived inefficiency and corruption of the legislative branch.<sup>327</sup> The constitutional “unbundling”<sup>328</sup> of the executive power serves at least two functions—as an “internal check”<sup>329</sup> on executive power, by placing authority in multiple sets of hands, each with its own electoral base,<sup>330</sup> and as an additional layer of separation vis-à-vis the legislative and judicial branches, such that any action by either such branch operates against only a portion of the executive.

Another important difference lies in the area of implied or inherent powers. The extent to which the President does and ought to have such powers is contested.<sup>331</sup> The idea that state-level executive officers, whether the governor or any of the other elected members of the executive branch,<sup>332</sup> possess inherent

324. *Id.* at 1209. One would expect such a difference to undercut any arguments for the need for a robust nondelegation doctrine. The fact of ongoing legislative control should make it less necessary for the legislature to articulate more specific parameters for the exercise of administrative power at the outset.

325. *See supra* notes 115 and 288.

326. *See supra* Section III.F

327. Kersh, Mettler, Reeher & Stonecash, *supra* note 96, at 32–34.

328. Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1386 (2008).

329. Schapiro, *supra* note 73, at 102.

330. Precisely how, and how well, this works is a complex pair of questions. *See* Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537 (2019).

331. *See, e.g.*, Robert D. Sloane, *The Scope of Executive Power in the Twenty-First Century: An Introduction*, 88 B.U. L. REV. 341 (2008) (providing an overview of debates over the scope and contours of executive power in the federal government); Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480 (2006) (undertaking a comparative analysis of executive power).

332. The court has expressly held that, notwithstanding the constitutional status of the position, “the attorney general’s powers are prescribed only by statutory law.” *State v. City of Oak Creek*, 2000 WI 9, ¶ 24, 232 Wis. 2d 612, 605 N.W.2D 526. That does not necessarily imply the absence of

powers to act, such as in an emergency, is unfamiliar enough that arguments to that effect played no significant role in recent litigation over the government's response to the COVID-19 pandemic.<sup>333</sup> At the federal level, meanwhile, it is common to encounter depictions of the President's authority as nearly unconstrained.<sup>334</sup>

### iii. Differences in the Judicial Branch

Just as the state legislature possesses the comparatively (relative to its federal counterpart) unbounded police power, so, too, does the state judiciary

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constitutional limits. Whether one approaches the question from an originalist perspective or otherwise, it seems reasonable to conclude that the framers assumed a baseline level of good faith on the legislature's part such that, for example, an effort to completely strip the office of its powers could not stand.

333. See *Fabick v. Evers*, 2021 WI 28, 396 Wis. 2d 231, 956 N.W.2d 856 (2021) (considering a challenge to the governor's continued declaration of public health emergencies); *James v. Heinrich*, 2021 WI 58, 397 Wis. 2d 517, 960 N.W.2d 350 (2021) (considering a challenge to a Dane County health order closing schools). This lack of recognition of inherent executive power is generally characteristic of state constitutions. See WILLIAMS, *supra* note 76, at 304 ("Generally speaking, the governor must be able to point to either constitutionally granted or statutorily granted power in order to exercise legal authority."). Meanwhile the court has had little difficulty concluding that the judiciary enjoys a broad array of inherent and implied powers. See, e.g., *In re Janitor of the Supreme Court*, 35 Wis. 410, 419 (1874) ("It is a power inherent in every court of record, and especially courts of last resort, to appoint such assistants; and the court itself is to judge of the necessity."); *In re Courtroom*, 148 Wis. 109, 121, 134 N.W. 490, 495 (1912) ("Circuit courts have the incidental power necessary to preserve the full and free exercise of their judicial functions, and to that end may, in appropriate cases, make ex parte orders without formally instituting an action to secure the desired relief."); *State v. Cannon*, 199 Wis. 401, 402, 226 N.W. 385, 386 (1929) ("The courts established by the Constitution have the powers which are incidental to or which inhere in judicial bodies, unless those powers are expressly limited by the Constitution. But the Constitution makes no attempt to catalogue the powers granted."); *In re Kading*, 70 Wis. 508, 518, 235 N.W.2d 409, 413 (1975) ("The function of the judiciary is the administration of justice, and this court, as the supreme court within a statewide system of courts, has an inherent power to adopt those statewide measures which are absolutely essential to the due administration of justice in the state."); *State v. Schwind*, 2019 WI 48, ¶ 14, 386 Wis. 2d 526, 926 N.W.2d 742, 747 (2019) ("Inherent authority of the court derives from the doctrine of separation of powers."). There are, however, limits. See, e.g., *State v. Braunsdorf*, 98 Wis.2d 569, 586, 297 N.W.2d 808, 815–16 (1980) (declining to recognize an inherent power to dismiss a criminal case with prejudice based on history and a concern that the power would be "too great an intrusion into the realm of prosecutorial discretion"); *Grabarchik v. State*, 102 Wis.2d 461, 466, 307 N.W.2d 170, 174 (1981) (concluding, based in part on separation of powers principles, that "[t]he fashioning of a criminal disposition is not an exercise of broad, inherent powers.").

334. See, e.g., ERIC POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 3–4 (2011) (contending that the primary constraints on presidential power are not legal but come from "politics and public opinion").

possess a broader range of power.<sup>335</sup> Federal courts have limited jurisdiction.<sup>336</sup> By contrast, in the first year of statehood, the Wisconsin Supreme Court described the state's circuit courts as vested by the state constitution "with greater powers than were probably ever before, in a free government, delegated to any one tribunal—the united powers of the English King's Bench, common pleas, exchequer, and chancery,"<sup>337</sup> a characterization repeatedly invoked by the court over subsequent decades.<sup>338</sup> The Wisconsin judiciary has general jurisdiction, and exercises that jurisdiction in ways that regularly depart from the classically adversarial proceedings to which the federal judiciary is limited by virtue of the federal Constitution's "cases and controversies" requirement. Problem-solving courts serve as a recent manifestation of this sort of departure from the traditional model of adjudication. Such contrasts with the federal judiciary are present at the appellate level as well, perhaps most notably in the state supreme court's supervisory power.

Some additional significant points of contrast:

- The judiciary is elected. This is a point that is obvious, and seemingly significant, but also almost always overlooked. The counter-majoritarian difficulty—which in federal

335. For an analysis of the ways in which state judicial power, in general, differs from the federal judicial power, see Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001).

336. For an express recognition of differences in the extent to which Congress and the state legislature can regulate the jurisdiction of the courts, see *John F. Jehlke Co. v. Hill*, 208 Wis. 650, 242 N.W. 576, 580 (1932).

337. *Putnam v. Sweet*, 2 Pin. 302 (1849).

338. See, e.g., *State ex rel. Attorney General v. Portage City Water Co.*, 107 Wis. 441, 447, 83 N.W. 697, 699 (1900); *Harrigan v. Gilchrist*, 121 Wis. 127, 227, 99 N.W. 909, 933 (1904).

We shall see that, standing where we will and looking where we may, judicial power is present to prevent and redress wrongs. We take a view to the very horizon of our mental perception within the scope of human capacity to violate obligations other than those of a purely moral nature, and the jurisdiction of the circuit courts, except as specifically restricted by statute within legislative power to do so or by the Constitution itself . . . is found to occupy the whole field with instrumentalities designed, and as well adapted as human wisdom has been capable of making them, to execute its function to completeness.

*Id.* For a similarly broad characterization of the reach of the judicial power even past the 1977 amendments to the constitution, see *In re Guardianship of Eberhardy*, 102 Wis. 539, 548–50, 307 N.W.2d 881, 885–86 (1981) (noting the "extremely broad" grant of jurisdiction to the courts, and that the constitution "does not permit the legislature to divest the constitutional grant of jurisdiction from the unified court system"). Dicta in a recent opinion overlooks this characterization of the Wisconsin constitution's vesting of the judicial power. *State v. Schwind*, 2019 WI 48, ¶ 13, 386 Wis. 2d 526, 926 N.W.2d 742 (2019) (suggesting that the constitution's use of the word "court" "was referring to the institution known as a court, together with the powers it was generally understood at common law to possess.").

constitutional law flows from the problem of having an unelected judiciary striking down the acts of the people's elected representatives<sup>339</sup>—simply doesn't exist in the same form. Indeed, there is a sense in which any given member of the state supreme court, having been elected by a majority of voters statewide, has a greater claim to democratic legitimacy than any subset of the state legislature.<sup>340</sup> To the extent, then, that the fact that justices on the U.S. Supreme Court are unelected plays a central role for arguments relating to judicial review, that factor is not present with respect to the Wisconsin judiciary.

- The U.S. Supreme Court has been generally reluctant to interpret any of the Constitution's rights as encompassing positive (the right *to* something) in addition to negative (the right to be free *from* something) entitlements.<sup>341</sup> In part this is a function of intuitions about institutional design and function—the implementation of positive rights requires ongoing management, while the adjudication of negative rights typically involves the sort of retrospective assessment of past conduct that is in courts' wheelhouse. But the state constitution includes grants of positive rights.<sup>342</sup> (Examples include the entitlement “to a certain remedy in the law for all injuries, or wrongs, which he may receive in his person, property, or character” in Art. I, sec. 9, and the crime victim's rights provisions in Art. I, sec. 9m.) The positive rights provisions in the Wisconsin constitution are not as extensive as those in other state constitutions, but they nonetheless might be taken to support the proposition that

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339. “The root difficulty is that judicial review is a counter-majoritarian force in our system.” ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

340. In at least one telling of the story this connection is not incidental:

The development of judicial review accompanied the move toward the election of judges. While many have contested and viewed judicial review at the national level as a usurpation of power by one insulated branch, in the context of state government—by contrast—many viewed the concept as an extension of popular rule. Judges, as elected officials, were to act as the people's guardians, overturning acts of legislative excess.

Kersh, Mettler, Reeher & Stonecash, *supra* note 96, at 25.

341. See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1132–35 (1999).

342. Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY L. REV. 189, 192 (2002) (noting the significance of positive rights provisions in state constitutions).

the judiciary must necessarily take on a different role, because otherwise those rights would go unenforced.<sup>343</sup> Even if the legislature or executive bear primary responsibility for the enforcement of positive rights, their existence alone would seem to have implications for the relationships among the branches.

- The state judiciary retains some common-law lawmaking authority.<sup>344</sup> Thus state courts have a reservoir of lawmaking authority that exists independently of their democratic base—because the common law has been created and shaped even by unelected courts—which is worth taking into account in determining how those courts ought to exercise their roles relative to the other branches in the adjudication of separation-of-powers disputes, including, perhaps, the task of statutory interpretation.<sup>345</sup>

343. Helen Hershkoff argues that “[t]he enforcement of positive rights . . . requires a state court to share explicitly in public governance, engaging in the principled dialogue that commentators traditionally associate with the common law resolution of social and economic issues.” Hershkoff, *supra* note 341, at 1138.

344. For an early opinion concerning the continued vitality of the common law in Wisconsin after the adoption of the state constitution, see *Coburn v. Harvey*, 18 Wis. 147 (1864). A decade later, in *Attorney General v. Chicago & N.W. Ry. Co.*, 35 Wis. 425 (1874), Chief Justice Ryan held forth at length about the appropriateness of extending the judicial power to reach the larger and different problems posed by industrialization. *Id.* at 530–32. And in *Metropolitan Casualty Ins. Co. v. Clark*, 145 Wis. 181, 183, 129 N.W. 1065, 1065–66 (1911), the court emphasized the contingent nature of the common law, quoting Francis Bacon: “As waters do take tincture and taste from the soil through which they run, so do laws vary according to the region where they are planted, though they proceed from the same fountains.” In *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962), the court rejected the argument that the constitution prohibits it from adopting or changing common-law principles:

Inherent in the common law is a dynamic principle which allows it to grow and to tailor itself to meet changing needs within the doctrine of stare decisis, which, if correctly understood, was not static and did not forever prevent the courts from reversing themselves or from applying principles of common law to new situations as the need arose.

*Id.* at 11. See also *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967) (expounding on the evolving nature of the common law); *Sorensen v. Jarvis*, 119 Wis. 2d 627, 631–32, 350 N.W.2d 108, 111 (1984) (expressly noting the evolutionary and adaptable nature of the common law). But see *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N.W. 209, 227 (1911) (observing, with respect to the common law, “No court in our time has had competency . . . to change or create or destroy in that field. Power in that regard was expressly reserved to the Legislature.”). The court has invoked a similar power to develop more concrete standards in the application of broad statutory language. *Balistreri v. State*, 83 Wis. 2d 440, 449, 265 N.W.2d 290, 294 (1978).

345. See Peters, *supra* note 311, at 1555 (“State courts have the opportunity to consider not only the entire body of statutory enactments but also the large reservoir of common law principles that continue to fall exclusively within the judicial domain.”); *Id.* at 1557 (“There is no readily discernible parallel in the federal courts to the capacity of state courts to craft a legal landscape that encompasses and harmonizes statutory and common law principles.”).

In this sense, as Oregon Supreme Court Justice Hans Linde noted, state courts “share directly in governance” in a way that federal courts do not.<sup>346</sup>

James Gardner takes the point in a slightly different direction, observing that “nothing in the United States Constitution requires a state to have a written constitution in the first place, and if a state lacked a written constitution the courts would presumably take an active role in creating an unwritten one, as they have in England.”<sup>347</sup>

### *C. Methodological Pluralism Versus Methodological Inconsistency*

As suggested in Part I, the early history of the Wisconsin Supreme Court was one in which the justices engaged in methodological pluralism. The court’s early decades of work evidence no concern with methodological purity, no belief that the framers of the Wisconsin constitution were concerned, above all, with fealty to some set of abstractions that might have been dominant in the intellectual air sixty years prior. It was not the job of a judge to build idealized castles in the sky against which to measure human institutions, but rather to exercise judgment to determine which analytical tools were appropriate to the task at hand, often if not always informed by an understanding that among the foremost hopes of the framers of any constitution is to create a government that works.

A shift occurred in the mid-1970s,<sup>348</sup> at which point the court began to invoke a variety of originalism as its preferred interpretive methodology. The following is a representative statement of its approach:

Constitutions should be construed so as to promote the objects for which they were framed and adopted. “The constitution means what its framers and the people approving of it have intended it to mean, and that intent is to be determined in the light of the circumstances in which they were placed at the time[.]” We therefore examine three primary sources in determining the meaning of a constitutional provision: the plain meaning, the constitutional debates and practices of the time, and the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption.<sup>349</sup>

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346. Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner’s Failed Discourse*, 24 RUTGERS L.J. 927, 952 (1993).

347. Gardner, *supra* note 317, at 1051.

348. See *supra* note 64 and accompanying text.

349. Dairyland Greyhound Park, Inc. v. Doyle, 2006 WI 107, ¶ 19, 295 Wis. 2d 1, 719 N.W.2d 408 (citations omitted).

But, as further outlined in Part I, the court did not consistently transport that approach into its consideration of issues under the Declaration of Rights or with respect to the separation of powers. And lately some of the justices have shown a taste for an approach that relies on history, but not the history of the Wisconsin constitution. Rather than focusing on 1848 or attempting to account for the changes worked by any intervening amendments, the opinions instead discuss Montesquieu, Locke, and the Federalist Papers without bothering to connect those sources to the thinking of the framers of the Wisconsin constitution, which of course took place more than a half-century later. They do so not recognizing that “when the framers referred to foreign writers such as Montesquieu, ‘they did so to embellish an argument, not to prove it. The argument itself was grounded on what had been learned at home. Theory played a role, but it was always circumscribed and tested by experience.’”<sup>350</sup> Instead, the underlying assumption seems to be that there is a “brooding omnipresence”<sup>351</sup> of American constitutional common law, such that powers can be defined and separated in but a single way. On this view, the state constitution’s invocations of the legislative, executive, and judicial powers were references to fixed, ideal conceptions of those powers, such that the proper interpretive approach is one that maintains (or returns to) the contours of those ideals. A further assumption seems to be that the framers meant for the powers to maintain a perpetually fixed form for their own sake rather than because the specified allocation served an instrumental purpose that was the true object of the arrangement. And yet, curiously, the justices engage in this sort of analysis while also invoking a very instrumentalist basis for the separation of powers, namely the avoidance of tyranny.<sup>352</sup>

One could, of course, simply regard these recent departures as a simple continuation of the pluralist tradition. The court’s utilization of its

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350. Gwyn, *supra* note 313, at 263 (quoting LOUIS FISHER, *PRESIDENT AND CONGRESS: POWER AND POLICY* 4–5 (1972)).

351. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

352. A more substantive criticism of this approach is that its focus on maintaining a rigid conception of the powers creates the possibility (perhaps better stated as the likelihood or certainty) that exogenous factors will lead to shifts in the balance of power even if the structure of government were to remain entirely unchanged. Stated somewhat differently, it seems inevitable that the 1848 government transported to 2021 would operate differently, and have a different balance of power, than it did in 1848. Changes in the nature of the world—a larger, denser, more globally connected population—lead to changes in the nature of the problems confronted by government, and that different set of demands will play to the strengths of the branches in different ways. There may, for example, simply be more situations in the modern world calling for the exercise of executive power, which in turn would shift the balance toward the executive even without a change in the formal structure of government. (Indeed, it is just that sort of thing that seems to have led to the formation of the administrative state.).

methodological frameworks has never been entirely consistent, and these opinions could simply be additional examples of exceptions. On that view the correct takeaway is that, despite the superficial methodological consensus within these domains,<sup>353</sup> the court has not, in fact, adopted a single, overarching vision of what the state constitution is or how it should be interpreted and applied. The *Busé* framework suggests a crude version of originalism, but the court's approach to rights with a federal analogue is fundamentally inconsistent with originalism. The court's separation of powers jurisprudence, with its sporadic invocations of originalism, stands somewhere in the middle.

None of this is necessarily bad. This sort of methodological pluralism has characterized the court's jurisprudence from the beginning.<sup>354</sup> That is unsurprising from a multimember court the composition of which changes over time. And while one fully committed to an originalist approach might argue otherwise, to adhere too rigidly to such an approach seems to elevate form over function, to imagine that constitutional framers were more interested in designing a conceptually perfect system than in designing a system that works. After all, past iterations of the Wisconsin Supreme Court recognized as much: "The framers of the constitution were practical men, and were aiming at practical and useful results."<sup>355</sup>

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353. And that consensus may be more apparent than real. In other words, thorough consideration of the opinions within these methodological categories could easily reveal a pattern of results that suggests the decisions are driven by something other than the purported framework, or that the court does not even consistently apply the framework. For example, the court in *Kalal* adopted an analytical framework for statutory interpretation that it purports to apply consistently to all cases. But there are exceptions. In *Wisconsin Legislature v. Evers*, for example, Justice Rebecca Dallet called out the court's majority for not applying *Kalal* when interpreting the term "security of persons." No. 2020AP608-OA (Wis. Apr. 6, 2020) (per curiam), [https://www.wicourts.gov/news/docs/2020AP608\\_2.pdf](https://www.wicourts.gov/news/docs/2020AP608_2.pdf) [<https://perma.cc/TV7Y-JWR4>]. And the court has developed an entirely distinct framework for interpreting criminal statutes in situations where the question is whether a statute creates a strict liability crime. *State v. Luedtke*, 2015 WI 42, ¶¶ 64–78, 362 Wis. 2d 1, 37, 863 N.W.2d 592, 610. It is possible to square the two approaches—that is, to conclude that *Luedtke* assumes that any statute lacking an express mens rea element is inherently ambiguous, such that resort to its additional set of factors is appropriate—but the *Luedtke* opinion makes no effort to do so, and indeed gives no indication that the court was even cognizant of the tension, despite the fact that both *Luedtke* and *Kalal* were before the court at the same time.

354. It has likewise characterized constitutional adjudication at the federal level. See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1984) (presenting a typology of constitutional arguments).

355. *State v. West Wis. Ry. Co.*, 34 Wis. 197, 212 (1874). See also *Minneapolis, St. P. & S.S.M. Ry. Co. v. R.R. Comm'n of Wis.*, 136 Wis. 146, 160, 116 N.W. 905, 910 (1908) (cautioning against an interpretive approach that would "presuppose that by the adoption of the Constitution the state so manacled itself as to be helpless to exercise old and well-known governmental powers or to apply such powers to new problems or new conditions").



Pluralism slips through, as well, in the court's selective pattern of deference. Of late, it has shown itself to be eager to defer to the legislature's assessments of the constitutionality of its legislation—though much less consistently in separation of powers cases—but not to the governor's. It has limited its own ability to consider legislative history in the interpretation of statutes, but at least some of its justices eagerly consult the political philosophers understood to have influenced the thinking of the framers of the constitution that served as one of the models for the Wisconsin constitution.

The problem is not the pluralism. The problem is that by purporting to commit to methodological frameworks but then inconsistently invoking them, and by appearing to invoke deference only when convenient, the court feeds the perception that the justices' motivations are extra-legal.

*D. The Complexity of Separation of Powers and the Appropriateness of Judicial Humility*

Viewed relative to either the federal system or its fellow states, Wisconsin has historically had a distinct separation of powers jurisprudence. What it does not so clearly have is a coherent separation of powers jurisprudence. Separation of powers questions are complicated, and the potential for unintended consequences is large. Slight adjustments to the power of one branch of government, or to the relative distribution of power between two branches of government,<sup>356</sup> can have implications that ripple through the system. The resolution of any given case will require drawing on principles that have implications not only for future cases within the narrow doctrinal bounds presented, but also for more broadly analogous cases and doctrines elsewhere within the larger universe of constitutional law (and adjacent doctrinal areas). Even a state constitution that has been amended relatively few times will reflect

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356. Consider, for example, *Kalal* and the question of statutory interpretation. The approach that a court takes to giving effect to statutory language unquestionably has implications for the balance of power between the judicial and legislative branches. As I have suggested above, *Kalal* has implications for the nature of the legislative power (in at least some respects it can be exercised only through the bicameral passage of a collection of words) and the judicial power (cutting judges off from considering otherwise relevant and probative information). One could imagine a very different approach. For example, instead of *Kalal*'s modified textualism a court—particularly one on which the justices have been elected by statewide vote—might choose to treat statutes as more akin to judicial precedent, at least in the sense that divining their underlying purpose would be thought more important than a technical parsing of their language. Such a court might similarly elect to continue to aggressively employ the maxim that “statutes in derogation of the common law are to be strictly construed.” *Kalal*, 2004 WI 58, ¶¶ 45–50. *Kalal* certainly recognizes in a general way that it concerns the separation of powers, but the fact that the court did not invoke its traditional core/shared powers framework suggests that, for reasons that remain unstated, it did not identify the case as presenting a “separation of powers” issue. *Id.*

conflicting perspectives, making it difficult at best to formulate a single coherent theory or set of theories by which to undertake the task of interpretation.<sup>357</sup> Wisconsin's constitution has seen, at the very least, the addition of the line-item veto and the restructuring of the judiciary in addition to all the social changes that have led to the development and growth of administrative agencies.

For these reasons, separation-of-powers cases provide an especially vivid demonstration of the risks inherent in case-by-case adjudication. Any given case involves at most a handful of discrete issues. For various reasons—limited resources, lack of broader familiarity with state constitutional law, the incentives created by their desire to win this case rather than to shape the development of the law more generally and thus to forgo any effort to fit their dispute into anything broader than the doctrinal category in which it arises, or in the case of some types of litigants to use this case to increase the likelihood of achieving some larger goal with respect to the development of the law—the arguments offered by the parties are likely to be focused more on trees than forest. Judges, as former lawyers, may have become habituated to this way of approaching cases, and are otherwise subject to all the psychological tugs that the “this-ness” of any given case will produce.<sup>358</sup> A given situation will implicate only a portion of the legal landscape and may well not be representative of the larger class of cases that fall within that area. Moreover, the court, as an institution, does not remain static over time, but instead speaks through different voices that state the positions of majorities that are not constant from one case to the next on behalf of a court the nature of which changes along with its personnel. To expect perfect coherence and consistency across cases and across time would therefore be to expect too much. The dynamic counsels in favor of humility and tentativeness. A given majority cannot be certain that it has considered all the information necessary to avoid tension or conflict with related but distinct bodies of doctrine.<sup>359</sup>

The bulk of the court's opinions throughout its history, even those relating to the relatively high-profile conflicts of the sort in which separation of powers questions tend to arise, have been unremarkable and unmemorable. Past cases are invoked in mostly conclusory ways, and the opinions provide no evidence that the court has attempted to tease out the underlying ideas or contemplate the ways they do (or do not) coalesce into more general principles that apply across doctrinal frameworks. This approach is, in an important sense, admirable. The

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357. See, e.g., G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 194 (1998).

358. Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884 (2006).

359. For a general recognition of this dynamic, see *In re Guardianship of Eberhardy*, 307 N.W.2d 881, 895, 899 (1981).

justices were acting as common-law judges, eschewing the temptation (if that is even how they experienced it) to rethink things anew in each case. They weren't trying to attract the attention of someone who might appoint them to a federal court, they weren't trying to shift the law in dramatic ways, they weren't playing to a crowd made up of a certain subset of the bar.<sup>360</sup> Or perhaps what the bar respected was different—perhaps what the bar generally respects today is still different, but the dynamics have changed due to greater ideological fragmentation, such that it is the views of specific subsets of the bar that will matter most—and the values were on modesty and practicality. This shallow reliance on the past may not have been ideal, in roughly the same way that rules can never provide the justice that would result from a perfectly administered set of standards, but when coupled with a disinclination toward radical change it greatly reduces the likelihood that any given decision will have wide-ranging unintended consequences.

That modesty is frequently absent from the court's recent opinions. The justices instead routinely sling epithets at one another. Consider, for a recent example, the dissenting opinions in *Johnson v. Wisconsin Elections Commission*,<sup>361</sup> in which the court selected from among an array of election districting maps proposed to account for population changes following the 2020 census. Redistricting presents a complex problem, and the majority, via an analysis that is clearly both defensible and contestable, selected the maps proposed by Governor Evers. Chief Justice Ziegler accused the majority of "an exercise of judicial activism,"<sup>362</sup> and of an analysis "imbued with personal

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360. Many of the court's recent opinions put one in mind of Lawrence Baum and Neal Devins's analysis in NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* (2019). Joseph Fishkin provocatively articulates the idea in discussing the United States Supreme Court:

The Republican Justices no longer spend their time with a community of other lawyers and judges of all political stripes. Instead they live in a relatively tight discursive community of Fed Soc and Fed Soc-adjacent conservative Republicans. In this narrower world, if you are a Supreme Court Justice, deciding a towering case that will define a substantial part of your personal legacy, you probably do not want to be on the side of moderation and compromise—even faux moderation and compromise. There is no legacy in that. You want to be with Thomas, and soak up the applause of your comrades-in-arms, even as most of the American public finds your performance appalling, partisan, and lawless. When you no longer spend your time talking with the general legal elite, but instead spend most of your time within a special, even-more-elite Fed Soc cadre, you probably want to be on the right side of the big stories your friends tell.

Joseph Fishkin, *The Company They Keep*, BALKINIZATION. (Dec. 2, 2021), <https://balkin.blogspot.com/2021/12/the-company-they-keep.html> [<https://perma.cc/5NDR-FVSD>].

361. 2022 WI 14.

362. *Id.* ¶ 66 (Ziegler, C.J., dissenting).

preference.”<sup>363</sup> She characterized the majority as “the other side”<sup>364</sup> and contended that it “picks sides and litigates for the Governor.”<sup>365</sup> Justice Rebecca Bradley similarly accused the majority of “[e]levating their subjective policy preferences over the law,”<sup>366</sup> and engaging in “(blatantly political) policymaking”<sup>367</sup> that amounts to “a startling departure from the rule of law.”<sup>368</sup> In sum, she contends, “the majority abandons the law, perverts the least-change approach into a license for policymaking, and subordinates constitutional commands, statutory restrictions, and precedent to the majority’s preferences.”<sup>369</sup>

It may well be, as I suggested at the outset, that the court’s decisions are a product of the justices’ partisan leanings, whether consciously or, more likely, otherwise. Even so, this sort of language is tiresome, unbecoming, and subversive of the rule of law it purports to serve. As Professor Carolyn Shapiro has observed, “there is a difference between considering judicial decisions wrong and considering them illegitimate.”<sup>370</sup> Charges of illegitimacy may play well with certain crowds. But they are ultimately counter-productive and feed the perception that the court—in its entirety—is engaged in little more than politics dressed up as something else.

## V. CONCLUSION

I advance here no grand claims about the separation of powers, under Wisconsin law or more generally. Indeed, my reading and analysis have convinced me most of all of the dangers of doing so. The field is vast, and the issues are complex and contingent. The government created by the state constitution is a unique and complex entity in which forces intersect and interact in a wide range of ways. Any change to such a system is likely to have unintended consequences. Law professors, like judges, are not well-equipped to predict the effects of major changes or to anticipate those consequences, and this one, at least, is not inclined to make bold claims about the nature of law that would have the effect of radically realigning a constitutional framework.

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363. *Id.* ¶ 67.

364. *Id.* ¶ 153.

365. *Id.* ¶ 174.

366. *Id.* ¶ 209 (Bradley, J., dissenting).

367. *Id.*

368. *Id.* ¶ 210.

369. *Id.* ¶ 260.

370. Carolyn Shapiro, Remarks at the Law Day Lunch Held by the McLean County (Ill.) Bar Association 7 (May 2, 2018) (transcript on file with author). *See also* Carolyn Shapiro, *What Members of Congress Say About the Supreme Court and Why It Matters*, 93 CHI.-KENT L. REV. 453, 458–59 (2018).

I hope instead to have accomplished three things. First, to have highlighted some threads running through the doctrine, to have identified some tensions and problem areas, and to have flagged some implications and open questions. Second, to have offered appropriate critique of the court's recent decisions. While the justices have been sensitive to critique,<sup>371</sup> they have, as discussed in the Introduction, been unable to avoid it. If my analysis is correct, their opinions have not aided their cause. And finally, to have demonstrated, as a result, the virtues of judicial humility.

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371. See *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 57, 376 Wis. 2d 147, 897 N.W.2d 384 (cautioning “that reckless criticism of the courts risks undermining their role as a check on the legislative and executive branches”); Patience Drake Roggensack, *Hallows Lecture: Tough Talk and the Institutional Legitimacy of our Courts*, MARQ. LAW., Fall 2017, <https://law.marquette.edu/assets/marquette-lawyers/pdf/marquette-lawyer/2017-fall/2017-fall-p45.pdf> [<https://perma.cc/V683-3SDZ>].