INSTITUTE FOR REFORMING GOVERNMENT

POTENTIAL LANDMARK DECISIONS OF A NEW SUPREME COURT OF WISCONSIN

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The Supreme Court of Wisconsin will soon have a new member: former Justice Daniel Kelly or current Milwaukee County Circuit Court Judge Janet Protasiewicz. Both are competing for a seat to be vacated by Justice Patience Roggensack, a 20-year veteran of the Court.

Because Kelly previously served on SCOW for four years himself and is a judicial conservative running to replace a judicial conservative, Wisconsinites have a relatively good idea of the types of decisions SCOW might be likely to issue if he rejoins it. Kelly is a textualist and originalist who contributed to or authored many of the Court's significant precedents from last decade.

Less well known is Protasiewicz. She would be the fourth judicial liberal on the seven-justice Court, shifting the balance of power to a new jurisprudential majority that also includes Justices Ann Walsh Bradley, Rebecca Frank Dallet, and Jill Karofsky.

Although there has been substantial general discussion of the hot-button issues that may come before the Court if Protasiewicz wins, such as abortion and redistricting, there has not been as much discussion of the means by which the Court would implement some of the drastic changes expected and the cases that would be at stake.

This memo briefly addresses this question.

1. ABORTION

Before the U.S. Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*,[1] abortion was a federal constitutional right and abortion regulation was tightly controlled by constitutional principles set forth in cases like *Roe v. Wade*[2] and *Planned Parenthood v. Casey*.[3] *Dobbs*, however, overruled these cases, returning the question of whether to permit abortion to the individual States.

In Wisconsin, this allowed a pre-existing statutory ban on abortion to retake effect.[4] Wisconsin Attorney General Josh Kaul has sued to invalidate this law, arguing that subsequently-enacted statutes superseded the ban and that the ban is unenforceable due to years of disuse.[5]

SCOW may therefore have the opportunity to toss out Wisconsin's abortion ban via a statutory ruling. Such a decision could eventually be overturned by Wisconsin's political branches. But there is also the prospect that the newly-constituted Court could discover a right to abortion in the Wisconsin Constitution. For instance, the U.S. Supreme Court had found protection of the right to abortion in the Fourteenth Amendment's Due Process Clause,[6] which bars States from "depriv[ing] any person of life, liberty, or property, without due process of law."[7] The Supreme Court of Wisconsin has interpreted the Wisconsin Constitution as providing similar due process guarantees.[8] Unlike a statutory ruling, a decision recognizing a state constitutional right to abortion could prevent the Legislature and Governor from enacting laws prohibiting or even significantly regulating it.

2. ACT 10

Former Governor Scott Walker's signature policy accomplishment was probably the enactment of 2011 Wisconsin Act 10, a law reforming collective

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[1] 597 U.S. ___, 142 S. Ct. 2228 (2022).
[2] 410 U.S. 113 (1973).
[3] 505 U.S. 833 (1992).
[4] *See* Wis. Stat. § 940.04.
[5] *See Kaul v. Urmanski*, No. 2022cv1594 (Dane County Circuit Court 2022).
[6] *See Casey*, 505 U.S. at 846.
[7] U.S. Const. amend. XIV, § 1.
[8] *See, e.g.*, *In re Mental Commitment of Christopher S.*, 2016 WI 1, ¶35, 366 Wis. 2d 1, 878 N.W.2d 109.

bargaining by public sector unions and overhauling union pension and healthcare benefits. Wisconsinites likely remember the massive protests and failed gubernatorial recall that accompanied the law, but may not recall all of the litigation. Of note, the Supreme Court of Wisconsin upheld Act 10 against constitutional challenge in 2014 in *Madison Teachers Inc. v. Walker*.[9] The plaintiffs in that case asserted a bevy of arguments against Act 10, asking the Court to strike it down on the grounds that it violated associational rights, equal protection rights, and the Wisconsin Constitution's Home Rule Amendment and Contract Clause.[10]

Although *Madison Teachers* was a 5-2 decision, only two of the justices on the Court at that time will still be on the Court when it starts its 2023 term. A new Court could consider whether to overrule the decision, returning a substantial amount of authority to public sector unions.

3. CRIMINAL DEFENSE RIGHTS

Some Wisconsin Supreme Court justices have indicated a view that the Court should interpret state constitutional provisions involving criminal defense rights more broadly than similarly-worded provisions in the U.S. Constitution on grounds other than the actual text of the constitutional provisions.

For example, in *State v. Halverson*, Justice Dallet, joined by Justices Ann Walsh Bradley and Karofsky, wrote approvingly of a controversial 2005 SCOW opinion that had expansively interpreted the Wisconsin Constitution's self-incrimination clause to require suppression of physical evidence obtained through intentional *Miranda* violations.[11] That earlier opinion rested its analysis not on the text of Wisconsin's self-incrimination clause, but instead on two "policy" goals, namely "deterrence" of "police misconduct" and "the preservation of judicial integrity."[12] A fourth vote would allow these justices to issue future majority opinions containing this same kind of constitutional analysis.

[9] 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337.
[10] *Id.* at ¶35.
[11] *State v. Halverson*, 2021 WI 7, ¶¶50-60, 395 Wis. 2d 385, 953 N.W.2d 847 (Dallet, J., concurring) (citing *Miranda v. Arizona*, 384 U.S. 436 (1966) and *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899).
[12] *Knapp*, 285 Wis. 2d 86, ¶¶74-75, 79.

More broadly, criminal defendants may find a new SCOW more receptive to their arguments in general. For instance, one study found that through the 2020-21 term, the Court's judicial liberals were far more likely than their conservative colleagues to favor defenses featuring the Fourth Amendment's protection against unreasonable searches and seizures.[13]

4. DEFERENCE TO AGENCY LEGAL INTERPRETATIONS

Former Justice Daniel Kelly's most significant achievement on the Supreme Court of Wisconsin was perhaps his authorship of the majority/lead opinion in *Tetra Tech v. Wisconsin Department of Revenue*, which "end[ed] [the Court's] practice of deferring to administrative agencies' conclusions of law."[14] For decades, the Supreme Court of Wisconsin had treated agency interpretations of statutes as sometimes binding on the Court itself if certain conditions were met.[15] This provided agencies with a significant advantage in litigation against private parties.

Although *Tetra Tech* was a 5-2 ruling on the question of whether to abolish the Court's deference doctrine, no majority existed for the rationale, making future reexamination more palatable.[16] Further, three members of that majority will have left the Court by the 2023-24 term if Justice Kelly is not elected. The Supreme Court could easily decide in a future case to restore to agencies the ability to control judicial decision-making.[17]

5. ELECTION INTEGRITY

Wisconsin has seen substantial election litigation in recent years as interested parties seek greater voting access or safeguards against fraud and other illegal conduct. Much of the litigation has turned on statutory interpretation questions involving Wisconsin's election laws. In *Teigen v. Wisconsin Elections Commission*, for instance, the Supreme Court of Wisconsin concluded that

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[13] *See* Alan Ball, *An Update on Fourth-Amendment Cases: 2019-20 and 2020-21*, SCOWstats (2022), https://scowstats.com/2022/04/26/an-update-on-fourth-amendment-cases-2019-20-and-2020-21/.
[14] 2018 WI 75, ¶3, 382 Wis. 2d 496, 914 N.W.2d 21.
[15] *See, e.g.*, *id.* at ¶¶14, 18-33.
[16] *Id.* at ¶3 n.3.
[17] The Court would need to grapple with statutory language prohibiting or disfavoring deference on questions of law. *See, e.g.*, Wis. Stat. § 227.10(2g). However the Court, itself, will determine the resolution of separation-of-powers questions such provisions could present.

ballot drop boxes are illegal under Wisconsin law and that an absentee ballot must be returned in person by the voter or by mail.[18] But the decision was 4-3, with Justice Roggensack in the majority, so the decision is vulnerable to being overruled.

The Court could also go back even further, to the Walker era, and consider its previous rulings upholding Wisconsin's voter ID law. Such a move would carry some symbolism, as Justice Roggensack authored the majority opinion in each one.[19]

And that's just the past. The Court is also likely to see a number of additional cases on election rules in coming years, including cases on absentee ballot curing and alternate absentee voting sites.

6. PARTIAL VETO

Wisconsin's Governor has long had a powerful veto pen, to the point where Wisconsinites have seen vetoes of individual paragraphs, sentences, words, and even letters in appropriations bills. Although constitutional amendments have prohibited some of the most aggressive uses of the pen,[20] the partial veto power remained robust when Governor Tony Evers took office.

Then, in *Bartlett v. Evers*, the Supreme Court of Wisconsin invalidated three of Governor Evers' vetoes, including a notable example in which he creatively struck through words to transform a program for purchasing energy efficient school buses into one requiring the installation of electric vehicle charging stations.[21] Supporters of the decision saw *Bartlett* as a necessary restoration of the separation of governmental powers in Wisconsin. But, as in *Tetra Tech*, there was no majority for any particular rationale justifying the result, and Justices Ann Walsh Bradley and Rebecca Dallet would have upheld the vetoes. Thus, the Court could be poised to reject *Bartlett* and allow for continued expansion of the veto power in Governor Evers' second term.

[18] 2022 WI 64, ¶4, 403 Wis. 2d 607, 976 N.W.2d 519.
[19] *League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker*, 2014 WI 97, 357 Wis. 2d 360, 851 N.W.2d 302; *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, 357 Wis. 2d 469, 851 N.W.2d 262.
[20] *See* Wis. Const. art V, § 10(1)(c).
[21] 2020 WI 68, ¶¶13-16, 393 Wis. 2d 172, 945 N.W.2d 685 (Roggensack, C.J., concurring in part and dissenting in part).

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7. PUBLIC HEALTH EMERGENCIES

Without a doubt, the most aggressive uses of governmental authority in Wisconsin during the last several years occurred in the context of measures aimed at combatting COVID-19. Schools and businesses were closed; Wisconsinites were at times confined to their homes; and various health and hygiene policies were mandated.

This resulted in a series of Supreme Court of Wisconsin decisions limiting the extent of governmental power during public health emergencies. In *James v. Heinrich*[22] the Court concluded that local health officers lacked statutory authority to close schools; in *Wisconsin Legislature v. Palm*[23] the Court invalidated the "Safer at Home" Order issued by the Secretary-designee of the Department of Health Services directing Wisconsinites to stay in their homes and closing non-essential businesses; and in *Fabick v. Evers*[24] the Court explained that Governor Evers could not unilaterally declare consecutive states of emergency for the same occurrence.

Every single one of these cases was narrowly decided 4-3. A new Court could revisit some or all of these issues and give the Executive Branch and local government officials the significant power that they had once claimed.

8. REDISTRICTING

Following the U.S. Supreme Court's 2019 ruling in *Rucho v. Common Cause*[25] that federal courts would not hear claims that district maps constitute partisan gerrymanders, attention shifted to state constitutions. The left now hoped to convince state courts faced with the task of redrawing maps that they were required to compensate for Democrats' disadvantageous concentration around cities.

But last year the Supreme Court of Wisconsin, in a landmark 4-3 decision entitled *Johnson v. Wisconsin Elections Commission*, not only announced that

[22] 2021 WI 58, ¶¶1-3, 397 Wis. 2d 517, 960 N.W.2d 350.
[23] 2020 WI 42, ¶¶1-4, 391 Wis. 2d 497, 942 N.W.2d 900.
[24] 2021 WI 28, ¶¶1-4, 396 Wis. 2d 231, 956 N.W.2d 856.
[25] 139 S. Ct. 2484 (2019).

it would likewise refuse to consider the partisan composition of maps, but also that it would adopt a "least-change" approach to updating district lines, making the fewest modifications to existing maps necessary to account for changes in population.[26] This modest conception of the judiciary's role in redistricting disputes shattered the hopes of Democrats eager to finally junk the set of election maps signed into law by Governor Walker a decade ago—until now.

Judge Protasiewicz has not been shy about criticizing the current set of maps.[27] Together with the three justices who dissented in *Johnson*, she could chart out a more expansive role for the judiciary in redistricting disputes and adopt new maps friendlier to liberals.

9. RELIGIOUS LIBERTY

Many are not aware that the Wisconsin Constitution provides much stronger religious liberty protections than obtain at the federal level. This stems in part from a 1996 case in which the Supreme Court of Wisconsin unanimously rejected the weak federal constitutional test used by the U.S. Supreme Court in assessing such claims.[28]

But as the culture has shifted, religious liberty is not as popular as it once was. A new Court could decide to reexamine, and erode, conscience protections under the Wisconsin Constitution. The effects of such a ruling could reverberate through every aspect of public life in Wisconsin.

10. RIGHT TO WORK

Another key Walker reform potentially at stake is the 2015 "right to work" law that bans businesses from mandating union membership or the payment of union dues or fees as a condition of employment. The law was successfully challenged in circuit court as an unconstitutional taking of property, but then

[26] 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469.
[27] *See, e.g.*, Zac Schultz, *Janet Protasiewicz, Daniel Kelly on Wisconsin redistricting*, PBS Wisconsin (Mar. 9, 2023), https://pbswisconsin.org/news-item/janet-protasiewicz-daniel-kelly-on-wisconsin-redistricting/.
[28] *State v. Miller*, 202 Wis. 2d 56, 68-69, 549 N.W.2d 235 (1996).

the ruling was reversed on appeal in 2017.[29] The case never went to the Supreme Court of Wisconsin, which at the time had a five-justice conservative majority. With a liberal majority on the Court, unions could decide to take another crack at invalidating the law.

11. SCHOOL CHOICE

School choice programs have been a fixture of Wisconsin's educational landscape since 1990. But this too required surviving multiple legal challenges at Wisconsin's high court in the 1990s.[30] The hotly-contested school choice cases divided the Court on multiple constitutional questions including establishment clause concerns and concerns relating to state constitutional provisions governing education, demonstrating the potential viability of a renewed anti-choice litigation campaign.

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These are by no means the only significant issues that could come before the Supreme Court of Wisconsin over the next few years. Free speech, the right to keep and bear arms, agency regulatory authority, and more are all potential subjects of review. The upshot is that the result of the upcoming Supreme Court election could produce a seismic shift in Wisconsin case law, with the legal framework of individual rights and governmental powers as we know it changing dramatically.

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[29] *International Association of Machinists District 10 and its Local Lodge 1061 v. State*, 2017 WI App 66, 378 Wis. 2d 243, 903 NW.2d 141.
[30] *See Davis v. Grover*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992); *Jackson v. Benson*, 218 Wis. 2d 835, 578 NW.2d 602 (1998).