No. 2024AP002429

IN THE WISCONSIN COURT OF APPEALS
DISTRICT II

ABBOTSFORD EDUCATION ASSOCIATION, AFSCME, LOCAL 47, AFSCME, LOCAL 1215, BEN GRUBER, BEAVER DAM EDUCATION ASSOCIATION, MATTHEW ZIEBARTH, SEIU WISCONSIN, TEACHING ASSISTANTS' ASSOCIATION, LOCAL 3220, AFT, AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 695,
Plaintiffs-Respondents,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, JAMES J. DALEY, DEPARTMENT OF ADMINISTRATION, KATHY BLUMENFELD, DIVISION OF PERSONNEL MANAGEMENT, AND JEN FLOGEL,
Defendants-Co-Appellants,

WISCONSIN STATE LEGISLATURE,
Intervenor-Defendant-Appellant,

KRISTI KOSCHKEE,
Intervenor-Appellant.

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE

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INTEREST OF AMICUS CURIAE

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute works to restrain governmental overreach at all levels of government. In fulfillment of that purpose, The Buckeye Institute files lawsuits and submits amicus briefs. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

The Buckeye Institute is dedicated to protecting individual liberties, and especially those liberties guaranteed by the Constitution of the United States, against government interference. The Buckeye Institute is a leading advocate of sound fiscal policy at the state and federal levels and supports legislative efforts to impose fiscal discipline

ARGUMENT

According to then Governor Walker, Act 10 was passed as a fiscal solution to "balance a $3.6 billion budget shortfall," the alternative to which would have been "laying off 12,000 state and local public employees over the next two years … ." Green Bay Press Gazette, *Wisconsin Gov. Scott Walker says National Guard ready for any unrest over anti-union bill*, Wisconsin Situation (May 22, 2011).[1] "By the best estimate, the Act 10 reforms saved Wisconsin taxpayers between $18 billion and $31 billion since 2012 … ." *Act 10 becomes a front-burner issue*

[1] https://wisconsinsituation.wordpress.com/2011/05/22/wisconsin-gov-scott-walker-says-national-guard-ready-for-any-unrest-over-anti-union-bill/.

— *along with billions in savings, lower costs to local governments, and better pay for excellent teachers*, Badger Institute (Dec. 3, 2024).[2]

I. The state legislature must be afforded deference to set state fiscal policy.

Both the U.S. and Wisconsin Constitutions delegate fiscal policy—the power to raise and spend money—expressly and exclusively to the legislative branch. *See, e.g.,* U.S. Const. art. I, § 9, cl. 7; Wis. Const. art. VIII, § 2. As part of the system of checks and balances that he championed, Madison recognized that "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." The Federalist No. 51, at 294 (James Madison) (Fall River Press ed., 2021). By granting the power to set fiscal policy to the legislative branch, the Framers sought to empower the People's most direct representatives to exercise that control. Madison explained that "this power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." The Federalist No. 58, at 332 (James Madison) (Fall River Press ed., 2021). Indeed, Madison noted how the House of Commons had used the power of the purse to reduce "far as it seems to have wished, all the overgrown prerogatives of the other branches of the government." *Id.* The People of Wisconsin have done the same.

[2] https://www.badgerinstitute.org/act-10-labor-reforms-had-far-reaching-benefits-for-wisconsin-taxpayers-students/.

Moreover, consistent with the Framers' idea that the People should be free to decide the size and expense of their government, the U.S. Supreme Court has cautioned courts not to interfere with "a State's fiscal policies under the Equal Protection Clause." *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 40–41 (1973). This makes perfect sense because the legislature's job in making fiscal policy requires drawing lines. The Supreme Court has "long recognized" "[t]he broad discretion as to classification possessed by a legislature in the field of taxation." *Madden v. Kentucky*, 309 U.S. 83, 87 (1940).

Further, legislatures are free to address problems piecemeal. For example, in *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307 (1993), the Court explained that the perfect need not be the enemy of the good, and that reforms are not suspect because the solution they present—often limited to what is politically possible—might be incomplete:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.

Id. at 315–16 (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)). This, was the course that the Wisconsin legislature took in enacting Act 10. The legislature recognized a problem in the form of significant public costs and addressed that problem. It drew lines informed by what was politically possible. Simply put, absent some evidence of invidious discrimination in the classification, the People should be free to set the terms of employment for public employees.

II. Deference is even more appropriate when an issue has been subject to significant public debate.

The Circuit Court noted that Act 10 was a significant reform and that its reforms were controversial. But the Supreme Court has explained that it is precisely in those situations, "when the laws at issue concern matters of great social significance and moral substance," where a "legislature's judgment applies." *See Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 301 (2022) (applying rational-basis review to abortion law) (citing *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365–368 (2001) ("treatment of the disabled"); *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) ("assisted suicide"); *San Antonio Independent School Dist.*, 411 U.S. at 32–35, 55 ("financing public education")).

In enacting Act 10, the People of Wisconsin engaged in a robust debate over polarizing issues. This is the hurley-burley of democracy in action, and it is how the Framers intended people with differing views to decide issues. The Constitution does not command perfection from legislatures in making legislative classification, especially in regard to a fiscal policy; merely that the ends sought are legitimate and the means rationally related to those ends. As the U.S. Supreme Court has held and the Wisconsin Supreme Court has reiterated, "equal protection is not a license for courts to the wisdom, fairness or logic of legislative choices." *Beach Communications,* 508 U.S at 313; *Mayo v. Wisconsin Injured Patients and Families Comp. Fund*, 2018 WI 78, ¶ 41, 383 Wis. 2d 1, 914 N.W.2d 678.

Deference to the will of the legislature, whether traveling under the name of the rational basis test or the presumption of constitutionality, is the basis for the constitutional balance that the

Framers created. The Circuit Court's apparent tightening of that standard should be reversed in favor of the traditional strong presumption of constitutionality and deference to the People's representatives.[3]

III. The constitutional balance envisioned by the Framers includes judicial deference to legislative policy decisions.

A. The Roots of Legislative Deference

The Framers drafted a constitution based on balance. Drawing on the history of earlier republics and their own experience as subjects of a distant monarch, they were brutal realists regarding the challenges and temptations of self-government and the fallibility of the human beings who did the governing. They feared the lure of government by an elite and unaccountable oligarchy as well as the danger of demagoguery and an "elected despotism" posed by unconstrained democracy. At the same time, they saw the possibility of injecting enlightenment idealism into government and were aware that history had presented them the opportunity to create a "Novus Ordo Seclorum"—a new order of the ages—that could balance the shifting will of the people with the eternal and inalienable rights of man.

The rational basis test, or its precursors, has served to preserve that balance by allowing the People to govern themselves while still protecting against invidious discrimination and the trammeling of fundamental rights. The test recognizes that it is not the role of the

[3] Of course, the "rational-basis standard is not … toothless," "it does not allow the court "to substitute [its] personal notions of good public policy for those" of the legislature. *Schweiker v. Wilson,* 450 U.S. 221, 234 (1981) (citations omitted). However, if there was ever a situation where those teeth should be capped, it is here where the legislature is exercising its spending powers to regulate the state's fiscal situation.

courts to rule on the wisdom of the policies that the People have enacted through their representatives and that "the Constitution presumes that absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process … ." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

To begin, the U.S. Constitution emerged from the soil of the English system, where Parliament was sovereign. Commentators have noted that "Blackstone's faith in parliamentary omnipotence was grounded on the fact that Parliament had within itself an effective system of checks and balances. The presence of the three estates of the realm--Crown, Lords and Commons--in the same place meant that Parliament was largely incapable of oppressing any one." Matthew P. Harrington, *Judicial Review Before John Marshall*, 72 Geo. Wash. L. Rev. 51, 61 (2003) (citations omitted). Thus, even

> if the parliament will positively enact a thing to be done which is unreasonable, I know of no power . . . to control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government.

1 Sir William Blackstone, *Commentaries on the Laws of England* 91 (David S. Berkowitz & Samuel E. Thorne eds., Garland Publ'g, Inc. 1978).

The newly independent colonists, "imbued with notions of popular sovereignty," Harrington, *supra*, at 63, thus looked to their state legislatures to both legislate for the common good and protect the individual rights of citizens. It did not take long, however, for Lord Acton's maxim to assert itself in colonial government. Legislative

overreach by state legislatures and fears of a "democratic despotism" emerged during the Revolutionary War. *Id.* at 65–66. State courts began tentative steps towards judicial review, rejecting Blackstone's notions of a near-omnipotent legislature, and holding that acts which violated state constitutions were void.

In *Bayard v. Singleton*, 1 N.C. 5 (1787), the case often seen as the first sprout of judicial review in the confederation period, future U.S. Supreme Court Justice James Iredell sued on behalf of a client whose lands had been confiscated during the Revolution. The state claimed legislative authority to seize the property under North Carolina's Confiscation Act. Iredell argued that because the Confiscation Act conflicted with the North Carolina Constitution's right to a jury trial, it was void. Iredell won the case, and the North Carolina Supreme Court held that no legislative act could "repeal or alter the constitution." *Id.* at 3. Still, the judicial review of the 1780s began with a strong presumption of constitutionality. *See* Harrington, *supra*, at 84 ("Judicial review was limited to situations where the judges were confronted with a concededly unconstitutional act, which is to say an act which violated some obvious, long-held fundamental right."). Iredell himself argued that "[i]n all doubtful cases, to be sure, [an] Act ought to be supported," and "should be unconstitutional beyond dispute before it is pronounced such." *Id.* at 85.

B. Legislative Deference at the Founding

Iredell's view of a judicial system empowered to invalidate legislative acts that plainly violated a constitution took hold as a reasonable compromise between the popular sovereignty that the Framers saw as the only source of legitimate government and the

dangers of runaway democracy. Edward S. Corwin, *Judicial Review in Action*, 74 U. Pa. L. Rev. 639, 645 (1926) (noting that the Framers "were committed to popular sovereignty as the only source of legitimacy in a government instituted to secure the unalienable rights of life, liberty, and the pursuit of happiness, but they well understood from experience the inevitable excesses of democracy.").

While it has become a trite observation, the Framers established the legislative power in Article I. *See, e.g.,* U.S. Const. art. I, § 1. In Federalist 51, Madison noted the legislature's primacy, observing that "[i]n republican government, the legislative authority necessarily predominates. The Federalist No. 51, at 295 (James Madison) (Fall River Press ed., 2021). The Framers sought to treat this "inconveniency" not by empowering courts to weigh in on public policy, but by dividing the legislature into two bodies and rendering them "by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit." *Id*.

The notion that courts might wade into policy debates so alarmed the founding generation that the Framers hastened to calm any concerns that the new charter might allow the federal judiciary to invade the legislature's exclusive policy-making province. Madison wrote that "[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*." The Federalist No. 47, at 275 (James Madison) (Fall River Press ed., 2021). He assured ratifying conventions

that the legislative and judicial branches would always remain separate, with no overlapping powers between them:

> The judges can exercise no … legislative function, though they may be advised with by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort.

Id.

Hamilton further assured in Federalist 78 that the judicial branch was the "least dangerous branch" of government. Like Madison, Hamilton took pains to assure the ratifying conventions that, unlike the executive and the legislative branches, the judiciary "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment." The Federalist No. 78, at 440 (Alexander Hamilton) (Fall River Press ed., 2021).

Consistent with Montesquieu's notion of balance in government that informed the Framers, and his warning that "[c]onstant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go," Montesquieu, *The Spirit of the Laws* 172 (Batoche Books ed., 2001), Hamilton expressly condemned any type of judicial activism that would substitute the court's will—i.e. policy preferences—for the legislature's judgment:

> It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. … The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their

pleasure to that of the legislative body.

The Federalist No. 78, at 443 (Alexander Hamilton) (Fall River Press ed., 2021).

Madison made these same assurance in Federalist 47, explaining the proposed Constitution builds on the state constitutions promise "that the legislative department shall never exercise the … judicial powers … the judicial shall never exercise the legislative … powers … ," and that separation "corresponds precisely with the doctrine of Montesquieu, as it has been explained, and is not in a single point violated by the plan of the convention." The Federalist No. 47, at 276 (James Madison) (Fall River Press ed., 2021).

C. The Supreme Court's Balancing of Deference with Judicial Review

John Marshall served as Chief Justice for thirty-four years. But any case decided by the Marshall Court after it established judicial review in *Marbury v. Madison*, 5 U.S. 137 (1803), necessarily receives lower billing. Yet Marshall's legacy rests not just on the establishment of judicial review, but in its refinement. Marshall recognized the awesome power of judicial review and in later opinions expressed that it should be used sparingly. In *Fletcher v. Peck*, 10 U.S. 87, 128 (1810), Marshall echoed earlier jurists' respect for the legislative branch, cautioning that "[t]he question whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy" and that "the opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." Marshall was particularly concerned that any judicial inquiry into the legislature's motives for a particular act risked a

slippery slope into "judicial interference" with the legislative function:

> If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

Id. at 130

And in *Ogden v. Saunders*, 25 U.S. 213 (1827), the Marshall Court established the presumption of constitutionality and the "beyond a reasonable doubt" standard for invalidating a statute. In *Ogden*, Justice Washington wrote that "[i]t is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt." *Id.* at 270.

CONCLUSION

Protecting the fiscal integrity of "the Government as a whole, 'is a legitimate concern of the State.'" *Lyng v. Internatl. Union, United Auto., Aerospace & Agr. Implement Workers of America, UAW*, 485 U.S. 360, 373 (1988) (quoting *Ohio Bureau of Emp. Servs. v. Hodory*, 431 U.S. 471, 493 (1977)). While this does not allow the state to "pursue the objective of saving money by discriminating against individuals or groups," "review of distinctions that [the legislature] draws in order to make allocations from a finite pool of resources must be deferential, for the discretion about how best to spend money to improve the general welfare

is lodged in [the legislature] rather than the courts." *Id.* (citing *Bowen v. Owens*, 476 U.S. 340, 345 (1986)).

The Plaintiffs' remedies thus appropriately lie in the statehouse, not the courthouse. The Circuit Court's decision should be REVERSED.

Dated this 2nd day of June 2025

Respectfully submitted,

By: Electronically signed by

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June 2, 2025

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 3,000 words.

Dated this 2nd day of June 2025.

By: *Electronically signed by Caleb R. Gerbitz*

CERTIFICATE OF E-FILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this brief with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 2nd day of June 2025.

By: *Electronically signed by Caleb R. Gerbitz*