

RECONSIDERING RATIONAL BASIS:
EQUAL PROTECTION REVIEW UNDER THE WISCONSIN
CONSTITUTION

*Lawrence Friedman**

ABSTRACT

*In a 2006 address to the Marquette Law School community, Judge Diane S. Sykes criticized a handful of decisions from the 2004-2005 term of the Wisconsin Supreme Court, the court on which she sat before being appointed to the United States Court of Appeals for the Seventh Circuit. She argued that these decisions—particularly those decided under the state constitution—revealed a lack of appropriate restraint on the court’s part, given the nature of the issues before the court. She also lamented the failure of the bar and the academy to attend closely to the court’s work. This latter complaint is a familiar one to students of state constitutional law: despite the fact that state constitutional decisions are no longer a novelty, state constitutional jurisprudence does not command a great deal of public attention. This essay takes up Judge Sykes’s charge, to the end of addressing the work of the Wisconsin Supreme Court as a contribution to a larger discourse about the metes and bounds of American constitutional law. The focus is on one of the cases Judge Sykes viewed as exceptionally troubling: *Ferdon v. Wisconsin Patients Compensation Fund*, in which the Wisconsin high court struck down the statutory limit on non-economic damages in medical malpractice cases. Part I begins by discussing the Wisconsin Supreme Court’s decision in *Ferdon*. Part II turns to Judge Sykes’ two central contentions: first, that the *Ferdon* court abandoned deferential*

* Associate Professor of Law, New England School of Law. Thanks to Phil Hamilton, Lynnea Thody, Dan Ticcioni, and Bob Williams for comments and suggestions. All errors remain my own.

rational basis equal protection review under the state constitution; and, second, that the decision in Ferdon reflects nothing so much as rank judicial activism. This essay argues, to the contrary, that Ferdon represents a nuanced and principled understanding of rational basis equal protection review, one that falls well within the bounds of reasonable—and modest—judicial decision-making in the state constitutional context. The essay concludes with some thoughts about the role that Ferdon and similar state supreme court efforts may play in enhancing our understanding of the ways in which state and federal constitutional law operate to allocate governmental authority vis-à-vis individual rights and liberties.

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In a 2006 address to the Marquette Law School community, Judge Diane S. Sykes criticized a handful of decisions from the 2004-2005 term of the Wisconsin Supreme Court, the court on which she sat before being appointed to the United States Court of Appeals for the Seventh Circuit.¹ She argued that these decisions—particularly those decided under the state constitution—revealed a lack of appropriate restraint on the court's part, given the nature of the issues before the court. She also lamented the failure of the bar and the academy to attend closely to the court's work.² This latter complaint is a familiar one to students of state constitutional law: despite the fact that state constitutional decisions are no longer a novelty, state constitutional jurisprudence does not command a great deal of public attention.³

In this essay, I take up Judge Sykes's charge, to the end of addressing the work of the Wisconsin Supreme Court as a contribution to a larger discourse about the metes and bounds of American constitutional law.⁴ I focus here on one of the cases Judge Sykes viewed as exceptionally troubling: *Ferdon v. Wisconsin Patients Compensation Fund*,⁵ in which the Wisconsin high court struck down the statutory limit on non-economic damages in medical

1. See generally Diane S. Sykes, *Reflections on the Wisconsin Supreme Court*, 89 MARQ. L. REV. 723 (2006).

2. See *id.* at 726.

3. See ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS xiii (4th ed. 2006) (observing that “the study of American constitutional law has been dominated by a virtually exclusive focus on the federal Constitution and its judicial interpretation”).

4. See generally Lawrence Friedman, *Reactive and Incompletely Theorized State Constitutional Decision-making*, 77 MISS. L.J. (forthcoming 2007) (discussing the importance of constitutional discourse about individual rights and liberties).

5. 701 N.W.2d 440 (Wis. 2005).

malpractice cases. I begin in Part I by discussing the Wisconsin Supreme Court's decision in *Ferdon*. In Part II, I turn to Judge Sykes' two central contentions: first, that the *Ferdon* court abandoned deferential rational basis equal protection review under the state constitution; and, second, that the decision in *Ferdon* reflects nothing so much as rank judicial activism. I argue, to the contrary, that *Ferdon* represents a nuanced and principled understanding of rational basis equal protection review, one that falls well within the bounds of reasonable—and modest—judicial decision-making in the state constitutional context. I conclude with some thoughts about the role that *Ferdon* and similar state supreme court efforts may play in enhancing our understanding of the ways in which state and federal constitutional law operate to allocate governmental authority vis-à-vis individual rights and liberties.

I.

A jury awarded Matthew Ferdon \$700,000 in non-economic damages and \$403,000 for future medical expenses as a result of a doctor's negligent actions during his birth; notwithstanding corrective surgeries, he would suffer from a partial paralysis and a deformed right arm for the rest of his life.⁶ The Wisconsin Patients Compensation Fund successfully moved to have the non-economic damages reduced pursuant to a statutory limitation capping jury awards on non-economic damages at \$350,000, adjusted for inflation.⁷ On appeal, Ferdon argued, among other things, that the statutory limitation violated the equality guarantees of the Wisconsin Constitution.⁸

The court began its analysis with a discussion of the appropriate level of scrutiny.⁹ The court agreed with the Fund that rational basis scrutiny should be applied, because the statute neither denied an individual a fundamental right nor created a suspect classification, the prerequisites to strict scrutiny

6. *See id.* at 446.

7. *See id.* Among the non-economic damages available to plaintiffs were “damages to compensate for pain and suffering, mental distress, loss of enjoyment of normal activity, and loss of society and companionship.” *Id.* at 450. The legislature created the Fund to pay medical malpractice claims that exceed statutory primary insurance thresholds, and health care providers must contribute to the Fund. *See id.* at 451.

8. The Wisconsin Constitution provides: “All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.” WIS. CONST. art. I, § 1.

9. *See Ferdon*, 701 N.W.2d at 456.

equal protection review.¹⁰ The court noted that, while the plaintiff's interests in the right to a jury and the right to a remedy under the Wisconsin Constitution were not fundamental, still those should be considered "important rights."¹¹

Under rational basis scrutiny, the court continued, statutes are presumed constitutional because they reflect the considered judgment of the people's representatives in the legislature in respect to "economic, social, and political decisions."¹² Notwithstanding the traditional deference afforded government action under the rational basis standard, however, "when a legislative act unreasonably invades rights guaranteed by the state constitution, a court has not only the power but also the duty to strike down the act."¹³ The court noted that, while the statutory cap on non-economic damages would not be subject to challenge as a violation of the right to a jury trial or the right to a remedy, it might implicate those individual interests.¹⁴

In the court's view, the statute created one main classification and one sub-classification relevant to the instant dispute.¹⁵ First, the statute distinguished between the victims of medical malpractice who suffer more than \$350,000 in non-economic damages and those victims who suffer less than that amount in non-economic damages—in other words, severely and less severely injured victims.¹⁶ Second, the statute created classes of medical malpractice victims depending on whether the victim had a spouse, minor children, or a parent; an unmarried victim might recover the entire statutory

10. *See id.* at 457. "Strict scrutiny applies if a statute challenged on equal protection grounds 'impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.'" *Id.* at 456 (quoting *State v. Annala*, 484 N.W.2d 138, 144 (Wis. 1992)). The Wisconsin courts have long treated article I, section 1 as an equal protection clause. *See State ex rel. Kellogg v. Currans*, 87 N.W. 561, 562 (Wis. 1901). As Robert Williams has argued, such treatment does not mean that the doctrinal analysis developed under the Fourteenth Amendment need be applied without question under the state constitution. *See Robert F. Williams, Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1219 (1985). On the Wisconsin Constitution generally, see JACK STARK, *THE WISCONSIN STATE CONSTITUTION: A REFERENCE GUIDE* (1997).

11. *Ferdon*, 701 N.W.2d at 457.

12. *Id.*

13. *Id.* at 458.

14. *See id.*

15. *Id.* at 462.

16. *See id.* Accordingly, "the cap's greatest impact falls on the most severely injured victims." *Id.* Research indicates that caps on non-economic damages disproportionately affect women, mainly because "certain injuries that happen primarily to women are compensated predominantly or almost exclusively through noneconomic loss damages." Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1266 (2004).

amount, for example, while a married victim would share that amount with his or her spouse, minor children, or parents.¹⁷

The court next sought to determine whether these classifications rationally served legitimate governmental ends. The court concluded that the statutory cap and the classification of medical malpractice victims “appear[ed] to express a legislative balancing of objectives: to ensure quality health care in the state; to compensate injured victims of medical malpractice; and to protect health care providers from excessive costs of medical malpractice insurance.”¹⁸ The classification of medical malpractice victims on the basis of the severity of their injuries rationally advanced none of these goals.

First, in respect to fair compensation, no rational basis existed for treating the most seriously injured less favorably than those who suffered less severe injuries.¹⁹ Second, in respect to ensuring reasonably priced malpractice insurance for health care providers, the evidence presented did not indicate that the victims of medical malpractice were the source of increased malpractice premiums, yet that class was required to bear the burden of containing malpractice costs by forgoing full tort compensation.²⁰ Third, in respect to keeping Fund assessments low and the Fund financially secure, the evidence indicated that the Fund’s stability was not dependent on the amount or even the existence of the cap.²¹ Fourth, in respect to the government’s interest in controlling health care costs, the evidence indicated that the cap would have no effect on what consumers paid for health insurance.²² Finally, in respect to the government’s interest in attracting and retaining quality health care providers, the evidence did not indicate that the cap bore a relation to whether providers decided to practice in a particular state,²³ or whether the cap deterred doctors from practicing preventive medicine.²⁴

In sum, the *Ferdon* court ruled that the plaintiff had met his burden of demonstrating beyond a reasonable doubt that the statutory cap on non-economic damages violated equal protection under the Wisconsin

17. *Ferdon*, 701 N.W.2d at 462.

18. *Id.* at 465.

19. *See id.* at 466. “[W]hen the legislature shifts the economic burden of medical malpractice from insurance companies and negligent health care providers to a small group of vulnerable, injured patients, the legislative action does not appear rational.” *Id.*

20. *See id.* at 473.

21. *See id.* at 483.

22. *See id.* at 485.

23. *See id.* at 487.

24. *See id.* at 489.

Constitution. The court was persuaded that, even on rational basis review, the cap could not survive judicial scrutiny; to hold otherwise, the court reasoned, “would amount to applying a judicial rubber stamp to an unconstitutional statute.”²⁵

II.

Judge Sykes argued in her address that the rational basis review employed in *Ferdon* essentially authorized 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.”²⁶ She saw the court’s rational basis review as little more than a means by which the majority could produce the substantive result it desired—in the end, “a political policy judgment, not a legal one.”²⁷ In her view, the court in *Ferdon* failed to pay adequate deference to the judgments of the coordinate branches of state government.²⁸

To be sure, the court in *Ferdon* did apply rational basis review more intensely than courts traditionally have in the equal protection context—in Judge Sykes’s words, the court utilized a “more probing judicial inquiry into the relationship between legislative means and ends than ordinary rational basis review.”²⁹ Indeed, the court made clear that, in the circumstances of the case, the rational basis standard required a thoughtful inquiry to determine “whether the legislation has more than a speculative tendency as the means for furthering a valid legislative purpose.”³⁰ This is what the court termed “meaningful” rational basis review, which seems to translate in practice to a search for a real and demonstrable connection between the legislature’s ends and the classification chosen to further those ends.³¹

25. *Id.* at 491. The Wisconsin Supreme Court has not been the only court to strike down statutory caps on damages in medical malpractice cases on state constitutional grounds. *See, e.g., Carson v. Maurer*, 424 A.2d 825 (N.H. 1980) (per curiam) (holding limit on non-economic damages violated state constitutional commitment to equal protection of the laws); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988) (holding that statutory cap violated state constitutional “open courts” provision).

26. Sykes, *supra* note 1, at 727-28.

27. *Id.* at 728.

28. *Id.* at 737.

29. *Id.* at 727.

30. *Ferdon*, 701 N.W.2d at 460.

31. *See id.* at 461.

The notion that certain government action requires, if not strict scrutiny, at least more thorough rational basis review, does not necessarily mean the *Ferdon* court awarded itself license to dictate particular outcomes. To the contrary: despite the court's more intense review of the statutory cap on non-economic damages, on close examination *Ferdon* remains very much a legal decision, and not a "political policy judgment."

Let's begin by situating Judge Sykes's criticisms in context. Often the cry of judicial activism reflects disagreement with an outcome and not a principled objection to a judicial decision.³² Those judicial decisions that truly lack "modesty" and "restraint" are the ones that ultimately result in the authoring court's accrual of power at the expense of the other departments of government; "activism" in the pejorative sense accordingly refers to a court's move in a case or series of cases to allocate decision-making authority to itself, in relation to the other branches of government.³³

We may reach a rough determination as to whether a court has accrued power for itself at the expense of the coordinate branches of government by reference to a series of jurisprudential variables. What is the extent to which the court has been faithful to precedent or proposed an adequate justification for departing from precedent?³⁴ Has the court eschewed a minimalist approach and instead announced sweeping rules or reached out to decide an issue that well could have been put off to another day?³⁵ Finally, what kind of remedy has the court proposed—is it one so expansive as to require judicial intrusion into the structure or running of public institutions, responsibilities more appropriate to the political departments of government?³⁶

A.

As Judge Sykes noted,³⁷ *Ferdon* appears to depart from precedent. In *Maurin v. Hall*,³⁸ the Wisconsin Supreme Court entertained an equal protection challenge to the statutory cap on non-economic damages in

32. See, e.g., Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1401 (2002) (noting that the term "activism," as commonly employed, "is empty, a mask for a substantive position").

33. Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1163 (2002).

34. See *id.* at 1149-51.

35. See *id.* at 1151-52.

36. See *id.* at 1154.

37. See Sykes, *supra* note 1, at 727.

38. 682 N.W.2d 866 (Wis. 2004).

wrongful death actions. The *Maurin* court applied rational basis review to conclude that the legislature had a legitimate objective in imposing a cap on non-economic damages in wrongful death cases, namely the prevention of disproportionately large damages awards inspired by the passions at play when the wrongdoer caused the victim's death.³⁹ The *Maurin* court also concluded that the legislative classification between victims who die and victims who do not was rationally related to the achievement of that objective.⁴⁰

The court in *Ferdon* distinguished *Maurin* on the basis of the differing legislative goals associated with each statutory damages cap: respectively, ensuring quality health care in the state of Wisconsin versus preventing disproportionately large damages awards due to the victim's death.⁴¹ That the *Ferdon* court did not apply the maximally deferential rational basis equal protection review that it had applied in *Maurin* lends some support to Judge Sykes's claim that the *Ferdon* court lacked restraint because it undermined the legislature's policymaking authority, but that fact is not dispositive. Indeed, it raises a more fundamental question: did the *Ferdon* court have any legitimate basis for applying its "meaningful" rational basis review?

Given the nature of the interests involved, the *Ferdon* court could have pointed to a legitimate basis for applying more intense rational basis scrutiny. The statutory cap on non-economic damages implicated two individual interests—the right to a jury trial and the right to a remedy—the court deemed "important," if not fundamental.⁴² Compare these interests to the interest at stake in that equal protection classic, *Williamson v. Lee Optical of Oklahoma*.⁴³ That case concerned a state law that constrained the ability of opticians to fit or duplicate eyeglasses—a regulation that affected the terms upon which individuals would compete (or not compete) in the local market for eyeglasses and attendant services.⁴⁴

Though the opticians affected by the state regulation in *Williamson* undeniably had an interest in the unfettered ability to fit and duplicate eyewear, such an interest derived "merely from shifting economic arrangements"⁴⁵—it was, in other words, an essentially contingent interest.

39. *See id.* at 890.

40. *See id.* at 890-91.

41. *See Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440, 453 (Wis. 2005).

42. *See id.* at 457.

43. 348 U.S. 483 (1955).

44. *See id.* at 486.

45. *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring) (comparing mere economic interests with the interest in freedom of speech and expression).

The rights to a jury trial and a remedy, on the other hand, not only find purchase in the text of the Wisconsin Constitution,⁴⁶ they are of a character qualitatively different from the opticians' interest. Unlike exclusively economic concerns, the rights to a jury trial and a remedy express a particular, fixed regard for the status and role of citizens vis-à-vis the machinery of democratic government: they serve to address instances in which government regulation of matters like causes of action and remedies may work to discriminate against some members of the community by restricting their access to justice.⁴⁷

The *Ferdon* court, moreover, was far from radical in acknowledging the distinction between important individual and mere economic interests for the purposes of rational basis review. The meaningful rational basis review applied by the Wisconsin court, or one similar to it, has been employed by numerous other courts in cases raising state constitutional challenges to a variety of regulatory efforts. In Massachusetts, for example, the Supreme Judicial Court has long applied more intense rational basis scrutiny in cases involving challenges to laws that implicate or restrict particular individual interests,⁴⁸ most notably in holding that no rational basis exists to exclude same-sex couples from civil marriage.⁴⁹

The rational basis standard applied in *Ferdon* was appropriate because of the individual interests implicated by the statutory cap on non-economic damages, and it would have been appropriate to apply that standard in *Maurin* as well. That case involved precisely the same interests: the right to a remedy and the right to a jury trial. Significantly, the damages cap at issue in *Maurin* likely would have survived the more intense rational basis standard: in that case, the means selected—a classification based upon cases most likely to result in large damages awards—furthered the state's goal of preventing unreasonable damages awards in wrongful death cases. As the court itself observed, it would have been difficult to discern a better means of achieving that legislative goal.⁵⁰

46. See WIS. CONST. art. I, § 5 (right to a jury trial); *id.* § 9 (right to a remedy).

47. See, e.g., *Paro v. Longwood Hosp.*, 369 N.E.2d 985 (Mass. 1977) (challenging review process for medical malpractice claims as violating state constitutional right to a remedy, among other grounds).

48. See Lawrence Friedman, *Ordinary and Enhanced Rational Basis Review in the Massachusetts Supreme Judicial Court: A Preliminary Investigation*, 69 ALB. L. REV. 415, 419-22 (2006).

49. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

50. See *Maurin v. Hall*, 682 N.W.2d 866, 890-91 (Wis. 2004).

Why, then, could the state in *Ferdon* not validly rely upon that reasoning to support the classification created by the statutory cap on non-economic damages in medical malpractice cases? As just discussed, the interests at stake were the same—whether the wrongdoer caused the victim’s death or severely injured her, the damages cap implicates the rights to a jury trial and a remedy. The *Ferdon* court suggested that the difference lies in “[t]he heightened passion surrounding a dead medical malpractice victim,” a factor that the legislature had adequately supported as the basis for the classification examined in *Maurin*.⁵¹ The existence of that factor may well distinguish the cases—and if the state were to muster the evidence to support a similar argument about the “passion” surrounding severely injured medical malpractice victims,⁵² a law that singles out that class for differential treatment in respect to damages should also survive. After all, the court’s meaningful rational basis review is still not strict scrutiny: even when government action implicates individual interests that are important but not fundamental, the state need only demonstrate that a factually supportable basis exists to conclude that the means chosen will indeed further the state’s desired ends.⁵³

B.

Respect for precedent is not the only criterion by which to assess whether the court’s decision in *Ferdon* served to enhance the judiciary’s authority vis-à-vis the coordinate branches of government. Though the *Ferdon* court embraced a more probing rational basis standard, one triggered when legislative classifications implicate individual interests that are important but not fundamental, *Ferdon* remains a minimalist decision—a decision marked by its narrowness and shallowness, traits associated more often with judicial modesty than with judicial overreaching.

In resolving constitutional disputes, minimalist judicial decisions leave “as much as possible undecided for consideration in the next case.”⁵⁴ The minimalist court strives to avoid sweeping decisions, preferring that rules

51. *Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440, 453 (Wis. 2005).

52. If the state advanced such an argument in *Ferdon*, the court apparently did not consider it. *See id.* at 464-65 (discussing legislative objectives associated with the statutory cap on non-economic damages).

53. *See Friedman, supra* note 48, at 418.

54. Young, *supra* note 33, at 1151; *see also* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6-7 (1996) (defining “minimalism” as “the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided”).

develop on a case-by-case basis.⁵⁵ A maximalist court, by contrast, offers broad rules of general applicability and may seek to resolve issues that need not be decided on the facts at hand.⁵⁶ As Cass Sunstein has argued, minimalist decision-making tends to be democracy-enhancing, as it “grants a certain latitude to other branches of government by allowing the democratic process room to adapt to future developments, to produce mutually advantageous compromises, and to add new information and perspectives to legal problems.”⁵⁷

The hallmarks of the minimalist decision are narrowness and shallowness. Minimalist decisions are narrow in the sense that they address only the issue or issues before the court, shallow in the sense that they studiously avoid abstract, theoretical analysis of the issue presented.⁵⁸ Within these parameters, *Ferdon* could scarcely be considered a broad decision: the court restricted itself exclusively to the question whether the discrimination against the victims of severe medical malpractice was demonstrably related to the legislature’s goal of ensuring the quality of health care for the people of Wisconsin.⁵⁹ The court left open the question whether its meaningful rational basis review would require the state to reconsider any other law or regulation concerning damages caps or state-wide policies related to the provision of health care.⁶⁰

Ferdon is also a shallow decision. As an initial matter, the court did not expressly advance any larger theoretical approach to a law implicating the differential treatment of the victims of severe medical malpractice, and its reluctance to regard the rights to a remedy and a jury trial as fundamental signifies a determination not to undermine future efforts to regulate those interests; had the court deemed those interests fundamental, it would have effectively removed them from “the arena of public debate and legislative

55. See Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1461 (2000) (describing minimalism as a court’s effort to “limit the binding impact of [a] decision as closely as possible to the particular facts of the case”).

56. See Sunstein, *supra* note 54, at 15 (defining “maximalism” as “an effort to decide cases in a way that establishes broad rules for the future and that also gives deep theoretical justifications for outcomes”).

57. *Id.* at 19.

58. See *id.* at 15-20.

59. See *Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440, 447 (Wis. 2005) (stating that the question before the court was “a narrow one,” namely whether the statutory cap on non-economic damages was constitutional).

60. See *id.* (noting that the case was “not about whether all [damages] caps, or even all caps on noneconomic damages, are constitutionally permissible”).

action.”⁶¹ In addition, the court’s analysis eschewed discussion of the foundational principles underlying the constitutional commitment to equality, and instead relied upon the factual-legal record—the statutory scheme of which the non-economic damages cap was a part and accompanying legislative findings—as the best guide to the legislature’s intentions and objectives.⁶²

C.

Finally, the remedy proposed by the *Ferdon* court did not intrude into the authority of the coordinate branches of government to either structure or run any public institution. Courts that impose expansive remedies for constitutional violations may well enhance their own authority in respect to matters about which they lack appropriate competence, as when they issue relief that risks “judicial involvement in the day-to-day running of public institutions, court-ordered expenditures amounting to millions of dollars, and continuing judicial supervision for periods of years or even decades.”⁶³ The quintessential cases involve court supervision of prisons; in that context, courts “have issued standards concerning how many prisoners are to share each cell, the temperature of the cells, whether they will have televisions or weight-lifting facilities, what they are to eat, and what disciplinary processes are to be used.”⁶⁴

Here, the court declared the statutory cap on non-economic damages in medical malpractice cases unconstitutional and remanded the case for further action by the lower court.⁶⁵ The court did not seek to restructure a public institution, order that public funds be expended to remedy the constitutional violation, or suggest that the courts should continue to supervise the regulation and conduct of medical malpractice actions in any way. The remedy in *Ferdon*—the declaration of unconstitutionality and remand of the case—accordingly differs not in degree but in kind from a remedy that would even indirectly allocate authority to the judiciary through mandated modifications to a public institution. Indeed, the court expressly stated that

61. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 989 (Mass. 2003) (Cordy, J., dissenting).

62. *See Ferdon*, 701 N.W.2d at 462-64 (relying upon statutory text and legislative findings to discern the legislature’s objectives in respect to the statutory cap on non-economic damages).

63. Young, *supra* note 33, at 1154.

64. John Choon Yoo, *Who Measures the Chancellor’s Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1127 (1996).

65. *See Ferdon*, 701 N.W.2d at 491.

statutory damages caps were not per se unconstitutional,⁶⁶ and that the legislature remained free to investigate alternative ways to achieve its overall goal of ensuring adequate health care resources for the citizens of Wisconsin.

D.

It remains to determine whether these factors, considered in isolation or together, indicate that the *Ferdon* court sought to augment its authority at the expense of the political departments of the Wisconsin government. First, though the court arguably departed from the precedent of *Maurin*, which upheld a cap on non-economic damages in wrongful death cases, still the basis for the court's enhanced rational basis review was sound, and had that review been applied in *Maurin*, the court likely would have reached the same result in that case.

Second, *Ferdon* is a minimalist decision. The court addressed only the narrow issue before it, and the holding did not undermine the legislature's authority to engage in future regulation of non-economic damages. The court also did not rule deeply, in that it did not declare the rights to a jury trial and to a remedy fundamental, which would have effectively limited future legislative action respecting these interests.

Third, and finally, *Ferdon* by its terms did not contemplate any continuing judicial role in overseeing the system of damages regulation in civil cases. On its face, the decision foretells none of the judicial intrusion into the running of public institutions that arguably signals an enhancement of judicial authority at the expense of the coordinate branches.

In short, it is far from clear that *Ferdon* represents the kind of re-allocation of authority between governmental departments that in many circumstances should be viewed as unwarranted judicial activism. The Wisconsin courts have no greater power post-*Ferdon* to hear or to decide equal protection cases under the state constitution, and the decision in no way precludes the people's representatives from regulating remedies in all manner of cases. It may not even preclude limits on non-economic damages in medical malpractice cases, should the government be able to show that any classifications created by such regulation bear more than a potential connection to a legitimate legislative objective.

To be sure, as Judge Sykes noted, *Ferdon* did not involve the application of ordinary equal protection rational basis review: the decision suggests that,

66. See *id.* at 448 ("Just because caps on noneconomic damages are not unconstitutional per se does not mean that a particular cap is constitutional.").

when government regulation touches upon interests that are important, if not fundamental—like the rights to a jury trial and remedy—the court will take a closer look at the fit between the regulation’s ends and means than in those instances—representing the mine run of cases—in which government regulation touches upon merely economic interests. Such enhanced scrutiny in these discrete circumstances serves to ensure that a legislature will not seek to effectuate its public policy objectives by infringing upon individual interests too important to leave entirely to the mercies of the political process. Nonetheless, if the government even in those circumstances can prove a demonstrable link between such infringement and legitimate public policy objectives, the result of the equal protection inquiry should be no different from those cases in which regulation implicates purely economic interests.

III.

In her Marquette address, Judge Sykes got one point exactly right: there ought to be more discussion of the work of the Wisconsin Supreme Court and other state high courts among members of the bar and the public.⁶⁷ As others have noted, the new judicial federalism is no longer so new.⁶⁸ Though commentators have been talking about state constitutionalism for several decades, the discussion has often involved members of the bar and the public only when a case concerns a particularly controversial issue, like a prohibition on same-sex marriage.⁶⁹

And yet, every state constitutional case should matter in at least this way: these decisions reveal how the relationships between and among the institutions of the judiciary, the legislature and the executive can be understood at a given moment in time. That understanding, in turn, reveals something about the workings of a state’s government and the authority each of its branches purports to wield and, therefore, about the extent to which government will be permitted to act in the name of the public good. That

67. See Sykes, *supra* note 1, at 738 (observing that the Wisconsin Supreme Court’s work “deserves closer attention from the legal community and the public”).

68. See, e.g., G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1098-1100 (1997); Robert F. Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 215-17 (2003) (discussing development of the new judicial federalism in respect to individual rights protections under state constitutions).

69. See, e.g., *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (declaring prohibitions on access of same-sex couples to benefits and responsibilities of civil marriage invalid under the New Jersey Constitution).

understanding may also inform the larger constitutional discourse between and among lawyers, lawmakers, judges, and commentators about the nature and purpose of the institutional relationships our state and federal constitutions create—and just how the balance between our need for order and our commitments to individual rights, like equal protection of the laws, ought to be struck.