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At the Wisconsin Supreme Court, Marsy's Law survives as the justices clash over constitutional interpretation

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The Wisconsin Constitution requires the legislature to present proposed constitutional amendments to the people for a vote. In a decision out today, the Wisconsin Supreme Court held that the judiciary plays only a limited oversight role in that process.

The immediate issue in *Wisconsin Justice Initiative, Inc. v. Wisconsin Elections Commission* was the fate of Marsy's Law, a crime victim bill of rights that Wisconsin voters overwhelmingly voted to incorporate into the state constitution back in 2020. A group of plaintiffs challenged the amendment, arguing that the ballot question failed to tell voters how expanding victim rights could intrude on rights of the accused.

Based on September's oral argument, it seemed likely that Marsy's Law would survive the court's review. Most justices signaled their hesitation to invalidate the measure. In the end, six of the seven justices concluded that the ballot question satisfied the requirements of the state constitution.

But the court was fractured in its reasoning, generating five separate opinions. A conservative four-justice majority concludes that an amendment survives review as long as the ballot language is not "fundamentally counterfactual" and has a "single general purpose." The three liberal justices would have adopted a different standard—one that would have allowed the court to reject ballot language that did not reflect "every essential" of the amendment. Several concurring opinions debate the proper methods of constitutional interpretation and the scope of the judicial power.

In the end, the opinions highlight fundamental differences among the justices over the court's proper role—both in interpreting the constitution and in safeguarding democracy.

The backstory

Article XII, section 1 of the Wisconsin Constitution sets out the process for amending the state's founding document.

A majority of legislators has to approve the proposed amendment over two successive sessions, after which the legislature is to "submit" the proposal "to the people in such manner and at such time as the legislature shall prescribe." If "more than one amendment" is proposed, the constitution requires that they be presented in a way so "that the people may vote for or against such amendments separately."

Until now, precedent on these provisions has been scant. One case from 1925 stated that the ballot language should capture "every essential of the amendment," but that discussion was (in Justice Hagedorn's view) "an extended digression" in a case that did not actually address the validity of ballot language. Another case from 1953 struck down a constitutional amendment because the ballot question said the opposite of what the amendment actually provided.

The plaintiffs challenging Marsy's Law argued that the amendment was not properly "submitted" to the voters because it misled them about its impact on criminal defendants, and that it should have been presented as multiple amendments. They prevailed in Dane County Circuit Court, where the judge struck down Marsy's Law but stayed the decision pending appeal. The court of appeals, highlighting the limited precedent and the statewide importance of the questions, certified the case to go directly to the Wisconsin Supreme Court.

Conflicting standards

In today's decision, the Wisconsin Supreme Court reversed the circuit court and concluded that Marsy's Law was validly enacted. In the majority opinion, Justice Hagedorn rejected the "every essential" requirement, which he concluded was unsupported by the original meaning of the Wisconsin Constitution.

Instead, joined by Chief Justice Ziegler and Justices Roggensack and Rebecca Bradley, Justice Hagedorn held that judicial review of how proposed amendments are presented to the people is limited. An amendment is properly "submitted" to the people as long as the ballot question is "not fundamentally counterfactual such that voters were not afforded the opportunity to approve the actual amendment"—like the situation the court encountered in 1953. Any judicial scrutiny beyond that would be contrary to the constitution's original meaning, as ballot questions for many years provided no detail about the amendment at all.

Six of the seven justices agreed on a second point: when a proposal counts as more than one amendment. As long as the provisions all "relate to the same subject matter and are designed to accomplish one general purpose"—a standard the court articulated back in 2010—they are a single amendment. Justices Dallet and Karofsky joined that part of the majority opinion.

According to the majority, the ballot question for Marsy's Law easily satisfied both standards: it was properly "submitted" to the people because did not state the opposite of the amendment's

content, and it qualified as a single amendment because its provisions shared the single purpose of expanding and protecting victims' rights.

Although Justices Dallet and Karofsky agreed with the outcome, they would have adhered to the 1925 "every essential" test to determine when an amendment is properly "submitted" to the people. Criticizing the majority's rule as "too narrow," Justice Dallet's concurrence proposed that the "ballot description, if the legislature chooses to provide one," be required to "accurately summarize the significant changes the proposed amendment would make to the Constitution." Otherwise, if "the legislature misleads the people . . . about what a proposed constitutional amendment would do, then the question was never truly submitted to them at all."

The court's lone dissenter, Justice Ann Walsh Bradley, would have invalidated the amendment entirely, concluding that "the diminution of a defendant's rights … constitutes an 'essential' element of the amendment." On the other extreme was Justice Rebecca Bradley, whose concurrence (joined by Ziegler and Roggensack) characterized the ballot language issue as "essentially political in nature" and therefore not susceptible to judicial resolution at all.

A showdown over originalism

Today's decision represents one of the last opportunities for the court's four-justice conservative majority to stake out its position on constitutional interpretation. On August 1, justice-elect Janet Protasiewicz will start her ten-year term, replacing Justice Patience Roggensack and shifting the court's balance of power.

Unsurprisingly, the court's two ideological camps clashed over fundamental questions about the court's proper role in interpreting the constitution and safeguarding democracy.

Justice Hagedorn opened his analysis by making the case for originalism, which he characterized as the court's consensus approach. "[T]he purpose of constitutional interpretation," according to Hagedorn, "is to determine what the constitutional text meant when it was written, commonly called the original public meaning or original understanding."

Dallet, by contrast, argued in favor of a "more pluralistic method" that considers not only "text and history" but also "precedent, context, historical practice and tradition." In a bit of foreshadowing of the next term, she emphasized that "an earlier court's choice of an interpretive methodology like originalism does not bind later courts to use that same methodology."

They also clashed over the role the court should play in safeguarding democracy. Quoting from the preamble of the Wisconsin Constitution, Justice Hagedorn highlighted "the foundational assumption of our system of government: all authority resides with the people, and it is the

people alone who have the authority to establish the terms and methods by which they will be governed." In her concurrence, Justice Rebecca Bradley argued that the majority's approach "safeguards democracy by preserving the prerogatives of the people's representatives in the legislature to decide political questions."

The court's liberal justices presented a different view. Justice Dallet emphasized that the legislature's constitutional authority has to be balanced against "the people's right—also reflected in the constitution—fairly to evaluate and vote on a proposed constitutional amendment." And in her dissent, Justice Ann Walsh Bradley emphasized that "democracy is undermined" when "the people are misled," with more rigorous judicial review providing a "safeguard against such an outcome."