

THE WISCONSIN SUPREME COURT 2008

**WISCONSIN SUPREME  
COURT UNBOUND:  
AN ACTIVIST MAJORITY IN THE BALANCE**



**WMC**

WISCONSIN'S BUSINESS VOICE

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## Wisconsin Supreme Court 2008:

# AN ACTIVIST MAJORITY IN THE BALANCE

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In April, Wisconsin voters will decide whether or not they want to continue the 4-3 activist majority on the Wisconsin Supreme Court.

Activist incumbent Justice Louis Butler seeks election to a 10-year term. Butler was appointed to the Court by Governor Doyle in August 2004, after mounting an unsuccessful campaign to defeat Justice Diane Sykes in April of 2000. In that election Justice Butler received 34 percent of the vote, losing in all 72 counties including Milwaukee.



Butler is being challenged by Burnett County Judge Michael Gableman, who was appointed to the bench by former Governor Scott McCallum. He won the seat with 78 percent of the vote in 2003. He was previously appointed a district attorney by Governor Tommy G. Thompson in Ashland County and won election to that post. Gableman is a judicial traditionalist, who believes courts should defer to the Legislature on public policy. Gableman has said he would follow in the traditions of former Justices Diane Sykes and Jon Wilcox.

Justice Butler is widely considered to be part of the activist wing of the Wisconsin Supreme Court. He has authored a number of controversial rulings in cases involving both civil and criminal law.

Most notably for industry, he authored a ruling that eliminated the individual causation requirement for tort liability in lawsuits against manufacturers of “fungible” products. This expansion of the “risk contribution” theory establishes a form of collective industry-wide liability in certain product liability cases.

In addition, Butler sided with the majority in overturning caps on non-economic damages in medical malpractice cases and easing the standard to win a punitive damage award.

Many noted legal scholars and jurists have publicly discussed the activist trend in the Wisconsin Supreme Court.

Sykes, now serving on the U.S. Court of Appeals for the 7th Circuit, said in a recent speech: *“The [Wisconsin Supreme] Court has also manifested a cavalier, almost dismissive attitude toward the sources of legal interpretation generally thought to be most authoritative: the text, structure, and history of the constitution and laws, and the court’s own precedents.”*

Even more to the point Prof. Rick Esenberg, of Marquette Law School, noted in a white paper prepared for the Federalist Society that: *“The court is now more or less evenly divided between two groups of justices who have dramatically different notions of the role of the judiciary.”*

### **BUTLER: SECOND WORST ON LIABILITY EXPANSION**

In 2007, the Judicial Evaluation Institute (JEI), which is affiliated with the U.S. Chamber of Commerce, conducted a thorough evaluation of the Wisconsin Supreme Court. The JEI study quantified the propensity of the individual judges to create, expand or restrain civil liability in Wisconsin. They looked at cases involving employment insurance, medical malpractice product liability and workers compensation. Each judge was given an overall cumulative score with higher scores representing higher levels of judicial restraint with respect to civil liability.

Justice Butler, according to JEI, ruled to expand liability in 78 percent of the cases studied in which the court issued a split decision. That’s the second worst record on the court.

The court’s recent foray into judicial activism after Butler’s appointment is inconsistent with its history and has grave implications for competitiveness for our state. Businesses need a court that does not cavalierly change the law on its own whim.

### **JUDICIAL ACTIVISM THREATENS COMPETITIVENESS**

When Wisconsin became a state, our founders established a democracy with three equal branches of government — a Legislature to write the laws, a Governor to execute the laws, and a Supreme Court to interpret the laws to ensure adherence to fundamental rights.

The Wisconsin Constitution envisioned a limited and modest role for the Supreme Court: to administer the court system; to hear appeals from lower courts; and, to take cases of statewide importance based on original jurisdiction under the constitution. Our legal system was widely regarded as fair and predictable with the Supreme Court basing its legal interpretations on the text, structure and history of the Constitution and laws of Wisconsin . . . as well as the Court’s own precedents. For much of our history, the court operated in this manner — recognizing that it is the Legislature’s proper role to make public policy.

The proper role of the court in our democracy can be re-established with leadership from the business community to demand a fair and impartial judiciary.

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# JUSTICE LOUIS BUTLER IS A KEY MEMBER OF THE ACTIVIST MAJORITY ON THE WISCONSIN SUPREME COURT

## ACTIVIST

ABRAHAMSON



82%

BUTLER



78%

BRADLEY



76%

CROOKS



57%

## TRADITIONALIST

PROSSER



39%

ROGGENSACK



41%

ZIEGLER



NEW MEMBER

*Justice Louis Butler voted to expand liability in 78 percent of cases involving liability in which the court issued a split decision.\**

*That's the second worst record on the Wisconsin Supreme Court.*

\*Source:  
Judicial Evaluation  
Institute 2007

## WISCONSIN'S SUPREME ACTIVISM: A COLLECTION OF QUOTES FROM *THE WALL STREET JOURNAL*

In recent years, Wisconsin's Supreme Court activist majority has gained national notoriety for its rulings overturning duly enacted laws. The Court has been the subject of numerous editorials and op-eds in *The Wall Street Journal*. Below are a few examples of the coverage of Wisconsin's Court from *The Wall Street Journal*.

### CHEESY JUDGES — APRIL 21, 2007

"Mr. Butler soon became the fulcrum for a new majority that overturned the court's own precedents and long-standing deference to the legislature's policy choices."

### EAT PAINT, GET RICH — JANUARY 19, 2006

"...the balance of power in the closely divided Wisconsin Supreme Court shifted after Democratic Gov. Jim Doyle appointed a liberal to a vacant seat on the bench. The reconstituted court quickly handed down several rulings that alarmed business and medical communities."

### ALABAMA NORTH — AUGUST 9, 2006

"On medical liability, the four judges toppled what had been a highly successful medical liability reform passed by the state legislature in 1995 . . . The 4-3 court majority offered the highly creative judgement that caps on such damages [medical liability] are 'patently arbitrary' with 'no rational relationship to a legitimate government interest.'"

### CAFETERIA CONSTITUTIONALISM — FEBRUARY 24-25, 2007

"The court has already gained national notoriety for allowing the use of 'junk science' in its courtrooms, doing away with the requirement that a particular manufacturer's lead paint be linked to an injury before a consumer can sue, and for sitting as a 'super-legislature,' by eliminating caps on noneconomic damages in medical malpractice cases. Any product could become the next target of tort lawyers seeking to expand business liability."

<b>ISSUES &amp; BACKGROUND</b>	<b>JUSTICE LOUIS BUTLER</b>		<b>JUDGE MICHAEL GABLEMAN</b>	
<b>CURRENT POSITION</b>	Wisconsin Supreme Court Justice, appointed by Governor Jim Doyle in 2004. <i>(Lost statewide election to High Court in 2000 when he faced then-Justice Diane Sykes.)</i>		Burnett County Circuit Court Judge, appointed by Governor Scott McCallum in 2002. Elected to the bench in 2003.	
<b>PROSECUTORIAL EXPERIENCE</b>	None		Appointed Ashland County District Attorney in 1999 by Governor Tommy G. Thompson, and won election to that post. Served as prosecutor in Marathon and Langlade Counties. Served as Clerk in a U.S. Attorney's Office, where he prepared federal criminal cases for prosecution.	
<b>CRIMINAL DEFENSE EXPERIENCE</b>	Served as Assistant State Public Defender from 1979 to 1992 in Milwaukee County.		None	
<b>OTHER EXPERIENCE</b>	Appointed Milwaukee County Municipal Court Judge in 1992. Won re-election to that post three times. Elected Milwaukee County Circuit Court Judge in 2002. A permanent member of the faculty of the National Judicial College in Reno. Serves as a member of the bench in the Southwestern Law School Moot Court Competition in Los Angeles. Adjunct assistant professor of law at Marquette Law School.		Adjunct professor of law at Hamline University School of Law, 2003-2005. Served as an Administrative Law Judge, Deputy Corporation Counsel, and private practice attorney. Served on the Wisconsin Supreme Court's State Court/Tribal Court Relations Committee. Past member of the Wisconsin Judicial Counsel.	
<b>PHILOSOPHY</b>	Judicial Activist. Cast tie-breaking votes on 4-3 Court rulings expanding liability for businesses, expanding criminal rights beyond U.S. Supreme Court rulings, and allowing expanded tribal gambling in Wisconsin.		Traditionalist. Opposes judicial activism and pledges to defer to the Legislature on matters of public policy.	
<b>BUSINESS ISSUES</b>	Approved overturning medical malpractice caps, expanded liability for manufacturers, and easing standards to win punitive damage claims.		"I will not legislate from the bench ... business owners deserve and expect decisions from the court that are fair and consistent." 10/4/07	
<b>SUPPORTERS</b>	Majority of circuit court judges, 18 district attorneys, Milwaukee police and fire unions, Wisconsin state police and fire unions, the Wisconsin State AFL-CIO, and other unions.		51 of the state's 72 sheriffs, 36 district attorneys, 17 assistant district attorneys, 19 police chiefs, and nine judges.	
<b>EDUCATION</b>	B.A., Lawrence University, 1973. Government. J.D., UW-Madison School of Law, 1977.		B.A., Ripon College, 1988. Education and History. J.D., Hamline University School of Law, 1993. Dean's List Honors.	



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