

SHIRLEY S. ABRAHAMSON, C.J. (*concurring in part and dissenting in part*). I agree that the Budget Repair Bill is not in effect. I further agree that the certification by the court of appeals should be denied.

¶75 Moreover, I agree that the challenge to the legality of the Budget Repair Bill, a bill that significantly affects all the people of this state, presents important fundamental constitutional issues about the separation of powers; the roles of the legislative, executive, and judicial branches of government; and judicial review.

¶76 It is exactly because the issues in the present case are of such constitutional and public policy importance that I do not join the order.

¶77 In a case in which the court is called upon to review the legitimacy of the legislative process, it is of paramount importance that the court adhere to the Wisconsin Constitution and its own rules and procedures, lest the legitimacy of the judicial process and this court's decision be called into question.

¶78 The Dane County Circuit Court took the time and made the effort to consider the issues carefully and write a 48-page decision, including findings of fact and conclusions of law, explaining and supporting its reasoning. In contrast, this court gives this important case short shrift. Today the majority announces for the first time that it is accepting the case. And today the majority decides the case.⁽³⁾

¶79 In rendering a decision, a court is to provide not merely an answer but also a reasoned, accurate explanation. A reasoned, accurate explanation is not an inconsequential nicety that this court may disregard for the sake of convenience or haste. It is the cornerstone of the legitimacy of judicial decision-making.

¶80 At first glance, the order appears to provide some support for broad conclusions reached on fundamental and complex issues of law. But on even casual reading, the explanations are clearly disingenuous, based on disinformation.

¶81 Justice Prosser's concurrence is longer than the order. The concurrence consists mostly of a statement of happenings. It is long on rhetoric and long on story-telling that appears to have a partisan slant. Like the order, the concurrence reaches unsupported conclusions.

¶82 In hastily reaching judgment, Justice Patience D. Roggensack, Justice Annette K. Ziegler, and Justice Michael J. Gableman author an order, joined by Justice David T. Prosser, lacking a reasoned, transparent analysis and incorporating numerous errors of law and fact. This kind of order seems to open the court unnecessarily to the charge that the majority has reached a pre-determined conclusion not based on the facts and the law, which undermines the majority's ultimate decision.

¶83 Justice N. Patrick Crooks explains the flaws in the order's and concurrence's attempt to recast the petition for supervisory writ as an original action. He explains why this court should

decide this case in an orderly appellate review of the circuit court's order with a full opinion. I join his writing.

¶84 I write to emphasize that in a case turning on separation of powers and whether the legislature must abide by the Open Meetings Law and the Wisconsin Constitution in adopting the Budget Repair Bill, it is imperative that this court carefully abide by its authority under the Constitution and follow its own rules and procedures.

¶85 A court's failure to follow rules and a court's failure to provide a sufficient, forthright, and reasoned analysis undermine both the court's processes and the decision itself. Only with a reasoned, accurate analysis can a court assure the litigants and the public that a decision is made on the basis of the facts and law, free from a judge's personal ideology and free from external pressure by the executive or legislative branches, by partisan political parties, by public opinion, or by special interest groups.

I

¶86 At its most basic level this case is about the need for government officials to follow the Wisconsin Constitution and the laws.

¶87 The District Attorney's challenge to the Budget Repair Bill asserts that the Open Meetings Law is a codification of the mandates expressly provided for in the Wisconsin Constitution. The District Attorney relies on Article IV, Section 10, "[t]he doors of each house shall be kept open," and also on Article I, Section 4: "The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged."

¶88 The legislature declared in the Open Meetings Law that the legislature would comply with the Law to the fullest extent "in conformance with article IV, section 10" of the Wisconsin Constitution.⁽⁴⁾ Statutes are interpreted to give effect to every word. A court assumes that the legislature says what it means, and means what it says. The words in a statute are not to be treated as rhetorical flair.

¶89 Nevertheless, the Attorney General asserts that the legislature need not abide by the Open Meetings Law; that the legislature can choose when and if it will follow the Open Meetings Law; and that courts cannot enforce the Open Meetings Law against the legislature and any of its committees.⁽⁵⁾

¶90 The legislature must play by the rules of the Wisconsin Constitution and the laws.

¶91 Playing by the rules and playing fair are integral to public trust and confidence in our government officials---legislative, executive, and judicial. Public trust and confidence in the integrity of the judicial branch is engendered by a court's issuing a reasoned public decision based on public records after public arguments. The judicial branch claims legitimacy by the reasoning of its decisions. "Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification."⁽⁶⁾

¶92 Trust and confidence in the integrity of the judicial branch as an institution is critical at all times but especially when a case has high public visibility, is mired in partisan politics, and is emotionally charged. The need for reasoned judgment is at its greatest in a case such as this one, in which substantial public policy and budgetary decisions of the coordinate branches may be affected.⁽⁷⁾ The issues presented in this case are steeped in a politically charged environment and involve highly controversial public policy and budgetary matters.

¶93 That the judiciary has the power of judicial review, that is, the power to interpret the Constitution and hear challenges to the constitutionality of legislative enactments, without pressure from the executive or legislative branches, is a fundamental principle of the United States and Wisconsin Constitutions.

¶94 This fundamental principle of judicial review was described in Federalist No. 78,⁽⁸⁾ which emphasized the importance of the separation of powers and of an independent judiciary to ensure that legislative enactments are consistent with the constitution.

There is no liberty, if the power of judging be not separated from the legislative and executive powers.

....

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. . . .

A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.

¶95 Ascertaining the meaning of the Wisconsin Constitution and whether the enactment of the Budget Repair Bill complies with constitutional directives is the essence of the present case. And the court must do so adhering to the Constitution, laws, and its own rules of procedure.

II

¶96 The order and Justice Prosser's concurrence are based on errors of fact and law. They inappropriately use this court's original jurisdiction, make their own findings of fact, mischaracterize the parties' arguments, misinterpret statutes, minimize (if not eliminate) Wisconsin constitutional guarantees, and misstate case law, appearing to silently overrule case law dating back to at least 1891. This case law recognizes a court's power to review legislative actions in enacting laws when constitutional directives are at issue.

A. The Order and the Concurrence Inappropriately Use This Court's Original Jurisdiction.

¶97 The order mistakenly asserts that the State of Wisconsin and Secretary Huebsch filed "a petition for supervisory/original jurisdiction pursuant to Wis. Stat. §§ (Rules) 809.70 and 809.71." No petition for original jurisdiction pursuant to Wis. Stat. § (Rule) 809.70 was filed in

this court by any party. The petition that was filed is captioned "petition for supervisory writ pursuant to Wis. Stat. § 809.71 and for immediate temporary relief pursuant to Wis. Stat. § 809.52," and the text of the petition adheres to the caption.

¶98 This court's authority for review is derived from the Wisconsin Constitution, which provides that the court has two types of jurisdiction: appellate and original.⁽⁹⁾ They are separate and distinct jurisdictions, serving different purposes. "The concept of original jurisdiction allows cases involving matters of great public importance to be commenced in the supreme court in the first instance."⁽¹⁰⁾

¶99 There is nothing "original" or "in the first instance" here. By commencing an original action on the court's own motion to review the final judgment of the circuit court, the order and Justice Prosser's concurrence are blending the separate and distinct concepts of original and appellate jurisdiction.⁽¹¹⁾

¶100 Why is this important? By blending what are under our constitutional authority separate and distinct jurisdictions----original and appellate----the order and concurrence attempt to skirt the normal standards of appellate review. Faced with no record, they conjure their own facts----something this court should never do, regardless of whether it is exercising appellate or original jurisdiction.

¶101 If this court wishes to take jurisdiction of the factual and legal issues presented in this matter, the legitimate and constitutional route is through an appeal. And indeed Justice Prosser reviews the circuit court's decision as if this case were an appeal.

B. The Order and the Concurrence Make Their Own Factual Findings.

¶102 The order states: "The doors of the senate and assembly were kept open to the press and members of the public during the enactment of the Act. The doors of the senate parlor, where the joint committee on conference met, were open to the press and members of the public. WisconsinEye broadcast the proceedings live."⁽¹²⁾ Access was not denied."

¶103 Footnote 1 of the order implies that these findings of fact are supported by the transcripts of the hearings before the circuit court, which were filed in "appendices accompanying the various motions and petitions filed herein."

¶104 Justice Crooks, at ¶143 n.15, powerfully explains that reliance on information in transcripts not in the record before this court is a departure from settled precedent.

¶105 In his concurrence, Justice Prosser makes his own factual findings. Indeed, most of his concurrence is a statement of happenings. Yet Justice Prosser asserts in ¶19 "that there are no issues of material fact that prevent the court from addressing the legal issues presented."

¶106 Where do all of these facts come from? Not from the certification proceedings (which the order denies) or from the petition for supervisory writ (which the court transforms into an original action). Not from the decision or final judgment of the Dane County Circuit Court.

Indeed, some of the "findings of fact" are in direct contravention of the facts found by the circuit court. By casting this as an original action, the four justices are able to skirt facts that may impede the rush to their ultimate destination.

¶107 The four justices are entitled to their opinions, but they are not entitled to their own facts. This court is not a fact-finding court.

¶108 If findings of fact are required in the exercise of our original jurisdiction, there are procedures for getting those facts. Instead of adhering to those procedures, the four justices set forth their own version of facts without evidence. They should not engage in this disinformation.

C. The Order and the Concurrence Mischaracterize the Arguments of the Parties.

¶109 No party argues to the court, as the order claims, that "the legislature amended Article IV, Section 10 of the Wisconsin Constitution by its enactment of the Open Meetings Law." The order builds a straw house so that it can blow it down.

¶110 Justice Prosser suggests that the argument of the parties is that the Open Meetings Law is a codification of Article IV, Section 10 of the Wisconsin Constitution such that the statutes amend the Constitution. Justice Prosser too builds a straw house to blow down with uncontested, accepted blackletter law that the Wisconsin Constitution cannot be changed by statute.

D. The Order and the Concurrence Fail to Address Adequately the Role of the Secretary of State.

¶111 The order and concurrence fail to examine carefully the arguments of the Secretary of State about the respective roles of the Secretary of State and the Legislative Reference Bureau in the publication of legislative acts, the printing of notice in the official state newspaper, and the effective date of a statute. See Wis. Stat. §§ 14.38(10), 35.095(3)(b), 991.11.

E. The Order and the Concurrence Minimize, If Not Eliminate, The Wisconsin Constitutional Guarantee, Article IV, Section 10, That "The Doors of Each House Shall Be Kept Open."

¶112 This constitutional provision, Article IV, Section 10 of the Wisconsin Constitution, has never before been interpreted by this court or any Wisconsin court. The order interprets and dismisses the constitutional provision in four short sentences without citation or rationale----an unsupported, four-sentence interpretation of a fundamental constitutional guarantee ensured by the people of Wisconsin!

¶113 After stating its own factual findings, the order dismisses the significant constitutional argument with four words: "Access was not denied." By this interpretation, the constitutional right of the people to know what its legislature is doing has been significantly minimized, if not eliminated.

¶114 Instead of the order's four-sentence analysis of this important constitutional provision, Justice Prosser sets forth a two-paragraph analysis. He goes further than the order with a novel interpretation of this constitutional provision. He states that the "manifest purpose" of Article IV,

Section 10 of the Wisconsin Constitution is "to prevent state legislative business from being conducted in secret except in extremely limited circumstances." From whence cometh Justice Prosser's "manifest purpose?" He doesn't say.

F. The Order and the Concurrence Misstate Case Law, Appearing To Silently Overrule A Court's Power To Review Legislative Actions For Compliance With Constitutional Directives.

¶115 The order and Justice Prosser's concurring opinion treat the answers to the significant questions of law presented as clear and beyond dispute, controlled by uncontroverted precedent. The order and the concurrence do not tell the full legal story.

¶116 The court of appeals certified the legal questions to this court because the answers are not clear and our precedent is conflicting. The court of appeals determined that clarification is required regarding "the interaction between the Open Meetings Law and a line of cases dealing with the separation of power doctrine," citing to four cases: Goodland v. Zimmerman, 243 Wis. 459, 10 N.W.2d 180 (1943); State ex rel. Lynch v. Conta, 71 Wis. 2d 662, 239 N.W.2d 313 (1976); State ex rel. La Follette v. Stitt, 114 Wis. 2d 358, 338 N.W.2d 684 (1983); and Milwaukee Journal Sentinel v. Wisconsin Dep't of Admin., 2009 WI 79, 319 Wis. 2d 439, 768 N.W.2d 700.

¶117 "In sum," the court of appeals stated, "Goodland and Stitt appear to favor the Secretary of State's position [the position now forwarded by the State of Wisconsin and Secretary Huebsch] that courts lack authority to invalidate legislation enacted in violation of the Open Meetings Law or, at the least, to do so before publication. In contrast, Lynch and Milwaukee Journal Sentinel support the District Attorney's view."

¶118 Neither the order nor the concurrence comes to grips with the issue in the present case, namely whether the Open Meetings Law complies with constitutional directives, specifically Article IV, Section 10 and Article I, Section 4, so that the court must enforce the Open Meetings Law.

¶119 First, the order misrepresents Milwaukee Journal Sentinel v. Wisconsin Department of Administration, 2009 WI 79, 319 Wis. 2d 439, 768 N.W.2d 700, as not involving the legislature's compliance with a statute. In the Milwaukee Journal Sentinel case, the court declared that it had jurisdiction to determine whether the legislature complied with Wis. Stat. § 111.92(1)(a), a statute governing legislative procedure, because that statute furthered the constitutional directives found in Article IV, Section 17(2) of the Wisconsin Constitution.

¶120 Second, the order fails to acknowledge that the Milwaukee Journal Sentinel case explained that a court will interpret and apply a procedural statute to determine whether the legislative action complies "with constitutional directives":

[W]e need not decide whether Wis. Stat. § 111.92(1)(a) is a rule of legislative proceeding because a statute's terms must be interpreted to comply with constitutional directives.

Accordingly, even if the statute might otherwise be characterized as a legislative rule of proceeding, we may interpret the statute and apply it to the legislative action to determine whether that action complies with the relevant constitutional mandates. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); [State ex rel. La Follette v. Stitt, 114 Wis. 2d [358, at] 367, [338 N.W.2d 684 (1983)]; McDonald v. State, 80 Wis. 407, 411-12, 50 N.W. 185 (1891).

Therefore, because both Wis. Stat. § 111.92(1)(a) and Article IV, Section 17(2) require the legislature to take additional actions to amend existing law or to create new law, and we have jurisdiction to interpret the Wisconsin Constitution and the Wisconsin Statutes, we have the authority to evaluate legislative compliance with § 111.92(1)(a). Stitt, 114 Wis. 2d at 367, 338 N.W.2d 684. Accordingly, we reject WSEU's argument in this respect, and proceed to determine whether the legislature complied with § 111.92(1)(a) in light of the Wisconsin Constitution.

Milwaukee Journal Sentinel, 319 Wis. 2d 439, ¶¶19, 20 (footnote omitted).

¶121 Justice Prosser fails to mention the case.

¶122 The Milwaukee Journal Sentinel case was based on at least three earlier cases, all concluding that a court may require the legislature to comply with a legislative procedural rule or statute if the procedural rule or statute furthers a constitutional directive.⁽¹³⁾

¶123 The order and Justice Prosser's concurrence put in jeopardy Milwaukee Journal Sentinel and prior case law that declares that a court may determine whether legislative action in enactment of a law complies with a relevant constitutional directive.

¶124 Milwaukee Journal Sentinel (and its precursors) correctly state the applicable principles of judicial review, the doctrine of separation of powers, and the functions of the legislature and judiciary.

III

¶125 In sum, the litigants and the public deserve more than the majority's hasty judgment.

¶126 Each person must abide by the law. Each branch of government must abide by the law. This court must ensure that the law governing judicial decision-making is followed. Justice Brandeis stated these principles eloquently as follows:

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. . . . Against that pernicious doctrine this court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

¶127 The resoluteness called for by Justice Brandeis is no less applicable to the observance of the fundamental principles of the courts in our system of government. Unreasoned judgments breed contempt for the law. The majority, by sacrificing honest reasoning, leads us down a pernicious path. The order today departs from fundamental principles. It fails to abide by the court's Constitutional authority and its own rules and procedures and harms the rights of the people from whom our authority derives.⁽¹⁴⁾ The legitimate and constitutional route to decide the issues presented is through an appeal.

¶128 For the reasons stated, I do not join the order.