

## An Overview of the Conference

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# AN OVERVIEW OF THE CONFERENCE

JACK STARK\*

The prospect of revising the Wisconsin Constitution, exciting as it is, may overwhelm those who contemplate doing it. In fact, even gathering and analyzing the materials that one needs in order to consider whether revision ought to be undertaken are formidable tasks. This conference allows persons who are interested in the constitution's quality to take a significant step forward in their deliberations about that quality and about the correct response to it.

The place from which to begin their journey is the place at which the conference began: Robert Williams' excellent article.<sup>1</sup> Professor Williams deftly sketches the background of the issue of whether to revise, that is, to extensively alter rather than make a few amendments to, the Wisconsin Constitution. He provides useful material about state constitutions in general and about Wisconsin's in particular, about the process of revision, and about efforts in other states to revise their constitutions. Perhaps most helpful is his discussion, which is based on the experience of other states, about the steps that must be taken if revision is to be attempted. In short, he creates a relevant and useful context in relation to which deliberations about revision can effectively take place.

The most important deliberations about a possible revision would be a discussion about whether to add, delete, or modify provisions on substantive grounds. The crucial consideration on these grounds is avoiding narrow provisions that would be more appropriately taken care of by means of statutes. These narrow provisions are likely to be advanced by those who have politically charged motives, not by those who wish to effect the common good. The worst outcome of constitutional revision would be the dominance of persons who seek political advantage, for example, by constitutionalizing positions on wedge issues. With that general goal in mind, it makes sense to examine

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1. Robert F. Williams, *Is the Wisconsin State Constitution Obsolete? Toward a Twenty-First Century, Functionalist Assessment*, 90 MARQ. L. REV. 425 (2007).

a few areas where possible substantive changes need to be examined. The most efficient way to proceed is to discuss the issues that the writers of the papers for the conference have raised.

Jason Czarnezki's article<sup>2</sup> is a first-rate foundation for discussions about whether the constitution's treatment of the environment necessitates revision and the ways in which that revision could best be accomplished. He acknowledges that the public trust doctrine, the notion that the state has a fiduciary duty in regard to certain natural resources, applies to only some of the waters of the state and is based on an expansive reading of the constitutional statement that those waters are "common highways and forever free."<sup>3</sup> He suggests adding a more explicit statement of the doctrine and expanding it to include all lakes and streams, and even all natural resources. Other environmental issues that he would like to see addressed in the constitution include: withdrawal of ground water; an expansion of trust lands; a broad statement of the citizens' rights in the environment, for example, a right to a healthy environment; making the public intervenor a constitutional office; and striking a balance between environmental protection and economic development.

As to education, William Niskanen advocates for a constitutional mandate for a school voucher program.<sup>4</sup> He recognizes that by several measures Wisconsin's schools are doing very well, but he asserts that they could be made dramatically better, for example, by instituting a statewide voucher program along the lines of the program that operates in Milwaukee. He even presents desirable features of such a program. Craig Maher, Mark Skidmore, and Bambi Statz<sup>5</sup> exhaustively explore school finance in Wisconsin. Implicitly they address the question of the degree to which the constitutional requirement for a uniform education<sup>6</sup> plays out in fiscal terms. Another possibility for revising the education article in the constitution comes to mind: other requirements could be added to the uniformity requirements such as high quality or at least adequacy. The phrasing of such a requirement is a delicate business.

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2. Jason J. Czarnezki, *Environmentalism and the Wisconsin Constitution*, 90 MARQ. L. REV. 465 (2007).

3. WIS. CONST. art. IX, § 1.

4. William A. Niskanen, *On Wisconsin: Some Friendly Constitutional Advice*, 90 MARQ. L. REV. 701 (2007).

5. Craig Maher, Mark Skidmore & Bambi Statz, *State Policy Consequences for Wisconsin's School Districts: Spending Disparities, Finance Formulas, and Revenue Restrictions*, 90 MARQ. L. REV. 621 (2007).

6. WIS. CONST. art. X, § 3.

For example, the difference between the cost of an adequate educational system and one of high quality might be hundreds of millions of dollars a year.

In the fields of taxation and fiscal policy, Mr. Niskanen<sup>7</sup> demonstrates that Wisconsin's economy is in good shape and its bureaucracy is not bloated. Moreover, he does not support a constitutional provision like the TABOR (Taxpayers' Bill of Rights) provision that was placed in Colorado's constitution.<sup>8</sup> He writes that amendments like that one limit the rate of growth of state spending to the inflation rate plus the rate of population growth, but they have not proved to be stable.<sup>9</sup> He suggests instead a set of specific guidelines for new constitutional provisions that would constrain state revenue and spending. He proposes adding to the constitution a provision that limits growth in state expenditures in any fiscal year to a stated percentage of state general revenues in the second prior fiscal year unless the growth is approved by a majority in each house of the legislature. He would also add another provision that would preclude increases in the rate or base of any state tax without the approval of a referendum. The topic of such fiscal restraints will likely arise during consideration of constitutional revision.

After presenting a very large amount of data and analyzing many other studies, Steven Deller and Judith I. Stallmann<sup>10</sup> present their views on fiscal restraints, sometimes arriving at conclusions that are similar to Mr. Niskanen's, sometimes disagreeing with him. They point out that for years analysts of fiscal restraints concluded that taxes were inconsequential for economic growth, but that very recently a few studies have muddied the waters, making the relation between the two inconclusive. They conclude, however, that high taxes are not necessarily bad for a state's economy, although they recognize a weak correlation between state (but not local) tax limits and economic growth, and they provide statistics to support their position. In general, Professors Deller and Stallmann appear to be unconvinced that Wisconsin needs a constitutional limit on taxes or revenue.

A very different kind of restraint on the state's spending—on its nature rather than its amount—is created by the public purpose

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7. Niskanen, *supra* note 4.

8. COLO. CONST. art X, § 20.

9. Niskanen, *supra* note 4.

10. Steven Deller & Judith I. Stallmann, *Tax and Expenditure Limitations and Economic Growth*, 90 MARQ. L. REV 497 (2007).

doctrine. This doctrine, which the Wisconsin Supreme Court has held has constitutional status,<sup>11</sup> does not appear explicitly in the constitution. It might be better if it did appear. Justice Luther Dixon propounded the doctrine in some early cases, two of which were on taxation.<sup>12</sup> This doctrine has two aspects. The primary aspect is a requirement that governmental money may be expended only for a public purpose. That rule seems non-controversial. The other aspect is a requirement that the unit of government that levies a tax must be the unit that spends the proceeds.<sup>13</sup> Michael Libonati, in a fine article, points out that this facet of the doctrine “has been an obstacle to legislation impacting on intergovernmental fiscal arrangements.”<sup>14</sup> One way to facilitate those arrangements is to draft a constitutional provision stating the public purpose doctrine, but rule out the second facet of that doctrine—the one on spending tax receipts. Reviewing the second part of the doctrine should occur while reformers consider the constitutional treatment of local units of government.

Professor Libonati’s statement about intergovernmental fiscal arrangements brings to mind a point that some advocates of local government have made in the context of possible constitutional revision. They argue that nothing in the constitution facilitates, and some things in the constitution impede, regional cooperation, so that agreements to cooperate must be fashioned by means of contracts. They are right that some problems affect more than one local unit of government and can best be addressed by a combination of governmental units. Sometimes the affected units overlap, such as a city and the county in which it lies. Sometimes the units are contiguous, such as two adjoining towns. However, the seriousness of the problem and the needed remedies are not clear yet. This issue is worth exploring.

Professor Libonati’s point about intergovernmental fiscal arrangements appears in his paper on local units of government.<sup>15</sup> He brings up a number of issues concerning local units of government that

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11. See, e.g., *Hopper v. City of Madison*, 79 Wis. 2d 120, 128, 256 N.W.2d 139, 142 (1977); *State ex rel. Singer v. Boos*, 44 Wis. 2d 374, 381, 171 N.W.2d 307, 311 (1969).

12. *Hasbrouck v. City of Milwaukee*, 13 Wis. 37, 44 (1860); *Soens v. City of Racine*, 10 Wis. 214, 223 (1860); *Knowlton v. Bd. of Supervisors of Rock County*, 9 Wis. 410, 420–21 (1859).

13. See, e.g., *Buse v. Smith*, 74 Wis. 2d 550, 579, 247 N.W.2d 141, 155 (1962); *Brodhead v. City of Milwaukee*, 19 Wis. 658, 672 (1865).

14. Michael E. Libonati, “Neither Peace nor Uniformity”: *Local Government in the Wisconsin Constitution*, 90 MARQ. L. REV. 593 (2007).

15. *Id.*

ought to be explored. For example, like environmental provisions, provisions on local units of government appear in various articles in the constitution rather than in an article exclusively devoted to that topic. It might be desirable to draft such an article. He also asserts that the uniformity clause<sup>16</sup> (requiring uniformity in property taxation) also impedes the rational achievement of fiscal reform. Professor Libonati looks through the lens of local government at the public trust doctrine, which has been discussed in the passage on environmental issues, and at the doctrine of non-delegation, which limits the legislature's authority to grant powers to local units of government.<sup>17</sup> The bedrock of the constitutional treatment of local units of government is the home-rule provision.<sup>18</sup> In addition to laying out the main issues on this topic, Professor Libonati explains the treatment of local units of government in other state constitutions and provides some wise advice for constitution-makers who confront these issues.

The issue of separation of powers arises in Jim Rossi's essay.<sup>19</sup> He analyzes two recent cases on the state's regulation of Indian gaming and the contexts in which those cases arose.<sup>20</sup> He argues that the principle of separation of powers has affected that regulation in negative ways. One solution is to amend the constitution narrowly in ways that affect the regulation of Indian gaming. Another solution is to cause a much broader change by altering the scheme of separation of powers. That second course of action ought to give one pause. First, it would be a major change and would have many unintended consequences. Second, the treatment of separation of powers in the Wisconsin Constitution is actually reasonably flexible. One can see this by comparing it with the treatment of separation of powers in Iowa's constitution.<sup>21</sup> Both constitutions vest legislative power in a legislative body, executive power in the executive branch, and judicial power in a court system.<sup>22</sup>

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16. WIS. CONST. art. VIII, § 1.

17. A leading case on this issue is *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 524, 137 N.W. 20, 34 (1912).

18. WIS. CONST. art. XI, § 3.

19. Jim Rossi, *Constitutional Isolationism and the Limits of State Separation of Powers as a Barrier to Interstate Compacts*, 90 MARQ. L. REV. 721 (2007).

20. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 719 N.W.2d 408; *Panzer v. Doyle*, 2004 WI 52, 271 Wis. 2d 295, 680 N.W.2d 666.

21. See Jack Stark, *A Comparison of the Wisconsin and Iowa Constitutions*, 31 RUTGERS L. J. 1019 (2000). On the separation of powers see *id.* at 1041-43.

22. IOWA CONST. art. III, div. 2, § 1 (legislative), art. IV, § 1 (executive), art. V, § 1 (judicial); WIS. CONST. art. IV, § 1 (legislative), art. V, § 1 (executive), art. VII, § 2 (judicial).

However, the Iowa Constitution also contains another relevant provision:

The powers of the government of Iowa shall be divided into three separate departments—the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.<sup>23</sup>

As one would expect, Iowa courts, because of that provision, rigorously enforce the separation of powers doctrine.<sup>24</sup> For example, they are loath to declare statutes unconstitutional, which one could argue reflects their desire not to assume legislative functions, and they narrowly interpret the governor's veto power,<sup>25</sup> which makes it difficult for the governor to assume legislative powers. In contrast, the Wisconsin Supreme Court seems to declare legislation unconstitutional at a slightly higher rate than does the Iowa court<sup>26</sup> and has treated the governor's veto power as very expansive.<sup>27</sup>

Many persons are dismayed by the great effect that reapportionment has on each party's strength in the legislature, and some of those persons would raise that issue at a constitutional convention. James Gardner's article<sup>28</sup> addresses reapportionment. One alternative to reapportionment is to include in the constitution a directive that electoral districts are to be drawn so as to make as many of them competitive as possible. Gardner disapproves of that approach because that would put the election in the hands of swing voters, who tend to be less interested and less well informed than party loyalists. In contrast, he defines electoral fairness as the degree to which "the electoral system produces a legislature in which political parties achieve representation

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23. IOWA CONST. art. III, div. 1, § 1.

24. Stark, *supra* note 21, at 1041.

25. *Id.* at 1035–40.

26. *Id.* at 1032.

27. See Benjamin W. Proctor, Comment, *Wisconsin's Chief Legislator: The Governor's Partial Veto Authority and the New Tipping Point*, 90 MARQ. L. REV. 739 (2007).

28. James A. Gardner, *What Is "Fair" Partisan Representation, and How Can It Be Constitutionalized? The Case for a Return to Fixed Election Districts*, 90 MARQ. L. REV. 555 (2007). The constitutional provisions on reapportionment are WIS. CONST. art. IV, §§ 3–5.

in proportion to their support in the electorate.”<sup>29</sup> He believes that the greatest impediment to that result is the commitment to single-member, territorial election districts. He prefers a system in which the boundaries between districts would remain constant, but the number of delegates allotted to each district would vary as the population of the districts varies. His paper is a good starting point in the debate on this issue.

Governors and their staff members probably approve of the Wisconsin Constitution’s treatment of the issue of gubernatorial vetoes; but, it is likely that the citizens of the state, if properly informed, would prefer to alter that treatment because the veto power in this state is generally regarded as the broadest in the country.<sup>30</sup> Benjamin Proctor takes up this issue in his well-researched comment.<sup>31</sup> As he points out, the root of the problem is a Wisconsin Supreme Court holding that “part” in the constitutional section on vetoes means the smallest imaginable portion.<sup>32</sup> One result of this initial interpretation is the Wisconsin Supreme Court’s approval of a veto that consisted of the lining out of a dollar amount and the writing in of a lower amount.<sup>33</sup> There would almost certainly be substantial support at a constitutional convention for a limitation of the veto authority.

For years, the only significant requirement for vetoes was that the material left after the veto must be “a complete, entire, and workable law.”<sup>34</sup> Later, the constitution was amended to prohibit creating new words by rejecting individual letters.<sup>35</sup> More recently, the Wisconsin legislature passed, on first consideration,<sup>36</sup> an amendment that would forbid creating by veto a new sentence that is composed of parts of more than one sentence.<sup>37</sup> The case law has recently produced a significant restriction, holding that the material left after a veto must be germane to (have the same subject matter as) the material from which it was

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29. Gardner, *supra* note 28.

30. WIS. CONST. art. V, § 10.

31. Proctor, *supra* note 27.

32. *Id.*; *see, e.g.*, State *ex rel.* Wis. Tel. Co. v. Henry, 218 Wis. 302, 313, 260 N.W. 486, 491 (1935).

33. Citizens Util. Bd. v. Klauser, 194 Wis. 2d 485, 485, 534 N.W.2d 608, 608 (1995).

34. *See Wis. Tel. Co.*, 218 Wis. at 314, 260 N.W.2d at 491.

35. WIS. CONST. art. V, § 10(1)(c).

36. *See Id.* art. XII, § 1 (stating that to be successful a proposed constitutional amendment must pass the legislature in identical form in two successive legislatures and then be ratified by the people).

37. Assemb. J. Res. 68, 97th Leg., Reg. Sess. (Wis. 2005); Enrolled J. Res. 40, 97th Leg., Reg. Sess. (Wis. 2005).

fashioned.<sup>38</sup> If the vetoes of the most recent budget bill that got the most attention had been challenged,<sup>39</sup> they would most likely have been reviewed in light of that principle. With two related vetoes the Governor effected a transfer of several hundred million dollars from the transportation fund to the general fund. The money transferred would ultimately increase school aid. In both of those vetoes, the germaneness requirement appears to have been violated. Most of the material that was vetoed was about particular transportation projects, and some of it was about the unfunded liability of the state's retirement system. Thus, there are some checks on the governor's veto power, but many persons would like there to be even more.

Joseph Ranney, the authority on Wisconsin legal history, contributed an article that serves two purposes.<sup>40</sup> One purpose is to make several suggestions about reforming the Wisconsin Constitution. He advocates eschewing "housekeeping" measures, those that have to do with administrative details of government such as the materials on the terms of office for local officials.<sup>41</sup> He also is opposed to amendments on controversial social policies, such as the amendment defining marriage that was approved by the voters in November 2006. He would make amending the constitution more difficult by changing to two-thirds the margin needed, in the legislature or in a referendum, to amend the document.

Mr. Ranney's second purpose is to offer suggestions on substantive provisions. His more controversial suggestions are eliminating the uniformity clause<sup>42</sup> and the internal improvements section.<sup>43</sup> He notes that the uniformity clause was designed for a system of taxation that consisted almost entirely of the property tax and that the clause is less appropriate for a more complicated system. However, under the case law, the clause applies only to the property tax.<sup>44</sup> Some would oppose eliminating the clause, partly because virtually every state has such a

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38. See *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 437, 424 N.W.2d 385, 387–88 (1988).

39. 2005–2007 Budget Act, Act 25, 2005 Wis. Sess. Laws 1.

40. Joseph A. Ranney, *Wisconsin's Constitutional Amendment Habit: A Disease or a Cure?*, 90 MARQ. L. REV. 667 (2007).

41. WIS. CONST. art. VI, § 4.

42. See *Id.* art. VIII, § 1; Jack Stark, *The Uniformity Clause of the Wisconsin Constitution*, 76 MARQ. L. REV. 577 (1993).

43. See WIS. CONST. art. VIII, § 10; Jack Stark, *A History of the Internal Improvements Section of the Wisconsin Constitution*, 1998 WIS. L. REV. 829.

44. Stark, *supra* note 42, at 585–98.

provision. Moreover, both provisions are bulwarks against favoritism and potentially against corruption.<sup>45</sup> A contrary view is that the clause and section should be retained, and the Wisconsin Supreme Court should enforce them more vigorously than it has recently done. For example, in the most recent uniformity clause case, a property tax exemption for airlines that have a hub in Wisconsin was held to be constitutional.<sup>46</sup> The exemption applied to only two airlines, and other airlines that operated in the state, including the plaintiff, were required to pay a tax on their in-state property. In the leading case on such situations, the court held that a complete exemption for a university's property was unconstitutional because other institutions of higher education received an exemption for only forty acres.<sup>47</sup> The court reasoned that it was not uniform to treat the property within a class differently.<sup>48</sup> The attorney general has agreed with that proposition.<sup>49</sup> Thus, the most recent case seems to be an anomaly.

The list of major substantive issues that the papers raise is very nearly comprehensive. However, there should probably be one more effort to ensure that the list is complete. One missing topic that comes to mind is takings or condemnation—governmental acquiring of private property for public purposes.<sup>50</sup> This is a topic that has often been in the news recently, primarily because of a controversial and well-publicized Supreme Court decision on the takings provision in the United States Constitution.<sup>51</sup> Except for the omission of “private” as a modifier of property, the Wisconsin section<sup>52</sup> on this topic is identical to part of the Fifth Amendment to the U.S. Constitution.<sup>53</sup> However, unlike its practice in regard to most of the sections in article I that have analogues in the U.S. Constitution, the Wisconsin Supreme Court has not followed federal case law in its interpretation of this section. The takings section is very brief, and many of the cases turn on a careful examination of the facts because there is no clear line between constitutional and

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45. *Id.* at 580.

46. *Nw. Airlines v. Wis. Dep't of Revenue*, 2006 WI 88, ¶ 14, 293 Wis. 2d 202, ¶ 14, 717 N.W.2d 280, ¶ 14.

47. *Bd. of Tr. of Lawrence Univ. v. Outagamie County*, 150 Wis. 244, 246, 136 N.W. 619, 623 (1912). The other colleges' exemptions were probably unconstitutional also because they were partial. *See Stark, supra* note 42, at 599–600.

48. *Bd. of Tr. of Lawrence Univ.*, 150 Wis. at 246, 136 N.W. at 623.

49. 54 Op. Wis. Att'y Gen. 60 (1965); 40 Op. Wis. Att'y Gen. 419 (1951).

50. WIS. CONST. art. I, § 13.

51. *Kelo v. City of New London*, 545 U.S. 469 (2005).

52. WIS. CONST. art. I, § 13.

53. U.S. CONST. amend. V, § 1.

unconstitutional public action. The primary question for constitutional reformers on this point is whether the case law has led to a rational distinction between public and private purposes. One possible revision that comes to mind is to add “damaging” to “taking” as a type of action that is impermissible without just compensation. Another possibility is to spell out some of the actions that are *public* uses. In the latter regard, the court in the federal case held that economic development, that is, benefits for corporations, is a public purpose.<sup>54</sup>

The uniformity clause case on airlines raises the issue of the proper response of constitutional reformers to case law that is inconsistent.<sup>55</sup> One response, of course, is to do nothing and wait for the courts to correct themselves, an outcome that is not assured. A reformer could also argue that constitutions ought to be general and should not contain provisions that in essence are directions to the courts about the proper way to interpret general provisions. The other view is that a constitution can properly accommodate such directions. For example, in regard to the uniformity clause, one could add to it a statement that all the members of a class of property must be treated uniformly.

The first step in the analysis of the uniformity clause is to decide whether anything should be done. If the decision is to go ahead with specific provisions, the second and more laborious step is to determine the material that should be added in response to unfortunate case law. In addition to the vital substantive issues that are pertinent to our deliberations, a constitutional reformer should dispose of three less important matters, including the constitution’s structure, removal of extraneous provisions, and cosmetic changes. Even great deficiencies in these areas do not make revision of the constitution necessary. Moreover, great deficiencies in them would not convert any citizen to advocacy of revision. Nevertheless, deficiencies are just that, and they ought to be remedied if more important matters are to be addressed. In fact, these problems are unlikely to be solved unless they are solved in conjunction with a major substantive revision.

The first class of minor problems relates to the constitution’s structure. For example, in his incisive article, Jason Czarnezki points out that “the constitution details financial provisions related to forests and minerals, creates the Commission of Public Lands, establishes jurisdiction of rivers and lakes providing the foundation for the public

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54. *Kelo*, 545 U.S. at 480–89.

55. *Nw. Airlines v. Wis. Dep’t of Revenue*, 2006 WI 88, ¶ 14, 293 Wis. 2d 202, ¶ 14, 717 N.W.2d 280, ¶ 14.

trust doctrine, and contains the recently enacted right to hunt and fish amendment.”<sup>56</sup> Those four topics appear in four articles of the constitution.<sup>57</sup> Particularly if Professor Czarnezki is right that a number of environmental provisions ought to be added to the constitution, it might be rational to combine the current and new provisions, if any, into a separate article on the environment. That would both make them easier to find and underline their importance.

Another type of minor revision that should be made concerns the removal of extraneous provisions, those that are undesirable not because they are substantively flawed but because they are superfluous. Among the candidates for omission are provisions about the prohibition of slavery,<sup>58</sup> the acceptance of the enabling act (allowing the Territory of Wisconsin to proceed toward statehood),<sup>59</sup> the disposition of territorial lands,<sup>60</sup> the transition from territory to state,<sup>61</sup> and the transition to a new judicial system.<sup>62</sup> Other candidates are the provisions that are based on the assumption that this state is a military power.<sup>63</sup> Still other candidates for deletion are such provisions as “The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles.”<sup>64</sup> That statement is more in the nature of a civics lesson and seems inappropriate in a constitution, but it was cited in a case.<sup>65</sup> Provisions are likely to be extraneous if they have not been amended or litigated. However, the absence of litigation is not a sure indicator that a provision ought to be removed. An example of such a provision is the prohibition of religious tests for office.<sup>66</sup> That seems to be a worthwhile protection.

Finally, the constitution would benefit from some cosmetic changes. For example, some archaic and redundant words and phrases can be eliminated. Also, some cleaning-up for the sake of consistency is desirable. As to that second goal, sprinkled throughout the constitution

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56. Czarnezki, *supra* note 2.

57. WIS. CONST. art. VIII, § 7, art. X, § 7, art. IX, § 1, art. I, § 26.

58. *Id.* art. I, § 2.

59. *Id.* art. II, § 2.

60. *Id.* art. IX, § 2.

61. *Id.* art. XIV, §§ 1–2.

62. *Id.* art. XIV, § 16.

63. *Id.* art. I, § 20, art. IV, § 29, art. V, §§ 4, 7 (2), art. VIII, § 7 (1).

64. *Id.* art. I, § 22.

65. *Stierle v. Rohmeyer*, 218 Wis. 149, 167, 260 N.W. 647, 655 (1935).

66. WIS. CONST. art. I, § 19.

in eighty-four places are brief phrases that refer to the enactment of statutory law.<sup>67</sup> They are phrased in fifteen ways.<sup>68</sup> Most importantly, they indicate that the constitutional provision in which they appear is not self-executing; that is, it does not by itself create rights, duties, or responsibilities but must be implemented by the enactment of a statute or statutes.<sup>69</sup> They also impose a duty to legislate, do not authorize shams, can be supplemented by court-fashioned restrictions and qualifications, and do not grant exclusive authority.<sup>70</sup> Surprisingly, they have frequently been relevant in litigation.<sup>71</sup> Consistency in regard to them would be desirable. One can attain it by using one phrase, such as “by statute,” in each place.

Returning to Mr. Ranney’s fine article, one notes that the bulk of it is a historical study of the amendments to the constitution.<sup>72</sup> He finds that certain themes emerge in the various periods into which he divides that history. He also considers the Wisconsin Constitution to be stable compared to those of other states. His statement that “the patterns of amendment and amendment rejection over the course of the state’s history provide clues as to what parts of the constitution might usefully be changed by reformers”<sup>73</sup> is supported by his analysis. Studying those patterns also helps persons who are considering constitutional reform to determine whether a constitutional convention or a series of amendments ought to be undertaken.<sup>74</sup> Mr. Ranney is skeptical about the benefits of a constitutional convention: “Wisconsin’s constitutional system has in the main been successful. The reforms discussed above would likely be useful, but it is far from certain that a new constitution is the best way to achieve them.”<sup>75</sup> Others would argue that extensive constitutional revision is desirable, perhaps necessary.

Answering the question that Mr. Ranney poses about the likely efficacy of major constitutional revision is the next step for reformers, and it requires more analysis. The proceedings of this conference have

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67. See Jack Stark, *Enigmatic Grants of Law-Making Rights and Responsibilities in the Wisconsin Constitution*, 81 MARQ. L. REV. 961, 961–62 nn.2–16 (1998).

68. *Id.* at 961–62.

69. *Id.* at 965.

70. *Id.* at 969–70, 973.

71. See *id.* at 962–63.

72. Ranney, *supra* note 40.

73. *Id.*

74. On that question it should be noted that an amendment may address only one issue. WIS. CONST. art. XII, § 1. Thus, if there are many problems, there must be many amendments to remedy them.

75. Ranney, *supra* note 40.

allowed reformers to address this question in a more rational and better informed way. They need even more material like the kind that this conference has produced, and they need to inform the citizens of this state about the benefits that revision is likely to bring. After that information is distributed, they need to determine the level of receptivity to a convention that ordinary citizens and political leaders have. Reformers need to remember that revising the constitution is not a panacea. If the legislative and executive branches ignore the constitution and the judicial branch incorrectly interprets it, the benefits of revision will be attenuated. Regardless of the final decision about whether to proceed with a convention, the decision-making process that this conference has so substantially advanced will be good for the constitution and, thus, good for Wisconsin.

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