

Marquette Law Review

Volume 90
Issue 3 *Symposium: Is the Wisconsin
Constitution Obsolete?*

Article 12

2007

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Repository Citation

Andrew Reschovsky, *Comments on William A. Niskanen's On Wisconsin: Some Friendly Constitutional Advice*, 90 Marq. L. Rev. 713 (2007).

Available at: <https://scholarship.law.marquette.edu/mulr/vol90/iss3/12>

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COMMENTS ON WILLIAM A. NISKANEN'S *ON WISCONSIN: SOME FRIENDLY CONSTITUTIONAL ADVICE*

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It is indeed an honor to be asked to comment on Dr. Niskanen's paper.¹ Bill Niskanen has had an illustrious career; he is a longtime student of government and has made insightful contributions to the literature on public decision making. The paper Bill presented today is interesting and provocative, and I encourage you to read it.

Although the paper covers a number of issues, I would like to focus these comments directly on Niskanen's five proposed constitutional amendments. I'll first ask whether each proposal is good public policy. If I conclude that the proposal represents sensible policy, I'll then ask whether it should be enacted as a statute or enshrined in the state's constitution.

I.

Niskanen's first proposal is that "*State general expenditures in any fiscal year may not exceed one hundred and [some] percent of the state general revenues in the second prior fiscal year without the approval of a majority of those elected to each house of the legislature.*"² He suggests that a reasonable target growth rate for state spending would be the growth rate of personal income within the state. There is no question that in making tax and spending policies, the legislature should pay attention to the growth rate of the economy. In fact, even without this rule, state and local government spending hasn't grown much faster than personal income growth. It's only three percentage points higher today than in 1970, a modest increase considering the rapid increase in the costs of providing public services, in particular health care.

Niskanen points out that linking spending to revenue from two years

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

2. *Id.* (emphasis added).

ago will help to stabilize state government spending. While the proposal might prevent big spending cuts during a recession, implementation of the spending limit might result in sharp cuts in spending a couple years after a recession. If this amendment (or a statutory version) had been in place over the past few years, the spending ceiling in 2004 would have dropped by nearly 12% relative to its level in 2003, reflecting the impact of the 2001 recession.³ Fortunately, the amendment gives the legislature the power to override the spending limit. In fact, it provides the legislature with the power it already has, namely the power to determine the level and composition of state spending. I'm left to ask, why then do we need this amendment?

II.

Niskanen's second proposal reads: "*The rate or base of no state tax may be increased without the approval by a majority of those voting in the next election for members of the legislature.*"⁴ The first question one might ask is why do we need such a policy when the current political environment is so strongly supportive of keeping taxes low? In Wisconsin, members of both major political parties are campaigning on "no new taxes" platforms,⁵ and legislators in both parties strongly supported a recently enacted property tax freeze.⁶ And more widely, nearly half of all members of Congress, our President, and over 1300 state legislators around the country have signed a "no new taxes" pledge.⁷

There are several reasons why, in my view, this proposal, even as a statute, is bad tax policy. First, requiring votes on all tax rate or tax base increases will make it very hard to ever reform the state tax system. One example of a sensible reform is the Streamlined Sales Tax Project, a national project to standardize across states the definitions of the sales

3. Information prepared by the author based on a simulation of Dr. Niskanen's proposal included in Niskanen, *supra* note 1.

4. Niskanen, *supra* note 1 (emphasis added).

5. See, e.g., Jennie Tunkieicz, *Election 2006: Incumbent, Challenger Both Favor Spending Restraints; The Differences Are in the Details in 63rd Assembly District*, MILWAUKEE J. SENTINEL, Oct. 23, 2006, at 3B.

6. See Steven Walters, *Doyle Tinkers with Property Tax Limits in Republican's Budget*, MILWAUKEE J. SENTINEL, July 24, 2005, at 1B (discussing Governor Doyle's vetoes of the 2005–2007 budget that altered, but did not remove, legislature-passed limits on local government tax levy increases).

7. Eric Parker, *State Lawmaker, Antitax Activist Debate Pledge to Oppose Tax Increases*, 41 ST. TAX NOTES 543 (2006).

tax base.⁸ Approval of the project recommendation by a large number of states will make it easier for states to begin taxing mail order and internet sales. Individual states would remain free to decide what to include in their sales tax bases, but every state would define categories of goods, for example, candy, in the same way. For Wisconsin, accepting the standard definition of candy would mean, for example, that marshmallows would become taxable. Other items that are now taxable would be excluded from taxation. Although members of the legislature can hold hearings on the proposal and debate its pros and cons at length before coming to a decision, most voters won't have the time to study the proposal in detail, and if they vote at all, may well be swayed by vote-no ads from the marshmallow industry. Unfortunately, there are no lobbyists for good tax policy. In my view, government will operate both more effectively and be more in tune with the public interest if decisions on complex fiscal issues are made by the legislature rather than via referendum. I note that this point of view appears to be shared by the panel of former governors who spoke last evening.⁹

Niskanen's tax proposal is *non-symmetrical*—all tax increases must go to the voters, but a tax decrease, even if targeted to a narrow interest group, say cranberry farmers, is not subject to approval by the voters. Might the real motivation here be one of downsizing government?

There is ample empirical evidence that voters are much more likely to support tax increases when the new revenues are dedicated to support a particular public service that the public values. In states where voters must approve tax increases, legislatures have frequently proposed *earmarked taxes*. The revenue from these taxes can only be used for specified purposes. The result is often a highly inflexible fiscal system, where over time the state raises lots of revenue for things that may no longer be top priorities, while it finds itself unable to raise sufficient revenue to respond to current needs. A case in point is Alabama, a state whose constitution contains over 700 amendments, many of them dealing with fiscal matters, and as a result of these amendments earmarks nearly 90% of total state revenue.¹⁰ As a result, the state has almost no flexibility to deal with new priorities. Therein lies a cautionary tale for Wisconsin.

8. Mary McLaughlin, *The Streamlined Sales Tax Project*, THE CPA J., Dec. 2003, at 58.

9. Former Governors Panel, Wisconsin Constitution Conference – Is the Wisconsin Constitution Obsolete? (Oct. 5, 2006).

10. See ALA. CONST. amends. 1–777; see also Tom Baxter, *Alabama Charts a New Course*, ATLANTA J.-CONST., June 8, 2003, at B12 (noting that Alabama law earmarks about 92 cents of every dollar collected).

III.

Niskanen's third proposed amendment attempts to prevent the state government from imposing unfunded mandates on local governments. The amendment says that "[t]he state must compensate local governments for the estimated incremental cost of any new state mandate on these governments."¹¹

I want to argue that the proposal is likely to result in undesirable outcomes. For example, because improperly treated sewage in one municipality is likely to cause harm to the residents of all downriver municipalities, it is perfectly reasonable for the state to set standards for municipal sewage treatment. Requiring the state to pick up the entire cost of meeting any new standards may not only lead the state to settle for lower environmental standards, but it will also provide the polluting local governments with a powerful incentive to under-maintain or delay upgrading its own sewage system, knowing that the state will have to pay for any mandated remediation.

Meanwhile, it is unlikely that the amendment would provide local governments with much fiscal relief. Yes, the state will have to compensate local governments for the costs of new mandates, but there will be nothing to stop the state from, in effect, financing the costs of the mandate by reducing other state aid to local governments, for example, shared revenue or transportation aids. Finally, estimating the cost of new mandates will undoubtedly lead to lots of litigation. Perhaps, we might call this proposal the "Lawyers Full-Employment Amendment."

IV.

Niskanen's most far-reaching proposal would make any primary or secondary school student in the state eligible for a voucher to attend a private school.¹² The value of the voucher would be equal to the state aid per student allocated to public schools in each student's home district. The basic argument in favor of school vouchers is that the competition among schools, both public and private, will increase the productivity of all schools and will result in gains in overall student achievement.

Niskanen justifies support for a universal school voucher amendment based on his conclusion that the Milwaukee Parental

11. Niskanen, *supra* note 1 (emphasis added).

12. *Id.*

Choice Program ("MPCP") has been an unqualified success.¹³ The fact is, the jury is still out on the effectiveness of the choice program. In his paper, Niskanen cites two studies, one that concluded that the academic performance of voucher students exceeded that of similar students remaining in the Milwaukee public schools,¹⁴ and the second that claimed that students in public schools that had to compete with the private voucher schools ended up improving their academic performance more than similar students in Wisconsin schools that did not face competition from private voucher schools.¹⁵ These research results led Niskanen to conclude that "almost every student was a winner."¹⁶

Although the statistical issues are quite complex, important questions have been raised about the conclusions of both of these studies by a number of other respected scholars.¹⁷ In addition, other studies of the Milwaukee Parental Choice Program, some of them more recent, find little, if any improvement in the academic performance of voucher students relative to Milwaukee public school students.¹⁸ I do not mean to suggest that Milwaukee's Parental Choice Program has been a complete failure. It seems quite clear that some students have prospered in voucher schools. But, it is important to emphasize that the evaluations are ongoing, and it is certainly too early to claim that the voucher program is an unqualified success.

In some ways, the success of the Milwaukee voucher program is beyond the point. In a slight of hand, Niskanen moved from Milwaukee's program, a voucher program targeted to low-income students, to a *universal* voucher program, one that would be available to all students.¹⁹ It is very important to note that there has been no direct

13. *Id.*

14. *Id.* (citing Jay P. Greene et al., *Effectiveness of School Choice: The Milwaukee Experiment*, 31 EDUC. & URBAN SOC'Y 190, 200 (1999)).

15. *Id.* (citing Caroline M. Hoxby, *School Choice and School Productivity: Could School Choice be a Tide that Lifts All Boats?*, in THE ECONOMICS OF SCHOOL CHOICE 287, 323 (Caroline M. Hoxby ed., 2003)).

16. *Id.*

17. See Helen F. Ladd, *School Vouchers: A Critical View*, 16 J. ECON. PERSP. 3 (2002); Cecilia Elena Rouse, *Private School Vouchers and Student Achievement: An Evaluation of the Milwaukee Parental Choice Program*, 113 Q.J. ECON. 553 (1998); Martin Carnoy et al., *Does Competition From Private Voucher Schools Improve Public School Performance?: A Case Study of the Milwaukee Parents' Choice Program, 1996/1997–2004/2005* (April 2006) (unpublished paper, on file with author).

18. See JOHN WITTE, THE MARKET APPROACH TO EDUCATION: AN ANALYSIS OF AMERICA'S FIRST VOUCHER PROGRAM (1999); Carnoy, *supra* note 17.

19. Niskanen, *supra* note 1.

research on universal voucher programs in the U.S., and research on the long-standing universal voucher programs in Chile and New Zealand calls into question the claim of voucher proponents that these programs will result in increased student achievement.²⁰ In fact, the international evidence suggests that universal vouchers may well have worsened the educational opportunities of low-income students.²¹

An unintended consequence of a universal voucher system may well be the increased stratification of schools by students' socioeconomic status and race. There exists considerable evidence that parents judge schools by the characteristics of the other students in the school.²² Recent evidence has pointed to the important role a student's peers play in his or her academic achievement.²³ As a result, with a universal voucher system, disadvantaged students may well end up in schools with heavy concentrations of other disadvantaged students. The chances that disadvantaged students will end up concentrated in certain schools are further increased *if* the value of vouchers does not reflect the extra resources needed to educate many disadvantaged students, *if* voucher schools are allowed to charge tuition or fees on top of the voucher, or *if* voucher schools are free to choose which students to accept.

My point here is not to attack universal vouchers, but to argue that the last thing we should do is to enshrine in our constitution an untested policy, especially when the stakes—the education of our children—are so high.

V.

Niskanen's final proposed constitutional amendment states that “[n]othing in this constitution should be interpreted to imply that any service financed by the state must necessarily be supplied by a state or local government organization.”²⁴

You may be surprised to hear that I agree with this statement 100%. For many years, both the state and local governments in Wisconsin have

20. Helen F. Ladd & Edward B. Fiske, *The Uneven Playing Field of School Choice: Evidence from New Zealand*, 20 J. POL'Y ANALYSIS & MGMT. 43 (2001); Patrick J. McEwan, *The Potential Impact of Large-Scale Voucher Programs*, 70 REV. EDUC. RES. 103 (2000); Patrick J. McEwan & Martin Carnoy, *The Effectiveness and Efficiency of Private Schools in Chile's Voucher System*, 22 EDUC. EVALUATION & POL'Y ANALYSIS 213 (2000).

21. See Ladd & Fiske, *supra* note 20; McEwan, *supra* note 20; McEwan & Carnoy, *supra* note 20.

22. Ladd, *supra* note 17, at 6–7; McEwan, *supra* note 20.

23. Ladd, *supra* note 17, at 7; McEwan, *supra* note 20, at 130–134.

24. Niskanen, *supra* note 1 (emphasis added).

been turning to the private sector to provide a wide range of services. For example, private enterprise is involved in operating prisons, counseling welfare clients, and maintaining police cars.²⁵ In fact, as Niskanen points out, Wisconsin provides a high level of public services with a below average number of government employees.²⁶ As far as I am aware, there is nothing in our constitution to prevent or discourage governments in Wisconsin from using the private sector to provide government financed services. So, it appears that what we have here is an amendment in search of a problem.

VI.

Like many states, Wisconsin faces myriad fiscal challenges. In his presentation, Bill Niskanen highlights a number of important fiscal issues, such as taxation, school funding, and unfunded mandates. Let me conclude by arguing that fiscal policy should be addressed by the state legislature. Wisconsin should take the U.S. Constitution as a model. One of the reasons that the U.S. Constitution has served us well for over 200 years is that the framers had the wisdom to leave detailed fiscal policy issues out of the Constitution. We would do well to follow that model in Wisconsin.

25. See generally PAUL KENGORE, WIS. POLICY RESEARCH INST., COMPETITIVE CONTRACTING AND PRIVATIZATION OPTIONS IN WISCONSIN STATE GOVERNMENT (2001).

26. Niskanen, *supra* note 1.

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