

Forward: Reappraising the Wisconsin Constitution

Michael K. McChrystal
michael.mcchrystal@marquette.edu

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Michael K. McChrystal, *Forward: Reappraising the Wisconsin Constitution*, 90 Marq. L. Rev. 407 (2007).
Available at: <http://scholarship.law.marquette.edu/mulr/vol90/iss3/2>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

MARQUETTE LAW REVIEW

Volume 90

Spring 2007

Number 3

FORWARD: REAPPRAISING THE WISCONSIN CONSTITUTION

MICHAEL K. MCCHRYSTAL**

This Symposium issue of the *Marquette Law Review* contains papers presented at a conference that asked, “Is the Wisconsin Constitution Obsolete?” The idea for the conference originated with Edward J. Huck, Executive Director of the Wisconsin Alliance of Cities, who saw significant limitations, imposed by the Wisconsin Constitution, on the ability of Wisconsin municipalities to cooperate in delivering services and to generate revenues to meet the public’s demand for local services.

Beyond these local government concerns, the idea of the conference was timely for additional reasons. In recent years, the Wisconsin legislature has debated numerous proposed amendments to the Wisconsin Constitution, including a proposed “gay marriage” amendment that appeared on the November 2006 ballot. Moreover, confidence in the performance of state government has been shaken by the recent convictions of Wisconsin legislative leaders from both the Democratic and Republican parties for crimes related their political activities.

* Wisconsin adopted “Forward” as the official state motto in 1851. See WIS. LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN 2003–2004 BLUE BOOK 964 (2003).

** Professor of Law, Marquette University Law School. Professor McChrystal, as organizer of the conference on which this Symposium is based, selected the contributors and solicited their papers. In addition to the scholars whose work appears in the Symposium, Professor McChrystal particular thanks Joseph D. Kearney, Dean of Marquette University Law School, Edward J. Huck, Executive Director of the Wisconsin Alliance of Cities, Jeff Mayers, President of WisPolitics, Jacob Manian, Research Assistant, and the editors and staff of the *Marquette Law Review*.

The gubernatorial veto is yet another state constitutional provision that invites revisiting. It is unusual in its shifting of power to the executive, permitting the governor an extraordinarily range of tactics in approving or vetoing individual words and numbers in appropriation bills. In addition, the Wisconsin Constitution has figured prominently in discussions of state and local taxation issues and of initiatives involving education.

State constitutions, including the Wisconsin Constitution, are not revered in the same way as the Constitution of the United States. Numerous factors no doubt contribute to this phenomenon. One factor may be that state constitutions are frequently amended, often with provisions more notable for their detail than their timeless vision. In Wisconsin, amendments require the legislature's initiative and approval, which means that the product is the result of the legislative process, with its various strengths and weaknesses.¹ Moreover, state constitutions are dispositively interpreted, in many jurisdictions including Wisconsin, by judges who themselves must face the voters.² In addition, in the important field of civil liberties, state constitutions have often been viewed as mere echoes of the rights recognized by federal courts under the United States Constitution.³

Given the relatively low esteem (which is not to say lack of esteem) for state constitutions, it may not be surprising that in assessing the Wisconsin Constitution, it matters how one conceives the standard to be applied. Is the constitution to be assessed in terms of its mere sufficiency, i.e., whether because of a constitutional infirmity something is going terribly wrong? Or is it to be judged by a standard of excellence, i.e., whether it reflects the state's "continuous drive to be a national leader?"⁴

1. See WIS. CONST. art. XII, § 1.

2. For an incisive discussion of "interpretive philosophy and judicial behavior" as it relates to the application of the Wisconsin Constitution by the Wisconsin Supreme Court, written by a former member of the court who now sits on the United States Court of Appeals for the Seventh Circuit, see Diane S. Sykes, *Reflections on the Wisconsin Supreme Court*, 89 MARQ. L. REV. 723 (2006).

3. Chief Justice Shirley S. Abrahamson of the Wisconsin Supreme Court has been a leading voice for a "new federalism" in state constitutional law that encourages state court judges to consider carefully whether provisions of their state constitutions must be interpreted identically to interpretations of their counterpart provisions in the federal constitution. See, especially, the highly influential article, Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985).

4. In adopting "Forward" as the official state motto, the State of Wisconsin website indicates that it is a choice "[r]eflecting Wisconsin's continuous drive to be a national leader."

As odd as it may sound, there are good reasons to hold the Wisconsin Constitution to a low standard. The process to create a new state constitution is costly and risky, and this may be especially true in circumstances where the drafters seek a level of excellence that may be possible only through innovation. Moreover, there is always the risk that a constitutional convention may be unsuccessful because highly divisive issues come to dominate. And so a case can be made that a mediocre state constitution—one that fails to deliver, relative to other states, a strong economy, clean and fair politics, a healthy environment, and desired public services—is acceptable, as long as there is no crisis requiring a wholesale constitutional change.

Constitutional change can also be incremental, of course, and the long history of amendments to the Wisconsin Constitution shows the relative ease (compared to a constitutional convention) of that course. Indeed, the most common criticisms of the Wisconsin Constitution are topical rather than global, including the local government issues that sparked the conference and the various taxation and education issues discussed in this Symposium.

To be sure, amendments born in the political cauldron of the legislative process may be unlikely to provide lasting solutions to the structural problems arising from the Wisconsin Constitution, particularly those involving local government revenues and services. Constitutional conventions are more likely to attract and value the participation of non-partisan civic leaders and students of government. And so, in the respects that the Wisconsin Constitution needs improvement, the question arises as to what process is most likely to accomplish that goal. The partisan legislative process seems an unlikely choice. One of the most successful solutions to a structural problem in the Wisconsin Constitution was the court reorganization amendments of the 1970s, which were based in important measure on the work of the Citizens Study Commission on Judicial Organization, which had been appointed by Governor Patrick J. Lucey in 1971 at the request of Chief Justice E. Harold Hallows.⁵ Perhaps similar study groups are the way forward on the important challenges currently posed by the Wisconsin Constitution.

See State Symbols, http://www.wisconsin.gov/state/core/wisconsin_state_symbols.html (last visited January 27, 2007).

5. See *In re Court of Appeals*, 82 Wis. 2d 369, 370, 263 N.W.2d 149, 149 (1978); William A. Bablitch, *Court Reform of 1977: The Wisconsin Supreme Court Ten Years Later*, 72 MARQ. L. REV. 1 (1988).

Suffice it to say that there are plenty of important and contentious issues to discuss in relation to the Wisconsin Constitution, that many of those issues are debated in political and civic circles, and that the scholarly conference and this Symposium offered the chance to make a rich and lasting contribution to public discourse and public policy concerning these critical matters.

The conference, held on October 5–6, 2006, was hosted by the Marquette University Law School, which was a co-sponsor with the Wisconsin Alliance of Cities and the University of Wisconsin – Madison La Follette School of Public Affairs. Leading national scholars joined with distinguished Wisconsin scholars to present the papers that are included in this Symposium. In addition, former Wisconsin Governors Patrick J. Lucey, Lee Sherman Dreyfus, and Anthony S. Earl, and former Wisconsin Lieutenant-Governor Margaret A. Farrow, participated in a panel discussion concerning the Wisconsin Constitution. The conference had considerable range and depth, as this Symposium issue of the *Marquette Law Review* reflects.

The Marquette University Law School and the *Marquette Law Review* are surely the appropriate actors in identifying and addressing significant public policy concerns. Other recent examples include the Wisconsin Tax Policy Colloquium held at Marquette Law School in the spring of 2004 with papers published in a special symposium issue of the *Marquette Law Review* later that year,⁶ and the Marquette Law School conferences on *Brown v. Board of Education* and (de)segregation in Milwaukee schools with the ensuing *Marquette Law Review* symposium published in 2005.⁷ The scholarship in those pages, and hopefully in these pages as well, will surely take Wisconsin forward in addressing the challenges that face us.

6. See Symposium, *Wisconsin Tax Policy*, 88 MARQ. L. REV. 1 (2004).

7. See Symposium, *The Brown Conferences*, 89 MARQ. L. REV. 1 (2005).