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On the 175th Anniversary of the Wisconsin Constitution: An Examination of the Early Court “Repairs” of a Rushed Document

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ON THE 175TH ANNIVERSARY OF THE WISCONSIN CONSTITUTION: AN EXAMINATION OF THE EARLY COURT “REPAIRS” OF A RUSHED DOCUMENT

STEVEN M. BISKUPIC*

The Wisconsin Constitution was a document prepared in a hurry. The fall 1848 national election was expected to be a referendum on the spread of slavery and the only way for residents of the Wisconsin Territory to vote in the national election was for Wisconsin to become a state. In order to become a state, however, Wisconsin first needed a constitution. For forty days in late December 1847 and January 1848, a constitutional convention met in Madison. Using the 1840s equivalent, delegates “cut and pasted” whole sections from the constitutions of New York and Michigan, as well as from an 1846 Wisconsin version rejected by the territory’s voters.

As a result, the finished product, despite having endured for 175 years, is filled with anomalies. Perhaps the most striking is that the Wisconsin Constitution does not have a due process clause. When this oversight was noticed after ratification, the Wisconsin Supreme Court simply declared that a due process clause was in fact present in the state’s constitution—either as part of “general principles” or as an unenumerated “inherent right.”

In this Article, the Author examines anomalies arising from the “cut and pasting” in the Wisconsin Constitution and the early court “repairs” which followed. The Author then considers the propriety of these early judicial “repairs” and whether there are reasons beyond stare decisis for considering these decisions as binding precedent.

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I. INTRODUCTION

*Constitutionalism is an attempt to have the living governed by the dead, but the dead, fortunately, lack the means of enforcement.*¹

The Wisconsin Constitution was enacted with no due process clause. The circumstance is remarkable on its face, given that almost all other provisions of the Fifth Amendment of the U.S. Constitution are repeated word-for-word in the Wisconsin Constitution—for reference, see the comparison chart in Part II below.² The absence is also notable given the lack of historical record on why the framers at the Wisconsin constitutional conventions in the 1840s chose not to include a due process clause. At one point, the clause was in a committee draft of a “bill of rights”; a week later, without public explanation, the proposed clause was gone, never to return—at least in explicit text.³

1. Lino A. Graglia, *Panel on Originalism and Precedent*, in ORIGINALISM: A QUARTER CENTURY OF DEBATE 113, 128 (Steven G. Calabresi ed., 2007).

2. See *infra* Section II.B.

3. MILO MILTON QUAIFE, CONVENTION OF 1846, at 301, 368 (1919). In 1870, Wisconsin amended article I, section 8, clause 1 of the Wisconsin Constitution to eliminate the requirement of

The omission did not go unnoticed by the early Wisconsin Supreme Court, which quickly and without controversy found a due process right present in the state constitution; it was simply implied in the document's "general principles."⁴ Later, after passage of the Fourteenth Amendment of the U.S. Constitution, the Wisconsin Supreme Court held that due process, as well as equal protection, were unenumerated rights which had always existed in the "inherent rights" clause of the Wisconsin Constitution's "Declaration of Rights."⁵ Since that point, a due process right—as well as equal protection—has not been seriously questioned as a matter of Wisconsin law.⁶

Constitutional interpretation assumes a certain reverence for the document at issue. The U.S. Constitution is hailed as a wonder of history, with the chosen clauses analyzed similar to scripture.⁷ What account should be made then, when a similar document at issue was, at least in places, poorly or carelessly drafted, or where anomalies or inconsistencies go well beyond a standard "scrivener's error?"⁸ The Wisconsin Constitution, as an example, was a rushed product, copying articles and sections from at least three other constitutions.⁹ Though the document has endured for 175 years, when certain provisions are examined, the end product exhibits baffling results. The lack of a due process clause is one example. Another example, more nuanced perhaps, arises in the context of the

indictment by grand jury. The new language provided that "no person shall be held to answer for a criminal offense without due process of law." The Wisconsin Supreme Court said the constitutional change was limited solely to elimination of the grand jury requirement and was not meant to incorporate the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. *Rowan v. State*, 30 Wis. 129, 144–49 (1872).

4. See *Newcomb v. Smith*, 2 Pin. 131, 134–35 (Wis. 1849); *Watkins v. Page*, 2 Wis. 92, 101 (1853) (Smith, J., concurring).

5. Section one reads, "All men are born equally free and independent, and have certain inherent rights: among those are life, liberty, and the pursuit of happiness. To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." WIS. CONST. art. I, § 1; see also *State v. Nergaard*, 124 Wis. 414, 418–19, 102 N.W. 899 (1905); *Black v. State*, 113 Wis. 205, 218–19, 89 N.W. 522 (1902).

6. See, e.g., *Buse v. Smith*, 74 Wis. 2d 550, 579, 247 N.W.2d 141 (1976) ("This court has held that art. I, sec. 1, Wis. Const., is substantially the equivalent of the due process and equal protection clauses of the 14th amendment of the U.S. Const."); see also *Teague v. Schimel*, 2017 WI 56, ¶ 37, 375 Wis. 2d 458, 896 N.W.2d 286 ("[W]e understand the Wisconsin Constitution as promising due process of law [under art. I, § 1 inherent rights].").

7. See generally Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984).

8. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION 20 (1997) (describing a "scrivener's error" as a written "slip of the tongue," where "on the very face of the statute it is clear to the reader that a mistake of expression (rather than of legislative wisdom) has been made").

9. See *infra* Parts III & IV.

governor's power to remove elected county officials where, due to apparent ignorance or sloppiness, the phraseology chosen by the drafters was completely contrary to their expressed intent.¹⁰ Similar instances, noted by others, are located through a perusal of early decisions of the newly-formed Wisconsin Supreme Court.¹¹ Yet, the examples explored below were quickly "fixed" or "repaired" by the early Wisconsin Supreme Court and accepted without controversy by the other branches of state government, as well as by the people of Wisconsin, who retained not only a relatively easy method of amendment—the Wisconsin Constitution now has more than 140 voter-approved changes—but also the ability to remove members of the judiciary through the ballot.¹²

The early Wisconsin justices engaged in these constitutional "repairs" not out of a sense of activism. Reviewing the historical record, one would be hard pressed to infer that these justices sought to thwart the will of the voters by improperly amending the state's constitution. If anything, the rules of construction that the justices applied in making these rulings later became "traditional," even conservative methods of constitutional interpretation. Instead, the early justices made these legal decisions after a rushed drafting process. Nonetheless, the question remains as to how the legal system should evaluate the precedential nature of these decisions.

In the Article that follows, Part II traces the drafting of the Wisconsin Constitution and how the document resulted with no due process clause. Parts III and IV explore other early examples of Wisconsin constitutional anomalies; these examples stem from (1) the governor's power to remove county officials and (2) whether land underwater in Lake Michigan can be utilized to skirt a vote concerning how county lines should be divided. Part V examines what rules of construction the early Wisconsin Supreme Court followed when reaching decisions on those issues; it concludes that these early justices followed their received legal training, drawing upon principles from influential jurists of the time and the fundamental canons of common law. Finally, in Part VI, the Article sets forth several reasons beyond mere *stare decisis* as to why we should consider these early "judicial repairs" as binding precedent. These reasons include: (1) these early justices were faced with a Wisconsin Constitution drafted in less-than-ideal circumstances; (2) in grappling with how

10. See *infra* Part III.

11. See, e.g., John Sundquist, *Construction of the Wisconsin Constitution: Recurrence to Fundamental Principles*, 62 MARQ. L. REV. 531, 536–55 (1979); see also Ray A. Brown, *The Making of the Wisconsin Constitution Part II*, 1952 WIS. L. REV. 23, 31–32, 46, 51.

12. See WIS. CONST. art. VII, § 7 (providing that judges are elected every six years); WIS. CONST. art. XII, § 1 (1848) (outlining the amendment process). Unless otherwise noted, all references to the Wisconsin Constitution are the 1848 version. For a list of the constitutional amendments, see WISCONSIN BLUE BOOK 2021–2022, at 479–84 (2021).

to interpret the hastily written constitution, these justices, some of whom had served as delegates to the state's constitutional convention, could speak with a level of authority as to the intent of the state's constitutional framers; and (3) the citizens of Wisconsin retained relatively easy methods of overturning these early court decisions through amendment or voting justices out of office, yet failed to take such action in light of these judicial repairs. Although these early judicial decisions arguably may fail under a strict reading of the Wisconsin Constitution's text, I conclude that considering them as binding precedent is justified.

II. DUE PROCESS AND THE WISCONSIN CONSTITUTION

A. The Drafting Process

The 1848 Wisconsin Constitution was written under a deadline.¹³ The Wisconsin Territory needed a constitution before it could both become a state and participate in the 1848 national election, an election expected to serve as a referendum on the spread of slavery.¹⁴ A constitution approved by the local electorate was a precondition to statehood.¹⁵ Yet, while statehood was both a popular goal and had been approved by Congress, an attempt at obtaining an approved constitution had failed miserably in 1846.¹⁶ More than 120 delegates attended a state constitutional convention—broken down into twenty-two committees—and labored for almost two straight months, often bitterly, before producing a document that was rejected by 60% of Wisconsin voters.¹⁷ There were many issues in dispute, but two of the most controversial were banking (which the convention proposed to ban entirely) and the property rights of married women (the proposed constitution gave married women the legal right to hold assets separate from their husbands, as a way of protecting them from

13. See MILO MILTON QUAIFE & JOSEPH SCHAFFER, *THE ATTAINMENT OF STATEHOOD: WISCONSIN HISTORICAL PUBLICATION COLLECTION VOL. 29, CONSTITUTIONAL SERIES VOL. 4*, at 2–3 (1928) (excerpting Governor Henry Dodge's message on statehood delivered on October 18, 1847). This publication also contains the Journal and Debates of Constitutional Convention. See *id.* at 275.

14. 1 ALICE SMITH, *THE HISTORY OF WISCONSIN: FROM EXPLORATION TO STATEHOOD* 638, 667 (1973); see also *WIS. DEMOCRAT*, May 22, 1848, at 2. Unless otherwise noted, contemporaneous newspaper reports were accessed through www.newspaperarchives.com (subscription required).

15. QUAIFE & SCHAFFER, *supra* note 13, at 2–3.

16. See *id.*; SMITH, *supra* note 14, at V, VIII, 653, 667.

17. SMITH, *supra* note 14, at 655–56, 665. The *Wisconsin Democrat* newspaper was one of the publications that regularly printed detailed reports from the convention. See generally *WIS. DEMOCRAT*, Oct. 10, 1846–Nov. 28, 1847.

creditors).¹⁸ Not in dispute was slavery—the popular view was that it should be outlawed in the state—and suffrage, which was generally limited to white males.¹⁹ In addition, beyond the substantive debate surrounding these issues, the 1846 convention often lacked decorum. Delegates gave speeches without time limits, yelled obscenities at one another, and engaged in petty jealousy over committee assignments and votes.²⁰

In mid-December of 1847, Wisconsin underwent another attempt at drafting a constitution, this time with only half the number of delegates as before and only six committees.²¹ Delegates sought to streamline the drafting process by using the rejected constitution from the year prior as a starting point, and put aside for later the controversial portions.²² Moreover, similar to the prior convention, the 1848 convention relied heavily on the 1846 New York Constitution, and the 1835 Michigan Constitution, as well as the Federal Constitution.²³

New York was a popular reference point because at least twenty-five of the delegates had connections to New York, and one of them, Rufus King—a powerful Milwaukee newspaper editor—strongly favored New York’s version.²⁴ In fact, King printed and circulated copies of this constitution to the delegates.²⁵ The choice of Michigan’s constitution stemmed from geographic factors and other considerations, such as Michigan’s similar opposition to slavery. Additionally, the success of Michigan’s 1835 constitution in

18. SMITH, *supra* note 14, at 664–65; *see also* QUAIFE & SCHAFFER, *supra* note 13, at 15 (excerpting *Wisconsin Argus* editorial from May 4, 1847); WIS. DEMOCRAT, Mar. 6, 1847, at 1; PRAIRIE DU CHIEN PATRIOT, Feb. 10, 1848, at 2 (discussing the reasons that the first constitution was defeated).

19. SMITH, *supra* note 14, at 665–66; *see also* QUAIFE & SCHAFFER, *supra* note 13, at 191 (listing the results of the vote on proposed suffrage).

20. SMITH, *supra* note 14, at 656.

21. *Id.* at 667–68.

22. *Id.*; QUAIFE & SCHAFFER, *supra* note 13, at 15 (quoting excerpts from newspapers suggesting that to save expense of new convention, the controversial provisions of the 1846 constitution simply be removed and then the remaining document be approved as is).

23. For examples of reliance on New York and Michigan constitutions, *see* the discussions on due process, removal powers, and sub-dividing counties. *See infra* Parts II–IV; *see also* QUAIFE & SCHAFFER, *supra* note 13, at 363 (pertaining to the U.S. Constitution); *id.* at 362, 384, 438, 641, 656, 739 (pertaining to the New York Constitution); *id.* at 375 (providing that the Michigan Constitution was debated by the U.S. Congress); *id.* at 931 (noting there were twenty-five delegates originally from New York state); QUAIFE, *supra* note 3, at 112, 127, 148, 291, 568–69 (illustrating the overlap of Michigan’s issues at the 1846 convention).

24. Perry C. Hill, *Rufus King and the Wisconsin Constitution*, WIS. MAG. OF HIST., June 1949, at 416, 416.

25. *See* SMITH, *supra* note 14, at 653–54 (discussing Rufus King distributing copies of the New York Constitution).

facilitating the state's admission to statehood further supported this document as a model.²⁶

The work of the second convention moved with less rancor.²⁷ The convention met for forty days through the end of January 1848—sometimes in perfunctory fashion.²⁸ In essence, a committee would present a proposed article, limited debate would follow, and then a resolution was passed approving the article's language.²⁹ Some of the most heated debates concerned the questions of how the convention should spend its budget and whether decisions were delayed simply because the delegates enjoyed the two dollar per diem, an amount in excess of daily laborer wages.³⁰ Nonetheless, besides banking and women's rights, significant debate time was given to a number of substantive issues, including the state's borders, terms of office for elected officials, debtor's rights—including a homestead exemption—the scope of suffrage, an elected judiciary, and limitations on the power of the executive.³¹

By February 1, 1848, a revised constitution was ready for public vote. Of the prior controversial issues, the banking question was resolved by agreeing to put the matter to the will of the voters.³² The controversy over the property rights for married women was settled by removing that provision, but expanding the general rights of debtors.³³ As in the 1846 draft, slavery was prohibited and suffrage was generally limited to adult white males.³⁴ On March

26. QUAIFE & SCHAFER, *supra* note 13, at 375; *see also* MICH. CONST. art. XVIII, § 11 (1850) (“Neither slavery, nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this state.”); WIS. CONST. art. I, § 2 (“There shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of crime, whereof the party shall have been duly convicted.”).

27. *See* QUAIFE & SCHAFER, *supra* note 13; *see also* Brown, *supra* note 11, at 25–26 (noting that the second convention featured “less bombastic oratory” and “personal recriminations between members, which often marred the earlier convention, were almost entirely lacking”).

28. *See, e.g.*, QUAIFE & SCHAFER, *supra* note 13, at 261; *see also* HILL, *supra* note 24, at 431–432 (describing cursory proceedings).

29. *See, e.g.*, QUAIFE & SCHAFER, *supra* note 13, at 215–60.

30. *See, e.g., id.* at 519–520; *see also* HILL, *supra* note 24, at 431–432.

31. *See, e.g.*, QUAIFE & SCHAFER, *supra* note 13, at 454–68 (discussing boundaries); *id.* at 232–39 (discussing length of terms of office); *id.* at 284–96 (discussing debtor's rights, including a homestead exemption); *id.* at 356–90 (discussing the scope of suffrage); *id.* at 693–94 (discussing an elected judiciary); *id.* at 252–60 (discussing limitations on executive power).

32. SMITH, *supra* note 14, at 668, 670.

33. *Id.* at 668.

34. *See* WIS. CONST. art. I, § 2; WIS. CONST. art. III, § 1.

13, 1848, 70% of the voters approved the proposed constitution.³⁵ Interestingly enough, turnout for the vote in 1848 was about a third lower than the vote on the 1846 version.³⁶ The decrease was attributed to the apathy of voters who did not want to participate in a repeat of the bitter debate on the prior version.³⁷

With a constitution secured, Wisconsin became the country's thirtieth state on May 29, 1848.³⁸ In the presidential election that fall, Wisconsin's three electoral votes were cast for Democrat Lewis Cass, who favored the spread of slavery into new states via popular sovereignty.³⁹ Cass won Wisconsin with only 38% of the popular vote, due in large part to the overwhelming anti-slavery vote being almost equally divided between two anti-slavery candidates—Zachary Taylor (who prevailed nationally) and Martin Van Buren.⁴⁰

B. Enumerated and Unenumerated Rights

Before Wisconsin's 1846 constitutional convention convened, the *Racine Advocate* editorialized that one of the most important items to address was the creation of a citizen's right to use "due process of the law" to address wrongs through judicial review.⁴¹ The paper noted that without this right, citizens were left to the "impulse" of the legislature.⁴² When the convention began, Madison lawyer George B. Smith, who would later serve as the state's attorney general, was put in charge of a "Bill of Rights" committee.⁴³ Two weeks into the convention, his committee produced a document with a list of twenty-five separately numbered "rights" to be enshrined in the new constitution.⁴⁴ The Michigan Constitution, which had twenty enumerated rights, and the New York Constitution, which listed eighteen rights, were used as models.⁴⁵ Many provisions were copied verbatim, especially where these two state constitutions repeated language from the Federal Constitution's Bill of Rights.⁴⁶ Smith's proposed rights roughly fell into three categories: (a) broad declarations (e.g.,

35. SMITH, *supra* note 14, at 676.

36. *Id.*

37. Brown, *supra* note 11, at 25–26, 62.

38. SMITH, *supra* note 14, at 679; *see also* WISCONSIN BLUE BOOK 2021–2022, *supra* note 12, at 440.

39. SMITH, *supra* note 14, at 638.

40. *Id.*

41. *State Government*, RACINE ADVOC., July 7, 1846, at 2.

42. *Id.*

43. QUAIFFE, *supra* note 3, at 58, 301–03.

44. The list was published by the press just three days later. *See* WIS. DEMOCRAT, Oct. 31, 1846, at 2.

45. *See* MICH. CONST. art. I (1835); N.Y. CONST. art. I (1846).

46. *See generally* MICH. CONST. (1835); N.Y. CONST. (1846).

“[a]ll men are born equally free and independent”); (b) verbatim restrictions on governmental power from the U.S. Bill of Rights (such as in the chart below); and (c) additional declarations unique to the political climate in Wisconsin and other northern states at the time (e.g., “[t]here shall be neither slavery nor involuntary servitude in this state” and “[n]o person shall be imprisoned for debt in this state”).⁴⁷ With respect to due process, Smith proposed the following language:

Section 11. No person shall be deprived of life, liberty, or property but by the judgment of his peers or the law of the land.⁴⁸

One week later, however, another convention committee tore into Smith’s work, section-by-section, disparaging his effort and changing the language throughout. With respect to Section 11, an amendment was offered and approved that cut the language entirely and “substituted” it with a proposed definition of treason.⁴⁹ No explanation was recorded, and it is unclear if the treason provision was actually the substitute that was voted upon at the time, since no explicit record of the proposed substitute was made, other than that the treason provision ended up as the new Section 11. So many changes were made to the initial draft that an exasperated Smith was referred to by another delegate as a “laughing stock of the convention.”⁵⁰ The revised “Bill of Rights” was later approved by the 1846 convention by a vote of 85–9.⁵¹ Smith was absent from the convention on the day of the vote.⁵²

There is some evidence to suggest that the response to Smith’s work was simply a personality dispute. Smith was twenty-four years old at the time and

47. See QUAIFE, *supra* note 3, at 301–03. This can also be seen in the table below in this Section.

48. See *id.* at 301. At the time, the phrase “law of the land” was synonymous with “due process of law.” See *Newcomb v. Smith*, 2 Pin. 131, 132 (Wis. 1849); see also RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: IT’S LETTER AND SPIRIT* 268–274 (2021).

49. “Treason against the state shall consist only in levying war against the same, or in adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.” QUAIFE, *supra* note 3, at 749.

50. *Id.* at 372. In between Smith’s draft and the dramatic changes, Smith had alienated members of the convention by attempting to singlehandedly derail the draft of the article on internal improvements. *Id.* at 323.

51. The revised 1846 Bill of Rights was published on November 28, 1846. See *Constitutional Convention*, WIS. DEMOCRAT, Nov. 28, 1846, at 1.

52. See QUAIFE, *supra* note 3, at 723.

prone to arrogance.⁵³ A bar publication later damned him with the faint praise that while he “could not be called a scholar,” nor distinguished for “logical power,” he was “sometimes truly eloquent.”⁵⁴ In the week between the time that Smith produced his draft Bill of Rights and the severe edits that followed, Smith butted heads with other delegates over provisions on the judiciary and internal improvements, contending at one point that, if necessary, he would stand alone against the views of every other delegate.⁵⁵ When Smith’s version of the Bill of Rights was put to debate, nine different delegates stood ready with proposed changes.⁵⁶

A little more than a year later, the second convention met in Madison.⁵⁷ Only six of the delegates overlapped from the prior convention and Smith was not among them.⁵⁸ Within the first week, the Committee on General Provisions produced a “Declaration of Rights” modeled after the previous list of rights from the 1846 rejected constitution.⁵⁹ Again, additional changes were made to the 1846 version, with the most notable being to move the list of rights from Article XVI to Article I and inserting (again with almost no published debate) language memorializing inherent rights similar to wording from the Declaration of Independence.⁶⁰ The new version began:

Section 1. All men are born equally free and independent, and have certain inherent rights: among these are life, liberty, and the pursuit of happiness. To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.⁶¹

A list of enumerated rights followed.⁶² As seen in the chart below, the new version kept almost verbatim language from the Fifth Amendment of the U.S. Constitution that also had been previously used by New York, Michigan, and the 1846 Wisconsin convention. Still, the convention journal reflects the fact

53. *Id.* at 790; PARKER M. REED, *THE BENCH AND BAR OF WISCONSIN 185–86* (1882).

54. *See* REED, *supra* note 53, at 185.

55. *See* QUAIFE, *supra* note 3, at 58–67, 303–05 (authoring minority report on judiciary); *id.* at 323–24 (opposing provisions on internal improvements); *id.* at 324 (expressing willingness to stand alone).

56. *Id.* at 365–73.

57. QUAIFE & SCHAFER, *supra* note 13, at 175.

58. SMITH, *supra* note 14, at 667.

59. QUAIFE & SCHAFER, *supra* note 13, at 227–29.

60. The second paragraph of the Declaration of Independence begins as follows: “We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.” *THE DECLARATION OF INDEPENDENCE* pmb. (U.S. 1776).

61. WIS. CONST. art. I, § 1.

62. QUAIFE & SCHAFER, *supra* note 13, at 227–29.

that delegates reviewed each revised section, and one delegate even asked that the language on double jeopardy be changed from no person for the same offense “shall be *twice put* in jeopardy” to no person for the same offense “shall be *put twice* in jeopardy.”⁶³ There was no published reference by the convention, however, to the absence of a due process clause. The *Racine Advocate* was silent as well.⁶⁴

63. QUAIFE & SCHAFER, *supra* note 13, at 714; *see also* QUAIFE, *supra* note 3.

64. The *Racine Advocate* did publish a list of grievances regarding the new constitution on voting rights, schools, the homestead exemption, and the structure of the courts; but with no mention of the lack of a due process clause. *See Anti-Constitutional Meeting*, RACINE ADVOC., Feb. 23, 1848, at 2.

| United States Constitution: Amend. 5 | 1846 New York Constitution: art. I, § 6 | 1835 Michigan Constitution: art. I, §§ 10– 12, 19 | 1846 Proposed Wisconsin Constitution: art. XVI, §§ 9– 10, 14 | 1848 Wisconsin Constitution: art. I, §§ 7–8, 13 |
|--|---|--|---|---|
| <i>No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury</i> | <i>No person shall be held to answer for a capital, or otherwise infamous crime...unless on presentment or indictment of a Grand Jury</i> | <i>No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury</i> | <i>No person shall be held to answer for a capital or otherwise infamous criminal offense unless on the presentment or indictment of a grand jury</i> | <i>No person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury</i> |
| <i>nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb</i> | <i>No person shall be subject to be twice put in jeopardy for the same offense</i> | <i>No person for the same offense, shall be twice put in jeopardy of punishment</i> | <i>no person for the same offence shall be twice put in jeopardy of punishment</i> | <i>no person for the same offence shall be put twice in jeopardy of punishment</i> |
| <i>nor shall be compelled in any criminal case to be a witness against himself</i> | <i>nor shall be compelled. in any criminal case, to be a witness against himself</i> | ** | <i>nor shall be compelled in any criminal case to be a witness against himself</i> | <i>nor shall be compelled in any criminal case to be a witness against himself</i> |
| <i>nor be deprived of life, liberty or property without due process of law</i> | <i>nor be deprived of life, liberty or property without due process of law</i> | ** | | |
| <i>nor shall private property be taken for public use without just compensation</i> | <i>nor shall private property be taken for public use, without just compensation</i> | <i>The property of no person shall be taken for public use, without just compensation therefor</i> | <i>The property of no person shall be taken for public use, without just compensation therefor</i> | <i>The property of no person shall be taken for public use, without just compensation therefor</i> |

** The Michigan Constitution of 1850 added, at article VI, § 32: “No person shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.”

C. Judicial Correction

A year after the constitution was ratified, the Wisconsin Supreme Court faced an appeal that alleged, in part, that property damaged by a state-approved dam had essentially been taken without due process in violation of the Wisconsin Constitution, even though the Wisconsin Constitution contained no explicit due process clause.⁶⁵ Writing for a 3–2 majority, Justice Levi Hubbell skirted the issue, holding that a right to “due process” was implied from a number of sources: common law, federal law, and “constitutional conventions for the last half century.”⁶⁶ He wrote that he would not go against the weight of this authority.⁶⁷ The dissent found an easier path of avoidance: since the statute at issue had been enacted before statehood, the federal right to due process controlled.⁶⁸ Cases thereafter followed a similar path: all claimed that “due process” applied in state actions, but none cited a specific section of the Wisconsin Constitution for support.⁶⁹ Due process was said to be part of “general principles” or gleaned from combining several of the other enumerated rights.⁷⁰ In still another case, Justice Jason Downer declared simply and without citation, “Our constitution provides no person can be deprived of his property without due process of law.”⁷¹

The Wisconsin court changed its reasoning in the aftermath of the enactment of the Fourteenth Amendment to the U.S. Constitution, which in part

65. *Newcomb v. Smith*, 2 Pin. 131, 132–33 (Wis. 1849).

66. *Id.* at 135.

67. *Id.*

68. *Id.* at 141–44.

69. *See* *Watkins v. Page*, 2 Wis. 69, 76 (1853) (Smith, J., concurring) (noting due process is a “general principle”); *Pratt v. Donovan*, 10 Wis. 320, 324 (1860) (“[G]eneral principle that no man shall be deprived of his property without due process of law.”); *Anderton v. City of Milwaukee*, 82 Wis. 279, 52 N.W. 95 (1892) (equating the article I, section 9 right to “remedy at law” provision as equivalent to the Due Process Clause of Fourteenth Amendment of U.S. Constitution); *State v. Redmon*, 134 Wis. 89, 101, 114 N.W. 137 (1907) (Timlin, J., concurring) (citing the article I, section 9 right to “remedy at law” and article I, section 13 “private property may not be taken for public use without just compensation” as equivalent to due process discussed in a prior case); *see also* *State v. Bielby*, 21 Wis. 204, 207 (1866); *Lenz v. Charlton*, 23 Wis. 478, 479 (1868); *Durkee v. City of Janesville*, 28 Wis. 464, 468 (1871); *Phelps v. Rooney*, 9 Wis. 70, 81 (1859) (Dixon, J., dissenting).

70. *See* *Watkins*, 2 Wis. at 76 (Smith, J., concurring); *Pratt*, 10 Wis. at 324; *Anderton*, 82 Wis. at 279; *Redmon*, 134 Wis. at 101 (Timlin, J., concurring); *see also* *Bielby*, 21 Wis. at 207; *Lenz*, 23 Wis. at 479; *Durkee*, 28 Wis. at 468; *Phelps*, 9 Wis. at 81 (Dixon, J., dissenting).

71. *Winner v. Fitzgerald*, 19 Wis. 415, 417 (1865). While it is possible that Justice Downer’s reference to “our constitution” was meant to apply to the Federal Constitution, the case at hand involved state law issues only.

provided that “no state” shall “deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.”⁷² The Wisconsin court held that this Fourteenth Amendment language did nothing to alter the Wisconsin Constitution since due process and equal protection were present in the inherent rights clause “long before the enactment” of the Fourteenth Amendment.⁷³ Since that time, the existence of a due process right in the Wisconsin Constitution has never been questioned.⁷⁴

D. Evaluation of the Historical Record

There are several possibilities for the failure of the Wisconsin constitutional conventions to include an explicit due process clause: (1) the due process clause was left out by oversight; (2) the clause was left out intentionally as unnecessarily redundant to the inherent rights clause; and (3) the clause was left out intentionally as unwanted. None of these explanations appear satisfactory. The first—oversight—is most likely, as it is consistent with the Michigan model, which also inexplicably excluded a due process clause before curing the oversight in 1850.⁷⁵ This explanation, however, does not come without pause; consider the following historical facts.

During Wisconsin’s initial constitutional endeavors, and while at the committee level, a due process clause was included but then eliminated during the rancor of rewrites in 1846. What is more, delegates were aware of due process clauses; they existed in the New York Constitution and almost every other state constitution in the union.⁷⁶ Finally, other clauses from the Fifth Amendment of the U.S. Constitution were examined in detail by the Wisconsin convention to the point where one delegate sought and obtained the trivial juxtaposition of two words in the double jeopardy clause (“twice put” was changed to “put twice”). Were such trivialities examined but not the absence of a due process clause?

72. *State ex rel. Kellogg v. Currans*, 11 Wis. 431, 432, 87 N.W. 561 (1901); *State v. Nergaard*, 124 Wis. 414, 418–19, 102 N.W. 899 (1905); *see also Black v. State*, 113 Wis. 205, 218–19, 89 N.W. 522 (1902) (describing equal protection as an inherent right in article I, section 1).

73. *Kellogg*, 11 Wis. at 432.

74. *See, e.g., Teague v. Schimel*, 2017 WI 56, ¶ 37, 375 Wis.2d 458, 896 N.W.2d 286.

75. *See* MICH. CONST. art. VI, § 32 (1850) (“No person shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.”); *see also Michigan Constitution of 1850*, WIKISOURCE, https://en.wikisource.org/wiki/Michigan_Constitution_of_1850 [https://perma.cc/CR9D-PAJB].

76. *See* THOMAS M. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 351 n.1 (1868) (listing due process clauses in state constitutions as of 1868).

The lack of a need for a due process clause does not fair better. Did the framers believe that a due process right was part of the inherent rights as Wisconsin justices later held?⁷⁷ If so, that justification finds no support in the final 1846 draft, which contained no inherent rights clause. Moreover, the inherent rights language of the 1848 version refers only to the rights of “life, liberty and happiness,” not property, which was at the time the prominent justification for the due process clause.⁷⁸ There also is the complex question of whether a positive legal right to “due process” is *inherent* in human existence, or a natural right, especially when the words “due process of law” themselves were later used to justify incorporation against the states of other inherent and enumerated federal rights from the U.S. Constitution.⁷⁹ It is true that due process was a right long recognized by custom,⁸⁰ but no record from the convention supports the view that the delegates were satisfied to imply due process in the clause.

Unwanted would be the most perplexing explanation. Why, in a constitution overflowing with concerns of the rights of the individual, would due process be purposely excluded with no public debate or outcry? Many years later, Justice Felix Frankfurter famously contended that the country would be better off if the due process clauses in the Federal Constitution were eliminated.⁸¹ But, again, there is no similar record of any such debate from either of the Wisconsin constitutional conventions.

From the perspective of the final document’s plain meaning, the words “due process” simply did not appear.⁸² The intent of the drafters may be surmised as above, but even if accurately gleaned, what should have been the result of the exclusions? Michigan amended its constitution a short time later to fix the

77. Just before the vote approving the 1848 constitution, an anonymous “Farmer of Grant [County]” published an editorial generally supporting the constitution, but noting, “We talk of the inherent rights of man without knowing anything about them.” *Constitution of Wisconsin*, POTOSI REPUBLICAN, Mar. 2, 1848, at 2.

78. See COOLEY, *supra* note 76, at 351–63.

79. See Randy E. Barnett, *Who’s Afraid of Unenumerated Rights?*, 9 U. PA. J. CONST. L. REV. 1, 1–22 (2006); BARNETT & BERNICK, *supra* note 48, at 271.

80. COOLEY, *supra* note 76, at 351.

81. See ARCHIBALD MACLEISH & E.F. PRICHARD, *LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER 1913–1938*, at 16 (1971). Frankfurter believed that in the early twentieth century, the Due Process Clause was improperly construed to protect corporations against reasonable employment regulation, such as minimum wage and barring child labor.

82. See *Rowan v. State*, 30 Wis. 129, 144–49 (1872) (regarding an 1870 amendment to the grand jury clause).

oversight. By contrast, Wisconsin relied upon judicial repair instead. Perhaps the significance of inherent rights as a concept alone is enough to presently justify the Wisconsin courts' later repairs. Yet, little more in the text, structure, or history of the 1848 constitution supports that interpretation.

III. THE GOVERNOR'S POWER TO REMOVE COUNTY OFFICIALS

The discussion above may be considered an academic exercise because Wisconsin citizens were never in real danger of losing their right to due process of law. The Fourteenth Amendment of the U.S. Constitution, enacted twenty years after the Wisconsin Constitution, assured that fact. In this Part, I address a second, more practical anomaly arising from the drafting of a provision granting the governor power to remove elected county officials, including local prosecutors.⁸³ The text of this removal language appears to give the governor almost unfettered power to remove local county officials. The language chosen from the New York Constitution did just that. But Wisconsin's constitutional convention, as well as subsequent court proceedings, just as clearly and unambiguously treated this removal power as one to be exercised only "for cause"—even though the term for cause was well-understood in 1848, was discussed among the delegates, was used explicitly in comparison documents, but ultimately was not affirmatively set forth in the final Wisconsin document.

A. Constitutional Provisions on Removal

As with other provisions, members of the Wisconsin constitutional convention leaned heavily on the work from other states for ways to constrain abuses of governmental power.⁸⁴ The most logical and favored tool was to establish elective office, rather than appointed office, with an emphasis on short

83. In Wisconsin, the governor's ability to remove a district attorney was a campaign issue in the 2022 gubernatorial campaign. A citizen petition sought to remove the Milwaukee County district attorney over his role in allowing bail for a defendant who later drove a vehicle through a Christmas parade, killing six people. Legal counsel for Democratic Governor Tony Evers found the petition did not meet the "for cause" threshold. Tim Michels, the Republican candidate, said he would remove the district attorney "on day one" of a new administration. *See* Letter from Matthew Fleming, Att'y, Murphy & Desmond S.C., to Off. of Legal Couns. (Jan. 11, 2022), <https://www.wispolitics.com/wp-content/uploads/2022/01/220111LegalCounsel.pdf> [<https://perma.cc/4HSJ-VPFN>]; Todd Richmond, *Evers Attorney: Complaint Over Milwaukee Prosecutor Invalid*, AP NEWS (June 11, 2022, 5:39 PM), <https://apnews.com/article/wisconsin-milwaukee-cee2c5136aeb375180d85fbd364d9461> [<https://perma.cc/97MS-UR6E>]; Corrine Hess, *Tim Michels Says If Elected Governor He Would Fire District Attorney John Chisholm on Day 1*, MILWAUKEE J. SENTINEL (Nov. 2, 2022), <https://www.jsonline.com/story/news/politics/elections/2022/11/02/wisconsin-governor-candidate-tim-michels-says-fire-milwaukee-county-district-attorney-john-chisholm/69611109007/> [<https://perma.cc/XYU3-WRV6>].

84. *See infra* Part III.

terms, which Wisconsin did with a flourish.⁸⁵ The governor would be elected to two-year terms,⁸⁶ as would other key members of the executive branch who historically would have been appointed. The attorney general, secretary of state, and treasurer all were made elected constitutional officers with two-year terms.⁸⁷ Members of the assembly (the state equivalent of a house of representatives) would serve a single-year term and state senators would serve two-year terms.⁸⁸ Justices and judges would be elected, then a relatively new phenomenon, for terms of six years.⁸⁹

The convention also embraced multiple, overlapping in-term removal provisions to further protect against improper conduct of public officials.⁹⁰ The New York and Michigan constitutions were again used as models.⁹¹ Under the resulting Wisconsin Constitution, every “civil officer” from every branch of state government was subject to impeachment and trial for “corrupt conduct in office, or for crimes and misdemeanors.”⁹² Members of the legislature additionally faced expulsion and removal by contested right to sit.⁹³ Judges, with their longer tenure of six years, faced “removal by address,” which essentially granted the legislature the authority to remove any judge for any reason, provided that two-thirds of both houses concurred.⁹⁴

85. See, e.g., QUAIFFE & SCHAFER, *supra* note 13, at 237.

86. WIS. CONST. art. V, § 1; cf. N.Y. CONST. art. IV, § 1 (providing for a governor elected to a two-year term); MICH. CONST. art. V, § 1 (1850) (providing for a governor elected to a two-year term).

87. Compare WIS. CONST. art. VI, § 1, with N.Y. CONST. art. V, § 1 (providing that the secretary of state, comptroller, treasurer, and attorney general are all elected to two-year terms), and MICH. CONST. art. VIII, § 1 (1850) (providing that the secretary of state, school superintendent, treasurer, commissioner of land office, and auditor are all elected to two-year terms).

88. Compare WIS. CONST. art. IV, §§ 4–5, with N.Y. CONST. art. III, § 2 (providing that assembly members are elected annually, and senators are elected every two years), and MICH. CONST. art. IV, §§ 2–3 (1850) (providing that senators and representatives are each elected for two-year terms).

89. Compare WIS. CONST. art. VII, § 7, with N.Y. CONST. art. VI, §§ 2, 4 (providing for judges to be elected to eight-year terms), and MICH. CONST. art. VI, §§ 1–2 (1850) (providing for justices to be elected to six-year terms).

90. See WIS. ARGUS, June 8, 1847, reprinted in QUAIFFE & SCHAFER, *supra* note 13, at 30.

91. See *infra* notes 92–95.

92. Compare WIS. CONST. art. VII § 1 (regarding impeachment trials), with N.Y. CONST. art. VI, and MICH. CONST. art. XII, §§ 1–4 (1850).

93. Compare WIS. CONST. art. IV, §§ 7–8, with MICH. CONST. art. IV, § 9 (1850) (regarding expulsion and the contested right to sit).

94. Compare WIS. CONST. art. VII, § 13, with N.Y. CONST. art. VI, § 11. See also *In re Advisory Opinion*, 507 A.2d 1316, 1335 (R.I. 1986) (Kelleher, J., dissenting) (discussing removal by address as akin to legislature “un-electing” judges).

B. Election and Removal of County Officials

Article VI, section 4 of the Wisconsin Constitution provided for the election of sheriffs, district attorneys, registers of deed, and coroners to two-year terms; it also provided for their potential in-term removal: “The governor may remove any officer in this section mentioned, giving to such officer a copy of the charges against him, and an opportunity of being heard in his defense.”⁹⁵

The provision for in-term removal of these elected county officials had been discussed in 1846 and a proposal had been made that their removal would be for reasons of “misconduct or malversation.”⁹⁶ At the second convention, substitute language was put forth by Rufus King, the Milwaukee newspaper publisher, who was not a lawyer.⁹⁷ King originally was from New York and he was the grandson of a delegate (with the same name) at the federal constitutional convention in Philadelphia in 1787.⁹⁸ At the Wisconsin convention, the younger King favored the New York constitutional model. He printed and distributed copies of the New York Constitution to fellow delegates, twenty-five of whom also had New York connections.⁹⁹ His proposal on the in-term removal of county officials was taken almost exactly from article X, section 1 of the New York Constitution, which read: “The governor may remove any officer in this section mentioned, within the term for which he shall have been elected; giving to such officer a copy of the charges against him, and an opportunity of being heard in his defense.”¹⁰⁰

King’s proposal was debated by the convention on December 27, 1847.¹⁰¹ The convention notes indicate that delegates were concerned that the provision gave the governor too much power and various alternatives were suggested.¹⁰² One was to strike the removal power entirely, another was to give the power to

95. Compare WIS. CONST. art. VI, § 4, with N.Y. CONST. art. X, § 1 (1846) (“The governor may remove any such officer in this section mentioned, within the term for which he shall have been elected; giving to such officer a copy of the charges against him, and an opportunity of being heard in his defense.”), and MICH. CONST. art. XII, § 7 (1850) (providing that elected county officials may be removed on terms set by the legislature “in such manner and for such cause as to them shall seem just and proper”).

96. QUAIFE, *supra* note 3, at 272.

97. *Id.*; HILL, *supra* note 24, at 416 (discussing King’s background and the influence of his New York connections); see also *Sons of New York in Wisconsin*, MILWAUKEE SENTINEL & GAZETTE, Jan. 1, 1848 (promoting the “Sons of New York in Wisconsin” festival).

98. HILL, *supra* note 24, at 416.

99. See SMITH, *supra* note 14, at 653–54 (discussing Rufus King distributing copies of New York Constitution); QUAIFE & SCHAFER, *supra* note 13, at 931 (noting the twenty-five delegates from New York state).

100. N.Y. CONST. art. X, § 1 (1846).

101. QUAIFE & SCHAFER, *supra* note 13, at 262, 274–75.

102. *Id.* at 274; see also *id.* at 900–30.

the legislature, and a third suggested leaving the matter to local judges.¹⁰³ King and another member of his committee defended the proposed language and noted its limited reach.¹⁰⁴ They said the language chosen meant that the removal by the governor would be limited to for cause situations.¹⁰⁵ Based on this explanation, each alternative proposal was defeated.¹⁰⁶ An account of the debate, with the for cause assurance, was published in a newspaper the next day.¹⁰⁷ Yet, ultimately, the words for cause did not appear in the Wisconsin Constitution and the chosen New York language meant just the opposite.¹⁰⁸

At the time, removal for cause was a well understood nineteenth century concept, arising from both common law and statute.¹⁰⁹ The term provided for in-term removal or loss of office because of conduct constituting “inefficiency, neglect of duty, or malfeasance.”¹¹⁰ At the same time, the language provided a type of civil service protection from at-will removal by a senior executive—such as the King, the President, or a governor.¹¹¹ In the mid-nineteenth century, the distinction between for cause removal (as opposed to the more common at-will removal) was usually bestowed in an isolated and affirmative fashion.¹¹² At the federal level, only the comptroller of the currency had for cause protection, and that arose from a statute, not the Constitution.¹¹³ In the states, New York was perhaps one of the biggest proponents of providing for cause removal and specific laws there gave protection from at-will removal to a wide variety of positions, down to a city bellringer.¹¹⁴ But the for cause application generally was not applied without specific legislative designation.¹¹⁵

103. *Id.* at 274.

104. *Id.*

105. *Id.*

106. *Id.* at 275.

107. See *Constitutional Convention*, TRI-WEEKLY ARGUS, Dec. 28, 1847, at 3.

108. See generally *In re Guden*, 64 N.E. 451 (N.Y. 1902), *affirming* *Guden v. Dike*, 75 N.Y.S. 794 (App. Div. 1902), *reversing* *Guden v. Dike*, 75 N.Y.S. 786 (Sup. Ct. 1902).

109. See Jane Manners & Kev Menard, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency*, 121 COLUM. L. REV. 1, 6 (2021).

110. *Id.* at 6.

111. *Id.* at 18–19.

112. *Id.* at 39–52.

113. *Id.* at 74; see also *id.* at 63 n.363.

114. *Id.* at 42 (citing statutes); *People ex rel. Belch v. Bearfield*, 35 Barb. 254 (N.Y. 1861) (discussing bellringer removal).

115. See *In re Guden*, 64 N.E. 451, 451 (1902); see also *infra* Sections III.D–E. But see *Ekern v. McGovern*, 154 Wis. 157, 142 N.W. 595 (1913), *overruled by* *Boerschinger v. Elkay Enters., Inc.*, 26 Wis. 2d 102, 114, 132 N.W.2d 258 (1965).

New York went through three constitutional conventions in the nineteenth century and the removal provision for county officials—the language adopted by Wisconsin—was discussed at each.¹¹⁶ At the first convention in 1821, the removal language was put in the constitution as part of a compromise to gain approval for the election of those same officials, who previously were appointees of the governor.¹¹⁷ At the 1846 convention, the plain language was discussed and concern was raised that a governor could replace an elected official for any reason, including partisan purposes.¹¹⁸ Nonetheless, the delegates left the language alone. There had been no perceived abuses to date, and the term “charge” suggested that removal, while not rising to the level of for cause, had to be for something more than a trivial allegation.¹¹⁹ Finally, in 1894, a proposal was made to change the removal standard to one involving for “good cause shown.”¹²⁰ Again, the convention rejected this standard and kept the language as originally drafted.¹²¹ Thus, while King and his committee may have thought they were limiting the governor’s power to for cause removal, the language they chose from New York did almost the opposite. Even so, based on the review below, it is evident that Wisconsin courts have endorsed the understanding that the constitutional removal provision entails a proceeding for cause.

C. “For Cause” and a Petition to Remove Sheriff Larkin

In the early 1860’s, in somewhat indirect fashion, the for cause issue came before the Wisconsin Supreme Court in connection with a petition to the governor to remove Milwaukee County Sheriff Charles Larkin.¹²² In November of 1861, six Milwaukee citizens, including J.A. Noonan, asked for removal of Sheriff Larkin for “neglect of duty,” a term that was part of a for cause justification.¹²³ Larkin was alleged to have stood aside while a mob lynched a Black jail prisoner who had been accused of stabbing and killing a white man.¹²⁴ As directed in the constitution, the governor sent Larkin a copy of the petition

116. *In re Guden*, 64 N.E. at 452.

117. *Id.*

118. *Id.*

119. *Id.* at 453.

120. *Id.*

121. *Id.*

122. *See Larkin v. Noonan*, 19 Wis. 82 (1865).

123. *See Charges Against Charles H. Larkin, Sheriff of Milwaukee County, and His Reply Thereto*, DAILY MILWAUKEE NEWS, Feb. 11, 1862, at 1. Further discussions can be found in publications in the *Daily Milwaukee News* and its coverage through March 28, 1862.

124. *Id.*

and gave him an opportunity to respond.¹²⁵ Larkin denied the allegation, stating that he was away from the jail at the time of the lynching.¹²⁶ Sworn testimony was then taken on the governor's behalf by "commissioners," with Larkin's attorney given the opportunity to cross-examine witnesses.¹²⁷ At the conclusion of the proceedings, the governor issued a declaration stating that he would not remove Larkin because the proof did not warrant removal.¹²⁸ Larkin then turned around and sued Noonan and the other petitioners for libel and defamation.¹²⁹

Larkin v. Noonan came before the Wisconsin Supreme Court on the issue of whether the removal proceeding had been one regarding "cause."¹³⁰ According to the court, the distinction was important because if the matter involved cause, then Noonan's petition was protected by the equivalent of judicial privilege; if not, then the libel and defamation suit could go forward.¹³¹ Justice Orsamus Cole issued a unanimous decision for the court, declaring "it is obvious" that the constitutional removal provision involved a proceeding for cause.¹³² His reasoning, however, focused on the procedures involved—the governor would essentially sit as a judge—rather than the underlying neglect of duty or for cause basis of the charge.¹³³ Interestingly enough, yet unmentioned in the decision, was that Cole himself had been a delegate at the constitutional convention and had even been a member of King's committee that proposed the removal language.¹³⁴

125. *Id.*

126. *Id.*

127. *Id.*

128. See *Charges Against Charles H. Larkin*, DAILY MILWAUKEE NEWS, Mar. 28, 1862, at 1.

129. *Larkin v. Noonan*, 19 Wis. 82, 87–89 (1865).

130. *Id.*

131. *Id.*

132. *Id.* at 88.

133. *Id.* Although Larkin lost his suit, the state legislature subsequently voted to reimburse him \$1,906 for his attorney's fees and costs in defending against removal. At the time, Larkin was no longer sheriff but was a member of the state legislature. See *Legislative Summary*, WIS. STATE J., Mar. 31, 1866, at 1.

134. Justice Cole was a delegate on the committee which drafted this provision. QUAIFFE & SCHAFER, *supra* note 13, at 206.

D. “For Cause” Implied

The for cause language came before the Wisconsin Supreme Court again in 1913 and then in 1922.¹³⁵ In 1913, in *Ekern v. McGovern*, the insurance commissioner, a position created by statute, had been removed by the governor under a statute that mirrored the constitutional language for removal of sheriffs, district attorneys, registers of deed, and coroners.¹³⁶ The majority opinion, written by Justice Roujet Marshall, noted the history of removal provisions, including Wisconsin’s reliance on the New York and Michigan models.¹³⁷ But his decision ultimately relied upon common law principles instead, holding that for cause removal was “presumed” for all public office unless and until the constitution or statute dictated otherwise.¹³⁸ According to Marshall, since neither the constitution nor the applicable statute affirmatively rejected the for cause language, the standard applied.¹³⁹

In 1922, in *State ex rel. Rodd v. Verage*, the court considered whether the governor had legally removed a sheriff who had refused to acknowledge the validity of a governor’s pardon.¹⁴⁰ In that case, the court was directly confronted with an argument that neither the plan language nor the New York precedent supported a for cause limitation on the governor’s removal power.¹⁴¹ The court, in a majority opinion written by Justice Walter C. Owens, rejected the argument by finding that the legislature had since, “for purposes of clarity,” added the phrase for cause to a statute that mirrored the constitutional section.¹⁴² The court said that the addition had been supported by governors of both parties.¹⁴³ Therefore, under “the spirit of fundamental principles” of constitutional construction, the for cause standard was now implied in the constitutional language.¹⁴⁴ Surprisingly, the court added that there was “no suggestion” that the Wisconsin delegates had used the New York Constitution as a model.¹⁴⁵

135. See *Ekern v. McGovern*, 154 Wis. 157, 142 N.W. 595 (1913), *overruled by* *Boerschinger v. Elkay Enters., Inc.*, 26 Wis. 2d 102, 114, 132 N.W.2d 258 (1965); *State ex rel. Rodd v. Verage*, 177 Wis. 295, 187 N.W. 830 (1922).

136. *Ekern*, 154 Wis. at 199–204.

137. *Id.*

138. *Id.* at 249.

139. *Id.* at 287.

140. *Verge*, 177 Wis. at 297–98.

141. *Id.* at 302.

142. *Id.* at 301–02.

143. *Id.* at 302.

144. *Id.*

145. *Id.*

E. Evaluation of the Historical Record

As the Wisconsin Supreme Court acknowledged, the plain language of the constitutional removal provision does not set forth a for cause justification. The New York courts held similarly, and, contrary to the view of Justice Owens, the New York language was taken almost word-for-word after Delegate Rufus King, a publisher by trade, passed out copies of the New York Constitution to fellow delegates and advocated the New York wording for the Wisconsin Constitution.¹⁴⁶ Justice Marshall’s use of common law to imply a for cause standard may be supportable under common law, but only to a point. For the Wisconsin Constitution, the drafters used cause as part of the removal provisions of legislators in article IV, section 8, and considered and rejected a proposal that would have allowed “a majority of judges” to remove members of the legislature for “like cause.”¹⁴⁷ Instead of presuming cause, the drafters added cause in some places, but not others. Moreover, the common law “presumption” of cause is further undermined by the U.S. Supreme Court case of *Seila Law LLC v. Consumer Financial Protection Bureau* (CFPB).¹⁴⁸ In that case, the Court held that under the U.S. Constitution, for cause was the exception, not the rule.¹⁴⁹ Even where such language was explicitly provided, as in the case of the legislation involving the head of the CFPB, it still needed to conform with Article II’s provision that “all executive power” is vested with the President, a clause also present in the Wisconsin Constitution.¹⁵⁰

IV. UNDERWATER COUNTIES

I set forth one more example of an early court decision that, at least on its face, may be called into question based upon the plain wording of the Wisconsin Constitution compared to the historical record of the constitutional convention. The Wisconsin constitutional convention consisted of delegates drawn from then existing counties.¹⁵¹ The subsequent constitution enshrined

146. See SMITH, *supra* note 1414, at 653–54.

147. WIS. CONST. art. IV, § 8 (regarding expulsion of legislators for cause); see also QUAIFE & SCHAFFER, *supra* note 13, at 642 (discussing a proposal to give the legislature the power to remove judges “for good cause shown”; “it was not necessary that the offense should be an impeachable one”).

148. 591 U.S. 197, 215, 220 (2020).

149. *Id.*; see also Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 386–87 (1927).

150. *Seila L. LLC*, 591 U.S. at 213–14; see also WIS. CONST. art. V, §§ 1, 4 (providing that the executive power is vested in the governor, who “shall take care that the laws be faithfully executed”).

151. QUAIFE, *supra* note 3, at 15–16; QUAIFE & SCHAFFER, *supra* note 13, at 4–5.

county borders for similar governmental representation.¹⁵² But with the north and west parts of the state containing vast swaths of uninhabited or undeveloped land, the delegates understood that new counties would need to be created.¹⁵³ Delegates also recognized population growth might create the need to divide existing counties, especially in the eastern part of the state.¹⁵⁴ At the same time, delegates worried that improper political motives may lead to the division of an existing county over the will of the local electorate.¹⁵⁵ To prevent inappropriate influences in the creation of new counties, delegates determined that local voters should—in most cases—approve the division of an existing county before a new county is created.¹⁵⁶ These delegates also wanted the voters to approve any changes to the locations of a previously established county seat.¹⁵⁷ The Michigan Constitution was again used as a model. Under article XII, section 7—“Miscellaneous Provisions”—the Michigan Constitution provided: “No county now organized by law shall ever be reduced, by the organization of new counties, to less than four hundred square miles.”¹⁵⁸ Wisconsin enacted the following under an article similarly titled “Miscellaneous Provisions”:

7. No county with an area of nine hundred square miles or less shall be divided or have any part stricken therefrom, without submitting the question to a vote of the people of the county, nor unless a majority of the all the legal voters of the county voting on the question shall vote for the same.

8. No county seat shall be removed until the point to which it is proposed to be removed, shall be fixed by law, and a majority of the voters of the county, voting on the question, shall have voted in favor of its removal to such point.¹⁵⁹

At the time of the enactment of the Wisconsin Constitution, Washington County, just north of Milwaukee County, was less than 900 square miles of land mass.¹⁶⁰ The county also had a long-running, bitter dispute concerning where the county seat should be located.¹⁶¹ By law, the county seat was Port

152. See, e.g., WIS. CONST. art. XIV, § 12 (listing counties in relation to legislative districts).

153. QUAIFE & SCHAFER, *supra* note 13, at 621–25, 837–39, 870–73 (discussing delegate debates on issues changing county borders).

154. *Id.*

155. *Id.*

156. WIS. CONST. art. XIII, § 7.

157. WIS. CONST. art. XIII, § 8.

158. MICH. CONST. art. XII, § 7 (1835).

159. WIS. CONST. art. XIII, §§ 7, 8.

160. *State v. Larrabee*, 1 Wis. 200, 205 (1853).

161. DONALD E. SILLDORFF, HISTORY OF OZAUKEE COUNTY (1998), <https://www.co.ozaukee.wi.us/DocumentCenter/View/624/History-of-Ozaukee-County> [<https://perma.cc/6YL4-YPR7>].

Washington. By 1852, however, most county functions had moved to Grafton—about five miles to the south, and a vote to move the county seat to West Bend—about twenty miles west—had been defeated, but not without allegations of voter fraud.¹⁶² As another of many attempts to solve the problem, the legislature proposed the county be divided on a north-south basis, with a new county formed. But that proposal also was rejected by a majority of the voters.¹⁶³ In early 1853, fed up with the problem that had dragged on for almost five years, the state legislature quickly passed a new proposal to resolve the issue, purportedly for good: Washington County was to be split on an east-west divide, with Ozaukee County created to the east.¹⁶⁴ West Bend would become the new county seat of Washington County and Port Washington would be the county seat for the new Ozaukee County. The legislature said it was creating the change by statute alone; the matter was not to be put to the voters.¹⁶⁵ Instead, the legislature, in prior separate legislation, determined that the borders of Washington County extended well into Lake Michigan, making the size of the county closer to 1800 square miles, double the constitutional requirement to divide a county without a vote.¹⁶⁶ After the governor signed the proposal into law, county officials from the old Washington County sued, and the matter came before the Wisconsin Supreme Court.¹⁶⁷

The Wisconsin Supreme Court upheld the legality of the newly created counties, even though to do so meant Washington County—prior to the division—was determined to have more land underwater than not.¹⁶⁸ The opinion, written by Chief Justice Edward Whiton, unanimously and in almost summary fashion, stated that despite the apparent legislative manipulation to circumvent the language of section 7 of the Wisconsin Constitution, since the

162. S.M. Booth, *Washington County Seat Election*, DAILY DEMOCRAT (Milwaukee), Apr. 24, 1852, at 3.

163. *Id.*

164. *Division of Washington County*, MADISON WIS. STATE J., Feb. 11, 1853, at 2; *Division of Washington County*, MADISON WIS. STATE J., Mar. 2, 1853, at 2; *Washington County*, MADISON WIS. STATE J., Mar. 3, 1853, at 2; *Washington County Seat*, MADISON WIS. STATE J., Mar. 4, 1853, at 2. The new county was named Ozaukee County.

165. *Division of Washington County*, MADISON WIS. STATE J., Mar. 2, 1853, at 2.

166. *State v. Larrabee*, 1 Wis. 200, 205 (1853). Before the vote, State Senator Andrew Blair, who was elected from Washington County, argued that the bill was unconstitutional because it divided the county without a vote. *Division of Washington County*, MADISON WIS. STATE J., Mar. 2, 1853, at 2.

167. *Larrabee*, 1 Wis. at 204–05.

168. *Id.* at 207.

state border of Wisconsin to the east extended to the middle of Lake Michigan,¹⁶⁹ the legislature was free to allocate portions of the lake to the counties along the shore.¹⁷⁰ To the court, that settled the issue, and Ozaukee County was born into Wisconsin history.¹⁷¹

The record of debate from the constitutional conventions, however, does not readily support Whiton's interpretation. On January 31, 1848, the delegates debated the Miscellaneous Provisions sections—found in article XIII, sections 7 and 8—in detail.¹⁷² The square mileage requirement was a compromise born from considerations of distances between population centers; approval by vote was determined to be the norm, but at some point, one large town should be too far removed from a second, smaller town to wield potential veto power over the creation of a new county centered around the smaller town.¹⁷³ Nine hundred square miles (or more) was the distance chosen at which the will of the local voters could not be overridden by *citizens living farther away*—not from an arbitrary spot in the middle of a lake where no one lived.¹⁷⁴ Moreover, at the 1846 convention, the delegates, when considering a similar proposal, expressly determined that “Lake Michigan, Green Bay, [and] Lake Superior” should not be used to determine the size of the county for purposes of future division.¹⁷⁵

As for the public's understanding, the legislature's decision to extend county borders into Lake Michigan was met with derision. The *Kenosha Democrat* called it “a funny proposition” and suggested that for new county seats to be centrally located, they would need to be on barges.¹⁷⁶

Justice Whiton, however, may well have had other important, but unspoken, considerations when he issued his decision. Whiton failed to mention in the opinion that he was a delegate at the 1847–1848 convention and contributed to resolving an impasse over what should actually constitute Wisconsin's borders

169. See WIS. CONST. art. II, § 1 (describing the Wisconsin border as extending, in parts, to “the center of Lake Michigan”).

170. *Larrabee*, 1 Wis. at 206–08.

171. *Id.* The question of whether the manipulation also moved the county seat without a vote was similarly answered by the court in a separate opinion, holding that once a separate county was created, so was the county seat, meaning that the prior county seat had not actually been moved. Att'y Gen. *ex rel.* Turner v. Fitzpatrick, 2 Wis. 542, 549–50 (1853).

172. QUAIFFE & SCHAFFER, *supra* note 13, at 870–72.

173. *Id.*

174. *Id.*

175. QUAIFFE, *supra* note 3, at 354.

176. *A Funny Proposition*, KENOSHA DEMOCRAT, Feb. 14, 1852, at 2. The paper understood that under the same strained use of Lake Michigan square mileage two years earlier, Racine County had been divided to bring Kenosha County into existence. See WKLY. WIS., Jan. 30, 1850, at 3 (discussing the bill to divide Racine County to create new Kenosha County).

in relation to the neighboring states.¹⁷⁷ Individual delegates wanted Wisconsin to claim as much land as possible, especially to the north and west, but others worried that continuing a fight would antagonize Congress and threaten statehood altogether.¹⁷⁸ A delicate compromise worked out over several years was memorialized in article II of the 1848 constitution.¹⁷⁹ With regard to Michigan, whose Upper Peninsula bordered Wisconsin to the north, Michigan would receive disputed land, but Wisconsin's border would be extended to the middle of Lake Michigan, except near Michigan's Upper Peninsula, where the line becomes convoluted and turns in circular fashion.¹⁸⁰ One Wisconsin newspaper noted that, without the compromise, Wisconsin's claim to Lake Michigan "would have extended about a cable's length from shore along half of our present coast. As it is, our berth extends to the middle of the lake; and time may come when we shall regard this extension of our maritime jurisdiction as far more important than [the land relinquished]."¹⁸¹

At the 1847–1848 convention, Whiton strongly supported this compromise and opposed any action that might upset its balance.¹⁸²

In the three instances noted above, the Wisconsin Supreme Court arguably rewrote the plain terms of the Wisconsin Constitution to insert a due process clause, to limit the governor's removal power to for cause, and to divide Washington County. In the remaining Parts, I examine the early methods of interpretation undertaken by the Wisconsin court in doing so. Then, I consider whether factors beyond *stare decisis* support affording these decisions the status of binding precedent.

177. See, e.g., QUAIFFE & SCHAFER, *supra* note 13, at 454–80, 744–48, 780–91, 823–30. Whiton, however, exercised his delegate privilege and his speeches were not recorded. *Id.* at 922.

178. *Id.* at 746–47, 787.

179. *Id.* at 830.

180. *Id.*; see also WIS. CONST. art. II (delineating borders). The legal question of how far land rights extended into bodies of water was largely unsettled at the time. See JOSEPH D. KEARNEY & THOMAS W. MERRILL, LAKEFRONT: PUBLIC TRUST AND PRIVATE RIGHTS IN CHICAGO 26–27 (2021).

181. WIS. ARGUS, June 1, 1847, reprinted in QUAIFFE & SCHAFER, *supra* note 13, at 24. Although the disputed constitutional language was taken from the Michigan Constitution, it was not until after the *Larrabee* decision that Michigan courts addressed whether the size of a county would include any of the land under the Great Lakes. See *Rice v. Ruddiman*, 10 Mich. 125 (1862). Although *Larrabee* was cited by one of the parties, the court resolved the dispute without consideration of Lake Michigan underwater land. See *id.*

182. QUAIFFE & SCHAFER, *supra* note 13, at 474–76.

V. A BRIEF HISTORY OF WISCONSIN'S EARLY METHODS OF CONSTITUTIONAL INTERPRETATION

A. Justices from Elsewhere

None of the first justices of the Wisconsin Supreme Court were born in Wisconsin. Rather, all had come from states to the east, settling in the Wisconsin Territory before or shortly after statehood was achieved.¹⁸³ None were formally educated in the law; they all had been trained through apprenticeships—known as “reading the law”—with established lawyers before gaining admission to the bar.¹⁸⁴

Justice Orsamus Cole was typical. He was born in New York in 1819 and in the early 1840s, he studied literature at Union College in Schenectady.¹⁸⁵ In 1845, after a brief stop in Chicago, he moved to Grant County in Wisconsin as part of a wave of westward expansion encouraged by local Wisconsin groups, such as the New England Emigrating Society.¹⁸⁶ In Grant County, Cole studied the law with a local attorney and soon after gained admission to the bar.¹⁸⁷ He began his practice and involved himself in local politics.¹⁸⁸ He was a delegate to the 1847–1848 constitutional convention, was elected to one term in Congress, and then lost a race for attorney general.¹⁸⁹ In 1855, he won election as a Wisconsin Supreme Court Justice, where—through multiple reelections—he stayed for the next thirty-seven years.¹⁹⁰

For lawyers and judges such as Cole, legal guidance could be drawn from almost any source: statutes, treatises, common law, decisions from other jurisdictions, and even common sense.¹⁹¹ The Wisconsin Constitution gave only minimal direction to the supreme court justices regarding their duties; with

183. See REED, *supra* note 53, at 31–79. The Wisconsin Constitution dictated that all judges be elected. For the first five years, the five circuit (trial) judges would combine to sit as the supreme court, reviewing each other's work. After five years, separately staggered elections would fill five supreme court seats separate from the circuit judges. See WIS. CONST. art. VII, § 4.

184. REED, *supra* note 53, at 50–79.

185. *Id.* at 65.

186. See E. BRUCE THOMPSON, MATTHEW HALE CARPENTER: WEBSTER OF THE WEST 23–25 (1954) (discussing westward migration to Wisconsin, including the influence of the New England Emigrating Society).

187. REED, *supra* note 53, at 65.

188. *Id.*

189. *Id.* at 65–66.

190. *Id.* at 66.

191. See *Dean v. Pyncheon*, 3 Pin. 17, 25 (Wis. 1850) (resolving a building ownership through “rule of both common sense and common law”).

limited exceptions, their job was “appellate jurisdiction only.”¹⁹² The constitutional conventions analogized them to a “court of error,” there to reverse mistakes of the lower courts, with the U.S. Supreme Court held up as the model.¹⁹³ There was no instruction to the court regarding how to interpret the state constitution, but *Marbury v. Madison* had been decided forty-five years earlier and the convention debate recognized that the U.S. Supreme Court held the last word on legal disputes.¹⁹⁴ With no specific direction otherwise given, the first justices when interpreting the Wisconsin Constitution resorted to their customary approach as legal professionals: they drew from a variety of sources. For example, in deciding one of the first constitutional cases in 1849, the court’s opinion referred to state and federal statutes, the Magna Carta, constitutional conventions from other states, common law, decisions from other courts, and the writings of the famous British jurist Sir Edward Coke.¹⁹⁵ Thus, in navigating early complex legal problems, these initial Wisconsin justices, such as Cole, did not embark on a radical course when they turned to an array of legal authority for guidance. Moreover, among this broad range of sources, the early court frequently relied upon the interpretations and writings of contemporary legal scholars Joseph Story and Thomas Cooley.

B. The Guidance of Joseph Story and Thomas Cooley

Story and Cooley, both nationally respected judges and authors, held significant influence over the early Wisconsin Supreme Court. As discussed below, for these two scholars, the proper method of constitutional interpretation was as follows: where the plain meaning of terms at issue were easily understood, that interpretation applied; where ambiguity arose, pre-established rules—including historical references—were relied on to determine the original intent behind the terms used during drafting and ratification. While modern readers will recognize this as a traditional interpretive approach, Cooley and Story helped establish that foundation.

192. WIS. CONST. art. VII, § 3. The constitution provided an exception to the appellate limitation if otherwise dictated in the constitution. A 1977 amendment gave the supreme court limited authority to hear original matters. See *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶ 12, 394 Wis. 2d 602, 951 N.W.2d 556 (2020). The original constitution also gave the supreme court the authority to issue necessary writs.

193. QUAIFE, *supra* note 3, at 498–99; QUAIFE & SCHAFFER, *supra* note 13, at 645–92.

194. QUAIFE & SCHAFFER, *supra* note 13, at 661; see also *id.* at 462–68 (discussing a proposal to have the U.S. Supreme Court make the final decision on border disputes); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

195. See *Newcomb v. Smith*, 2 Pin. 131, 132–35, 146 (Wis. 1849).

In 1833, Joseph Story, a U.S. Supreme Court Justice, published *Commentaries on the Constitution of the United States*—an influential publication that contained more than fifty rules of construction for interpretation of the U.S. Constitution.¹⁹⁶ According to Story:

The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties. . . . Where the words are plain and clear, and the sense distinct and perfect arising on them, there is generally no necessity to have recourse to other means of interpretation.¹⁹⁷

If the words were not plain, as was often the case, then the justices should turn to established rules to help them in determining the “sense of the parties” involved in the drafting and ratification of the Constitution.¹⁹⁸ According to Story, “[t]he text was adopted by the people in its obvious and general sense,” and the Constitution should be interpreted with that goal in mind.¹⁹⁹ Story favored an examination of contemporary construction, but only to “illustrate and confirm the text.”²⁰⁰ The other rules to be consulted were similar to those used for statutory construction: examination of the words used, both individually and within the document as a whole; comparison of how other legal documents had used such words; antecedent and contemporary history; legislative intent; and practical considerations, such as whether the proposed construction would lead to an absurd result.²⁰¹ From an early stage at the Wisconsin court, there was little distinction between constitutional interpretation and statutory interpretation.²⁰²

Beginning around 1870, the Wisconsin justices began to rely heavily upon a treatise specific to state constitutions, Thomas Cooley’s *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*.²⁰³ To Cooley, state constitutions were drafted

196. *Id.* at 164.

197. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 136 (1833). Story was a U.S. Supreme Court Justice from 1812 to 1845. *Life Story: Joseph Story (1779-1845)*, SUP. CT. HIST. SOC’Y, <https://supremecourthistory.org/supreme-court-civics-resources/life-story-joseph-story/> [https://perma.cc/93QA-UAKP].

198. STORY, *supra* note 197, at 197–224; Daniel Suhr, *Interpreting the Wisconsin Constitution*, 97 MARQ. L. REV. 93, 96–104 (2013); *see also* Sundquist, *supra* note 11, at 531–37.

199. *See* STORY, *supra* note 197, at 142.

200. *Id.* at 137.

201. *Id.* at 134–62.

202. *See* Suhr, *supra* note 198, at 96.

203. *See, e.g.*, *Whiting v. Sheboygan & Fond du Lac R.R. Co.*, 25 Wis. 167, 187 (1870); *see also* COOLEY, *supra* note 76. Cooley was Chief Justice of the Michigan Supreme Court and Dean of

differently from the Federal Constitution, particularly in the lack of precision regarding the language utilized:

The deficiencies of human language are such that if written instruments were always carefully drawn, and by persons skilled in the use of words, we should not be surprised to find their meaning often drawn into question, or at least to meet with difficulties in their practical application. But these difficulties are greatly increased when draftsmen are careless or incompetent.²⁰⁴

Cooley examined all the state constitutions in existence at the time and collected and analyzed hundreds of state court cases interpreting those constitutions.²⁰⁵ From these sources, he distilled rules of construction specific to state issues, such as the creation of municipal governments, taxation, and eminent domain.²⁰⁶ On general construction, Cooley mirrored Story: where the plain meaning could be ascertained, the courts had to stop there.²⁰⁷ If uncertainty was found, rules of construction were in place to lead the judges to reliable indicators of the meaning intended at the time of ratification.²⁰⁸ Above all, “arbitrary rules” were to be avoided, for they assisted “ingenious attempts to make the constitution seem to say what it does not.”²⁰⁹ Nonetheless, constitutions were not statutes. General statements of principle often were set out in state constitutions and Wisconsin was no exception. For example, the first clause of the Wisconsin Constitution declared, “[a]ll men are born equally free and independent.”²¹⁰ What did that mean when a few pages later, the same constitution declared that the right to vote was generally limited to white males? Cooley contended that general statement clauses served two main purposes. First, they were expressions of popular sovereignty, an indication that the constitution was a limited and potentially temporary delegation of power from the people; a power that could be revoked by the citizenry through the ballot

Michigan Law School. *Justice Thomas M. Cooley*, COOLEY L. SCH., <https://www.cooley.edu/about/mission-history/justice-cooley#:~:text=Justice%20Cooley%20was%20appointed%20to,%2C%20estates%2C%20and%20domestic%20property> [https://perma.cc/28KT-VBV7].

204. COOLEY, *supra* note 76, at 38.

205. *Id.* at 351–53.

206. *Id.* at 189–256, 479–522, 523–72.

207. *Id.* at 55.

208. *Id.* at 55–82.

209. *Id.* at 83.

210. WIS. CONST. art. I, § 1.

box or amendment or even through a new constitutional convention. Second, even though the constitution was a limited delegation of that sovereignty, it was still necessary and important to declare *some* of the important rights that had been retained.²¹¹ But Cooley went no further on the contradictions that would arise on issues of race, other than to briefly trace the legal history of slavery and note its recent abolishment in the United States.²¹²

Cooley was arguably the single most influential source for the early court. His treatise was cited in more than one hundred cases and even if not mentioned explicitly, the justices followed his—and Story’s—traditional mode of interpretation: one that looked to apply the plain meaning of terms first and foremost, but in the absence of such clarity, used established rules, including references to history, to construe the intent of the terms used at the time of drafting and ratification.²¹³

C. “Common Law Constitutionalists”

Cooley also suggested that judges interpret state constitutions with reference to the common law.²¹⁴ The typical state constitution, Cooley found, “assume[d] the existence of a well understood system [of common law], which is still to be administered but under such limitations and restrictions as that instrument imposes.”²¹⁵ In fact, the Wisconsin Constitution, at article XIV, section 13, provided that “[s]uch parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of the state until altered or suspended by the legislature.”

In adopting Cooley’s view, the early justices acted in accordance with what some scholars now call “constitutional common law.”²¹⁶ For example, with respect to individual rights, justices favored an incremental expansion of rights, consistent with the broad affirmative declarations of rights announced in state constitutions, but also supported—or tempered—by developed concepts. According to Professor Randy J. Kozel, common law constitutionalism “seeks to promote the evolution of constitutional law toward moral and just results

211. COOLEY, *supra* note 76, at 256–59, 398.

212. *Id.* at 295–99.

213. *Id.* at 38–84.

214. *Id.* at 60–62.

215. *Id.* at 61.

216. See generally David A. Stauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 878 (1996); Andrew C. Spiropoulos, *Just Not Who We Are: A Critique of Common Law Constitutionalism*, 54 VILL. L. REV. 181 (2009). “Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until suspended or altered by the legislature.” WIS. CONST. art. XIV, § 13.

while recognizing the value of precedent on grounds including constraint and humility.”²¹⁷ Given this approach, it comes as no surprise that the early Wisconsin courts interpreted the Wisconsin Constitution to recognize and read in a due process clause. By doing so, the courts adapted and applied principles of fundamental rights as understood at the time.

VI. THE PROPRIETY OF EARLY COURT “REPAIRS” OF THE CONSTITUTION

Against this historical backdrop, one does not find evidence that the early justices or the public believed that the justices were stretching the boundaries of judicial propriety in determining that the constitution did, in fact, contain a due process clause; that removal for cause was presumed in the governor’s constitutional powers; and that the geographic makeup of counties could include underwater land in Lake Michigan. Moreover, nothing in the contemporary record suggests these rulings were considered activist or beyond the scope of the justices’ constitutional duties. Instead, these early justices acted in accordance with the contemporary legal training they had received, training which allowed them to draw upon principles espoused by influential jurists of the era and fundamental canons of common law. Their approach led them to extend certain provisions of the Wisconsin Constitution beyond their plain text, thus raising the question of whether these early decisions should now withstand modern scrutiny solely based on a literal reading of the text. If so, it is important to recognize that the early justices’ interpretations were shaped by the prevailing legal climate, historical context, and the need to adapt basic

217. Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 212 (2014). For example, in 1859, the Wisconsin Supreme Court determined that indigent criminal defendants had the right to court appointed and compensated legal counsel. This holding was made more than one hundred years before the U.S. Supreme Court found that the Sixth Amendment required the same. Yet, in making its ruling, the Wisconsin court in 1859 did not rely upon sweeping pronouncements regarding the constitutional rights of an impoverished accused. Instead, the court simply noted the potential unfairness of convicting an innocent defendant who could not afford to hire competent counsel. The court also suggested that if the district attorney was to be paid by the county, it was only logical that the county also compensate defense counsel. *Carpenter v. Dane Cnty.*, 9 Wis. 274, 275, 277 (1859); see also *Gideon v. Wainwright*, 372 U.S. 336 (1963). That is not to say that there were not instances where the early Wisconsin Supreme Court justices were activists. In 1854, the justices created a national controversy by declaring that the *federal* Fugitive Slave Act was unconstitutional under the *Federal* Constitution. *Ex parte Booth*, 3 Wis. 145, 147–48 (1854); *In re Booth*, 3 Wis. 1, 113–14, 127 (1854); see also generally BAKER H. ROBERT, *THE RESCUE OF JOSHUA GLOVER: A FUGITIVE SLAVE, THE CONSTITUTION, AND THE COMING CIVIL WAR* (2006). The decision subsequently was overturned by the U.S. Supreme Court. *Abelman v. Booth*, 62 U.S. 506, 507, 526 (1858).

principles to the rushed nature by which the Wisconsin Constitution was drafted and ratified.

Of course, these decisions now have the weight of being established precedent, with all the benefit that the principle of *stare decisis* has to offer.²¹⁸ Yet additional grounds support these early constitutional determinations as well. First, as set forth by Cooley, state constitutions, in general, simply were not as well written as the U.S. Constitution, so additional leeway needed to be given to early state court justices grappling with the lack of precision.²¹⁹ Wisconsin certainly was no exception to Cooley's thesis. The Wisconsin delegates who drafted the constitution and the citizens that voted for its approval were as a group more concerned with achieving statehood (and voting in the next presidential election) than in weighing the impact that every clause of a constitution presented to the citizens as an all-or-nothing condition to statehood. As such, the early justices simply took on the task, uncontroversial at the time, of necessary edits or repairs.²²⁰

218. See generally Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179 (2014). As early as 1853, the Wisconsin Supreme Court declared that a prior determination was binding on the parties "whether right or wrong, just or unjust." Att'y Gen. *ex rel.* Cushing v. Lum, 2 Wis. 507, 522–23 (1853); see also Rogan v. Walker, 1 Wis. 631, 649 (1853) (declaring the case bound by *stare decisis*). *Stare decisis* is a common law principle that prior holdings should bind future courts. See Hall v. City of Madison, 128 Wis. 132, 147–48, 107 N.W. 31 (1906) (Marshall, J., dissenting) (describing *stare decisis* as the one of the most "eminently just maxims" of common law). That same term, the court reserved to itself the prerogative to overturn prior decisions but suggested that the power would be used sparingly: "We entertain the highest regard for the former decisions of this court, and will abide by them, unless a controlling sense of our obligations of conscience and duty shall impel us to dissent from them." Att'y Gen. v. Blossom, 1 Wis. 277, 289 (1853). Of course, since that time, much debate has arisen regarding when and on what basis the Wisconsin court should find an "obligation" to overrule its precedent. See, e.g., Bartlett v. Evers, 2020 WI 68, ¶¶ 66–69, 143–45, 205–06, 249–250, 393 Wis. 2d 172, 945 N.W.2d 685; see also Daniel R. Suhr & Kevin LeRoy, *The Past and the Present: Stare Decisis in Wisconsin Law*, 102 MARQ. L. REV. 839, 844 (2019); Joseph S. Dietrich, *The State of Stare Decisis in Wisconsin*, WIS. LAW. (Nov. 13, 2018), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=91&Issue=10&ArticleID=26681> [<https://perma.cc/6ZJA-XQXJ>]; Alan Ball, *Is Stare Decisis Dead*, SCOWSTATS (Mar. 28, 2017), <https://scowstats.com/2017/03/28/is-stare-decisis-dead/> [<https://perma.cc/EL9D-VQPF>].

219. COOLEY, *supra* note 76, at 38–39.

220. This reasoning is similar to that set forth by James Madison in Federalist Number 37, where he said that even the best constitutional writing was still going to leave ambiguities. Madison wrote that the inherent nature of putting new ideas into words created such a circumstance: "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." THE FEDERALIST NO. 37 (James Madison). Madison foresaw that abstract concepts in the Constitution would be crystalized by post-ratification consensus, including those determined by the judiciary. The *ex post facto* clause turned out to be a

Second, also according to Cooley, where the plain meaning could not be determined, one particular rule of construction for state constitutions allowed the courts to give deference to the views of justices who had attended the constitutional convention.²²¹ Those judges carried first-hand knowledge of the intent of those involved in the drafting process. For the first forty-two years of its existence, the Wisconsin Supreme Court had at least one member who had been a delegate at the 1847–1848 constitutional convention.²²² For the first eleven years, there were at least two justices who were delegates, and then for another seven years, there was one from the 1847–1848 convention and one from the 1846 convention.²²³ None of these justices ever dissented from the view that a due process clause was part of the general principles of the Wisconsin Constitution. In addition, Justice Cole, who authored the decision

prime example. At the time of ratification, the term was subject to two different understandings. Lawyers believed that the term applied solely to retroactive criminal laws. At the same time, the general public understood that the term applied to all laws, particularly including anything impacting contracts. Both views had support in the historical record. The Supreme Court resolved the issue in *Calder v. Bull* by holding that the narrower legal application would apply. 3 U.S. 386, 399 (1798). Thereafter, the other branches of the government, as well as the public, accepted that resolution and the matter was considered settled or, in Madison’s term, “fixed.” See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019); Caleb Nelson, *Originalism, and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003).

221. COOLEY, *supra* note 76, at 69 (“[T]he contemporaries of the Constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the Constitution, and of the sense put upon it by people when it was adopted by them.”).

222. Justice Whiton, a delegate from the 1847–1848 convention, served on the court from 1848 to 1859. *Former Justices: Justice Edward V. Whiton*, WIS. CT. SYS., <https://www.wicourts.gov/courts/supreme/justices/retired/whiton.htm> [https://perma.cc/7UEC-4DUG] (Feb. 13, 2022). He overlapped with fellow delegate Charles Larrabee, who was on the court from 1848 to 1853. *Former Justices: Justice Charles H. Larrabee*, WIS. CT. SYS., <https://www.wicourts.gov/courts/supreme/justices/retired/larrabee.htm> [https://perma.cc/P99L-K3WB] (Feb. 13, 2022). He also overlapped with fellow delegate Samuel Crawford, a justice from 1853 to 1855. *Former Justices: Justice Samuel Crawford*, WIS. CT. SYS., <https://www.wicourts.gov/courts/supreme/justices/retired/crawford.htm> [https://perma.cc/6AWN-VCHJ] (Feb. 13, 2022). He then overlapped with Cole for the remainder of his eleven year term. *Former Justices: Justice Orsamus Cole*, WIS. CT. SYS., <https://www.wicourts.gov/courts/supreme/justices/retired/cole.htm> [https://perma.cc/4BL3-EMCJ] (Feb. 13, 2022). Justice Orsamus Cole, a delegate at the 1847–1848 convention, served on the court from 1855 to 1892. *Id.* Edward G. Ryan, a delegate from the 1846 convention, served on the court from 1874 to 1880, overlapping with Cole. *Former Justices: Justice Edward G. Ryan*, WIS. CT. SYS., <https://www.wicourts.gov/courts/supreme/justices/retired/ryan.htm> [https://perma.cc/V7E7-P5SM] (Feb. 13, 2022).

223. See *supra* note 222 and accompanying text.

adding for cause to the governor's power to remove elected county officials, was on the committee that drafted those powers.²²⁴ Justice Whiton, who authored the unanimous opinion on the division of Washington County, was one of the convention's experts on the creation of Wisconsin's borders.²²⁵

Finally, Wisconsin citizens retained the power to revoke or change constitutional provisions through a relatively easy amendment process: simple majority, as opposed to supermajority, approval was all that was required of the legislature and the voters to ratify an amendment.²²⁶ As a result, Wisconsin's constitution has been amended over 140 times.²²⁷ The citizens also retained the power to remove justices through the ballot-box or through other constitutionally defined in-term methods, such as impeachment.²²⁸ No constitutional amendment was sought, nor was any justice removed from office on the basis of rulings related to the due process clause, removal for cause, or permitting Washington County to be divided despite the will of the voters. The potential for changes to both the state constitution and the high court stand in stark contrast to the federal system, where amendment is more difficult and Justices are appointed for life, with removal only available by impeachment.²²⁹ The almost permanent status of federal judges forms one of the key justifications for an originalism critique of expansive methods of interpretation: that the democratic process is often usurped by unelected and otherwise unaccountable judges.²³⁰ By contrast, in Wisconsin, the problem of "unaccountable" justices is much less acute.

224. QUAIFFE & SCHAFER, *supra* note 13, at 206.

225. *Id.* at 471–78, 922.

226. WIS. CONST. art. XII, § 1.

227. See WISCONSIN BLUE BOOK 2021–2022, *supra* note 12, at 479–84.

228. WIS. CONST. art. VII, §§ 1, 4, 13. In 1855, Justice Samuel Crawford lost reelection based on the unpopularity of his ruling (in dissent) that the Fugitive Slave Act was constitutional (when the majority said otherwise). *Former Justices: Justice Samuel Crawford*, *supra* note 222. Prior to that election, Justice Levi Hubbell, was impeached but not convicted on charges relating to bribery and sexual harassment of female litigants. See T.C. LELAND, TRIAL OF THE IMPEACHMENT OF LEVI HUBBELL, JUDGE OF THE SECOND JUDICIAL CIRCUIT, BY THE SENATE OF THE STATE OF WISCONSIN 5–6, 85–86 (1853). As a result, Hubbell returned to the Milwaukee County bench instead of trying to keep a seat on the supreme court. *Id.* Around the same time, another justice, Abram Smith, declined to run for reelection after similar bribery allegations arose. *Former Justices: Justice Abram D. Smith*, WIS. CT. SYS., <https://www.wicourts.gov/courts/supreme/justices/retired/smith.htm> [https://perma.cc/VK9Y-S655] (Feb. 13, 2022).

229. *Cf.* U.S. CONST. art III, § 1 (providing lifetime appointments); U.S. CONST. art. V (providing that an amendment must be approved by two-thirds of legislature and two-thirds of states).

230. See, e.g., Graglia, *supra* note 1, at 127–29.

VII. CONCLUSION

*The constitution sadly needs revising. It is full of bungling sentences and awkward expressions.*²³¹

The *Wisconsin Argus* newspaper wrote this critique of the rejected 1846 draft of the Wisconsin Constitution. The 1848 version may have improved on the grammar, but forgetting to address a due process clause may be close to the ultimate bungle. The “cutting and pasting” from other constitutions certainly streamlined the process but left in its wake several questionable results. The early Wisconsin court took up the task of repairing the constitution, and those determinations should remain binding, based not only on principles of stare decisis, but also because: (1) the justices faced a Wisconsin Constitution drafted in less-than-ideal circumstances; (2) in grappling with how to interpret the hastily written constitution, the early justices who had served as delegates spoke with authority as to the intent of the framers; and (3) the citizens of Wisconsin retained relatively easy methods of overturning these early court decisions through amendment or voting justices out of office. Combined, these factors weigh heavily in favor of accepting the early precedent of justices fixing or repairing parts of the Wisconsin Constitution, a document drafted in a hurry.

231. WIS. ARGUS, May 4, 1847, reprinted in QUAIFFE & SCHAFER, *supra* note 13, at 15.

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