Shaping Debate, Shaping Society: Three Wisconsin Chief Justices and Their Counterparts

Joseph A. Ranney
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THEIR COUNTERPARTS

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One of the most common devices which has been used over the years to humanize the legal profession and spark public interest in it is the portrayal of judicial dissenters. Most portrayals have focused on members of the U.S. Supreme Court. Justice Oliver Wendell Holmes has been known as "the great dissenter" for many years and has often been portrayed (not entirely accurately) as a lonely voice of reason and enlightenment on the Court during the early 20th century. Recently several authors have dramatized the disagreements between Justice William Brennan and Chief Justice William Rehnquist during the 1970s and 1980s as a fierce struggle between Brennan's campaign to preserve the flame of Warren Court liberalism and Rehnquist's campaign to dismantle it.1 Whether the popular educational benefits of these portrayals compensate for their lack of legal nuance is an open question.

Few such analyses have been done at the state court level.2 This article takes a step in that direction: it examines three pairs of Wisconsin supreme court justices whose service covered most of the state's first century.

Chief Justice Luther S. Dixon (1859-74) and Justice Byron Paine (1859-

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2. Indeed, there have been few historical studies of state court judges in general. The leading studies of individual judges are LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957); ALFONS J. BEITZINGER, EDWARD G. RYAN: LION OF THE LAW (1960); and JOHN P. REID, CHIEF JUSTICE: THE JUDICIAL WORLD OF CHARLES DOE (1967). Shaw served on the Massachusetts supreme court from 1830 to 1860, Ryan served on the Wisconsin supreme court from 1874 to 1880 and Doe served on the New Hampshire supreme court from 1859 to 1874 and 1876 to 1896.
64, 1867-71) served during the pioneer era of Wisconsin law. They led opposing sides of a debate over Wisconsin's relationship with the federal government which dominated state politics during the Civil War era. They also pursued different approaches to several legal issues of vital importance to Wisconsin during its transition from an agricultural to a mixed industrial and commercial economy.

Chief Justice John B. Winslow (1891-1920) and Justice Roujet D. Marshall (1895-1918) helped shape the court's approach to the fundamental economic and political reforms of the Progressive era. Winslow vigorously advocated a course of "constructive conservatism": his views influenced the court's decision to defer to and uphold most of the reform laws of the era, and helped shield the court from the political attacks suffered by other state courts which struck down laws more freely. Marshall played a useful though largely unsuccessful role as the court's voice of caution: he argued that constitutional rights should not be tailored to the times and urged the court to scrutinize reform laws closely for interference with the liberty and property rights it had fashioned during the 19th century.

After Winslow departed from the court Chief Justice Marvin Rosenberry (1916-50) carried on Winslow's legacy of legal accommodation to social reform. Rosenberry realized earlier than most judges the central role which regulatory agencies would play in modern American government and during the 1920s he forged a new standard of judicial deference to administrative action. In the 1930s he applied Winslow's approach of "constructive conservatism" to economic and labor reform laws the Wisconsin legislature passed in response to the Depression. After Justice Edward Fairchild (1930-57) joined the court, he took over Marshall's role as a voice of caution that in accommodating social reform, the courts must not overlook the importance of protecting individual rights.

This article examines the three chief justices and their counterparts from both a personal and a longitudinal perspective. Its premises are first, that ongoing debates and differences of opinion between judges can illuminate the way in which state courts resolve important legal questions and second, that changes over time in judicial personnel and in the debates which occupy state courts can illuminate the ways in which state legal systems evolve. In particular, it touches on the perennial question: to what extent are legal systems shaped by the personal and intellectual force of individual lawmakers, and to what extent by broader social forces?
I. DIXON AND PAINE

A. First Phase of the States Rights Debate: The Booth Cases

Byron Paine was born in Ohio in 1827. The Paines were fervent abolitionists who played a prominent role in fostering the abolition movement in northern Ohio. Paine’s family moved to Milwaukee in 1847 and he plunged into law and politics soon afterward.

Both Paine and Dixon came to fame through Sherman Booth, a Milwaukee abolitionist leader. In 1852 a Missouri slave named Joshua Glover escaped to Wisconsin. Two years later Glover’s owner discovered he was living in Racine and obtained a writ for his arrest under the Fugitive Slave Act of 1850. The Act was deeply unpopular throughout the north because it was one of the first federal laws which supported slavery directly and because it required northern states to help slaveowners recapture runaway slaves. Booth organized a mass meeting in front of the Racine County jail; after listening to him speak the crowd broke into the jail and released Glover, who made his way to safety in Canada. Federal authorities then brought charges against Booth for obstructing enforcement of the Act.

Booth quickly realized he had been handed an opportunity to challenge the Act, and he retained Paine to represent him. Paine applied to Wisconsin supreme court justice Abram Smith for a writ of habeas corpus. Paine attacked the Act’s constitutionality on several grounds previously advanced by abolitionist lawyers and rejected in other states, but he also advanced a novel argument: that the Act violated state sovereignty. States rights would play a central role in Paine’s legal philosophy and in Wisconsin’s legal history for the next 20 years.

Citing a long line of authority dating back to the Kentucky and Virginia Resolutions of 1798-99, Paine contended the Wisconsin supreme court had just as much right as the United States Supreme Court to determine the constitutionality of federal laws and that it should ignore previous Supreme Court decisions upholding the 1850 Act’s predecessor statute. The federal

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4. These included arguments that the law violated Art. III of the Constitution by providing for hearings before federal commissioners rather than judges; that the fugitive clause in Art. IV, § 2 of the Constitution did not provide an enforcement mechanism; and that because Wisconsin had not enacted enforcement measures the Act could not be enforced within the state. For a detailed general history of the legal wing of the antislavery movement see ROBERT M. COVER, JUSTICE ACCUSED (1975).

constitution, said Paine, was "a mere article of compact between the States, depending for its execution entirely on their integrity and good faith." The cause of union would best be served by narrowly construing federal powers "and steadfastly resisting all encroachments upon the rights of the States." Paine recognized that "difficulties and conflicts might result" from his states rights doctrine—even, ultimately, legal anarchy and secession—but reasoned that "storm [was] not so fatal as stagnation" and was better than "federal tyranny and usurpation."  

A few days later Justice Smith took Wisconsin and the nation by surprise when he released Booth and declared the Act unconstitutional on all of the grounds urged by Paine. Smith not only accepted Paine's states rights doctrine but called on Wisconsin to rally around it:

I solemnly believe that the last hope of free . . . government rests with the states. Increase of influence and patronage on the part of the federal government naturally leads to consolidation, consolidation to despotism and ultimate anarchy, dissolution and all its attendant evils.

The full Wisconsin supreme court sustained Smith's ruling soon afterward, and the states rights issue continued to dominate Wisconsin politics throughout the 1850s. A group of federalists led by former supreme court justice Timothy Howe of Green Bay and future chief justice Edward Ryan of Milwaukee argued that if the federal government were forced to give way to "elementary criticisms and decisions of State authorities, it is not difficult to foresee most grave and disastrous results;" but the federalists were in the minority.

Paine's victory made him famous in abolitionist circles throughout the north, and in April 1859 Wisconsin voters elevated him to the supreme court. Ten days after Paine's election, Chief Justice Edward Whiton died and Luther Dixon was appointed to replace Whiton.

Dixon was born in Vermont in 1825. He was educated in academies

215 (1847).


7. In re Booth, 3 Wis. 1, 24-25 (1854). Sixty years later Chief Justice Winslow delivered history's judgment of Smith's opinion: "The note of defiance here rings out with unmistakable clearness; it was magnificent, but it was not good law." JOHN B. WINSLOW, THE STORY OF A GREAT COURT 79 (1912).

near his home and then read law in the office of Luke Poland, one of Vermont’s preeminent lawyers and politicians of the early 19th century. Concluding that his chances of advancement were better on the western frontier than in his native state, he moved to Wisconsin in 1851 and settled at Portage. Dixon was a genial, convivial man who made friends easily. He was elected Columbia County district attorney twice in the mid-1850s, and in 1858 he was appointed judge of the central Wisconsin circuit which included Columbia County. Dixon’s selection as chief justice surprised many because he was not well known outside his home area. However, he was not to remain obscure for long.

During Paine’s election campaign the United States Supreme Court, speaking through Chief Justice Roger Taney, overturned the Wisconsin court’s 1854 Booth decision essentially for the reasons cited by Wisconsin federalists. Normally the Wisconsin court accepted and filed federal Supreme Court decisions as a matter of routine, but of course Booth was not a normal case and the court declined to file Taney’s decision. But in an opinion that gave new hope to the federalists, Dixon argued that Taney’s decision should be accepted. Although Dixon personally believed the Fugitive Slave Act was unconstitutional, he argued that even unpopular federal decisions must be obeyed and that refusing to submit to Washington would do more harm than good:

[A states rights] construction would ... place it in the power of any one state, beyond all peaceful remedy, to arrest the execution of the laws of the entire Union, and to break down and destroy at pleasure every barrier created and right given by the constitution.... [Even] if it be granted that both Congress and the Supreme Court have improperly discharged the high trusts reposed in them by the American people, it has no tendency to prove or disprove the existence of this power.

Dixon’s opinion gave many Wisconsinites pause. It cost him the Re-

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9. Paine, however, had an ability to command the affection of supporters and opponents alike which Dixon was unable to match. This is shown, for example, in Edward G. Ryan’s memorial tribute to Paine upon the latter’s death in 1871. 27 Wis. 32 (1871). Ryan was bitterly opposed to Paine politically and was Paine’s principal adversary throughout the course of the Booth cases, described below; he was also famous for his blunt and public evaluations of other men. Nonetheless, he went well beyond the complimentary generalities usually found in tributes to deceased judges and revealed an unmistakable respect and affection for Paine.

10. 1 HISTORY OF THE BENCH AND BAR OF WISCONSIN 121-33 (John Berryman ed. 1898); In Memoriam: Death of Luther S. Dixon, 81 Wis. xxxi, xxxii-xxxiii (1892).


12. Ableman v. Booth, 11 Wis. 517, 520-22, 532, 540 (1859). Paine did not vote on the issue because he had been involved in the Booth case as counsel. Justice Orsamus Cole voted not to file the decision, so the motion to file failed on a 1-1 vote.
publican party’s nomination for reelection in 1860, but he ran as an independent and attracted just enough support from Democrats and moderate Republicans to win reelection by 400 votes out of more than 116,000 cast.  

B. Second Phase of the States Rights Debate: The Removal Statutes

Dixon’s reelection, the Republican victory in the November 1860 presidential election and the approach of civil war caused states rights sentiment in Wisconsin to decline sharply. However, Paine and the supreme court proved reluctant to let go of the doctrine.

In the 1850s and 1860s Congress passed a series of laws expanding federal court jurisdiction, including several removal statutes. These laws became a new forum for the debate between Paine and Dixon. In *Moseley v. Chamberlain* (1861), Paine and Justice Orsamus Cole refused to allow a defendant to remove a railroad injury lawsuit to federal court even though diversity jurisdiction existed. They contended, consistent with their position in *Booth*, that Congress had no power to interfere with cases filed in Wisconsin state courts. Dixon dissented. But following the Civil War, in *Knorr v. Home Ins. Co. of New York* (1869) Cole switched sides and joined with Dixon in upholding a corporate defendant’s right to remove a suit to federal court. Cole recognized the federal Supreme Court would undoubtedly sustain removal and that the war had permanently discredited the idea that the states were coequals of the federal government. Therefore, he stated, sticking to his former position “would be of no earthly advantage, that I can see, to any person or any principle.”

Paine continued to oppose federal removal, but he also recognized the tide had turned against him. In *Knorr* he explained defensively that “[s]ecession is revolutionary; states rights not,” and argued:

> [T]hese fluctuations in the popular feeling and opinion can have no legitimate influence upon the question of legal interpretation. . . . [U]nder our system of divided sovereignty, it is . . . a question of the gravest delicacy and importance, and, at least, of

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13. Ranney, *supra* note 8, at 108-11; WINSLOW, *supra* note 7, at 131-36, 141-42. From 1848 to the mid-1870s most supreme court candidates ran on party tickets. After that time, a custom developed of balancing party representation on the court and after 1900 the races became largely nonpartisan. See WINSLOW, *supra* note 7, at 356, 385-86.


15. 18 Wis. 700 (1861).

16. *Id.*

17. 25 Wis. 143 (1869).

18. *Id.* at 149.
doubt, whether the states, the original sovereignties, hold their reserved powers subject to the judgment of the federal court.  

A year after Knorr, Paine and Cole joined forces in defense of states rights for the last time in *Whiton v. Chicago & Northwestern R. Co.* (1870) and *In re Tarble* (1870). In *Whiton* they held that a plaintiff who chose to file a suit in state court could not later remove it even though a federal statute explicitly authorized plaintiffs to do so. Choosing to file in state court, they reasoned, waived any right of removal. Dixon argued that Congress' broad constitutional power to regulate the jurisdiction of federal courts allowed it to permit removal by plaintiffs and that "however unnecessary or ungracious such legislation may seem to be, or however burdensome to parties," it must still be respected under the federal supremacy clause.  

In *Tarble*, Paine and Cole held that a state court commissioner had the right to issue a writ of habeas corpus ordering federal military officers to release a boy under the legal enlistment age who had joined the army. Paine recognized the U.S. Supreme Court had held otherwise in *Booth* but protested that the high court had misinterpreted the Wisconsin court's actions in *Booth*: Wisconsin had only asserted equal jurisdiction with the federal courts over such matters, not the right to paramount jurisdiction. Dixon was unimpressed with this reasoning and reminded Paine that under *Booth* only the federal courts could issue habeas writs against federal officers.  

Two years later the U.S. Supreme Court summarily reversed both *Whiton* and *Tarble*. In *Whiton* it held that Congress's extension of removal rights to plaintiffs was appropriate because plaintiffs might discover local prejudice after instituting state court actions, and that in any case federal jurisdiction was not subject to any sort of state limitation. In *Tarble* the high court, speaking through Justice Stephen Field, affirmed Taney's 1859 reasoning in *Booth*. Field stated flatly, as had Taney, that Paine's doctrine of coequal state and federal authority over federal actions would open all federal laws to inconsistent interpretation and enforcement by the states.

19. *Id.* at 152-54.
20. 25 Wis. 424 (1870).
21. 25 Wis. 390 (1870).
22. *In re Whiton*, 25 Wis. at 436-37. In *Akerly v. Vilas*, 24 Wis. 165 (1869), Dixon joined Cole and Paine in rejecting a removal attempt. Dixon distinguished *Akerly* from *Whiton* on the ground that in *Akerly* the plaintiff did not try to remove the case until after it had been tried and decided in state court. *Whiton*, 25 Wis. at 435.
which in turn would render them meaningless. State officials were entitled to verification that prisoners were held under proper federal authority, but once that information was provided the state's authority and interest in the matter ended.25

Paine died while the Whiton and Tarble cases were on appeal, and during the five years after his death the states rights doctrine also underwent its death throes in the supreme court. In Morse v. Home Ins. Co. (1872),26 the court—this time with Dixon's support—upheld an 1870 statute which required fire insurance companies to agree as a condition of doing business in Wisconsin not to remove cases against them to federal court. Dixon justified the law on the ground that states had an absolute right to dictate the conditions under which corporations could conduct business within their borders.27 But the U.S. Supreme Court was no more willing to accept Dixon's concession than it had been willing to accept Paine's all out states rights position: it reversed Morse on appeal, stating in broad terms that states could not use their powers of corporate regulation to circumvent federal jurisdictional laws.28

C. Government Involvement in Railroad Financing

Paine and Dixon also took different approaches to one of the most important economic issues of their time: the extent to which local governments could and should support the development of railroads. Railroads had a tremendous impact on 19th century Wisconsin. They fundamentally

25. United States v. Tarble, 80 U.S. (13 Wall.) 397, 405-09 (1872). Tarble is considered the leading case on this point even though the high court had previously made the same holding in Booth. "It is as if the unambiguous language of Booth could not be trusted because of its intimate connection with slavery and with the court that had rendered Dred Scott." COVER, supra note 4, at 166, 187.

26. 30 Wis. 496 (1872).
27. 1870 Wis. Laws 56.
28. 87 U.S. (20 Wall.) 445 (1874). In State ex rel. Drake v. Doyle, 40 Wis. 175 (1876), aff'd sub nom. Doyle v. Continental Ins. Co., 94 U.S. 535 (1876), the court upheld an 1872 statute requiring revocation of the license of any corporation which removed a case against it. Wis. L. 1872, c. 64. Curiously, the author of the Drake decision was Edward Ryan, who had been an ardent federalist during the Booth era but had become more sympathetic to states rights as the rest of the nation was becoming less so. Ryan criticized the U.S. Supreme Court's decision in Morse: he argued that states have absolute power to set the conditions under which they will allow corporations to do business within their borders. Ryan commented acidly that corporate anti-removal laws were morally if not legally valid because "it may be presumed there is some sense of decency even among corporations." Doyle, 40 Wis. at 191-93, 216-17. The U.S. Supreme Court drew a distinction between issuance and revocation of corporate licenses and affirmed Ryan's decision, but several decades later it reversed itself and held that state regulatory powers must give way where they operate even indirectly to defeat federal jurisdiction. Terral v. Burke Const. Co., 257 U.S. 529 (1921).
changed Wisconsin society by making the state's cities and rural areas interdependent, and they were essential to Wisconsin's ability to compete effectively in the changing national economy of the late 19th century. Wisconsin's legislature and courts, like their constituents, oscillated between hope and fear when it came to railroads: they viewed railroads as the prime vehicle for leading the state to prosperity and greatness, but also saw them as potential economic tyrants. The state constitution prohibited state financing of railroads, but whether those prohibitions extended to municipalities was uncertain.

During the 1850s the legislature passed numerous laws authorizing municipalities to give financial aid to railroads. Municipalities most commonly gave aid by issuing bonds the proceeds of which they used to purchase railroad stock. They expected to use dividends on the stock and, if necessary, local taxes to repay bondholders. Following the onset of a severe depression in 1857 most Wisconsin railroads became insolvent, dividends dried up and local taxpayers suddenly faced the specter of sharp tax increases to pay off municipal bond obligations. Many tried to escape liability by arguing that Wisconsin municipalities had exceeded their constitutional authority in issuing bonds.

In two 1859 cases, Clark v. Janesville and Bushnell v. Beloit, the court rejected this argument but sent mixed signals about municipal financing. It conceded that if the framers had it to do over they might well have prohibited municipal financing. However, it held the state constitution permitted financing and affirmed the social utility of the practice. The court did not formally hold that railroad financing constituted a legitimate municipal purpose but Paine, speaking for the court in Clark, strongly hinted that it was.

Ten years later, after Wisconsin had gone through a wave of railroad

29. The first line, from Milwaukee to Waukesha, was completed in 1851; by 1880 there were 2,950 miles of track throughout the state. The railroads cost tens of millions of dollars to build, an unimaginably large sum to most 19th century Wisconsinites; they circulated large amounts of money into and out of the state, and by the end of the 19th century they employed about 6% of the state's workforce. See CURRENT, supra note 3, at 437-45; 3 ROBERT C. NESBIT, THE HISTORY OF WISCONSIN: URBANIZATION AND INDUSTRIALIZATION, 1873-1893, at 72, 87-128, 475-77 (1985); ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 83-94 (1977).
30. WIS. CONST. Art. VIII, § 10.
32. 10 Wis. 135 (1859).
33. 10 Wis. 195 (1859).
34. Bushnell, 10 Wis. at 220-24.
35. Clark, 10 Wis. at 176.
bankruptcies and the court had turned back the legislature's repeated attempts to provide contractual relief to farmers who had mortgaged their farms to pay for now worthless railroad bonds. Dixon persuaded the court to make a belated attempt—apparently unique among American states—to restrict municipal subsidies. In *Whiting v. Sheboygan & Fond du Lac R. Co.* (1870) the court, speaking through Dixon, held that railroads were clothed with a public interest sufficient to allow government to give them indirect aid (such as delegation of eminent domain powers and purchases of railroad stock) but refused to allow them direct governmental payments. In a convoluted opinion, Dixon strove mightily and not very successfully to draw an intelligible line between public purposes which could be financed directly and those which could not. He ultimately concluded that corporations which were controlled or owned outright by government could be supported by direct subsidy, but private corporations which were merely "under regulation as to tolls" could not. Dixon argued that indirect government support "was far less susceptible of legislative abuse, and far less dangerous to private right" than direct tax support. He bluntly stated to Wisconsin railroads: "Thus far shalt thou go, and no further."

Paine did not share Dixon's qualms. His dissent in *Whiting* was his clearest judicial expression of sympathy for legal instrumentalism, that is, the shaping of the law to favor the forces of economic development over other interests. Paine picked apart Dixon's attempt to draw a line between direct and indirect government support and affirmed in soaring language that railroads were a public concern for purposes of all types of government support:

Railroads . . . are the most marvelous invention of modern times. They have done more to develop the wealth and resources, to stimulate the industry, reward the labor, and promote the general comfort and prosperity of the country, than any other and perhaps than all other mere physical causes combined. . . . And yet, notwithstanding all these tremendous results, . . . we are now told that the public has not sufficient interest in the construction of a railroad to sustain an exercise of the taxing power, because, forsooth, in executing the great public work, the state has made use of the agency of a private corporation, and left it to the comparatively petty and unimportant profits to be derived from the

36. See WINSLOW, supra note 7, at 10, 164-83.
37. 25 Wis. 167 (1870).
38. Id. at 196-97.
39. Id. at 210.
actual operation of the road!\textsuperscript{40}

*Whiting* generated heavy criticism both within and outside Wisconsin,\textsuperscript{41} but the court consistently adhered to Dixon's position in later years and continued to express open regret that the state had ever permitted municipal support of railroads.\textsuperscript{42} Nevertheless, Paine's views did not go completely unheeded. Those eager to have local rail service found it easy to get around *Whiting* by procuring local laws couched in broad terms allowing municipalities to give "aid" to local railroads. In *Bound v. Wisconsin Central R. Co.*\textsuperscript{43} (1878) the supreme court held that such laws passed muster under *Whiting*, even though Chief Justice Ryan pointed out in dissent that "there is nothing in the statute to preclude [direct support] in a thousand different forms."\textsuperscript{44}

\textbf{D. Shaping Wisconsin's Tort Law}

Modern tort law emerged as a product of the industrial revolution. Some scholars have concluded that 19th century tort law was designed to subsidize economic growth by limiting entrepreneurial liability and that it served as a substitute for tax subsidies;\textsuperscript{45} others have argued that the courts displayed "significant sternness to major industries" and concern for tort victims.\textsuperscript{46} Both Dixon and Paine came down for the most part in the second camp, but there were significant differences of opinion between them which illustrate the complexity of the early development of tort law.

In 1848, most Americans believed that individuals who caused injury in any way, either to themselves or others, should take responsibility for those injuries and not seek to blame others. This belief produced the contributory negligence doctrine: if an injured person's carelessness contributed to

\begin{itemize}
    \item \textsuperscript{40} Id. at 219-20.
    \item \textsuperscript{41} In *Olcott v. Supervisors of Fond du Lac County*, 83 U.S. (16 Wall.) 678 (1873), the U.S. Supreme Court agreed with Paine. The *Olcott* case did not come up on appeal from the Wisconsin state courts so the high court could not overrule *Whiting*, but the Court made clear that it considered *Whiting* a freak decision which Wisconsin federal courts should not follow.
    \item \textsuperscript{42} See, e.g., Ellis v. Northern Pacific R. Co., 77 Wis. 114, 118, 45 N.W. 811, 813 (1890).
    \item \textsuperscript{43} 45 Wis. 543 (1878).
    \item \textsuperscript{44} Id. at 557, 579. In 1874, Wisconsin voters approved a constitutional amendment limiting municipal debt to 5% of the total value of taxable property within the municipality. WIS. CONST. Art. XI, § 3. The measure did not stop municipal subsidies to railroads entirely but it was a much more effective check on overspending and risky investment than *Whiting* ever was.
    \item \textsuperscript{45} See, e.g., MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 99 (1977); J. WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES 18-21 (1956).
\end{itemize}
his injury in any way, he could not recover from others even if their negligence had also caused the accident and even if they were more negligent than the victim. 47

In Stucke v. Milwaukee & Mississippi R. Co. 48 (1859), the first case in which the Wisconsin supreme court directly considered the contributory negligence doctrine, Dixon and Paine both displayed a streak of sympathy for accident victims which would surface repeatedly in subsequent court decisions. Speaking for the court, Dixon declined to hold that an injured person's contributory negligence precluded recovery in all cases. He laid out two loopholes. Where a defendant was "recklessly" or "grossly" negligent the injured person's negligence would not bar recovery unless it was also reckless or gross. In addition, where the injured person's negligence was a remote cause of the accident and the defendant's negligence a proximate cause, the injured person could recover. 49 Dixon acknowledged that the court had just made Wisconsin one of the most liberal states in allowing recovery:

An adherence to the rule which we have adopted will, we believe, promote safety to the lives of persons and to property so largely entrusted to their care. Collisions and disasters will be less frequent. The bitterness and animosities which would be engendered on the part of those suffering wrongs, by the insolence and wantonness of companies and their employees, which by the relaxation of the rule the law would fail to redress, would be productive of far greater evils than the paltry inconveniences to which companies may sometimes be subjected, could possibly counterbalance. 50

Paine took the next liberalizing step. The year after Stucke, in Chamberlain v. Milwaukee & Mississippi R.R. Co. 51 (1860) he persuaded Dixon to join him in the unprecedented step of rejecting the fellow servant doctrine, under which employees could not recover from their employers for

47. See G. Edward White, Tort Law in America: An Intellectual History 5-8 (1980); Horwitz, supra note 45, at 204-10.
48. 9 Wis. 202 (1859).
49. Id. at 212-15. Dixon defined "proximate" negligence as "negligence occurring at the time the injury happened" and indicated that an injured person's negligence would be deemed "remote" in cases where the injury "might have been avoided by the defendant in the exercise of reasonable care and prudence."
50. Id. at 219-20. Rules similar to those laid out by Dixon were subsequently adopted in other states and became known as the doctrine of "last clear chance." As the 19th century progressed, this became one of the most common devices used by American courts to ameliorate the harsh effects of contributory negligence. See White, supra note 45, at 45-50.
51. 11 Wis. 238 (1860).
injuries caused by the negligence of a fellow worker. Paine noted that courts adopting the fellow servant doctrine had drawn a distinction between injuries inflicted on workers by superiors (for which recovery could be had) and by their peers (for which the employer could not be held liable). With characteristic directness he swept the distinction aside, holding that it was artificial and did not accurately reflect the role of workers in an industrial economy. He dismissed the idea that employees assumed the risk of injury by voluntarily accepting employment and that the market would necessarily compensate them for the risk in the form of higher wages. He also rejected the argument that the fellow servant doctrine would make workers more careful to avoid risk: rejection of the doctrine, he retorted, would make employers more careful to hire good employees.

Paine’s triumph was short lived. The next year, in Moseley v. Chamberlain (1861), Dixon changed his mind and the court reinstituted the fellow servant rule. Dixon stated that at the time the Milwaukee & Mississippi case was decided he thought at least some other states did not follow the rule but he had since learned otherwise, and he was not willing to stand alone against the tide. He made no attempt to defend the fellow servant rule but frankly admitted: “I recede more from that deference and respect which is always due to the enlightened and well considered opinions of others, than from any actual change in my own views.”

In Kellogg v. Chicago & Northwestern R. Co. (1870), Paine and Dixon staked out different positions on two additional issues of importance: landowner liability and causation. In Kellogg, sparks from a wood-burning locomotive had alighted on adjoining fields, leading to substantial fire damage. The first issue in Kellogg was whether contributory negligence barred recovery by landowners who failed to remove weeds and stubble close to the track. Here, the 19th century ideal of individual responsibility for negligence conflicted sharply with the still strong ideal that individuals should have the unrestricted right to use their land as they saw fit, and the court was faced with a difficult choice.

52. Starting with Farwell v. Boston & Worcester R.R. Co., 45 Mass. (4 Met.) 49 (Mass. 1842), American courts had universally followed the fellow servant doctrine. See Horwitz, supra note 45, at 208-10. The Chamberlain case had come before the Wisconsin court previously, before Dixon and Paine joined the bench, and at that time the court indicated it would adhere to the fellow servant doctrine. Chamberlain v. Milwaukee & Mississippi R. Co., 7 Wis. 367 (1858).

53. Chamberlain, 11 Wis. at 254.

54. 18 Wis. 700 (1861).

55. Id. at 705.

56. 26 Wis. 223 (1870).
Consistent with their positions in *Whiting*, Paine chose the more instrumentalist rule and Dixon the rule more sympathetic to legal tradition. Dixon concluded that contributory negligence should not be used to limit land use rights in any way. "No man," he said, "is to be deprived of the free, ordinary and proper use of his own property by reason of the negligent use which his neighbor may make of his."

Paine, on the other hand, candidly addressed the economic impact of the fire cases and argued that a new balance should be struck between landowners and railroads. Dixon's position, he concluded, would effectively impose an absolute obligation on railroads to clear their land which would be "disproportionately burdensome and oppressive."

Dixon then turned to proximate cause. Was the railroad liable only for damage to the burned area which the sparks had struck, or for damages to the barn and all other areas to which the fire ultimately spread? In 1870 most states held that sparks would be considered only a remote cause of damage away from the immediate area which they struck and that railroads would not be held liable for such damage. Dixon, however, refused to follow this rule because it failed to establish a clear distinction between proximate and remote cause. After wrestling with the issue Dixon formulated a broad proximate cause standard, couched in terms of foreseeability and a direct chain of physical events, which remained the law of Wisconsin for the next 60 years:

> It was apparent in this case... that, if set at the time and under the circumstances, [the fire] would prove destructive of the property of the plaintiff or of others... It required no prophetic vision to see this. It was a matter within the common experience of mankind. There were the "natural and ordinary means" at hand, by which it must prove so destructive. Those means extended directly and continuously from the place where the burning coals

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57. *Id.* at 231.
58. *Id.* at 243-47. Dixon's position on landowner liability did not prevail for long. In *Murphy v. Chicago & Northwestern R. Co.*, 45 Wis. 222 (1878), the court vindicated Paine and held that landowners could be held contributorily negligent in railroad fire for leaving combustible materials on their land. The court, through Justice David Taylor, stated that Dixon's comments on landowner liability in *Kellogg* were dicta and that *Kellogg* stood only for the rule that a landowner's failure to clear land does not automatically constitute negligence. Taylor gently but firmly indicated Dixon had gone too far. He pointed out that in an increasingly interdependent world, neither absolute liabilities nor absolute immunities should be favored in tort law. *Id.* at 226-29.
59. The rule was first established in *Ryan v. N.Y. Central R. Co.*, 35 N.Y. 210 (1866). Legal historians have cited *Ryan* as a leading example of 19th century courts' desire to foster enterprise and economic growth even at the expense of uncompensated individual loss. See, e.g., LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 410-12 (1973).
from the engine first touched the dry grass and weeds on the company's road, to the plaintiff's stacks, buildings and other property.60

Paine took a narrower view of proximate cause than Dixon. He noted that the fire at issue in Kellogg had been spread by the wind, and concluded this should be treated as an intervening cause rendering the sparks a remote cause of the accident. He opined that such intervening outside factors provided a bright line between proximate and remote causes of fires which Dixon's test did not.61

II. WINSLOW AND MARSHALL

A. The Outsider and Horatio Alger

John Winslow and Roujet Marshall came from very different backgrounds. Marshall in many ways exemplified the Horatio Alger ideal of going from rags to riches through sheer hard work, and the Algeresque quality of his life shaped his legal philosophy. Marshall was born in New Hampshire in 1847; his family moved to Sauk County when he was a child. The family had only modest means but Marshall was endowed with a phenomenal capacity for hard work, which enabled him to educate himself in the law while farming full time.

Marshall began the practice of law in Chippewa Falls in 1873. He quickly gained a reputation for being more fond of work and less fond of carousing than most of his colleagues. In the late 1870s he came to the attention of Frederick Weyerhaeuser, who was starting to build a lumber empire that eventually would encompass huge operations in Wisconsin and the Pacific Northwest. Marshall became chief counsel for Weyerhaeuser's interests in Wisconsin and Minnesota; in 1880 he helped Weyerhaeuser put together a cartel which controlled much of the Chippewa River valley lumber trade for the next 30 years, and he prospered along with Weyerhaeuser. In 1885 Marshall was elected judge of the circuit comprising far northwest Wisconsin, and in 1895 after several unsuccessful tries he gained appointment to the supreme court.62

60. Kellogg, 26 Wis. at 236-37 (citation and emphasis omitted).
61. Id. at 249.
62. 1 ROUJET D. MARSHALL, THE AUTOBIOGRAPHY OF ROUJET D. MARSHALL 260-96, 482-522 (1922); ROBERT FRIES, EMPIRE IN PINE: THE STORY OF LUMBERING IN WISCONSIN, 1830-1900, at 145-57 (1951). As well as providing many useful details about Marshall's life and times, Marshall's autobiography unintentionally reveals many clues to his personality. It makes clear that Marshall viewed his life in epic terms and it confirms the two major flaws which surface in his judicial opinions: prolixity and a tendency to take himself a bit too seriously.
Winslow was born in western New York in 1851; his father was a moderately prosperous businessman. The family moved to Racine when Winslow was a child. After graduating from law school in 1875, Winslow rose quickly in the legal profession: he built a successful practice and was elected circuit judge for the Racine area in 1883.6 He was appointed to the supreme court in 1891; he became chief justice in 1907 and remained on the court until his death in 1920.

Despite his success, Winslow knew something of what it was like to be an outsider. He was a Democrat in a heavily Republican state and as result he had several difficult reelection campaigns despite his reputation as an excellent judge. Winslow first gained statewide recognition in 1888 when he held that Wisconsin's first women's suffrage law, enacted two years before to give women the right to vote in "any election pertaining to school matters," applied not just to school offices but all offices on the ballot at such elections. The supreme court overturned his decision, but throughout his career Winslow continued to be supportive of women's rights even though public opinion was against him more often than not.64

B. The Debate Over Substantive Due Process

Winslow’s and Marshall’s tenure on the court spanned the Progressive era in Wisconsin. Between 1900 and 1915 Wisconsin enacted far-reaching reform laws in a variety of areas including election practices, civil service, railroad and public utility regulation, taxation, and workplace health and safety reform. These reforms marked the culmination of Wisconsin’s adjustment to the industrial age; they have shaped much of modern economic life in Wisconsin.65

Throughout the Progressive era, reformers watched the Wisconsin Supreme Court to see if it would follow the lead of the U.S. Supreme Court and many other state courts which frequently invoked the doctrine of substantive due process to strike down reform laws:

Due process was, broadly speaking, a general substantive limitation upon the police power of the state. Any state statute, ordinance, or administrative act which imposed any kind of limitation

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upon the right of private property or free contract immediately raised the question of due process of law. And since a majority of statutes of a general public character imposed some limitations upon private property or contractual right, the ramifications of due process were endless. . . . Not in every instance was the statute found to be a violation of due process. In most cases the opposite was true. However, the [Supreme] Court insisted upon its right to examine the statute in question and to determine whether it constituted a legitimate exercise of the police power.66

Several Wisconsin Supreme Court decisions early in the Progressive era, in which both Winslow and Marshall joined, suggested the court might invoke substantive due process liberally. Most notably, in State ex rel. Zillmer v. Kreutzberg (1902) the court struck down an 1899 law prohibiting employers from firing workers for union membership. The court echoed the traditional 19th century individualist view that employers and workers could deal with each other on an equal footing, and it stated that liberty could best be defended by resisting "the present . . . unexampled popular . . . belief in the widest scope of governmental activity and interference with the individual."67

However, Zillmer turned out to be the high water mark of substantive due process in Wisconsin: during the next few years the court upheld several major reform laws which came before it.68 Winslow and Marshall took the lead in developing the debate over substantive due process both within and without the court, Winslow as an advocate of "constructive conservatism" in approaching reform and Marshall as an increasingly isolated defender of a more individualistic concept of liberty and property rights.

Marshall had an opportunity to showcase his philosophy in State v.

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67. 114 Wis. 530, 546, 90 N.W. 1098, 1101 (1902); 1899 Wis. Laws 332. See also State ex rel. Adams v. Burdge, 95 Wis. 390, 404, 70 N.W. 347 (1897) (overturning a Beloit school board smallpox vaccination requirement). Many years later, Winslow tacitly indicated that the court had come to regret its decision in Zillmer. John B. Winslow, Some Tendencies of Modern Legislation and Judicial Decision, lecture notes (May 3, 1916) at 26-27, (available in John B. Winslow Papers, State Historical Society of Wisconsin [hereinafter Winslow Papers, SHSW]).

68. See, e.g., Nunnemacher v. State, 129 Wis. 190, 108 N.W. 627 (1906) (upholding a 1903 law creating Wisconsin's first inheritance tax); Minneapolis, St. P. & S.S.M. R. Co., 136 Wis. 146, 116 N.W. 905 (1908) (upholding a 1905 law regulating railroad freight and passenger rates).
Redmon⁶⁹ (1907), in which the court struck down a law providing that train passengers occupying sleeping car lower berths could control whether unoccupied upper berths were open or closed. Relying on Zillmer, Marshall first argued that individualist liberty⁷⁰ was enshrined in the Wisconsin constitution: "By the preamble," he said, "preservation of liberty is given precedent [even] over the establishment of government." He also argued that Wisconsin's constitution imposed a positive duty on the court to review reform legislation closely for reasonableness. Marshall painted a dark picture of what would happen if the court was excessively deferential to the legislature. Regulation might go on:

till one would be placed in such a straight-jacket . . . that liberty and the pursuit of happiness, the incentive to industry, to the acquirement and enjoyment of property,—those things commonly supposed to make a nation intelligent, progressive, prosperous, and great,—would be largely impaired and in some cases destroyed. That such an extreme would be regulation run [riot] and is quite improbable, 'tis true, but it would be possible without limitations of some sort, if a police law be conclusively legitimate merely because it promotes, however trifling in degree, public health, comfort, or convenience.⁷¹

Soon after Winslow became chief justice in 1907 he began to present his case to the public and his colleagues. Mounting Progressive complaints about judicial activism so bothered Winslow that he undertook an extensive course of articles and speeches to explain what he viewed as the court's proper function in an age of change. In a speech given in early 1909 Winslow laid out the themes he would stress in the future in his pleas for "constructive conservatism" on the part of both judges and citizens. He made clear to his audience that at least in Wisconsin, the courts understood the forces driving reform:

The makers of the [Wisconsin] constitution . . . built, and wisely

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⁶⁹. 134 Wis. 89, 114 N.W. 137 (1907).
⁷⁰. Under this view, "it was impossible to conceive of the state as a source of freedom. For [its adherents] liberty was freedom from governmental interference." The individualist view contrasts with the more social view of liberty which arose in the 1930s in response to the Depression. The social view recognized "that social conditions such as poverty could also be a threat to liberty . . . [and that] the state would have to reconstruct that order and redistribute resources to make freedom possible." ⁸ OWEN M. FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 21, 302, 392 (1993).
⁷¹. Redmon, 134 Wis. at 109, 114 N.W. at 141. The next year Marshall repeated his sentiments in Bonnett v. Vallier, 136 Wis. 193, 116 N.W. 885 (1908), in which the court struck down a 1907 tenement housing law on the ground that its restrictions applied statewide even though the evils it was designed to eliminate existed mostly in Milwaukee.
built, for the conditions then existing; their great aim was to pro-
tect the rights and liberties of the individual citizen; they empha-
sized individual freedom because life was then essentially the in-
dividual life. But as individual life has more and more given
place to crowded community life, the rights and privileges once
deemed essential to the perfect liberty of the individual are often
found to stand in the way of the public welfare, and to breed
wrong and injustice to the community at large. . . . In a word, the
imperious and complex problems of great cities and crowded
populations have come suddenly upon a people whose funda-
mental law was designed for a rural or semi-rural state.\textsuperscript{72}

But he also reminded critics that the courts' duty to protect and pre-
serve the law makes them inherently conservative. "Judges are sworn to
protect and support both the federal and the state constitutions\textit{as they are},
not as they would like to see them, and any conscious swerving from this
duty would be moral treason," said Winslow. "If it appear that the basic
law of the commonwealth is faulty and fails to meet new social needs, [the
reformer's] course is not to abuse courts or judges but to take steps to
amend the basic law, wearisome though the task may be."\textsuperscript{73}

The debate between Winslow and Marshall came to a head in two of
the most important cases of the Progressive era, \textit{Kiley v. Chicago, Milw. St.
P. & P. R. Co.} (1909)\textsuperscript{74} and \textit{Borgnis v. Falk Co.} (1911). In
\textit{Kiley} the court
upheld a 1907 law modifying the traditional contributory negligence system
and instituting liberalized rules of recovery for railroad employees. The
court rejected the argument that the law violated employers' equal protec-
tion rights because it applied to all employees whether or not they were
engaged in hazardous work: it concluded that railroads were sufficiently
unique to justify special laws, and declined to second-guess the legislature's
 lumping all railroad employees into one category for safety purposes.
Marshall dissented, protesting that his colleagues were ignoring their past
support of his pronouncements on individualistic liberty and that "the im-
portance of constitutional restraints and the high prerogative power of ap-

\textsuperscript{72} John B. Winslow, The Patriot and the Courts, Address to Loyal Legion of Milwaukee
(February 3, 1909) at 9 (available in Winslow Papers, SHSW).
\textsuperscript{73} Id. at 9, 12. \textit{See also} John B. Winslow, \textit{An Understanding Heart: Does the American
Judge Possess It?}, 31 \textit{Survey} 17 (Oct. 4, 1913); Editorial, \textit{Chi. Trib.}, July 6, 1912 (praising a
Winslow editorial in the Journal of Criminal Law and Criminology and Winslow's recent speech
at Northwestern University urging reform of criminal procedure to meet public perceptions of
unfairness) (available in Winslow Papers, SHSW); letter from John H. Wigmore to John B. Win-
slow (July 8, 1912) (available in Winslow Papers, SHSW).
\textsuperscript{74} 138 Wis. 215, 119 N.W. 309 (1909).
\textsuperscript{75} 147 Wis. 327, 133 N.W. 209 (1911).
plying them, is as progressive as is the need for regulation." In a concurring opinion, Winslow expressed satisfaction that the court was now following a modern trend of increasing deference to the legislature.

Borgnis, in which the court upheld Wisconsin's 1911 workers compensation law, also marked a decline in Marshall's influence. There was irony in this: Marshall had been an ardent advocate of workers compensation for many years and agreed with the majority that the new law was valid. Indeed Winslow in his opinion for the court echoed Marshall's past comments criticizing the use of the contributory negligence doctrine in the workplace: "To speak of the common-law personal injury action as a remedy for this problem," Winslow said, "is to jest with serious subjects, to give a stone to one who asks for bread." Winslow then seized his opportunity to reinforce his message to Wisconsinites that the court was sympathetic to the reform needs of the age. He set forth what is probably the most famous apologia for flexible constitutional construction ever written in Wisconsin:

When an eighteenth century constitution forms the charter of liberty of a twentieth century government must its general provisions be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals? Clearly not. This were to command the race to halt in its progress, to stretch the state upon a veritable bed of Procrustes. Where there is no express command or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of a constitution's adoption must have their due weight; but the changed social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration and become influential factors in the settlement of problems of construction and interpretation.

Winslow's remarks were too broad for Marshall, who replied with one of his most famous expositions of judicial conservatism. Marshall saw no contradiction between workers compensation and judicial conservatism:


78. Id. at 349, 133 N.W. at 215-16. Procrustes is a figure from Greek mythology who tied his victims to an iron bed and stretched or shortened their bodies to fit the bed. Thus Winslow was suggesting that the "bed" of the law must change size and shape to fit an ever-changing body of social needs and responsive legislation.
he was concerned not about the result Winslow reached but the way Winslow got there. The constitution's protection of liberty and property rights in general was unchanging in Marshall's eyes, although the specific rights which the constitution protected could change as social conditions changed. Marshall viewed workers compensation as an essentially conservative measure. "The legislature," he argued, "responded not so much to a general demand, as to a constitutional command, to conserve, in the light of the present, the public welfare." Marshall excoriated Winslow's suggestion that constitutions must be interpreted in different ways to fit different periods of history and the related suggestion that such broad interpretation was necessary to save the workers compensation law:

If the constitution is to efficiently endure, the idea that it is capable of being re-squared, from time to time, to fit new legislative or judicial notions of necessities in prae senti, instead of new legislation being tested by it, must be combated whenever and wherever advanced.\(^7\)

During the years after its decision in Borgnis the court upheld numerous reform laws with an increasing degree of deference to the legislature. Marshall consistently protested that "it is the duty... of the court to inquire whether such statute[s] really subserve any public purpose,"\(^8\) but his protests were increasingly futile. The court held that unless the legislature's decision that a law or classification promoted a legitimate public policy was "manifestly wrong," the law would not be overturned.\(^9\) It applied this rule even though in several cases involving statutes designed to aid a particular industry, it had to strain mightily to conceive of legitimate rationales which would justify upholding the laws.\(^10\)

In another irony, Marshall's last triumph in 1915 also led to the end of his judicial career. Between 1903 and 1911 the legislature established Wisconsin's first conservation program, passing a series of acts which came to be known collectively as the Forestry Law. Among other things the For-
estory Law created a state board of forestry and a state forest reserve, authorized the state to sell timber and other products from the forest reserve but only to the extent consistent with sound conservation practices, and made a special appropriation from the state's general fund for the purchase of additional reserve lands.83

In the Forestry Case, State ex rel. Owen v. Donald (1915),84 Marshall persuaded his colleagues that the Forestry Law was unconstitutional. Possibly the court's decision was in part the product of Marshall's years promoting the untrammeled economic exploitation of the northern woods as Weyerhaeuser's counsel.85 Speaking for the court, Marshall held that the law violated several provisions of the state constitution, most importantly the prohibition of state aid for internal improvements.86 He rejected the state's argument that the definition of "internal improvements" should be interpreted in light of Wisconsin's changing conditions and needs and that the development of a forest reserve was a public purpose within the scope of the legislature's general powers. Marshall once again went out of his way to emphasize that the rights of the individual, not the use of government "police powers" to provide for the common good, formed the central theme of American life. "Exercise of the police power," he stated, "is impliedly limited by the very spirit and purpose of the constitution to conservation of "life, liberty and the pursuit of happiness" and of all other inherent rights."87

Only Winslow took issue with Marshall. In a concurring opinion, he agreed the Forestry Act had flaws which required its invalidation but argued that the state had the power to appropriate funds for any public purpose, whether it created an immediate benefit or not, and that clearly forest conservation was a public purpose:

83. 1903 Wis. Laws 450; 1905 Wis. Laws 264; 1907 Wis. Laws 491; 1909 Wis. Laws 137; 1911 Wis. Laws 639. The Forestry Law was controversial throughout the period of its development. Many people in northern Wisconsin were concerned the Forestry Law would impede, not help, future development of the north. VERNON CARSTENSEN, FARMS OR FORESTS: EVOLUTION OF A STATE LAND POLICY FOR NORTHERN WISCONSIN 33-43 (1958).

84. 160 Wis. 21, 151 N.W. 331 (1915).

85. Professor Hurst has characterized Marshall's opinion in the Forestry Case as a "deep emotional reaction against the style of legal action that the [Forestry Law] represented. These feelings grew naturally out of the confrontation between men bred in the buoyant opportunism of nineteenth-century action and an emerging twentieth-century insistence on closer, more professional rationalization of economic and social processes." J. WILLARD HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915, at 585 (1964).

86. The internal improvements clause stated that with very limited exceptions, "the state may never contract any debt for works of internal improvement." WIS. CONST. Art. VIII, § 10.

87. Donald, 160 Wis. at 136, 138, 151 N.W. at 369, 370.
It would be a mere affectation of learning to dwell upon the value to a state of great forest areas. That has been established long since and is not open to question. The lamentable results which have followed the cutting of forests over large areas, the serious effects of such cutting upon climate, rainfall, preservation of the soil from erosion, regularity of river flow, and other highly important things which go to make up the welfare of the state, are matters of history. They are not to be descanted upon.\textsuperscript{89}

Winslow also argued that forest conservation was not barred by the internal improvements clause. That clause, he argued, was meant only to keep the state out of projects which could be performed by the private sector and it was unrealistic to think that any private enterprise would undertake conservation and reforestation. Consistent with his position in \textit{Borgnis} Winslow suggested that conservation “has not been recognized as [a public purpose] until recently perhaps, but that is merely because the conditions which make it such have only recently arisen and become acute.”\textsuperscript{89}

The \textit{Forestry Case} was probably the most controversial supreme court decision of the Progressive era. Marshall’s opinion played a significant role in his defeat for reelection in 1917 by Walter Owen, who as attorney general had defended the Forestry Law in court.\textsuperscript{90} One year after Marshall’s death, the court all but officially repudiated his concept of individualistic liberty and substantive due process when it upheld broad municipal zoning powers in \textit{State ex rel. Carter v. Harper} (1923). Fittingly the author of the court’s decision was Owen, who gave an emphatic requiem for Marshall and his philosophy:

Many declarations appear in our reports, coming from the pen of Mr. Justice Marshall, tending to create the impression that there are constitutional limitations upon the exercise of this [police] power....

It is thoroughly established in this country that the rights preserved to the individual by these constitutional provisions are

\textsuperscript{88} \textit{Id.} at 159, 151 N.W. at 377.

\textsuperscript{89} \textit{Id.} at 160, 151 N.W. at 378. For a more detailed analysis of Marshall’s and Winslow’s opinions and the effect the \textit{Forestry Case} had on substantive due process in Wisconsin see \textit{Hurst}, supra note 85, at 575-85.

\textsuperscript{90} \textit{See} Editorial, \textit{Wis. St. J.}, April 2, 1917 (stating that “we do not believe all [Marshall’s] decisions bear the forward vision that is most helpful in building precedent for the future’s good and that Owen “sees law in the light of humanity and human welfare and not of individual right divorced from human welfare”). In 1924 voters approved a constitutional amendment allowing the legislature to create and fund conservation programs. \textit{Wis. Const.} art. VIII, \S\ 10.
held in subordination to the rights of society.... In this day, none will dispute that government in the exercise of its police power may impose restrictions upon the use of property in the interest of public health, morals and safety. That the same restrictions may be imposed upon the use of property in promotion of the public welfare... is perhaps not so well understood, but, nevertheless, is firmly established.\(^9\)

III. ROSENBERRY AND FAIRCHILD

A. The Apostle of Administrative Law

When Marvin Rosenberry joined the supreme court in 1916 no one could have predicted he would eventually assume Winslow's mantle. Rosenberry was born in 1868 and spent his early years in Michigan. After graduating from the University of Michigan Law School in 1893, he moved to Wausau where he developed a prosperous corporate practice and worked his way up through the ranks of local Republican politics. Rosenberry was sympathetic to the "Stalwart" or anti-LaFollette wing of the Republican party, although he was not a Stalwart leader. He was active in an unsuccessful 1904 effort to deny LaFollette renomination for governor which destroyed the Stalwarts' political effectiveness for the next ten years.\(^9\) In 1915 Emanuel Philipp finally regained the governorship for the Stalwarts, and the following year he appointed Rosenberry to the court.

Rosenberry did not turn out to be the reactionary that Progressives feared he would be. In the first place, he was never as conservative as many assumed. He later revealed that during his years in practice he found that sometimes the only way the small corporations he represented could get fair treatment from larger corporations was by seeking help from state regulatory agencies, and that fact helped shape his philosophy when he became a judge.\(^9\) In addition, shortly after joining the court Rosenberry underwent a conversion of sorts when the court decided *State v. Lange Canning Co.* (1916).\(^9\)

In *Lange Canning* the court reviewed a 1911 reform law which broadly prohibited women from working hours "dangerous or prejudicial to [their]

\(^9\)2. See letter from Marvin Rosenberry to MILW. SENTINEL, March 19, 1904 (available in Marvin B. Rosenberry Papers, State Historical Society of Wisconsin).
\(^9\)4. 164 Wis. 228, 157 N.W. 777 (1916).
life, health, safety or welfare” and created the Industrial Commission, one of the state’s first great administrative agencies, to investigate working conditions and fix rules implementing this general standard. The Industrial Commission law provided much less legislative direction and granted much more agency discretion than had previous reform laws, and there was real concern that the court would strike down the law based on the traditional doctrine against delegation of legislative power.95

Initially it appeared this worry was justified. In a decision written by Rosenberry the court held, with only Winslow dissenting, that the delegation of power to the Commission was indeed too broad. But Attorney General Walter Owen then asked the justices to reconsider and after further review the court changed its mind. Rosenberry stated without elaboration in a second opinion that the law merely allowed the Commission to determine the facts as to what hours of work were “dangerous” and then apply the legislature’s command to prohibit such hours.96

Lange Canning marked a turning point in Wisconsin law: the court took its first step toward open acceptance of agencies as a fourth branch of government. There is no record of the justices’ reconsideration conferences, but whatever was said in those conferences most likely caused Rosenberry to examine his view of administrative delegation for the first time. Because Winslow was the only supporter of broad delegation in the first Lange Canning decision, it is quite possible that he played a key role in converting Rosenberry. If so, Lange Canning marked the point at which Winslow passed the legacy of constructive conservatism to Rosenberry and perhaps inspired Rosenberry to put his own stamp on Wisconsin’s administrative law.

During the decade after Lange Canning Rosenberry tried to work out a comprehensive theory of administrative law. He was deeply bothered by the conflict between the traditional delegation doctrine and the reality that almost all agency rules and decisions involved some element of discretion and policymaking because the legislature could no longer fill in all the details of regulatory law for an increasingly complex society.

Rosenberry had a blunter, more direct personality than Winslow, and this played an important part in leading him to his final conclusion. Some-

95. 1911 Wis. Laws 485; see JOHN R. COMMONS, MYSELF: THE AUTOBIOGRAPHY OF JOHN R. COMMONS 154-55 (reprint, 1963) (1934). The traditional delegation doctrine held that “the legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action to depend.” Dowling v. Lancashire Ins. Co., 92 Wis. 63, 69, 65 N.W. 738, 739 (1896).

time between 1916 and 1924 he decided the best way to overcome the conflict was to admit openly what Lange Canning had implied: the traditional delegation doctrine must be scrapped and agencies must be effectively recognized as a new branch of government. Rosenberry presented his case in a series of legal and academic articles in which he explained:

Administrative tribunals... did not come because anyone wanted them to come. They came because there seemed to be no other practical way of carrying on the affairs of government and discharging the duties and obligations which an increasingly complex social organization made it necessary for the government to perform...

[T]hose who have opposed the creation and extension of administrative tribunals have as a rule had the best of the argument on legal and constitutional grounds, but have been obliged to yield to an irresistible social pressure... Would it not be wiser to recognize this fact, to give it a place in our legal system, to acknowledge unequivocally its real nature, and to avail ourselves of the experience in which it has had its greatest development, to the end that it may not become... a source of tyranny and oppression?

The supreme court moved in Rosenberry's direction slowly but inexorably, and in 1928 Rosenberry finally persuaded his colleagues to make his views part of Wisconsin law in State ex rel. Wisconsin Inspection Bureau v. Whitman (1928). Whitman represented the final step in the process of endorsing the new role of agencies in government and, more broadly, endorsing the Progressive vision of the 20th century service state. Rosenberry explained:

The power to... determine the general purpose or policy to be achieved by the law; to fix the limits within which the law shall


98. Compare, e.g., Wagner v. Milwaukee, 177 Wis. 410, 188 N.W. 487 (1922) (striking down a Milwaukee ordinance which imposed a minimum wage scale for city work based on prevailing union wage scales; the court held on a 4-3 vote that this was tantamount to a delegation of wage control to unions) with Kreutzer v. Westfahl, 187 Wis. 463, 204 N.W. 595 (1925) (upholding a 1919 law giving the state securities commission broad power to investigate stock issuers and sellers and prevent "fraudulent" and "inequitable" practices).

99. 196 Wis. 472, 220 N.W. 929 (1928). In Whitman the court reviewed a 1917 law giving the state insurance commissioner veto power over rules made by the state Rating Bureau, whose mission was to make insurance rates as uniform and nondiscriminatory as possible. 1917 Wis. Laws 61.
operate,—is a power which is vested by our constitutions in the legislature and may not be delegated. When, however, the legislature has laid down these fundamentals of a law, it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose. . . . It only leads to confusion and error to say that the power to fill up the details and promulgate rules and regulations is not legislative power. 100

B. Fairchild as a Judicial Counterweight, 1930-1940

Fairchild rose to prominence earlier than Rosenberry. He was born in Pennsylvania in 1872 and after completing his education moved to Milwaukee in 1894 to begin his legal career. He established a private practice, served for several years as an assistant district attorney and was elected to the state senate in 1906. In 1909 Fairchild was appointed to the joint legislative committee that prepared the state's workers compensation law; he played an important role in drafting the law and mobilizing Stalwart support for it. As a result of this experience he maintained a lifelong interest in labor issues, particularly the establishment of vocational schools and continuing education for workers. In 1915 Gov. Philipp appointed Fairchild a circuit judge for Milwaukee County and in 1930 another conservative governor, Walter Kohler, appointed him to the supreme court.

After Fairchild joined the court he quickly became a judicial counterweight of sorts to Rosenberry. Rosenberry had considerable personal force and charm which he used to the fullest to forge social bonds with his fellow justices and develop consensus for his views. In Fairchild's view, Rosenberry "aimed to make it impossible for control by any faction." But Fairchild was also very strong-minded and was not at all reluctant to dissent where he felt his colleagues did not pay adequate deference to his views. 102

100. *Whitman*, 196 Wis. at 505-06, 220 N.W. at 941. Rosenberry did not elaborate on where to draw the line between "determining policy" and "filling up the details," but he reassured Wisconsinites that both the legislature and the courts could check any agency overreach- ing "according to common sense and the inherent necessities of governmental coordination." *Id.* at 507-08, 510, 220 N.W. at 942-43.

101. Letter from Edward Fairchild to Robert B.L. Murphy (September 7, 1961) (available in Fairchild Papers, SHSW); *see also* In Memoriam: Justice Marvin Bristol Rosenberry, 15 Wis. 2d xxix, xxxiv, xlii (1961).

102. Fairchild's reputation for independence is illustrated by an incident in 1936 where, disappointed by the majority's proposed opinion, he challenged them: "Very well, you file that opinion and I'll write a dissent that will make you look like monkeys." As the justices left their conference room a bystander mistakenly greeted one of the majority justices as "Justice Fairchild." The justice turned to the real Fairchild and said with some asperity: "Have you filed
During the 1930s the legislature enacted many laws to combat the Depression, some of which copied federal reforms sponsored by Franklin Roosevelt’s administration and some of which were unique. Court challenges to several pieces of Wisconsin’s “little New Deal” tested Rosenberry’s philosophy of deference to administrative government and gave Fairchild his first opportunity to critique that philosophy.

In 1931 the legislature passed a bank stabilization law in response to a wave of bank failures which swept Wisconsin as well as the rest of the nation at the beginning of the Depression. Under the stabilization law banks could defer depositors’ demands for immediate payment and operate under plans for gradual repayment if their plans were approved by the state banking commissioner and by depositors holding at least 80% of total deposits. In *Corstvet v. Bank of Deerfield* (1936), the court upheld the law against a due process challenge. Rosenberry was not bothered in the least by the fact that 80% of depositors and the banking commissioner could control the disposition of the other 20 percent’s assets. Writing for the majority, he analogized the law to bank liquidation laws: because the stabilization law was a more mild means of tackling the same problem liquidation laws addressed, it did not violate the rights of minority depositors.

Fairchild, however, served notice that he would take a more traditional view of property rights. He concluded that the stabilization law impaired depositors’ rights to demand their money, particularly in cases where deposits had been made before the law was passed:

> Banks are important institutions and considerable factors in the scheme of our economy, but the rights of the creditors of these institutions are also matters of great concern. Although the creditor’s debt may degenerate and become the subject of compromise in case of an insolvent bank, it cannot be ignored, much less so when dealing with a going institution.

It was also an article of faith among economic reformers that the rapidly falling prices and rising unemployment of the early 1930s were largely due to predatory competition, and that this evil could be checked by enacting fair practices codes for each industry. In 1933 the legislature passed the Wisconsin Recovery Act (WRA) to implement this ideal at the state level. The WRA in effect made the governor an agency for purposes of administering the law: it authorized him to establish codes of fair competi-

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that opinion already?” Edward Fairchild notes, n.d. (available in Fairchild Papers, SHSW).


tion after consulting with each industry. It gave him broad power to fill in the details of the codes including regulation of working conditions, minimum pay levels and collective bargaining rights.\textsuperscript{105}

The WRA was too broad even for Rosenberry, and in 1935 the court struck down the law on a unanimous vote on the ground that it was an excessive delegation of legislative power.\textsuperscript{106} The 1935 legislature promptly responded by recasting the WRA to follow the standards Rosenberry had created in earlier cases for delegation of administrative powers. It broadly prohibited unfair competition and trade practices, and authorized the governor to make findings of fact as to what constituted unfair practices in each industry. A unanimous court held in the \textit{Tavern Code Case} (1936)\textsuperscript{107} that this version of the law did not violate modern delegation doctrine, but when other aspects of the law were challenged Rosenberry and Fairchild parted company.

In \textit{State ex rel. Attorney General v. Wisconsin Contractors} (1936),\textsuperscript{108} the court upheld a WRA provision allowing the governor to assess against a regulated industry the cost of enforcing its code. The majority, including Rosenberry, saw no difference between delegating fact-finding power as to unfair practices and as to the cost of enforcement, reasoning that assessment of costs was an integral part of regulation. Fairchild dissented: he did not write an opinion, but almost certainly he was concerned that privatizing the cost of enforcing a general law raised due process and equal protection concerns.

The next year, in \textit{State ex rel. Attorney General v. Fasekas} (1937),\textsuperscript{109} the court upheld on a 4-3 vote a WRA provision allowing the governor to impose minimum wage standards. Despite two recent U.S. Supreme Court decisions which strongly indicated minimum wage standards violated due process,\textsuperscript{110} Rosenberry and the other members of the majority had no trou-

\textsuperscript{105} 1933 Wis. Laws 64, 391, 476.
\textsuperscript{106} Gibson Auto Co. v. Finnegan, 217 Wis. 401, 412-13, 259 N.W. 420, 425 (1935). A few months later the U.S. Supreme Court struck down the analogous federal law, the National Industrial Recovery Act, on similar grounds. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
\textsuperscript{107} Petition of State ex rel. Attorney General, 220 Wis. 25, 264 N.W. 633 (1936).
\textsuperscript{108} 222 Wis. 279, 268 N.W. 238 (1936).
\textsuperscript{109} 223 Wis. 356, 269 N.W. 700 (1937).
\textsuperscript{110} Adkins v. Children's Hospital, 261 U.S. 525 (1923) and Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936). The Wisconsin Industrial Commission had established women's minimum wage standards in several industries as a health and safety measure before \textit{Adkins}, which also involved a minimum wage law for women, was decided. The \textit{Adkins} decision was highly unpopular in Wisconsin. After it was handed down, the 1925 Wisconsin legislature passed a law prohibiting "oppressive wages" for women workers and mandating a "living wage" for mi-
ble concluding that minimum wage standards passed constitutional muster because they were reasonably related to regulation of unfair competition. Rosenberry brushed aside the Supreme Court's decisions by commenting that they did not involve unfair trade practice laws, which the legislature was clearly entitled to enact, and that they did not apply to "emergency measures."¹¹¹

Fairchild and two other justices disagreed. They argued that the majority treated the Supreme Court decisions too cavalierly and that unless and until Supreme Court overruled its earlier cases, minimum wage controls must be held to violate due process and freedom of contract.¹¹² Fairchild and his fellow dissenters were also bothered by the fact that the WRA allowed the governor to enact codes without giving opponents notice and a chance to be heard before the codes went into effect. They warned that excessive delegation of power to agencies might in the long run pose a fundamental threat to procedural due process.¹¹³

The last major court battle over the "little New Deal" came in 1938. A cherished goal of New Dealers in Washington and Madison was the establishment of electric power systems in rural areas, and starting in 1935 Progressive governor Philip LaFollette made that goal one of his top priorities. LaFollette was opposed by businessmen and legislators who felt that the development of power systems should be left to the private sector. They succeeded in blocking his program in the 1935 legislature, but the 1937 legislature passed a public power law on a close vote after prolonged and bitter debate. The new law made an appropriation to the Wisconsin Development Authority (WDA), a private corporation that had been created in anticipation of the bill's passage in order to promote municipal utilities and electric cooperatives. It contained a proviso that the WDA was not to use the money for "unconstitutional activities."¹¹⁴

The law was promptly challenged, and the following year a deeply divided supreme court upheld it in State ex rel. Wisconsin Development

¹¹¹. 1925 Wis. Laws 176. The Commission followed a policy of implementing the law through persuasion rather than coercion, and the law was never challenged in court. See ARTHUR J. ALTMEYER, THE WISCONSIN INDUSTRIAL COMMISSION: A CASE STUDY IN LABOR LAW ADMINISTRATION 189-90, 196-98 (1932).

¹¹². Fasekas, 223 Wis. at 364-65, 269 N.W. at 704-05.

¹¹³. Id. at 366-73, 269 N.W. at 705-08.


¹¹⁴. 1937 Wis. Laws 334.
Authority v. Dammann (1938). The court’s decision contained echoes of Lange Canning. The court initially concluded the law was an unconstitutional delegation of legislative power because it did not specify how WDA was to use its legislative appropriation and did not provide for any supervision of WDA’s activities. But when Attorney General Orland Loomis asked the court to reconsider, it changed its mind. Rosenberry and the other members of the majority now focused on the fact that the legislature had not conferred any powers not already in WDA’s corporate charter. The question then became: could the legislature appropriate funds for the activities of a private corporation? The majority held that given the fact that many parts of Wisconsin still did not have adequate electric power in the late 1930s, promotion of public power systems was a legitimate public purpose and therefore WDA’s use of public funds was constitutional. However, it ruled that WDA could not use state money to help a particular group build or buy a particular plant: it could only engage in general promotion of public electric power systems.

In a lengthy dissent, Fairchild vigorously attacked the WDA law. He argued that the law violated the delegation doctrine and that by changing its opinion the court was yielding to public opinion and stretching administrative government beyond all reasonable limits. Fairchild expressed particular concern that in the WDA law, the state for the first time was delegating regulatory powers to a private corporation and encouraging direct economic competition between government and the private sector. The majority’s effort to limit the scope of WDA’s activities did not eliminate the law’s harm. “How is it possible to encourage the formation of power districts in general,” asked Fairchild, “without throwing the weight of the taxpayers’ money into the scales upon an election to determine a purely local and proprietary concern?”

Fairchild’s position ultimately triumphed politically. The 1939 legislature, which was considerably more conservative than the 1937 legislature, did not renew funding for WDA. The agency limped along on private funding for some years and was finally dissolved in 1954.

C. Shaping Wisconsin’s Modern Labor Law

A final area of law the debates between Rosenberry and Fairchild helped shape was modern Wisconsin labor law. Wisconsin labor law evolved more or less in step with the state labor movement. Both began to

115. 228 Wis. 147, 277 N.W. 278 (1938).
116. Id. at 166, 171-202, 280 N.W. at 702, 704-717.
117. Id. at 219, 280 N.W. at 719.
emerge in the 1880s and during the next half century the courts and the legislature, like Wisconsinites in general, displayed very mixed feelings toward unions. In 1931 the tide turned decisively toward labor when the legislature enacted Wisconsin’s first comprehensive labor code, patterned after the federal Norris-LaGuardia Act. The Wisconsin code explicitly declared that all workers had a right to organize, sanctioned a wide range of union activities related to strikes and picketing, and expanded the right to a jury trial in cases involving labor disputes.

Throughout the 1930s the supreme court divided over the question of how broadly to interpret the union rights granted by the 1931 code and other labor statutes, but it generally came down in favor of labor’s position. Fairchild played a centrist role in these decisions; his position helped shape Wisconsin’s labor law both on and off the court.

The two leading cases of the period were *American Furniture Co. v. Teamsters Local 200* (1936) and *Senn v. Tile Layers Protective Union* (1936). In *American Furniture* the court held by a 4-3 vote that the Wisconsin code protected picketing even in situations where the targeted employer’s workers opposed the union. The majority concluded that the union rights created by Wisconsin’s code, unlike those of Norris-LaGuardia, were not limited to cases where employees wanted a union: unions had a right to target their actions at workers as well as employers.

By adopting this approach the majority elected to treat the labor movement as a triangular relationship: unions, employers and employees were placed on a par with each other and any two groups could combine and act however they saw fit toward the other group. Fairchild, however, argued that the majority ignored what he viewed as the guiding spirit of both Norris-LaGuardia and the Wisconsin code: that the employee’s right of choice was paramount. Decisions as to unionization ultimately should be left in the hands of employees and the government should merely create a level playing field between employers and unions competing for employee allegiance. Fairchild worried that allowing unions to pressure employees and to negotiate with employers notwithstanding employees’

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119. 1931 Wis. Laws 376. The 1931 law temporarily made Wisconsin the leading labor rights state in the Union: it preceded the Norris-LaGuardia Act by a year, and it explicitly sanctioned various types of union activity, whereas Norris-LaGuardia merely prohibited courts from enjoining such activity. See CHARLES O. GREGORY, *LABOR AND THE LAW* 185-90 (1946).

120. 222 Wis. 338, 268 N.W. 250 (1936).

121. 222 Wis. 383, 268 N.W. 270 (1936), aff’d, 301 U.S. 468 (1937).
wishes could ultimately lead to employer-dominated unions:

I am in doubt as to the right of an employer to interfere with the freedom of choice of a group of men to have a representative or to retain the right individually to negotiate with the employer, where this group of men have been in the service of the employer for many years. If, under the statute, in an organized business where men have established a status of employee, morally recognized, if not legally, the employer can force those men to organize or start them toward an organization, the control feature, described as employer domination, was not done away with as evidently the legislature intended it should be.  

The same day American Furniture was decided, the court held in Senn that unions could strike for a closed shop even in a situation where the employer worked alongside his employees so that a closed shop would force him out of a job. Justices Chester Fowler and George Nelson, who dissented with Fairchild in American Furniture, argued that this was taking the law too far: it countenanced restraint of trade by unions and could strike a death blow to many small businesses. They denounced the holding as "un-American, oppressive, and intolerable." Fairchild, however, sided with Rosenberry and the majority and indeed wrote the majority opinion. He believed that when employees were interested in a union, the union should have complete freedom to compete with the employer for the employees' allegiance even where that would affect the employer's own security:

If it be assumed that appellant cannot operate his business successfully upon the conditions insisted upon by the respondents, still no right of appellant now protected by law is invaded by respondents' efforts to bring appellant's business to union standard.... An economic contest has developed.... The nature of the controversy is one in which the court and law enforcing officers can have no interest other than to preserve the equality of each contender before the law.

In 1937 a Progressive-dominated legislature enacted the Wisconsin Labor Relations Act (WLRA), closely modeled on the federal Wagner Act, which compelled employers to bargain in good faith with unions. The WLRA ratified American Furniture and went a step beyond the Wagner Act by allowing employers to agree to closed shops even where there was

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123. Senn, 222 Wis. at 389-90, 268 N.W. at 273. On appeal, the U.S. Supreme Court upheld Fairchild and the majority by a 5-4 vote. Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937). The majority and dissenters on the Supreme Court for the most part repeated the points their Wisconsin counterparts had made.
no direct evidence that the affected workers favored it. But Fairchild's view that employers and unions should be on an equal footing, with the final choice of representation left in the hands of employees, ultimately triumphed. The 1939 legislature repealed the WLRA and replaced it with the Wisconsin Employment Peace Act. The Employment Peace Act disallowed closed-shop agreements unless 75% of the affected employees voted for a closed shop, thus effectively restoring complete power over representation to employees.

IV. CONCLUSION: THE LONGITUDINAL VIEW

What do the three sets of debates described above reveal about the evolution of Wisconsin's legal system? On the surface they appear quite dissimilar, but on closer examination they show an interesting pattern of continuity. The social issues the supreme court faced in each era changed, but many of the central legal themes those issues raised remained the same. To a striking extent the justices of each era carried on legacies left by their predecessors and adapted them to changing times with great skill.

Finding the unifying themes of the debates between Dixon and Paine is a particular challenge because the two justices carved out broad new paths in many different areas of the law. But in their time, that was not unusual. During the years before and just after statehood, from 1836 to about 1865, lawyers and judges had abundant opportunities to help shape the new state. Wisconsin had to create a state constitution and develop a body of statutory and common law; it also had to establish a legal system to enforce the new laws. As a result, Wisconsin's first generation of lawyers and judges became the only generation for whom making, not just implementing law was the norm rather than the exception.

The debates between Dixon and Paine can best be summed up as a contest between classical conservatism and liberal instrumentalism. The instrumentalist view of law, which favored the forces of economic development over all other interests, dominated legal discourse during their

124. 1937 Wis. Laws 51.
125. 1939 Wis. Laws 57. In the early 1940s the court rejected two challenges to the closed shop limitations of the Employment Peace Act. Wisconsin Employment Relations Bd. v. Milk & Ice Cream Drivers Union, 238 Wis. 379, 299 N.W. 31 (1941), cert. den. 316 U.S. 668 (1942) (rejecting an argument that the act impaired freedom of speech); Allen Bradley Local No. 1111 v. Wisconsin Employment Relations Bd., 237 Wis. 164, 295 N.W. 791 (1941), aff'd 315 U.S. 740 (1942) (rejecting an argument that the Wagner Act preempted the Employment Peace Act). The Employment Peace Act anticipated and was similar to the federal Taft-Hartley Act of 1947.
126. See generally PARKER M. REED, BENCH AND BAR OF WISCONSIN (1882); Joseph A. Ranney, Practicing Law in 19th Century Wisconsin, 67 Wis. LAW. 10 (March 1994).
time. It was fueled by a prevailing spirit of “buoyant opportunism,” a be-
lief that America’s resources were inexhaustible and a sense of unlimited
possibility in all fields of human endeavor. Dixon had very little sympa-
thy for instrumentalism, as shown particularly in his effort to limit govern-
mental subsidies for railroads in *Whiting* and to avoid treating railroads as
favored entities in important tort cases such as *Chamberlain* and *Kellogg*.Yet at bottom, Dixon did not view the law in anti-instrumentalist terms: he
was more concerned with preserving traditional channels of authority and
decision making, whatever their economic or social consequences. Thus it
was that he quickly abandoned his brief rebellion against the fellow servant
doctrine in *Chamberlain*, yet risked his career to defend federalism in
*Booth* at a time when the political and legal tide in Wisconsin was all the
other way.

Paine was a thoroughgoing instrumentalist, but his instrumentalism
contained an alloy of social liberalism: he believed in moral progress as
much as economic progress. Paine’s instrumentalism stands out in his de-
fense of municipal financing of railroads and his defense of railroads
(representing America’s economic future) against landowners
(representing the past) in the *Kellogg* case. His social liberalism stands out
in his efforts to modify contributory negligence to make railroads bear the
cost of injuries they inflicted on passengers, whom he considered an eco-
nomically weaker class than the landowners he declined to favor in *Kel-
logg*. Dixon, by contrast, tried to modify contributory negligence and cau-
sation to help landowners in *Kellogg* more because of his respect for
traditional rights of property than to check the economic power of rail-
roads.

To the modern reader, armed with the retrospective knowledge that
centralization of power during and after the Civil War was an important
component of American industrial success, Paine’s unswerving adherence
to states rights might seem inconsistent with his instrumentalism. It was
nothing of the sort: Paine believed Wisconsin had a more advanced moral
and economic system than the United States as a whole and that federal
interference would hinder his state’s progress. States rights was the tool he
used to try to prevent that from happening. Though Dixon won most of
his debates with Paine, Paine and instrumentalism were the more trium-
phant forces in the end.

Winslow and Marshall did not have the opportunities to create new law
which were available to Dixon and Paine. But if they did not create law,
they took Dixon’s and Paine’s legacies and turned them in new directions.

127. See HURST, supra note 45, at 10-11, 18-20; HORWITZ, supra note 45, at 99.
Unlike Dixon and Paine, Winslow and Marshall's debates did not range over a gamut of legal issues: they concentrated on one relatively clear-cut issue, substantive due process. The connection between the Dixon-Paine debates over states rights, railroad financing and tort reform becomes clear only upon close study; the nature of the Winslow-Marshall debate was apparent both to lawyers and the public at the time it took place.

In many ways, Marshall was Dixon's philosophical successor and Winslow was Paine's successor. Marshall, like Dixon, was a classical conservative. He was not opposed to change for change's sake, but wanted to make sure that it was accomplished in a way that would preserve individual rights and would not subject the state constitution to openly revisionist interpretation. Marshall believed it was best to accommodate change by permitting shifts in the definition of the liberty and property rights protected by the constitution, rather than opening the door to direct reinterpretation of the constitution itself as Winslow suggested in Borgnis. Condoning flexible constitutional interpretation smacked too much of orientation to result rather than principle; it was also an abdication of the judiciary's central duty to check the legislature when reforms were only marginally beneficial and infringed too much on basic freedoms. It must not be forgotten that despite Marshall's criticisms of Winslow's philosophy, the two justices voted together more often than not: Marshall voted with his colleagues to uphold Progressive reforms most of the time, and Winslow joined Marshall in striking down major reform laws in Zillmer and Bonnett. But to Marshall their difference of approach was crucial. Marshall, like Dixon, abhorred judicial orientation to result. Winslow did not view result orientation as natural and good like Paine; but neither did he believe, like Marshall, that the court should blind itself to the social consequences of its actions.

Like Winslow and Marshall, Rosenberry and Fairchild had little opportunity to make new law out of whole cloth but they also lived in an era of dramatic social and economic change and played a significant part in shaping that change. Due in part to Winslow's influence in Lange Canning, Rosenberry ultimately went beyond Winslow's philosophy of accommodating social change through broad constitutional interpretation and forged a 20th century version of Paine's instrumentalism by successfully advocating open legal recognition of administrative government's new role in Wisconsin. Rosenberry's language creating a new delegation doctrine in Whitman was so broad that one may reasonably ask: if Fairchild had not joined the court in 1930, would the court under Rosenberry have imposed any constraints at all on Wisconsin's "little New Deal" legislation?

As it was, Fairchild followed in Marshall's footsteps in several respects.
He approved most labor and economic legislation during the Depression and unlike several of his more conservative colleagues avoided the temptation to challenge the more radical reform laws based on substantive due process. But he took it upon himself to carry forward Marshall's concerns about protecting liberty and property rights in the regulatory context, and he clearly influenced the court's decisions to strike down the first version of the Wisconsin Recovery Act in 1936 and to limit the scope of the Wisconsin Development Authority's activities in 1938. His position that employees' freedom to decide on unionization should be unfettered, while not successful with his colleagues, was ultimately adopted by the legislature.

The judges profiled here used debate to clarify and sharpen, for their colleagues, many issues which were vital to a determination of what kind of place Wisconsin would be. In many instances—Paine in opposing any form of support for slavery, Winslow in urging his colleagues to view reform with respect, and most notably Rosenberry in his advocacy of a new view of administrative government—they were able to bring a majority of the court to their views and prevail over their counterparts. But in the process the counterparts often raised points and issues which were never permanently put to rest. The central themes they articulated—the extent to which judges should be oriented to process and to result, whether Wisconsin's legal system should value reform or stability most highly, and where the line should be drawn between meeting broad social needs and protecting individual rights—continue to be debated today, and most likely will always be part of the fabric of legal discourse in Wisconsin. By carrying these themes forward in their time, the counterparts also made important and enduring contributions to the legal system.