Enigmatic Grants of Law-Making Rights and Responsibilities in the Wisconsin Constitution

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The Wisconsin Constitution includes two types of statements about the authority and duty to make laws. The first type is clear, direct and general. This type appears in Article IV, the article pertaining to the legislature. In that article, the constitution vests legislative power in both houses of the legislature—the senate and assembly. The second type of statement appears throughout the constitution. Such statements are enigmatic because one cannot be certain about the scope of the lawmaking authority that instances of that type grant, because each is limited to a particular subject about which laws might be enacted and because many of the instances indirectly grant authority. The second type is also enigmatic because the wording of the instances of it varies considerably. Some of them even restrict lawmaking authority. As one would expect, the case law on the second type of statement is rich and somewhat surprising.

One may begin to understand the enigmatic type of statements in the Wisconsin constitution by classifying instances of it. Even if one allows small variations in phrasing among the members of some classes (and interprets instances so as to reflect modern drafting conventions), there are fifteen classes of instances in the Wisconsin Constitution: (1) "the legislature may ... by statute provide;" (2) "the legislature by law may;" (3) "as defined by law;" (4) "the legislature shall provide;" (5)
(a prohibition) "no law;"6 (6) "shall be recognized by laws;"7 (7) "the legislature may;"8 (8) "laws may be enacted;"9 (9) "the legislature may, except . . . ;"10 (10) (another prohibition) "the legislature may not, except . . . ;"11 (11) "the legislature shall;"12 (12) (relating to impeachment) "the assembly may;"13 (13) "except as provided by law;"14 (14) (another prohibition) "the legislature may not;"15 and (15) "except by law."16

The phrasing of the preceding statements creates at least three difficulties. The first is immediately apparent. The bewildering variety of phrasings makes it unclear whether each statement has the same legal effect. If the effect of all the statements is not equal, the effect of each is difficult to determine. Second, those statements that direct or authorize the legislature to enact a law do not reflect the constitutional requirement that bills be presented to the governor.17 This requirement makes it impossible for the legislature single-handedly to enact a law unless it overrides a gubernatorial veto. The third difficulty is that the words "by law" are ambiguous. This phrase might mean that joint resolutions, which do not require action by the governor, will not suffice. This makes sense in light of the presentment requirement's scope. In fact, the Supreme Court of Wisconsin did construe the phrase that way. Interpreting two constitutional provisions regarding reapportionment, one of which included "by law" and the other of which did not, the court, in State ex rel. Reynolds v. Zimmerman,18 held that "[w]e can see no reason why the constitutional framers should have intended that the congressional redistricting must be by law but that legislative redistricting might be by action of the legislature alone."19 The use of "by

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8. WIS. CONST. art. I, § 23; art. I, § 24; art. IV, § 22; art. IV, § 23; art. IV, § 24, cl. 3; art. IV, § 24, cl. 4; art. IV, § 24, cl. 6a; art. IV, § 32; art. VIII, § 1; art. VIII, § 7, cl. 1; art. VIII, § 10, cl. 2; art. X, § 1; art. XI, § 1; art. XII, § 1; art. XIII, § 10, cl. 1.
9. WIS. CONST. art. III, § 2; art. IV, § 28; art. XI, § 1.
11. WIS. CONST. art. IV, § 24; art. VII, § 28.
12. WIS. CONST. art. IV, § 27; art. VII, § 5 cl. 1; art. VII, § 6; art. X, § 1; art. X, § 3.
14. WIS. CONST. art. VII, § 8; art. VIII, § 2.
15. WIS. CONST. art. I, § 8, cl. 3; art. IV, § 17, cl. 2; art. IV, § 26, cl. 1; art. IV, § 31.
16. WIS. CONST. art. VIII, § 2; art. XII, § 8.
17. WIS. CONST. art. X, § 5.
18. 22 Wis. 2d 544, 126 N.W.2d 551 (1964).
19. Id. at 554, 126 N.W. 2d at 557.
law" probably also means that rulemaking by an administrative agency will not suffice if a constitutional provision requires lawmaking. Rules have the force of law; however, they are not law. Further, rules are promulgated by executive agencies, not enacted by the legislature and the governor. About the phrases in which "by law" appears and in which there is no reference to the legislature, it could be argued that action by a court, another law-making body, would suffice. The court in Reynolds convincingly solved these problems. Except for the constitutional provision that mentions the state assembly's unilateral action, all the other enigmatic phrases refer to the enactment of statutory law.

I. THE CONSTITUTIONAL CONVENTIONS

The references to these enigmatic phrases in the debate during the constitutional conventions are certainly evidence of the way in which the phrases should be interpreted. One caveat is in order. Some of the debate relevant to those phrases concerned whether to specify the value of property that would be exempt from execution under a judgment or to make a general statement so that the amount could later be specified by statute. This "value of property" exemption, banking and women's property rights were the three most controversial issues during the debate on and the campaign for ratification of the first proposed state constitution. Voters later rejected the first draft. The exemption was also a major issue during the debate at the second constitutional convention. The bipartisanship that pertained during most of that convention often dissipated when that issue arose. Some delegates favored borrowers; others favored lenders. A few of the remarks that the delegates made during arguments about whether to include a dollar amount in the constitution seem to be based not only on conceptions about the propriety of doing so but also on a calculation about whether the convention's delegates or the legislature and governor would agree upon a higher amount. At one point, Mr. Stoddard Judd, recognizing an unstated motive, pointed out that Mr. Experience Estabrook, who had recently argued against specifying an exemption amount in the constitution, had earlier voted to specify in the constitution the amount of


21. Recently Wisconsin courts have interpreted constitutional provisions by analyzing their plain meaning, discussing the contemporary material on them (usually the debates during the constitutional convention) and the first law enacted on their subject matter. See, e.g., Thompson v. Craney, 199 Wis. 2d 674, 546 N.W. 2d 123 (1996); Busé v. Smith, 74 Wis. 2d 550, 247 N.W. 2d 141 (1976); Board of Education v. Sinclair, 65 Wis. 2d 179, 222 N.W. 2d 143 (1974); State ex rel. Martin v. Heil, 242 Wis. 41, 7 N.W. 2d 375 (1942).
Supreme Court justices' salaries.  

Even allowing for certain delegates' ulterior motives, one can discern two themes in the debate. The first is that the constitution ought to enunciate broad principles, while the statutes should specify details. Some delegates recognized that this distinction is most obviously valid in regard to details that might become inappropriate because of the passage of time. Two examples are the details that were just mentioned: the amount of the "value of property" exemption and the amount of judges' salaries. However, Mr. Warren Chase argued that the distinction between general principles and details was not always clear and absolute. Moreover, the delegates did include details in the constitution, including among them some that almost certainly would become outmoded, such as the amount of judges' salaries and the geographical extent of each circuit court's jurisdiction. Despite Mr. Chase's warning and the delegates' own mixed motives, if the delegates believed that a detail should be left to the legislature and the governor, they usually added one of the enigmatic references to enacting statutory law. That fairly consistent practice indicates that the delegates understood the nature of constitutions, but at first glance that practice does little to illuminate the enigmatic statements, because the constitution's general grant of legislative authority would, by itself, allow the legislature to enact laws that filled in details. Nevertheless, the addition of those phrases indicated that legislative work needed to be done and foreshadowed one of the themes in the case law that would interpret those phrases. The delegates' actions also indicate that the constitutional provisions in which the enigmatic statements appear are not self-executing.

The second discernible theme in the debate is that the constitution directs the legislative and executive branches of government. Most important for the question of the enigmatic phrases' meaning, the constitution directs those branches as they exercise their authority to enact laws. This direction has both a positive and a negative aspect. As to the positive aspect, the constitution directs the legislature to act by initiating the statute-making process. The constitution thus implicitly bestows upon the legislature the authority to initiate that process. As to

23. Id. at 285, 293, 297, 771, 794.
24. Id. at 763.
26. WIS. CONST. art. IV, 1.
27. THE ATTAINMENT OF STATEHOOD, supra note 21, at 287, 291, 764.
the negative aspect, the constitution sometimes constrains the legislature. For example, the constitution specifies a number of individual rights in Article I that legislation may not abridge. This theme, too, foreshadows a major theme in the case law: that the phrases do not grant plenary power to the legislature and the governor. Of the two aspects, constraint is echoed more frequently in the pertinent case law.

II. THE PROVISIONS ARE NOT SELF-EXECUTING

One of the main themes in the case law is that the presence of an enigmatic phrase about lawmaking authority indicates that the constitutional provision is not self-executing. That is, by itself a phrase of that type does not forbid, authorize, or require any behavior (the three functions of statutory law). A provision that includes such a phrase has no effect unless the legislature and the governor implement it by enacting legislation. Contrasting a provision that does not contain one of the enigmatic phrases to a provision that does contain one will clarify this point. A provision of the first type is "[e]very person may freely speak, write and publish his sentiments on all subjects." That statement immediately and directly grants rights, which may be vindicated in court, and litigants may attack statutes that might contravene them. A contrasting provision is "[t]axation of agricultural land and undeveloped land, both as defined by law, need not be uniform with the taxation of each other or with the taxation of other real property." Absent the enactment of statutory law to define agricultural land for taxation purposes, an assessor may not, for example, assess that kind of land at 50% of its fair market value and assess all other taxable property at 100% of its fair market value. That latter portion of the constitution put on firmer legal footing the ensuing enactment of the farmland preservation program, under which owners of agricultural land receive income tax credits that offset some of their property tax liability. Without the constitutional provision that credit would grant a partial property tax exemption and thus would result in nonuniform property taxation, so it would have violated the section in the constitution of which the provi-

28. Id. at 290, 402.
29. Virtually all statutes perform one of those functions or state conditions or consequences related to the behavior that is forbidden, authorized or required. See Jack Stark, The Art Of The Statute 7-11 (1996).
30. Wis. Const. art. I, § 3.
sion is a part. However, the provision’s efficacy depended upon legislation. After a statutory definition was created, the authorization of unique taxation of agricultural land became effective, and that authorization made possible the enactment of a constitutional farmland preservation credit, which included that definition.

One section of the constitution is explicitly self-executing. Its final subsection is “[t]his section shall be self-executing and mandatory. Laws may be enacted to facilitate its operation but no law shall be enacted to hamper, restrict or impair the right of recall.” This section grants to the voters the right to recall elected officials, a right that the elected officials who sit in the legislature might be tempted to fail to implement by statute. As we shall see, the case law had demonstrated before that section was ratified in 1926 that constitutional provisions that do not contain an enigmatic expression are self-executing. Including that final subsection might have cast doubt on that general rule because it would encourage courts to wonder why that subsection was necessary and, therefore, to wonder whether the rule was indeed general. On the other hand, it might have done no harm or have been a prudent addition that ensured that courts would interpret the section to be self-executing.

The first case distinguishing self-executing constitutional provisions from others involved a provision that in this context is interesting for two reasons. First, that provision concerned the exemption from judgments, the debate on which at the second constitutional convention did much to reveal the beliefs of the delegates about the differences between constitutions and statutes. Second, that convention, rather than specifying an exemption amount, wrote the following: “[t]he privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted.” That section did not merely indicate that the legislature was to fill in the details; it also directed the legislature to do so and established two standards (“wholesome laws” and “reasonable amount”), al-

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34. The definition is actually of “farmland,” not “agricultural land,” and now appears at WIS. STAT. § 71.58 (3).
35. WIS. CONST. art. XIII, § 12, cl. 7.
36. 13 Wis. 260 (1860).
37. WIS. CONST. art I, § 17.
beit vague ones, for the statutes that were to be enacted. Because the legislature was directed, not merely authorized, to act and had failed to do so, if a court were ever tempted to hold that a constitutional provision was self-executing despite the appearance in it of one of the enigmatic expressions it would have occurred in a case on that type of enigmatic grants of lawmaking authority. Nevertheless, in this case the court refrained from doing so, holding that "[t]here can be no doubt that the courts possess no power to compel the legislature to enact the laws required by that section; nor could they, in the absence of any statutes upon the subject, by judicial decision supply the deficiency."

The next case in this line, The Chicago, Milwaukee and St. Paul Railway Co. v. State, was brought on Article IV, section 27, which specified that "the legislature shall direct by law in what manner and in what courts suits may be brought against the state." The court in this case was the first to use the term self-executing. Of the constitutional provision, the court held "it is not self-executing, and manifestly was not so intended. Otherwise, the mandate would have been to the courts instead of the legislature...." This was another case in which a court might have been sorely tempted to hold that it could execute a constitutional provision that included an enigmatic phrase, rather than waiting for the legislature to execute it. The temptation would have arisen from the fact that the provision at issue regulated the courts' operation and thus intruded on the judiciary's power. The constitution itself vested the judicial power in the courts. Nevertheless, the court deferred to the legislature and upheld a statute that required filing a claim against the state with the legislature before commencing litigation against the state.

In spite of several unusual facts, the next pertinent case, Kayden Industries, Inc., v. Murphy, significantly clarified the relation between the enigmatic phrases and the self-executing nature of constitutional provisions that do not contain an enigmatic phrase. This was a case on the lottery section of the constitution. It is well established that lotteries have three elements: a prize, chance and consideration. Part of

38. Conroe, 13 Wis. at 265.
39. 53 Wis. 509, 10 N.W. 560 (1881).
40. Wis. Const. art IV, § 27.
41. The Chicago, Milwaukee and St. Paul Ry. Co., 53 Wis. at 513, 10 N.W. at 561.
42. Wis. Const. art VII, § 2.
43. 34 Wis. 718, 150 N.W. 447 (1967).
44. Wis. Const. art IV, § 24.
45. 34 Wis. 724, 150 N.W. 452 (citing State ex rel. Cowie v. La Crosse Thea-
that section consisted of a list of things that were not consideration for defining a lottery. The unusual feature of the list was its introductory phrase: "[e]xcept as the legislature may provide otherwise." Thus, this provision allowed the legislature to eliminate items from the list of exceptions. The section also prohibited lotteries, so the enigmatic phrase applied only to part of the section. The next unusual feature of this case is that it also involved a statute that had been enacted to codify the list in the constitution, almost as if the legislature were reacting to the arguments of those members of the constitutional convention who believed that details belong in statutes, not in constitutions. To exacerbate the complications, in the next year, 1966, a statute that changed the list of exceptions to the items that were consideration was enacted: the legislature exercised its authority to "provide otherwise."

From this unusual material on gambling the court fashioned a rational analysis of the relation between the enigmatic phrases and the self-execution of constitutional provisions. The court quoted an encyclopedia: "[a] constitutional provision is self-executing if no legislation is necessary to give effect to it, and if there is nothing to be done by the legislature to put it in operation. A constitutional provision contemplating and requiring legislation is not self-executing." Recognizing that the enigmatic phrase applied only to deleting items from the list of things that were not consideration, the court held that the general prohibition against lotteries and the list in the constitution were self-executing. As to that list, entering a mercantile establishment, the issue in this case, was not consideration at first. However, the legislation that was enacted during the next year removed that exception. After untangling the case's oddities, the court left a clear distinction: constitutional provisions that did not refer to statute making were self-executing, and constitutional provisions that did refer to statutemaking were not self-executing.

The distinction was so clear that during the next year, in Forseth v. Sweet, the plaintiff conceded that a constitutional provision containing one of the enigmatic phrases was not self-executing and then argued that a statute had executed the provision. The constitutional provision

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46. WIS. CONST. art IV, § 24.
47. Kayden, 34 Wis. 2d at 731, 150 N.W.2d at 453 (quoting 16 AM. JUR. 2D Constitutional Law, § 94 (1965)).
48. Id. at 732, 150 N.W.2d at 453.
49. 38 Wis. 2d 676, 158 N.W.2d 370 (1968).
50. Id. at 679, 158 N.W.2d at 371.
was Article IV, section 27: "[t]he legislature shall direct by law in what manner and in what courts suits may be brought against the state."\(^{51}\) The facts that the order to the legislature was explicit and one of the easier to interpret of the enigmatic phrases may have helped to induce the concession.\(^{52}\) In any event, at that time the case law on this issue, despite the small number of relevant opinions, appeared to be consistent and clear. Moreover, during the next year, in *Chart v. Gutmann*,\(^{53}\) the court explicitly followed *Forseth v. Sweet* on this issue.\(^{54}\) In a later case, *Kallembach v. State*,\(^{55}\) the court again held that Article IV, section 27 is not self-executing.\(^{56}\) In a number of other cases on that section, the court, although it did not distinguish between constitutional provisions that are self-executing and those that are not, held that a suit may not be brought against the state unless a statute explicitly authorizes such a suit.\(^{57}\)

### III. THEY IMPOSE A DUTY TO LEGISLATE

Another theme in the case law on the enigmatic phrases is that they impose on the legislature and governor a duty to enact laws. Just as most of the cases holding that the phrases indicate that a constitutional provision is not self-executing involved Article IV, section 27, most of the cases that developed this theme involved article VII, section 15. That section, which was repealed during 1966, provided for the election of justices of the peace "in such manner as the legislature may direct."\(^{58}\) An exception is the first case in which a court so held, *Bull v. Conroe*,\(^{59}\) which was discussed above\(^{60}\) and which was on Article I, section 17, the provision that required an exemption from judgments for debtors. The court in that case referred to "the laws required by that section" and remarked that failing to enact laws exempting property from exemption would "be a clear violation of the plainly expressed will of the people."\(^{61}\)

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51. WIS. CONST. art. IV, § 27.
52. 38 Wis. 2d at 690.
54. *Chart*, 44 Wis. 2d at 427, 171 N.W.2d at 334.
55. 129 Wis. 2d 402, 385 N.W.2d 215 (Ct. App. 1986).
56. *Id.* at 409, 385 N.W.2d at 218.
58. WIS. CONST. art IV, § 15 repealed by 1965 J.R. 50.
59. 13 Wis. 260 (1860).
60. Text accompanying footnote 34.
61. *Id.* at 265.
Nevertheless, as we have seen, the court acknowledged that it had no power to compel the legislature to execute the provision. In later cases the courts were less deferential. The first of the relevant cases on article IV, section 27 is *State ex rel. Wood v. Goldstucker and Another.*

Goldstucker had been elected a justice of the peace before the legislature repealed the portion of Fond du Lac's charter that created that position. The court held that the constitutional provision mandated a law on the election of a justice of the peace, particularly because there once had been such a law, and that, therefore, Goldstucker still held office. The second case in the line, *Trogman v. Grover,* had virtually identical facts, and the result was the same. The court in the third case, *Olson v. Hawkins,* also held that the office, once created, could not be abolished. The final case that developed this theme, *State ex rel. Reynolds v. Zimmerman,* was on Article IV, section 3, which directs the legislature to apportion the state for election purposes after each census. The court assumed that the legislature must perform that duty and held that it must perform it by statute.

**IV. THEY DO NOT AUTHORIZE SHAMS**

The enigmatic phrases that grant authority to the legislature (by implication, with the concurrence of the governor except in the case of bills passed notwithstanding vetoes) may at first glance appear to do so without limitation. The case law indicates otherwise. It indicates, for example, that laws enacted on the basis of a constitutional provision that includes one of the enigmatic phrases may not be used to create a sham. This rejection of shams is the third major theme in the case law on the enigmatic phrases. All of the cases in which the court so held involved the same section of the constitution. That fact may cast doubt on their general applicability, but the principle is so rational and, as we will see, there are so many other limits placed by courts on the statute-making authority granted by those provisions that the principle almost certainly would be held to apply regardless of the constitutional provision at issue.

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62. 40 Wis. 124 (1876).
63. *Id.* at 130.
64. 109 Wis. 393, 85 N.W. 358 (1901).
65. *Id.* at 396, 85 N.W. at 359.
66. 135 Wis. 394, 116 N.W. 18 (1908).
67. *Id.* at 398, 116 N.W. at 19.
68. 22 Wis. 2d 544, 126 N.W.2d 551 (1964).
69. *Id.* at 557, 126 N.W.2d at 557.
The part of the constitution that was litigated in those cases is Article XI, section 3. Until it was amended during 1926, that section specified "[i]t shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages." Under the original version of this subsection, the state government enacted those municipalities' charters, specifying in detail their powers and duties. Under the current version of that subsection, cities and villages may govern themselves except for matters of statewide concern. The case law makes it clear that, under the first version of the subsection, the state, and, under the second version of the subsection, persons who wish to create a city or village, may not create governmental entities purporting to be cities or villages but lacking the attributes essential to those entities. In fact, the court has usually been rigorous in enforcing that principle.

The first case in this series, Smith v. Sherry, concerned a village the territory of which was not completely contiguous. The plaintiffs suggested that the motive for the creation of this odd governmental entity was to include valuable property in the village's tax base; in fact, they argued that the village's composition violated the uniformity clause of the state constitution, that document's most important tax provision. The court declined that gambit but held that "where the territory so attempted to be included in a village is not adjacent or contiguous thereto, and the village has no interest therein as a village, its annexation for the mere purpose of increasing the corporate revenues by the exaction of taxes is an abuse and violation of that provision of Section 3, art. XI." Before the wording of the relevant part of the constitution was changed, three other cases were brought on the authority to create municipalities. The first was State ex rel. Town of Holland v. Lammers, in which the plaintiff attacked a statute that allowed any territory that fulfilled certain population and size requirements to become a village. Upon rehearing, the court held that fulfilling these requirements was not enough, because they allowed the creation of sham villages. Specifically, it held "that the power to incorporate territory as a village under Section 854, Stats. 1898, is limited to such territory as possesses the characteristics mentioned. It must be a village in fact, with a

70. Wis. Const. art VI, § 3.
71. 50 Wis. 210, 6 N.W. 561 (1880).
72. Id. at 216, 6 N.W. at 567 (citing Wis. Const. art. VII, § 1).
73. Id. at 217, 6 N.W. at 564.
74. 113 Wis. 398, 86 N.W. 677 (1902).
reasonably compact center or nucleus of population, and not a mere agricultural community." In *Fenton v. Ryan* the area that purported to be a village had three parts: thirty-eight and one-half acres that were settled, 465 acres of agricultural land that were not contiguous to the settled portion and seventy-five acres that were under water. The supreme court affirmed the trial court, holding that the area did not have the attributes identified by the court in *State ex rel. Holland v. Lammer*. Two years later, in *Incorporation of Town of Biron*, the court applied the same criteria as had the courts in the two previous cases, but, even though part of the village's territory was a thin strip across a river from the village's main body, held that the criteria were fulfilled. In *In re Incorporation of Village of St. Francis* the court applied the village-like test rigorously, as it had in most of the earlier cases. It held that the area in question was not sufficiently like a village.

Thus, by 1948 it was clear that Article XI, section 3, despite its broad phrasing, did not authorize the creation of villages that were not really villages and that included superfluous land and that courts would most likely apply those criteria rigorously. The central issues in the next three cases on this constitutional provision were not whether the entity created was village-like. In *In re Village of Elm Grove* the issues were whether even more land should have been included in the village and whether a city, rather than a village, should have been created. The court in *In re Village of Oconomowoc Lake* affirmed the proposition that a village must be village-like and held that the petition for incorporation must address that issue. The most recent of the three cases is *In re Village of Elmwood Park*. In it the plaintiff argued that his seventeen-acre parcel should not have been included in the village. The appellate court rejected the trial court's consideration of a factor, economic effects, in addition to the factors that had been applied in the

75. *id.* at 417, 86 N.W. at 679.
76. 140 Wis. 353, 122 N.W. 756 (1909).
77. 146 Wis. 444, 131 N.W. 829 (1911).
78. *id.* at 451, 131 N.W. at 831.
79. 209 Wis. 645, 245 N.W. 840 (1932).
80. *id.* at 654, 245 N.W. at 549.
81. 267 Wis. 157, 64 N.W.2d 874 (1954).
82. *id.* at 162, 64 N.W.2d at 877.
83. *id.* at 163, 64 N.W.2d at 877-78.
84. 270 Wis. 530, 72 N.W.2d 544 (1955).
85. *id.* at 537-38, 72 N.W.2d at 547.
86. 9 Wis. 2d 592, 101 N.W.2d 659 (1960).
87. *id.* at 594, 101 N.W.2d at 661.
case law and held that incorporating the territory and including in it the plaintiff's parcel were constitutional. 88

V. COURTS WILL ADD RESTRICTIONS AND QUALIFICATIONS TO THEM

The next major theme in the case law on the enigmatic phrases is that courts will add restrictions and qualifications to the grants of statutemaking power that the constitution bestows. Bull v. Conroe, 89 the first case in which a court clearly distinguished between constitutional provisions that were self-executing and those that required statutemaking and the first case holding that the enigmatic phrases imposed a duty to enact statutes, is also the first case in which a court asserted its authority to add restrictions and qualifications to the authority that the enigmatic phrases grant. In that case, Luther Dixon, one of the more impressive of the justices who have sat on the Wisconsin Supreme Court, wrote, "I cannot assent to the doctrine that the discretionary power given to the legislature is absolute and unlimited, and that it may not do violence to the clause [that gave it the power to specify the property that is exempt from execution], as well by exempting too much as too little, or by protecting those things which are not of the necessary comforts of life as well as by refusing to protect those which are." 90 Justice Dixon did not assert the basis of his authority to "write in" limits, but it apparently was the constitutional provision that vested judicial power, including the power to interpret the constitution, in the judiciary. 91 In this case, however, he held that no violence was done to the constitution by an act that annexed the debtor's land, even though the annexation made an exemption from execution inapplicable to it.

The most defensible of the limits to the authority granted by an enigmatic phrase is that a statute that is enacted on that basis may not violate another constitutional provision. That holding, too, may be found in Bull v. Conroe. 92 Justice Dixon began his opinion thus: "I entirely concur with the counsel for the respondent in the position that all parts of the constitution are equally binding and imperative." 93 He went on to consider whether the annexation was an uncompensated taking

88. Id. at 598-99, 101 N.W.2d at 662.
89. 13 Wis. 260 (1860).
90. Id. at 267.
91. Wis. Const. art VII, § 2.
92. 13 Wis. 260 (1860).
93. Id. at 264.
and thus unconstitutional, and held that it was not. This limit was also applied in State ex rel. Sweet and another v. Cunningham and others, which concerned the sale of school lands. A portion of the constitution directed provision "by law" for the sale of school lands. The court held that another part of the constitution created the school fund, which included the proceeds from the sale of school lands, as a trust fund, thereby dedicating it for educational purposes and making unconstitutional a statute directing that some of the proceeds be used for a state park. At issue in State ex rel. Melms v. Young was a statute requiring nonpartisan elections of public officials in counties that have a population of at least 250,000 (at that time, only Milwaukee County). The statute rested on the legislature’s constitutional authority to declare the means of electing certain county officers. The court held that this authority did not negate the constitutional requirement that the system of county government be as “nearly uniform as practicable.” The court held that the legislature may classify counties, for example by population, but only if there is a rational reason not to treat them all alike, and it held that no such reason justified the statute that was challenged.

Another limit appeared in a case on a law that regulated the rates charged by railroads and created railroad commissioners to enforce those regulations. The constitutional basis upon which this law rested was a grant of authority to create corporations and to alter or repeal their charters. The law was challenged in Attorney General v. Railroad Companies. The court agreed with Judge Cooley’s statement that a regulation applicable to corporations must be for the comfort, welfare or safety of society (that is, it must be a valid use of the state’s

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95. Conroe, 13 Wis. at 272.
96. 88 Wis. 81, 57 N.W. 1119 (1894).
99. Id. at 83, 57 N.W. at 1121.
100. 172 Wis. 197, 178 N.W. 481 (1920).
102. Id. at 203-4, 178 N.W. at 482 (citing Wis. Const. art. IV, § 23).
103. Id. at 202-3, 178 N.W. at 482.
105. Wis. Const. art. XI, § 1.
106. 35 Wis. 425 (1874).
police power). However, the court held that the attempt to regulate the rates of a railroad under Article XI, section 1 was constitutional, partly because federal cases that strictly interpreted the prohibition against impairing contracts were decided during an era before the power of corporations had grown to massive size. The court arrived at this position even though it conceded that the charter was a contract.

In *Huber v. Martin*, the court interpreted more restrictively the constitutional authority to alter and repeal corporate charters. In that case the issue was an attempt by a mutual insurance company to transform itself into a stock company under a law that permitted that action if certain requirements were fulfilled. The court held that the right to hold property under a particular type of corporate form was a contractual right that could not be impaired, so that the law in question violated the Wisconsin constitution. The court also held that the statute violated the federal constitution's due process and equal protection clauses. In other words, the court extended to certain stockholders the corporation's rights. Even if the corporation had certain rights that could not be impaired, which is far from obvious, it had chosen to transform itself and had conformed to the statute that allowed that transformation. Moreover, the propriety of extending those rights to stockholders is questionable. The state had argued that its power to alter and repeal corporate charters validated the law that allowed the action that was being challenged, but it did not convince the court. The court in this case thus eroded the power of the legislature and governor to alter and repeal corporate charters.

Another railroad case, *State ex rel. Northern Pacific R. Co. v. Railroad Commission*, followed thirty-five years later. At issue was the obligation to pay for a railroad crossing. The court, citing an earlier Wisconsin case as well as a few cases from other jurisdictions, held that the railroad had obtained a vested right because it built its line, including the point where the crossing was to be located, under a charter before the enactment of a statute that specified the payment arrange-

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107. *Id.* at 591-92 (quoting COOLEY'S CONST. LAW 577).
108. *Id.* at 592.
109. 127 Wis. 412, 105 N.W. 1031 (1906).
110. *Id.* at 415, 105 N.W. 1034.
111. *Id.* at 439, 105 N.W. at 1040 (citing WIS. CONST. art I, § 12).
112. *Id.* (citing U.S. CONST. amend XIV).
113. 140 Wis. 145, 121 N.W. 919 (1909).
114. *Id.* at 158, 121 N.W. at 932.
ment, so that it could not be made to pay for the crossing. The Wisconsin precedent that it cited certainly does not support the court's argument. The earlier court held that a charter that imposed an obligation on a railroad to pay taxes could be altered by statute, as it had been, and that the taxes thus imposed were valid. That precedent, therefore, supported the position opposite to the one that the later court took. The later court was also well aware of, but undaunted by, the apparently plenary power that the constitution granted to the legislature and governor to alter corporate charters; it held that that power was less than plenary.

Like Chicago & N.W.R. Co. v. State, the next case that limited the constitutional authority of the legislature and governor to repeal and alter corporate charters was a response to legislation that the Progressives enacted. The legislation at issue in the former case was the result of Robert M. La Follette's attempt to diminish the power of railroads by taxing and regulating them. The legislation in the next case, Water Power Cases, was designed to protect the environment, specifically water resources. It was one of the incredible number of important, forward-looking pieces of legislation that were enacted during the 1911 legislative session. That legislation repealed all of the charters for dams then in effect, subjected all the dams in the state to review by the Railroad Commission and provided that the charters of some would be renewed but the charters of others would remain invalid and those dams would be subject to appropriation, with compensation. The court was impressed by the economic development that the state had accomplished and attributed some of it to the dams in question. From Chicago & N.W.R. Co. v. State it picked up a minor thread: that the legislation authorized a taking without just compensation contrary to the state and federal constitutions, although the legislation did provide for compensation. Therefore, the court invalidated the law, indicating again that the power to alter and repeal charters, despite its appearance,

115. Id. at 160, 121 N.W. at 924-25.
116. Id. at 151, 121 N.W. at 925.
117. Id. at 161, 121 N.W. at 925.
118. 128 Wis. 553, 108 N.W. 555 (1906).
119. Id.
120. 148 Wis. 124, 134 N.W. 330 (1912).
121. Id. at 142-43, 134 N.W. at 336-37.
122. 128 Wis. 553, 108 N.W. 557 (1906).
123. Wausau State R.R., 148 Wis. at 136, 134 N.W. at 337. See Wis. Const. art. I, § 9; U.S. Const. amend. 5.
was not plenary.

*State ex rel. Cleary v. Hopkins Street Building & Loan Association*\(^{124}\) resembles *Huber v. Martin* in that it involved both a corporate charter and an attempt to change the form of a corporation. A state building and loan association, acting under a Wisconsin statute, became a member of, and a borrower from, the Federal Home Loan Bank.\(^{125}\) Shortly before the Wisconsin law was enacted, the federal government enacted a law that allowed members of the Federal Home Loan Bank that fulfilled certain requirements to become federal savings and loan associations.\(^{126}\) The Hopkins Street Building and Loan Association and two other savings and loan associations attempted to do so.\(^{127}\) An action was brought against the former association to declare the conversion void, and actions were brought by two other savings and loan associations to restrain the Commissioner of Banking from preventing their conversion to federal associations.\(^{128}\) The three actions were consolidated.\(^{129}\) The court held that the state law authorizing the transformation was unconstitutional because it allowed a "fundamental and radical change in the purpose of a corporation,"\(^{130}\) a result that may not be accomplished if even one stockholder dissents. By holding that a single stockholder could prevent the alteration of a corporate charter, the court implied that the constitutional provision that apparently granted to the legislature the right to alter charters was a virtual nullity.

In *State ex rel. Van Alstine v. Frear*\(^{131}\) the court did not hold that a statute was unconstitutional but it did specify limits to the power of the legislature and governor to enact elections laws. A section of the constitution begins "[l]aws may be enacted:" and proceeds to list a number of subjects related to elections.\(^{132}\) That section does not state any limits to the lawmaking authority on that subject. The court, however, held that although the legislature may regulate the exercise of the franchise, it may not deny the franchise or make its exercise so difficult that it is in effect denied.\(^{133}\) The court’s approach resembles the approach of the

\(^{124}\) 217 Wis. 179, 257 N.W. 684 (1934).

\(^{125}\) *Id.* at 182, 257 N.W. at 260.

\(^{126}\) *Id.* at 183, 257 N.W. at 261.

\(^{127}\) *Id.*

\(^{128}\) *Id.* at 184, 257 N.W. at 262.

\(^{129}\) *Id.*

\(^{130}\) *Id.* at 190, 257 N.W. at 688.

\(^{131}\) 142 Wis. 320, 125 N.W. 961 (1910).

\(^{132}\) WIS. CONST. art. III, § 2.

\(^{133}\) *Id.* at 341, 125 N.W. at 968.
courts that held that the authority to make laws incorporating municipalities did not extend to the creation of shams. That is, regulation is one thing and prohibition masked as regulation is another, just as a village is one thing and a pseudo-village is another. The court, however, held that the statute before it, which dealt with the election of United States senators, merely regulated elections and thus did not violate the constitution.\textsuperscript{134}

Like the court in \textit{State ex rel. Van Alstine v. Frear}, the court in \textit{Weed v. Bergh}\textsuperscript{135} stated limits to the authority to enact laws, even though the constitutional provision that created that authority did not limit it. The pertinent constitutional provision authorized the legislature to enact a law to regulate the banking business.\textsuperscript{136} The bank that brought this case objected to the statutory requirement that banks be corporations. The court stated that banking was a common-law right and thus could not be prohibited, including prohibition under the guise of regulation, and that, although banking could be regulated, that regulation must be "reasonably necessary to secure the public welfare and safety."\textsuperscript{137} Granting the common law precedence over the constitution is odd indeed, particularly in light of the constitutional provision that states that only the parts of the common law that do not conflict with the constitution remain in effect.\textsuperscript{138} In contrast, the statement that prohibition in the guise of regulation is unconstitutional is in the spirit of \textit{State ex rel. Van Alstine v. Frear} and the municipal incorporation cases. Although the court in \textit{Weed v. Bergh} set forth limits where none exist in the constitution, it held that the statute did not violate those limits. Specifically, it found the regulation to be reasonable, noting, for example, that forcing banks to be corporations would ensure continuity if an owner died.\textsuperscript{139}

The authority for the two most basic functions of state government, taxing and spending, is granted, in whole or in part, by means of enigmatic statements, which is one reason why this topic is important. One constitutional provision states that "[t]he legislature shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year."\textsuperscript{140} The uniformity clause\textsuperscript{141} of the constitution applies to both

\begin{itemize}
\item \textsuperscript{134} \textit{Id.} at 351.
\item \textsuperscript{135} 141 Wis. 569, 124 N.W. 664 (1910).
\item \textsuperscript{136} \textit{Id.} at 572, 124 N.W. at 667 (relying on WIS. CONST. art. XI, § 41).
\item \textsuperscript{137} \textit{Id.} at 573, 125 N.W. at 665 (citing 1 MORSE, BANKS & BANKING § 13 (4th ed.)).
\item \textsuperscript{138} WIS. CONST. art. XIV, § 13.
\item \textsuperscript{139} 151 Wis. 569, 124 N.W. 664 (1910).
\item \textsuperscript{140} WIS. CONST. art. VIII, § 5.
\item \textsuperscript{141} WIS. CONST. art. VIII, § 1.
\end{itemize}
state and local taxes, and it explicitly authorizes some taxes and implicitly authorizes others. The authority to spend is implicit in the statement in the constitution that "[n]o money shall be paid out of the treasury except in pursuance of an appropriation by law." ¹⁴² That is, if the legislature and governor may spend only by means of statutory appropriations, they implicitly have the right to spend. The constitution explicitly limits the spending authority by requiring a balanced budget.¹⁴³

The courts have also limited the authority to tax and to spend. The primary court-made limit to the taxing authority of both the state and local units of government is the principle that the unit of government that imposes a tax must be the unit of government that spends the proceeds of that tax.¹⁴⁴ The court enunciated this principle in nine cases.¹⁴⁵ In one of them, Busé v. Smith, the court connected this doctrine to the public purpose doctrine: "the purpose of the tax must be one which pertains to the public purpose of the district within which the tax is to be levied and raised."¹⁴⁶ That connection indicated that the court was not concocting this doctrine out of thin air. Rather, it is a logical extension of the doctrine that taxes may be levied only for public purposes. It would make no sense to validate a tax because it served the public purpose of a jurisdiction other than the one that imposed the tax.

The public purpose doctrine in its general form is the other court-made limit to the state's taxing and spending authority. It also applies to the taxing and spending authority of other units of government, but because that authority is not granted in constitutional provisions that contain an enigmatic phrase the doctrine as it applies to other units of government is not relevant here. The authors of two articles carefully analyzed the doctrine.¹⁴⁷ A third author used one of the public purpose doctrine cases as the basis of a discussion of several jurisprudential is-

¹⁴². WIS. CONST. art. VIII, § 2.
¹⁴³. WIS. CONST. art. VIII, § 5.
¹⁴⁴. On the authority to tax in this state in general and on this limit in particular, see Jack Stark, The Authority to Tax in Wisconsin, 77 MARQ. L. REV. 457 (1994).
¹⁴⁵. Sigma Tau Gamma Fraternity House v. City of Menomonie, 93 Wis. 2d 392, 288 N.W.2d 85 (1980); Busé v. Smith, 74 Wis. 2d 550, 247 N.W.2d 141 (1976); State ex rel. Warren v. Nusbaum, 59 Wis. 2d 391, 208 N.W.2d 780 (1973); State ex rel. American Legion 1941 Convention Corp. v. Smith, 235 Wis. 443, 293 N.W. 161 (1940); State ex rel. Wis. Dev. Auth. v. Dammann, 228 Wis. 147, 280 N.W. 698 (1938); State ex rel. City of New Richmond v. Davidson, 114 Wis. 563, 88 N.W. 596 (1902); Lund v. Chippewa County, 93 Wis. 640, 67 N.W. 927 (1896); Broadhead v. City of Milwaukee, 19 Wis. 658 (1865).
¹⁴⁶. 74 Wis. 2d 550, 577, 247 N.W.2d 141; 160 (1976).
These authors identified eight cases in which courts declared statutes authorizing state taxing or state spending unconstitutional because they violated the general public purpose doctrine. In his article Judge Eich also cited a number of cases in which the court assumed the validity of the doctrine but held that the statute had a state public purpose. In addition to the cases mentioned in those articles, there are several other relevant public purpose cases. One of them, State ex rel. Garrett v. Froehlich, involved a complicated flow of money. The state had required counties to pay for the treatment of "habitual drunkards." Acting in reliance on that law, a number of persons had established treatment clinics and had incurred expenses. After that law was declared unconstitutional, a law was enacted to reimburse those persons. The second law was then declared unconstitutional on public purpose grounds.

The court in an early case held that another kind of authority granted by one of the enigmatic phrases is not plenary. In State ex rel. Raymer v. Cunningham the court remarked that in the constitutional provision "the supervision of public instruction shall be vested in a state superintendent, and such other officers as the legislature shall direct," "other officers" means assistants and clerks. In other words, the legislature was not free to create positions for subordinate edu-

148. Samuel Mermin, Concerning the Ways of Courts: Reflections Induced by the Wisconsin "Internal Improvement" and "Public Purpose" Cases, 1963 Wis. L. Rev. 192.

149. State ex rel. La Follette v. Reuter, 33 Wis. 2d 384, 147 N.W.2d 304 (1967); State ex rel. Thomson v. Giessel, 265 Wis. 558, 61 N.W.2d 903 (1953); State ex rel. Martin v. Giessel, 252 Wis. 363, 31 N.W.2d 626 (1948); State ex rel. American Legion 1941 Convention Corp. v. Smith, 235 Wis. 443, 293 N.W. 161 (1940); State ex rel. Wis. Dev. Auth. v. Dammann, 228 Wis. 147, 280 N.W. 698 (1938) (which also held that the statute violated the principle that the unit of government that imposes a tax must be the unit of government that spends the proceeds of the tax); State ex rel. Consol. Stone Co. v. Houser, 125 Wis. 256, 104 N.W. 77 (1905); Wis. Keeley Inst. Co. v. Milwaukee County, 95 Wis. 153, 70 N.W. 68 (1897); Attorney Gen. v. City of Eau Claire, 37 Wis. 400 (1875). These authors missed a few of Justice Luther Dixon's opinions (see Jack Stark, The Wisconsin Constitution: A Reference Guide 219-224 (1997)).

150. Appeal of Van Dyke, 217 Wis. 528, 259 N.W. 700 (1935); State ex rel. Atwood v. Johnson, 170 Wis. 218, 175 N.W. 589 (1919); Brodhead v. City of Milwaukee, 19 Wis. 624 (1865); State ex rel. Owen v. Donald, 160 Wis. 21, 151 N.W. 331 (1915); Hasbrouck v. City of Milwaukee, 13 Wis. 37 (1860); Soens v. City of Racine, 10 Wis. 214 (1860).

151. 118 Wis. 129, 94 N.W. 50 (1903).

152. Id. at 130-31, 94 N.W. at 52.

153. Id. at 143, 94 N.W. at 55.

154. 82 Wis. 39, 51 N.W. 1133 (1892).

155. Id. at 48, 51 N.W. at 1135.

156. Id. at 48, 51 N.W. at 1135.
tional officers in any way that it chose. Two Opinions of the Attorney General reiterated that interpretation and stated that all "other officers" must be under the direction of the State Superintendent. Those opinions are based on *State ex rel. Raymer v. Cunningham* and on the debate during the state constitutional convention. In *State ex rel. Thompson v. Craney*, the court followed those Attorney General's Opinions and *State ex rel. Raymer v. Cunningham*, holding that all "other" state educational officers must be under the direction of the State Superintendent of Public Instruction and that, therefore, statutes that created a Department of Education and stripped the State Superintendent's office of most of its powers were unconstitutional.

Not surprisingly, courts have been loath to grant plenary power to the legislature and governor, on the basis of an enigmatic statement, in regard to judicial matters. At issue in *State ex rel. Pierce v. Kundert* was a statute that detached Green County from its judicial circuit, created a circuit that included only that county, created a term for the circuit court judge that was briefer than the terms of the other circuit court judges in the state and specified that if the same person was not both circuit court judge and county court judge the circuit court judge would be paid only $1,500 annually, which was considerably less than the other circuit court judges received. The purported authority for this statute was a constitutional provision that allowed the legislature to specify the terms of office and the compensation of circuit court judges. Nevertheless, the court held that that differential treatment of Green County judges was unconstitutional, because that county had no relevant characteristics that distinguished it from other counties.

The decision in an extremely difficult case, *In Matter of Guardianship of Eberhardy*, resulted in the diminution of the power of both the courts and the legislature. At issue was the sterilization of a severely mentally retarded person. The constitution grants to the circuit courts broad jurisdiction: "[e]xcept as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal

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158. 199 Wis. 2d 674, 546 N.W.2d 123 (1996).
160. 4 Wis. 2d 392, 90 N.W.2d 628 (1958).
161. *Id.* at 394, 90 N.W.2d at 630 (citing Wis. CONST. art. VII, § 7).
162. *Id.* at 396, 90 N.W.2d at 632.
163. 102 Wis. 2d 539, 307 N.W.2d 881 (1981).
within this state." In other words, it is presumed that a circuit court has jurisdiction, but the legislature and governor may limit that jurisdiction. In this case, the Supreme Court directed circuit courts to refrain from exercising their jurisdiction in order to allow the sterilization of persons who cannot give informed consent to the procedure. That is, the Supreme Court, not the legislature and the governor, limited the circuit courts' jurisdiction. That limitation was accomplished not "by law" but by exercise of the Supreme Court's authority to supervise the lower courts. Although in so doing it reduced the judicial authority of circuit courts, the Supreme Court also held that the authority of the legislature and governor to limit the circuit courts' jurisdiction was not plenary but was shared with the Supreme Court. The issue in this case nominally was jurisdiction, but the case's result was substantive. The effect of the decision is that Wisconsin courts may not allow sterilization of persons who cannot give informed consent to the procedure.

Mueller v. Brunn was about a limitation "by law" of the jurisdiction of a court in accordance with the constitutional provision on that subject. A statute provided that actions about damage to property must be brought in the county where the property is located. After an historical interlude about the common law and an allusion to a very old federal case, the court, despite the statute, held that the case could be brought in the county where the plaintiffs resided, because the alleged wrong was not really a damage to property. That result, based on long obsolete common law actions, is a bit of a stretch. The court's true motivation might instead be revealed in the final sentence of the opinion: "[i]t is time that the legislature revise these archaic Wisconsin venue statutes and bring them into conformity with reality." That statement appears to be an implicit recognition that the statute really did require the venue in the case to be the county where the property was located and that it took some judicial prestidigitation to avoid that result.

Under the constitution the legislature may provide that in civil cases agreement of a specified number of jurors will constitute a valid verdict. The only constitutional limit on this authority is that the specified number must be at least five-sixths of the jury. Soon after this con-

164. WIS. CONST. art. VII, § 8.
165. Eberhard, 102 Wis. 2d at 578, 307 N.W.2d at 899.
166. WIS. CONST. art. VII, § 3, cl. 1.
167. 105 Wis. 2d 171, 313 N.W.2d 790 (1982).
168. Id. at 189, 313 N.W.2d at 794.
169. Id. at 190, 313 N.W.2d at 799.
170. WIS. CONST. art. I, § 5.
stitutional provision was ratified, a statute was enacted that allowed agreement by ten jurors to constitute a valid verdict. That statute was an issue in *Dick v. Heisler*. The court held that a verdict was valid only if the same ten jurors agreed to the answer of each question that was submitted to them. The court argued that parties have a common-law right to a special verdict and that, if one were allowed, affirmative answers by different combinations of jurors would constitute disagreement. That is true, but it required one leap of faith to arrive at the case's holding in regard to general verdicts and another leap of faith to arrive at the conclusion that the relevant constitutional provision should in effect be qualified. Nevertheless, the holding has been a precedent for courts in a long series of cases.

VI. THE AUTHORITY IS NOT NECESSARILY EXCLUSIVE

A recent case added a twist to the courts' response to the enigmatic phrases. The constitution states that circuit courts have "such appellate jurisdiction in the circuit as the legislature may prescribe by law." That part of the constitution was relevant in *In Matter of Mental Condition of C.M.B.* A court commissioner had denied a petition for involuntary commitment. The central issue of the case was whether that order could be appealed directly to the Court of Appeals. The Supreme Court held that the next step was review by the circuit court. The court based its holding in part on a definition of “appeal” that applies only to a chapter that pertains only to the Courts of Appeals and the Supreme Court, not to circuit courts, and ignored the reference to “in the circuit” in the constitution. If one assumes that the review by the circuit court that the Supreme Court, because of the holding in this case, now requires of decisions by court commissioners about petitions for

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171. 184 Wis. 77, 198 N.W. 734 (1924).
172. *Id.* at 86, 198 N.W. at 737.
173. *Id.* at 86-87, 198 N.W. at 737-38.
174. Mueller v. Brunn, 105 Wis. 2d 171, 313 N.W.2d 790 (1982); Wendel v. Little, 15 Wis. 2d 52, 112 N.W.2d 172 (1961); Fleischhacker v. State Farm Mut. Automobile Ins. Co., 274 Wis. 215, 79 N.W.2d 817 (1956); McCauley v. International Trading Co., 268 Wis. 62, 66 N.W.2d 633 (1954); Scipior v. Shea, 252 Wis. 185, 31 N.W.2d 199 (1948); Haase v. Employers Mut. Liability Co., 250 Wis. 422, 27 N.W.2d 468 (1947); Stylow v. Milwaukee E. R. & T. Co., 241 Wis. 211, 5 N.W.2d 750 (1942); Larson v. Koller, 198 Wis. 160, 223 N.W. 426 (1929); Hobbs v. Nelson, 188 Wis. 108, 205 N.W. 918 (1925). At first it appears from reading those cases that there are even more cases in this series, but some of the precedents cited are not on point.
175. WIS. CONST. art. VII, § 8.
176. 165 Wis. 2d 703, 478 N.W.2d 385 (1992).
177. *Id.* at 709, 478 N.W.2d at 388.
commitment is actually appellate authority in the circuit—an assumption that has some attractiveness—the court granted appellate jurisdiction to circuit courts even though the constitution bestows the power to do so solely to the legislature. If so, this case is unlike those in which the court qualified constitutional grants of authority to the legislature and governor. Rather, this case indicates that constitutional grants of authority made by an enigmatic phrase are not exclusive. That, in turn, is another reason to conclude that those grants of authority are not the final word on the subject and that, therefore, the authority is not plenary.

VII. CONCLUSION

Cases interpret only some of the enigmatic phrases that appear in the state constitution. However, many of those phrases have been illuminated by courts, and there is a voluminous case law that is relevant to them. That body of case law justifies four conclusions: those phrases indicate that the constitutional provision in which they appear is not self-executing, they impose a duty on the legislature to act (although courts do not order compliance if the legislature fails to do so), they do not authorize shams and courts feel free to qualify or limit them. The first two conclusions are not of great practical significance, because laws have already been enacted if they were required. They are important mainly because they signal that the plain meaning of those phrases is not their only meaning. That fact becomes even more obvious upon consideration of the cases that lead to the third and fourth conclusions. Those two conclusions combine to produce the quintessence of the case law on the enigmatic phrases: those phrases do not grant plenary power to the legislature and governor.