Religion and the Police Power in Wisconsin

William W. Boyer Jr.

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

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol37/iss1/2

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

William W. Boyer, Jr.**

It is elementary in the American federal system of government that the states have reserved to them the police power. This power has been variously defined; but essentially it includes the power of the state, and of course its subdivisions, to enact laws and regulations to protect and encourage the public health, safety, morals, comfort, welfare and convenience of the people.¹

How religion in the State of Wisconsin stands in relation to the police power is the subject of this discussion.² For instance, issues have been raised as to the legality of the employment of chaplains in state institutions, the distribution of religious literature on public thoroughfares, the holding of religious meetings in public places, the operation of public health measures in parochial schools, and the imposition of religious tests as conditions for membership in private organizations. These are but a few of the questions analyzed here. What follows comprehends discussion of those police power policies of the State of Wisconsin which have touched the subject of religion.³


²B.A., College of Wooster (1947); M.A., University of Wisconsin (1949); Formerly, Instructor in Political Science, University of Florida (1950), Grinnell College (1951-1952); Presently, recipient of a grant from the Fund For Adult Education of the Ford Foundation.

³For discussion of other aspects of Church-State relations in Wisconsin, see: Boyer, Public Transportation of Parochial School Pupils (in the January issue

*This power has been defined in varying language, but of substantially the same general import. 'All laws for the protection of life, limb, and health, for the quiet of the person, and for the security of property,' fall within the general police powers of government. 'All persons and property are subjected to all necessary restraints and burdens, to secure the general comfort, health and prosperity of the state'; and it has been said that 'it is co-extension with self-protection. . . . It is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society.'" State ex rel. Adams v. Burdge, 95 Wis. 390, 398-9, 70 N.W. 347, 349 (1897).


³For discussion of other aspects of Church-State relations in Wisconsin, see: Boyer, Public Transportation of Parochial School Pupils (in the January issue
Eligibility to Public Office

That clergymen occupy a crucial position in protecting the public morals in Wisconsin was recognized at an early date. Prior to the first convention for framing a constitution for the state, a few Wisconsin newspapers engaged in a lively battle of words concerning the eligibility of clergymen to public office. Foremost among those opposing such eligibility was the *Milwaukee Courier*. In contemplation of the framing of constitutional provisions on the subject, its editorial of November 19, 1845, read, in part, as follows:

"The messengers from God to man have, or ought to have, a holier ambition in carrying out the precepts of their divine master than in entering the wrangling field of political debate. The mild influences of the one are lost in the angry turmoil of the other. We are willing they may 'vote, pay tax, and run,' not for Congress, however, but 'in the race that is set before them,' satisfied that in confining themselves to their proper Christian duties they will reflect a higher and nobler honor . . . than if they are found as political disputants and candidates of a party . . . We cheerfully subscribe to the . . . suggestion . . . that 'we want no church and state legislation,' and hope to see no union of the kind; and if the ministers of the 'church' will confine themselves within their proper sphere, we think . . . that the 'state' need apprehend no danger from that quarter."*

Needless to say, no such constitutional restriction was forthcoming; but the *Courier's* opinion illustrates how far some were willing to carry separation of Church and State. On September 9, 1846, the *Courier* stated that it did not "expect to hear of the establishment or endowment of any religion, or any restriction of the free exercise of any mode of religious worship, any more than we look for the suppression of moonshine and the establishment of perpetual sunshine."*

Its expectation was fulfilled so far as the adopted constitution provided for religious liberty, at least. Article I, section 18 provides:

"The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any
place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

Chaplains

On the very threshold of statehood, in January, 1849, the Attorney General was asked to reply to a request from the new Wisconsin senate “in regard to the constitutionality of an appropriation to pay for the services of a chaplain.” According to Article I, section 18, Attorney General James S. Brown said:

“An appropriation to pay a chaplain for his services either in the Senate or Assembly is in no respect an appropriation for the benefit of a religious Society within the terms of the constitution, but is a payment to a private person for his own services rendered to the public. It is true that an indirect advantage may arise to some religious society but the same benefit might result from the payment of a debt of any nature due to a member of a religious society. But the appropriation under consideration is for the personal benefit of a private individual and one in which no religious society has a legal interest. The first part of the same section prohibiting a law to compel any individual to assist or maintain any ministry, does not affect any appropriation from the public Treasury to pay for the services of a chaplain.”

Although the 1849 legislature did not pass a law permitting all state institutions to employ chaplains, it did require the keeper of each prison to provide, at public expense, a copy of the Bible or New Testament for each prisoner, “who may be able or desirous to read,” for his use during confinement. “And any minister of the gospel disposed to aid in reforming the prisoners, and instructing them in their moral and religious duties, shall have access to them at seasonable and proper times.” This provision was retained, in substance, until 1947. In 1878, the revised statutes provided for a state prison chaplain who “shall hold divine service in the chapel once on each Sunday, instruct the prisoners in their moral and religious duties, and visit the sick on suitable occasions.”

---

6 For discussion of adoption of this section, see: Brown, The Making of the Wisconsin Constitution, 1952 Wis. L. Rev. 57-8.
8 Id. at 45.
10 Wis. Rev. Stat. ch. 201, sec. 4905 (1878), formerly Wis. Rev. Stat. ch. 188, sec. 13 (1858). "He shall also act as librarian and prepare and keep a list of the number and titles of the books in the library. He shall be in attendance at the prison daily during usual business hours, unless excused by the warden. He shall devote not less than three hours per day, once in each week and
Curiously, the 1878 revised statutes in addition provided that a “Catholic clergyman may also be engaged by the warden” of the state prison to hold services “once each month for the benefit of prisoners of that faith, at an expense not to exceed two hundred dollars per annum.” This is the only legislative provision relating to chaplains that specifically referred to a clergyman of a particular faith. In 1910, Attorney General Gilbert said that if this provision were construed “as an inhibition against the appointment of a Catholic clergyman as chief chaplain” it would be unconstitutional as a violation of Article I, section 19 of the Wisconsin Constitution which prohibits the requirement of a religious test for any public office.

“It is very evident that by enacting said section . . . it was the legislative intent to provide for Catholic instruction and services in case a chief chaplain was selected of a different religious faith, and vice versa, thus providing for religious service of both faiths, Protestant and Catholic.”

It is a matter of public knowledge, however, that among the Wisconsin population more faiths are represented than can conceivably be classified as “Protestant and Catholic.” This fact was recognized by an interim legislative committee of 1947 which commented that “it seems advisable to omit mention of any denomination, faith or form of worship,” on the ground that the section “does not harmonize with” Article I, section 18 of the Wisconsin Constitution. Accordingly, the legislature consolidated and revised the law on the subject in 1947, so that now provided is the following:

“Freedom of worship; religious ministration. (1) Subject to reasonable exercise of the privilege, clergymen of all religious faiths shall be given an opportunity to conduct religious services within the state institutions at least once each week, attendance at such services to be voluntary.

(2) Religious ministration and sacraments according to his faith shall be allowed to every inmate who requests them.

(3) Every inmate who requests it shall have the use of the Bible.”

oftener, if the board of directors shall consider it necessary, to instructing those prisoners who need such instruction, in the common branches of English education; and with the consent of the warden, may call to his assistance such persons as he may deem qualified from among the convicts of the prison. The chaplain shall make full report to the warden on the thirtieth day of September in each year of all matters connected with his labors during the preceding year; the substance of which report shall be embodied in the report of the warden to the directors, required by this chapter.” Wis. Rev. Stat. ch. 201, sec. 4905 (1878). See, infra, note 14.

12 Rept. of Att’y Gen. 857, 858 (1910). The statutes relating to chaplains in state institutions were declared to be mandatory in 9 Ops. Wis. Att’y Gen. 62 (1920), and 7 Ops. Wis. Att’y Gen. 622 (1918).
14 Wis. Stat. sec. 46.066 (1951), created by Wis. Laws ch. 268, sec. 19 (1947). “New 46.066 is a consolidation and revision of old 46.03 (9) and 53.05. New
Here, then, was a situation where the legislature held a law to be unconstitutional on the ground that it was an unreasonable exercise of the state's police power that infringed upon religious liberty and separation of Church and State. Hence, the legislature changed the law. The judiciary had no part in the matter. The new provision was "submitted as a fair solution to the problem and as sufficient for the purpose in hand."16 It applies not only to all state institutions governed by the state department of public welfare, but also applies, "in so far as practicable," to all county jails.16

Clergymen in Court

Since 1839, Wisconsin clergymen have been exempt from serving as jurors.17 Thus, "ministers of the gospel or of any religious society" presently are exempted.18 A clergyman also holds a special status as a witness in court. The legislature has provided that

"A clergyman or other minister of any religion shall not be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs, without consent thereto by the party confessing."19

This provision has been characterized as declaring "a just rule and one which practically prevails, whatever may be the statute."20

To what degree this restriction applies was the issue in Colbert v. State,21 arising from criminal arson committed in the village of Welcome, Wisconsin. One Mrs. Colbert was charged with setting her

---

16 Wis. Stat. sec. 53.39 (1951), created by Wis. Laws ch. 519 (1947). "New 53.39 replaces old 55.08. Instead of repeating that separate special provision on the furnishing of Bibles and religious ministration in county jails, new 46.066 . . . is incorporated here by reference." Comment of Interim Committee, 1947, Wis. Ann. 266 (1950). In regard to private institutions for orphans, indigents, and delinquent children: "Any clergyman of good standing shall be granted reasonable facilities, at proper times and places, freely to minister and impart moral and religious instruction, according to the usages of his church or denomination, or who shall desire him to do so." Wis. Stat. sec. 58.01(5) (1951). It is interesting to note that the department of public welfare may not, under sec. 56.01, Stats., sell prison manufactured articles other than those named in sec. 56.06, Stats., to such nonprofit organizations as denominational hospitals. 36 Ops. Wis. Att'y Gen. 599 (1947).
17 See, Wis. Territorial Statutes, 267 (1839).
18 Wis. Stat. sec. 255.02(2) (1951).
19 Wis. Stat. sec. 325.20 (1951), formerly Wis. Rev. Stat. sec. 4074 (1878), from N.Y. Code sec. 833 (1877). "The theory that such communications are privileged is based upon the idea that the human being has need of spiritual consolation." Torpey, Judicial Doctrines of Religious Rights in America 302 (1948).
20 Revisers' Note, 1878, Wis. Ann. 1430 (1950). "This section is taken from section 833 of the New York Code, 1877." Ibid.
21 125 Wis. 423, 104 N.W. 61 (1905).
millinery store afire for the purpose of collecting $250 from insurance. Father Pellegren, the Catholic priest in Welcome, received an anonymous letter, written in pencil and five pages long, purporting to be a confession from a man in a Chicago hospital who said that he had set the building afire as an act of revenge against Mrs. Colbert for the reason that she had rejected him as her suitor. The spelling of words in the letter was poor and "was apparently the product of an illiterate mind." It closed with the request that it be published to "correct" things. Father Pellegren read the letter to Mrs. Colbert and she wrote the following statement and gave it to him:

"Please, I declare that no stranger spoke to me on July 10, 192, that I had now idea how the fire started, I declare that the letter is unknown to me. Mrs. L. Colbert."

Upon trial, the priest testified he believed, by comparing the handwriting, that Mrs. Colbert wrote both letters. This was corroborated by a handwriting expert. Upon appeal to the Wisconsin Supreme Court, counsel for Mrs. Colbert claimed that the trial court erred in permitting the priest to testify as to his conversation with her. It was argued that this was contrary to the statutory requirement that a clergyman is not allowed to disclose a confession made to him in his "professional character" without the consent of the confessing party. The Supreme Court held that the testimony was admissible for the reason that this was not a confession and the priest was not acting in his "professional character" at the time of the conversation.

The Wisconsin rule on the subject, then, is that no privileged communication exists if the statement is made to the clergyman other than in his "professional character." The privilege does not extend, moreover, to malicious or false statements.

Marriage Solemnization

There are only two methods by which marriage may be validly contracted in the State of Wisconsin—only after a license has been issued therefor in the following manner:

"(1) Before any person authorized by the laws of this state to celebrate marriages . . . by declaring in the presence of at least two competent witnesses other than such officiating person, that they take each other as husband and wife; or,

(2) In accordance with the customs, rules and regulations of any religious society, denomination or sect to which either of the parties may belong, by declaring in the presence of at least

22 To the same effect, in other jurisdictions, are: Partridge v. Partridge, 220 Mo. 321, 119 S.W. 415 (1909); Bloss v. C. & N.W. Rwy. Co., 144 Iowa 697, 123 N.W. 360 (1909); Hills v. State, 61 Neb. 589, 85 N.W. 836 (1901); Knight v. Lee, 80 Ind. 201 (1881). See, also, 70 C.J. 451, n. 13.

two competent witnesses, that they take each other as husband and wife.”

So-called common-law marriages are no longer recognized in Wisconsin. Also, polygamy is prohibited notwithstanding any religious practice to the contrary.

In 1839, the statutes of the Wisconsin territory permitted only those ordained clergymen who were Christians to solemnize marriages. The 1849 statutes specifically exempted marriage solemnization “among the people called Friends or Quakers” from the rule that the marriage ceremony must be performed by an ordained clergymen or public officer. But no such references to a particular faith or denomination may be found in the present statutes. Now it is simply provided that

“Marriages may be solemnized by any justice of the peace, police justice, municipal judge or court commissioner in the county in which he is elected or appointed, and throughout the state by any judge of a court of record, and by any ordained

24 Wis. Stat. sec. 245.12 (1951), created by Wis. Laws ch. 218, sec. 3 (1917). These provisions are identical with sec. 1 of the uniform marriage and marriage license act which was approved by the National Conference of Commissioners on Uniform State Laws in 1911, a note to which explained as follows: “Clause 2 . . . is in no sense a restriction upon, but is rather an enlargement of, the provisions of clause 1. . . . Clause 1 provides for the celebration of marriage before some legally authorized official, whether ecclesiastical or civil. But since Quakers, and many others, object to any form of ceremony other than that prescribed by the religious society to which either or both of the contracting parties may belong, it was recognized by the Conference that such persons should be permitted to enter into the marriage relation in the method prescribed or authorized by their respective religious rites and ceremonies. Nevertheless, . . . it was deemed essential that at least one of the parties should be a member of such religious society in order to entitle such parties to the benefit of the looser form of marriage contract authorized by said clause 2 . . . , which, being an exception to the general rule requiring a marriage ceremony to be performed by some officiating person, should go no farther than warranted by the circumstances of the case. In other words, where a religious society recognizes a marriage without an officiating person it should do so only because such marriage is binding on the conscience of at least one of the contracting parties as a member of the society, and the peculiar rights and privileges which may be granted to members of religious societies should not be extended to those who are not members so as to allow them to take advantage of the rules of the society to which they owe no obedience, and with which they have no affiliation. . . . The phrase ‘any religious society, denomination or sect,’ is broad enough to include not only Quakers, but every other denominational sect, or society, including the Ethical Society of New York, and other states, Christian Scientists, etc.” Quoted in 32 Ops. Wis. Att’y Gen. 105, 107-8n. (1943).

25 Smith v. Smith, 235 Wis. 96, 38 N.W. 2d 12 (1949); 17 Ops. Wis. Att’y Gen. 383 (1928); 7 Ops. Wis. Att’y Gen. 525 (1918).

26 Wis. Stat. sec. 351.02 (1951), created by Wis. Rev. Stat. ch. 139, sec. 2 (1849). For Wisconsin legislative concern with this subject, see: Resolutions Relating to the Mormon Church, 2 Senate Journal 691-2 (1905); Resolution Concerning Polygamy, Senate Journal 251-2, 332-4 (1907); Memorials Upon Polygamy, Assembly Journal 272-3 (1907).

27 Wisconsin Territorial Statutes 139 (1839).

28 Wis. Rev. Stat. ch. 78, sec. 16 (1849).
minister or priest in regular communion with any religious society and who continues to be such minister or priest.”

Because some religious societies differ in their disciplines concerning marriage rites, Wisconsin law has allowed, since 1901,

“for any licentiate of a denominational body or an appointee of any bishop, while serving as the regular minister or priest of any church of the denomination to which he belongs, to solemnize marriages; provided, he be not restrained from so doing by the discipline of his denomination.”

But any such “licentiate” or “appointee” must file credentials of his license or appointment with the clerk of the circuit court of the county in which his church is located, “who shall record the same and give a certificate thereof.” The same procedure applies to ministers or priests in regard to their credentials of ordination “or other proof of such official character.”

In 1847, the Supreme Court of the Wisconsin Territory held that a marriage was not invalid because it was discovered later that the person who officiated at the marriage ceremony had not previously filed his credentials of ordination with the clerk of the county court. It was sufficient that the marriage was solemnized under a license from a proper officer in the presence of witnesses and that the couple had thereafter lived together as husband and wife. It is not necessary, moreover, that a diploma of ordination be filed by a minister. A certificate signed by the President of the North Wisconsin District of the Lutheran Church, certifying that a named person was installed in the ministry, and authorizing him “under the rules of the Church, to perform all the functions of the ministerial office” is sufficient. Such a certificate presumptively satisfies “other proof of such official character,” as permitted by statute. An ordained minister, furthermore, need not be in active charge of a parish or church to perform a marriage ceremony.

In 1938, the Attorney General held that a person who had assumed

29 Wis. Stat. sec. 245.05 (1951).
30 Wis. Stat. sec. 245.06 (1951), created by Wis. Laws ch. 30, sec. 1 (1901).
31 Wis. Stat. sec. 245.07 (1951), created by Wis. Laws ch. 30, sec. 1 (1901).
32 Wis. Stat. sec. 245.08 (1951), formerly Wis. Rev. Stat. ch. 78, sec. 5 (1849), and Wisconsin Territorial Statutes 139 (1839).
33 Martin v. Ryan, 2 Pin. 24 (1847). In this connection, Wis. Stat. sec. 245.33 (1951) provides: “No marriage hereafter contracted shall be void by reason of want of authority or jurisdiction in the officiating person solemnizing such marriage, if the marriage is in other respects lawful, and is consummated with the full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.” Created by Wis. Laws ch. 218, sec. 3 (1917).
34 39 Ops. Wis. Att'y Gen. 485 (1950). “... There is no statute of this state authorizing the governor to confer upon anyone a permit to solemnize marriage.” Refr. of Att'y Gen. 822 (1908).
35 4 Ops. Wis. Att'y Gen. 978 (1915).
the position of minister without having been ordained or appointed by a non-denominational group, the “Bible Truth Assembly” of Wausau, was not authorized to solemnize marriages.\textsuperscript{36}

But a somewhat different view was taken by Attorney General Martin in 1943.\textsuperscript{37} A Wisconsin corporation, called the “Spiritual Assembly of Bahais of Milwaukee,” claimed in its bylaws to have “exclusive authority to conduct Bahai marriage ceremonies and issue Bahai marriage certificates within the area of its jurisdiction.” Since the sect did not claim, however, to ordain ministers or priests, and did not have licentiates or bishops, Attorney General Martin reasoned that “there is no requirement for the filing of credentials and there is no authority on the part of the clerk of a circuit court to accept such credentials for filing.”\textsuperscript{38} Marriage could be contracted, nevertheless, under one of the two methods permitted by statute, namely, in accordance with its customs, rules and regulations.\textsuperscript{39}

More recently, the Attorney General has similarly held that the clerk of a circuit court may not issue a certificate of authority, to solemnize marriages, to a member of the non-denominational “Plymouth Brethren” of La Crosse.\textsuperscript{40} Attorney General Broadfoot reasoned as follows:

“‘Elder’ Uglum is not the licentiate of a denominational body or an appointee of a bishop serving as a regular minister or priest of a denominational church, because the group to which he belongs is non-denominational. . . . It is noted . . . that the group . . . has no regular minister. It is also noted that the document which was submitted by the five ‘elders’ does not show that they, or the ‘Plymouth Brethren’ attempted to appoint or ordain ‘Elder’ Uglum as a minister, but only indicates that the elders purported to appoint him as a bishop for the sole purpose of performing and solemnizing marriages.”\textsuperscript{41}

Regardless of these facts, however,

“If the Plymouth Brethren religious society has customs, rules and regulations with respect to marriage, its members may . . . validly contract marriage in accordance with such customs, rules and regulations even though no member of the group may be entitled to a certificate of authority to solemnize marriages . . . .”\textsuperscript{42}

In conclusion, it appears well established that it is not necessary in Wisconsin for a person to be authorized by the clerk of a circuit

\textsuperscript{36} 27 \textit{Ops. Wis. Att’Y Gen.} 460 (1938).
\textsuperscript{37} 32 \textit{Ops. Wis. Att’Y Gen.} 105 (1943).
\textsuperscript{38} \textit{Id.} at 106.
\textsuperscript{39} \textit{Id.} at 107, citing \textit{Wis. Stat. sec.} 245.12(2); see, \textit{supra}, note 24.
\textsuperscript{40} 37 \textit{Ops. Wis. Att’Y Gen.} 449 (1948).
\textsuperscript{41} \textit{Id.} at 450-51.
\textsuperscript{42} \textit{Id.} at 452.
court to solemnize marriages so long as the marriage is contracted in accordance with the customs, rules and regulations of the religious society to which that person belongs. And want of authority or jurisdiction in the officiating person is no bar to a valid marriage which is lawful in other respects and is consummated in good faith by either of the parties so married.

**SUNDAY LEGISLATION**

Sunday laws in Western civilization date from 321 A.D. when the first Sunday law was issued by Emperor Constantine. Regulations governing the conduct of people on Sunday were among the first public laws of every colony of the Western Hemisphere. Thus, Governor Iverson, on establishing a colony in the Danish West Indies, proclaimed in 1672 that every person was required to attend service every Sunday, “and on failure to do so is to pay a fine of twenty-five pounds of tobacco.” Although English common law prohibited ordinary labor on Sunday, all Sunday work not necessary or charitable was forbidden in England in 1678. Observance of Sunday was required in each of the thirteen original states after the American Revolution. Since then, in the United States, “courts have endeavored to establish that the object of Sunday laws (under the police power) is the preservation of good morals and the peace and good order of society, and not to emphasize the religious significance of the day.”

**Blue Laws**

The 1839 Wisconsin Territorial Legislature provided that punishment would be meted out to any person who

> “shall keep open his shop, ware-house or workhouse, or shall do any manner of labor or business, or work, except only works

43 “All judges and city people and the craftsmen shall rest upon the venerable Day of the Sun. Country people, however, may freely attend to the cultivation of the fields, because it frequently happens that no other days are better adapted for planting the grain in the furrows or the vines in the trenches. So that the advantage given by heavenly providence may not for the occasion of a short time perish.” Quoted in Johnson and Yost, SEPARATION OF CHURCH AND STATE IN THE UNITED STATES 219 (Minneapolis, 1948).
46 Torpey, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA 51 (1948).
48 Johnson and Yost, SEPARATION OF CHURCH AND STATE IN THE UNITED STATES 232. But the constitutionality of Sunday observance statutes was sustained in earlier cases “on the ground of the right of a free Christian people, looking to the conservation of public order, peace, morality, and the promotion of the religious ideas pervading their history and indelibly stamped on their laws and institutions, to set apart the Lord's Day as a recurring period of ceremonial rest and voluntary worship, To a great extent that ground seems to have been abandoned, the courts now recognizing the validity of Sunday statutes as civil or police regulations.” 50 AM. JUR. 809; cases cited in notes thereto.
of necessity and charity, or be present at any dancing, or any public diversion, show or entertainment, or take part in any sport, game or play on the Lord's day, (commonly called Sunday;) . . ."⁴⁹

The serving or execution of any civil process on Sunday was also prohibited.⁵⁰ But excepted from the "no work" provision was any "person who conscientiously believes that the seventh, or any other day of the week ought to be observed as the Sabbath, and who actually refrains from secular business and labor on that day . . . unless he wilfully disturbs some other person."⁵¹

These provisions became law by action of the first state legislature in 1849.⁵² And they survived the passing of the years until 1933, with only minor modifications being made during the interim.⁵³ In the meantime, certain changes were signified by the adoption of provisions specifically stating that the barber shop,⁵⁴ general merchandising,⁵⁵ and the grocery and meat market⁵⁶ businesses were not to be deemed works of necessity or charity. Their doing business on Sunday, therefore, was illegal. But, "the running of any railroad train, street railway car or interurban railway car" on Sunday was designated a work of necessity by the legislature in 1913.⁵⁷ And Sunday newspaper publication was also made lawful.⁵⁸

The Wisconsin Sunday laws were characterized as being "very drastic, although only partially enforced and only in localities where religious sentiment dominated public officials."⁵⁹ Although the laws had been secularized, in 1858, to the extent of substituting "the first day of the week" for the "Lord's day,"⁶⁰ they became no less religiously significant. Historically, it appears that the matter of Sunday legislation competes favorably with prohibition as a source of litigation. The cases reaching the Wisconsin Supreme Court were numerous. Many opinions of the Wisconsin Attorney General were devoted to the subject.

⁴⁹ Wisconsin Territorial Statutes 367 (1839).
⁵⁰ Id. at 368.
⁵¹ Ibid.
⁵³ For example, Wis. Rev. Stat. ch. 134, sec. 43 (1858) provided that a civil process could not be served or executed against "any person who habitually observes the seventh day of the week instead of the first, as a day of rest . . . commonly called Saturday . . ." And, except for certain specified circumstances, Wis. Rev. Stat. ch. 119, sec. 19 (1858) provided that "no court shall be opened to transact any business on the first day of the week." But an injunction may be granted and served on Sunday "in case of exigency." Wis. Stat. ch. 126, sec. 2776 (1898). See, infra note 79.
⁵⁴ Wis. Laws ch. 300 (1909); repealed by Wis. Laws ch. 473, sec. 42b (1927).
⁵⁵ Wis. Laws ch. 393, 614 (1911); repealed by Wis. Laws ch. 74 (1933).
⁵⁶ Wis. Laws ch. 296 (1915), and ch. 133 (1919); repealed by Wis. Laws ch. 74 (1933).
⁵⁷ Wis. Laws ch. 74 (1913).
⁵⁸ Wis. Laws ch. 125 (1911).
⁵⁹ Johnson and Yost, supra cit., supra note 48, at 253.
⁶⁰ Wis. Laws ch. 171 sec. 19 (1858).
Generally, the cases and opinions reveal that the relevant statutes were strictly construed, although much was left for interpretation especially in deciding whether a particular work was one of necessity or charity. But the tortuous travail that Sunday laws caused Wisconsin legal authorities, through a century of time, approximately, merits no lengthy discussion here.

To summarize briefly, then, Wisconsin legal authorities held that Sunday closing laws did not constitute deprivation of liberty or property without due process of law.\(^6\) Exception from the statute, moreover, did not mean that a business must stay open on Sunday.\(^6\) Compliance required the complete discontinuance of business practices on the Sabbath other than works of necessity or charity.\(^6\) But a Sunday transaction did not always dissolve contractual liability.\(^6\) Moreover, an agreement entered into, or a contract signed, on Sunday, but not finally executed or delivered until a secular day, was held to be valid.\(^6\) Negotiable instruments which were executed on Sunday, however, were void.\(^6\) Indeed, any actual execution of a business agreement on Sunday was held to be void and unenforceable in the courts.\(^6\)


\(^{62}\) Walsh v. Chicago, M. & St. P. Ry. Co., 42 Wis. 23 (1877); Alexander v. Town of Oshkosh, 33 Wis. 277 (1873). For discussion of transactions of public authorities on Sunday, see: Ansorge v. City of Green Bay, 198 Wis. 320, 224 N.W. 119 (1929); Bloor v. Town of Delafield, 69 Wis. 273, 34 N.W. 115 (1887); De Forth v. Wisconsin & M. R. Co., 52 Wis. 320, 9 N.W. 17 (1881); 10 Ops. Wis. ATT’Y GEN. 824, 373 (1921).

\(^{63}\) Hodges v. Nalty, 113 Wis. 567, 89 N.W. 335 (1902); 13 Ops. Wis. ATT’Y GEN. 155 (1918); 6 Ops. Wis. ATT’Y GEN. 779, 511, 62 (1917); 5 Ops. Wis. ATT’Y GEN. 393 (1916); 4 Ops. Wis. ATT’Y GEN. 484, 124, 2 (1915); 2 Ops. Wis. ATT’Y GEN. 713, 443, 341, 322, 298, 287 (1913); 1 Ops. Wis. ATT’Y GEN. 338 (1912).

\(^{64}\) Weinsklar Realty Co. v. Dooley, 200 Wis. 412, 228 N.W. 515 (1930); Becker v. Noegel, 165 Wis. 73, 160 N.W. 1055 (1917); Gist v. Johnson-Carey Co., 158 Wis. 188, 147 N.W. 1079 (1917); Moore v. Kendall, 1 Chand. 32, 2 Pin. 99 (1849). For violations as affecting tort liability, see: Frint Motor Co. v. Industrial Commissions, 168 Wis. 436, 170 N.W. 285 (1919); Wausau Lumber Co. v. Industrial Commission, 166 is. 204, 164 N.W. 836 (1917); Masterson v. Chicago & N.W. Ry. Co., 102 Wis. 571, 78 NW. 757 (1899); Knowlton v. City Ry. Co., 59 Wis. 278, 18 N.W. 17 (1884); Sutton v. Town of Wauwatosa, 29 Wis. 21 (1871). For discussion of the Sutton case, supra, see: Roe, ed., SELECTED OPINIONS OF CHIEF JUSTICE DIXON AND RYAN OF WISCONSIN 228-31 (Chicago, 1907).

\(^{65}\) City Motor Co. v. Nelson, 208 Wis. 219, 242, N.W. 491 (1932); Mann v. Becker, 171 Wis. 121, 176 N.W. 765 (1920); O’Day v. Meyers, 147 Wis. 549, 133 N.W. 605 (1911); King v. Graef, 136 Wis. 548, 117 N.W. 1058 (1908); Taylor v. Young, 61 Wis. 314, 21 N.W. 408 (1884).

\(^{66}\) Becker v. Noegel, 165 Wis. 73, 160 N.W. 1055 (1917); Howe v. Ballard, 113 Wis. 375, 89 N.W. 136 (1902); Hill v. Sherwood, 3 Wis. 343 (1854). The fact that an act of forgery was committed on Sunday did not alter the offense. REPT. OF ATT’Y GEN. 232 (1910). But a check made, dated, and delivered on Sunday was void, and it was not forgery to alter it. REPT. OF ATT’Y GEN. 249 (1910).

\(^{67}\) Jacobson v. Bentzler, 127 Wis. 566, 107 N.W. 7 (1906); Sherry v. Madler, 123 Wis. 621, 101 N.W. 1095 (1905); Pearson v. Kelly, 122 Wis. 660, 100
The "blue laws" were repealed in 1933 and with them all the pertinent law that judges and attorneys general had espoused. In 1931, the Wisconsin legislature passed a joint resolution, which provided:

"Whereas, The repeal of the 'Sunday blue law' has several times in recent years come before the legislature, and there has always been dispute as to the wishes of the people with respect to this law; and

Whereas, There is only one method to really settle this question; therefore, be it

Resolved by the Assembly, the Senate concurring, That there be submitted to the qualified electors of this state, at the election to be held on the first Tuesday in April, 1932, the following question: "Shall sections 351.46 to 351.49 of the Wisconsin statutes, popularly known as the 'Sunday blue law,' be repealed?"

Accordingly, the resolution was submitted to the Wisconsin electorate, in April, 1932, which divided 396,436 to 271,786, or a majority of 124,650, in favor of repeal of the Sunday blue laws. And the following year, the legislature gave effect to this expressed will of the people.

Other Provisions

Still law in Wisconsin, however, is a provision adopted in 1919 which requires every employer of labor, "who owns or operates any factory or mercantile establishment in this state," to allow every employed person "at least twenty-four consecutive hours of rest in every seven consecutive days." But this does not apply in certain specified instances, such as emergencies, or to certain personnel, such as janitors and watchmen. The Industrial Commission has the authority and duty to enforce these provisions.

Thus, today in Wisconsin, any person may work on Sunday provided he is allowed to rest twenty-four consecutive hours during the six days next ensuing. The fact that there has been no litigation before the Supreme Court concerning this section indicates that the "one day of rest in seven" requirement is widely accepted. The Attorney General has had occasion to hold, however, that this section applies to gasoline filling

N.W. 1064 (1904) ; Ainsworth v. Williams, 111 Wis. 17, 86 N.W. 551 (1901) ; Williams v. Lane, 87 Wis. 152, 58 N.W. 77 (1894) ; Cohn v. Heimbauch, 86 Wis. 176, 56 N.W. 638 (1893) ; Smith v. Chicago, M. & St. P. Ry. Co., 83 Wis. 271, 50 N.W. 497 (1892) ; Vinz v. Beatty, 61 Wis. 645, 21 N.W. 787 (1884) ; Troewert v. Decker, 51 Wis. 46, 8 N.W. 26 (1881).

69 Wisconsin Blue Book 221 (1946).
70 Wis. Laws ch. 74 (1933).
71 Wis. Laws ch. 653 (1919).
72 Wis. Stat. sec. 351.50(1) (1951). "This shall not authorize any work on Sunday not now authorized by law." Ibid.
73 Wis. Stat. sec. 351.50(2) (1951).
74 Wis. Stat. secs. 351.50(3) and 351.50(3m) (1951). See, also, 15 Ops. Wis. Atty Gen. 396 (1926) and Wisconsin Red Book 242 (1950). For information
stations, to a stone quarry and a shipyard, and an electric power plant, but does not apply to the state or its political subdivisions, as employers. The Wisconsin statutes also provide that "no court shall be open or transact any business on the first day of the week" or certain specified holidays. Thus, when any contract matures on a Sunday it will be held to mature on the next secular day. And a justice of the peace may not set bail on a Sunday.

Although not strictly an issue concerning Sunday law, a Milwaukee district attorney posed a similar question to Attorney General Finnegan in 1936. The latter was asked whether orthodox Hebrews might be permitted to vote as absentee voters prior to election day, April 7th, since their religious precepts prohibited them from voting during the week in which the elections take place, as this was their religious holiday season. In replying affirmatively, the Attorney General said:

"In the interests of good citizenship every effort should be made to so construe the statutes as not to deprive an elector of the right to vote, merely on account of his religious beliefs, sincerely entertained, which make it impossible for him to vote on the particular day set for an election, and we are reluctant to read into the statutes any legislative intent to deny such voter this important franchise."
Among the miscellaneous statutory provisions pertaining to Sunday observance, presently in effect, is that forbidding any boxing or sparring exhibition on that day.\textsuperscript{83} "No prisoner shall be compelled to work on Sunday," moreover, "except it be on necessary household work or when necessary to maintain the management or discipline of the institution."\textsuperscript{84} Except for active military service, in case of necessity, no Wisconsin national guard troops may be transported on Sunday.\textsuperscript{85} Still in effect is the provision that forbids the serving of any civil process on Sunday,\textsuperscript{86} although legal notices may be published on that day.\textsuperscript{87} Furthermore, where the day, or the last day, for doing any act concerning negotiable instruments which is required or permitted by statute to be done, falls on Sunday, "the act may be done on the next succeeding secular . . . day."\textsuperscript{88}

Although there would seem to be no substantial need for so providing, since the Sunday blue laws were repealed, the statutes still assert that any person, who conscientiously believes that a day other than Sunday ought to be observed as the Sabbath, may perform secular business and labor on Sunday.\textsuperscript{89}

Some public pressure still exists to effect a return to Sunday blue laws in Wisconsin. For instance, present law provides local option so that a community can close taverns for any period the local voters choose.\textsuperscript{90} Moreover, wholesale or retail liquor stores holding "Class B" licenses are required by state law to be closed between 3:30 a.m. and 10 a.m. on Sunday.\textsuperscript{91} But on March 19, 1953, the Wisconsin Assembly killed a bill "by a resounding voice vote" which sought to require Sunday tavern closings. The bill was introduced by Assemblyman Milford C. Kintz, Republican of Richland Center, and had drawn support from clergy and temperance leaders in a public hearing before the Assembly Excise and Fees Committee. The Committee had recommended killing the bill. Assemblyman Kintz spoke briefly against the Committee action upon the Assembly floor, but was unable to muster the required seconds to obtain a roll-call vote.\textsuperscript{92}

\textsuperscript{84} Wis. Stat. sec. 56.22 (1951).
\textsuperscript{85} Wis. Stat. sec. 56.22 (1951).
\textsuperscript{86} Wis. Stat. sec. 331.29 (1951).
\textsuperscript{87} Wis. Stat. sec. 331.27 (1951).
\textsuperscript{88} Wis. Stat. secs. 116.01 (15) and sec. 117.03 (1951).
\textsuperscript{89} Wis. Stat. sec. 331.27 (1951).
\textsuperscript{90} Wis. Stat. sec. 176.38 (1951).
\textsuperscript{91} Wis. Stat. sec. 176.05(6) (a) (1951). "Any person who holds a license or permit to manufacture, rectify or sell intoxicating liquor at wholesale or who is the holder of a winery license may sell sacramental wine direct to ministers of the gospel, priests, rabbis or religious organizations for sacramental use exclusively." Wis. Stat. sec. 176.05(1g) (1951). See, infra, note 116.
\textsuperscript{92} The Madison Capital Times, March 19, 1953, p. 1, col. 8.
It would seem that present-day Wisconsin is far removed from the recurrence of Sunday blue laws.

Jehovah's Witnesses

Religious liberty is not absolute in Wisconsin. It must exist in relation to reasonable exercises of the state's police power. The paramount question involved in any discussion of religion and the police power is one mainly of liberty versus authority, a controversy long familiar to every social scientist generally, and every political scientist specifically. Where has the boundary line been drawn between the police power and religious freedom? Important new answers to this question have been rendered by the United States Supreme Court in the Jehovah's Witnesses cases of recent years. And this sect, otherwise known as the Watch Tower and Bible Tract Society, has also been instrumental in having such a line drawn by the Wisconsin Supreme Court.

A Matter of Faith

The Witnesses' many quarrels with the police power are traceable to their remarkably unique manner in practicing their faith and their literal interpretation of the Biblical injunction:

"Thou shalt have no other gods before me. Thou shalt not make unto thee any graven image, or any likeness of any thing that is in Heaven above, or that is in the water under the earth. Thou shalt not bow down thyself to them nor serve them: for I the Lord thy God am a jealous God . . ." 

Hence, as a matter of faith, they object to saluting the flag, to governmental licensing and permit regulations, and other signs of obeisance to civil authority. Requirements for securing a municipal permit to solicit contributions, distribute their literature, or obtain the use of a public park are viewed as offending their religious conscience and precepts.

"Followers of . . . Charles Taze Russell and . . . Joseph Frederick Rutherford, they are serene in their belief that the second coming of Christ is due momentarily, that there is no

---


94 Exodus 20:3-5. Seemingly incompatible verses, often cited in answer by Christians of other denominations, may be found in Romans 13:7, I Peter 2:17, and Numbers 2:2.

95 For discussion of the flag-salute cases, see: Johnson and Yost, Separation of Church and State in the United States 175-86.
time to build churches and that the ‘witness work’ must be
carried on by the direct method of calling on people in their
homes, distributing pamphlets and playing records on portable
phonographs describing their publications and beliefs for the
edification of whomsoever will listen. . . . A variation of the
phonograph technique is for the Witness to offer to leave books
and pamphlets and to request a ‘contribution,’ which may or may
not be in proportion to the cost of the printed matter. The
Witnesses are very clear on this point—their ‘literature’ is not
sold; it is given freely, as is the reciprocal contribution in the
amount set by the donor’s conscience. This point has an obvious
bearing on the commercial (as contrasted with the religious)
nature of these transactions—a matter of importance when the
Witnesses disobey a city official’s demand that they take out
permits before peddling or soliciting as is required of other
itinerant salesmen of books or merchandise.”

**Distribution of Literature**

In *Milwaukee v. Snyder*,

Harold F. Snyder was arrested for
violating an ordinance which made it “unlawful for any person . . . to
circulate or distribute any circular, handbills, cards, posters, dodgers or
other printed or advertising matter . . . in or upon any sidewalk, street
or alley . . . within the city of Milwaukee.”

Snyder, who was acting
as a picket, stood in the street in front of a meat market and distributed
to passing pedestrians handbills which set forth the position of
organized labor in its dispute with the meat market, and asked citizens
to refrain from patronizing it. Some of the bills were thrown in the
street by the pedestrians, but only Snyder, the distributor, was arrested,
according to the policy of the police department. The Milwaukee County
court found Snyder guilty and fined him.

Upon appeal to the Wisconsin Supreme Court, Snyder relied on
*Lovell v. Griffin* in which a handbill ordinance had been declared
unconstitutional by the United States Supreme Court in violation of
free speech and press and freedom of religion of the First Amendment
as made applicable to the states by the Fourteenth Amendment of the
United States Constitution. But that case does not apply here, said

---

Scr. Rev. 226-7 (1947).

97 230 Wis. 131, 283 N.W. 301 (1939). A brief was filed by Osmond K.
Fraenkel of New York City and Perry J. Stearns of Milwaukee, attorneys
for the American Civil Liberties Union, Inc., as amicus curiae.

98 Milwaukee Code of Ordinances, sec. 865. See, note, *Constitutionality of

99 303 U.S. 444 (1938).

100 Snyder’s claim alleged that the *Lovell* case in effect overruled *City of
Milwaukee v. Kassen*, 203 Wis. 383, 234 N.W. 352 (1931) whereby the
Wisconsin Supreme Court upheld the same ordinance against the claim that
it violated freedom of speech and press. In declaring the ordinance reason-
able, the Court said: “It is of course quite readily to be conceded that if
the enforcement of this ordinance were shown to have been directed at a
class of persons for the purpose of suppressing the free expression of their
Judge Fowler for the Wisconsin Supreme Court, because no religious issue is involved in the instant case. In the Lovell case, on the other hand, a Jehovah's Witness was required to be licensed by the city manager before the handbills could be distributed. The ordinance in the Lovell case, therefore, was "manifestly not aimed to prevent the littering of streets, as was the instant ordinance."\(^{101}\)

"The construction of the Milwaukee ordinance, as held by our state court, is binding upon the federal courts, so far as its aim or purpose is concerned. The purpose of the ordinance would not, of course, except it from operation of the freedom of speech, press, and religion provisions of the United States constitution, or from the operation of the Fourteenth Amendment thereto if it were enforced in a discriminatory manner. . . . But the instant ordinance was found in the instant case not to have been so enforced. . . ."\(^{102}\)

The United States Supreme Court granted Snyder's petition for review by issuing a writ of certiorari.\(^{103}\) The Snyder case gained religious significance insofar as the Supreme Court rendered one decision disposing of four similar cases: Schneider v. State, involving a Jehovah's Witness, Young v. California, Nichols v. Massachusetts, and Snyder v. Milwaukee, the instant case.\(^{104}\)

In the Young case, Young had been convicted for distributing handbills giving notice of a meeting of the "Friends Lincoln Brigade," at which speakers would discuss the war in Spain, in violation of the prohibited classification of commercial advertising in the Los Angeles handbill ordinance. In the Nichols case, Nichols had been convicted for distributing leaflets announcing a protest meeting, in connection with the administration of state unemployment insurance, in violation of a Worcester, Massachusetts ordinance.

In the Schneider case, an ordinance of the Town of Irvington, New Jersey, was involved, providing:

"No person . . . shall canvass, solicit, distribute circulars or other matter, or call from house to house . . . without first having reported to and received a written permit from the Chief of Police. . . ."

And it was further provided that the permit set forth the time it was


\(^{102}\) 230 Wis. at 135-6, 283 N.W. at 303.

\(^{103}\) 206 U.S. 629 (1939).

\(^{104}\) 308 U.S. 147 (1939).
to be used, the applicant's name, age, height, weight, place of birth, arrest and criminal record, clothing worn, and description of his project. Fingerprints and photographs were also required. The police chief was vested with the discretion, moreover, to refuse the application if he found the applicant was "not of good character or is canvassing for a project not free from fraud." Schneider, a Jehovah's Witness, did not apply for a permit for the reason that it would be "an act of disobedience to the command of Almighty God;" and Bible passages were cited to show the obligation so to preach God's word.

The United States Supreme Court divided 8 to 1 in reversing the state courts in each instance, with Justice McReynolds dissenting alone without opinion. Relying on the Lovell case, which the Wisconsin Supreme Court distinguished in denying Snyder's claim, Justice Roberts held for the majority that the municipal ordinances were unconstitutional because the "freedom of speech and of the press secured by the First Amendment . . . against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state."

"Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion." 106

Against the argument that, under the Milwaukee ordinance, the distributor is arrested only if those who receive the literature throw it on the streets, Justice Roberts replied:

"But, even as thus construed, the ordinance cannot be enforced without unconstitutionally abridging the liberty of free speech. As we have pointed out, the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution." 106

Although the Snyder litigation, itself, did not concern a religious issue involving Jehovah's Witnesses, what was said by the United States Supreme Court in disposing of it, along with a Jehovah's Witness case, would apply to the distribution of handbills in Wisconsin by a Jehovah's Witness or any other person for that matter. In discussing this, among other cases "in which issues of freedom of the press were merged with issues of freedom of religion," one authority has declared:

"We owe a debt of gratitude to the Jehovah's Witnesses, whose fanatical resistance to even the mildest governmental regulation has brought to the Supreme Court some twenty-five

---

105 308 U.S. at 160.
106 308 U.S. at 163.
cases in the decision of which the constitutional law of religious liberty has been established.”

But there is a limit to religious liberty, even for members of the Watch Tower Bible and Tract Society. In the Wisconsin case, *City of Washburn v. Ellquist*, a Jehovah's Witness was arrested for violating a City of Washburn ordinance which required prior registration and licensing of hawkers and solicitors with the city clerk. Ellquist's offense was the fact that he went from door to door, unlicensed, offering books and pamphlets in return for requested contributions of from 5 to 25 cents. Sometimes he left literature without receiving a contribution. "How far can a municipality reach out and not violate the constitutional provision of freedom of the press and freedom of religion?"—Judge Barlow stated the issue for the Wisconsin Supreme Court.

"Certainly no one would question the right of a city to require a religious organization to comply with reasonable building codes and zoning ordinances in the construction of a church building. Is there any more reason to question its right to require appellant to give his name, address, and to disclose the fact that he is distributing religious literature, when it is in the interest of the community that the proper authorities should have this information?..." 

The answer was obvious to the Court. This was a reasonable exercise of the police power for the protection of the welfare of the community.

"It is conceivable that undesirable persons may enter communities and possibly represent themselves to be ordained by the Watch Tower Bible and Tract Society, and members of this society would justly resent this condition and would undoubtedly seek the assistance of law enforcement authorities. Government and courts are necessary to protect the constitutional rights contended for by appellant. The rights of a municipality must also be protected by the same courts that protect the rights of appellant."

What Judge Barlow was saying, in effect, was that the age-old question of liberty versus authority, as reflected in the present issue of religious liberty versus the police power, is not always to be resolved in favor of liberty, especially when the authority of the state does not unreasonably restrict the liberty of the individual. Here there is no discriminatory power in the hands of the clerk. No fee or tax is involved. No religious test is imposed; and no unreasonable delay is

---

108 242 Wis. 609, 9 N.W.2d 121 (1943), rehearing denied, 242 Wis. 616a, 10 N.W.2d 292 (1943).
109 242 Wis. at 613, 9 N.W.2d at 123.
110 242 Wis. at 614, 9 N.W.2d at 123.
entailed. The distinguishing feature that makes this ordinance reason-
able and valid is that under it:

"The duty of the public official is mandatory; he has no power of discrimination; he performs a ministerial act, and the argu-
ment . . . that the official may refuse to issue the permit . . . is too remote and speculative to give it serious consideration."111

Religious Assembly

Few states could boast such explicit constitutional guaranties of the freedom of religious assembly as those provided by the Wisconsin Constitution:

"Every person may freely speak, write and publish his senti-
ments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press.112

"The right of the people peaceably to assemble . . . shall never be abridged.113

"The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; . . . nor shall any control of, or interference with, the rights of conscience be permitted . . . ."114

As if these provisions were not enough, the Wisconsin statutes make it unlawful for any person, at any time, to "wilfully interrupt or molest any assembly or meeting of people for religious worship or for other purposes, lawfully and peaceably assembled."115 This provision almost duplicates language in the statutes of the Wisconsin Territory of 1839,116 and has been in force constantly since that time.

111 Ibid. See file docket C1281 in the main files of Industrial Commission, Madi-
son, for memorandum of Sept. 13, 1940, discussing details of arrest and im-
prisonment of six members of a family of Jehovah's Witnesses for distribut-
ing literature in Two Rivers, Wisconsin, without licenses. The Commission's interest apparently was based on the fact that two minor girls of the group did not have street grade permits issued by the Commission.

112 Wis. Const. Art. I, sec. 3. The circulation by bishops of the Roman Catholic Church of a pastoral letter, forbidding the members of that church to keep or read a certain newspaper, but not requiring the breach of any contract nor the withholding of any advertising patronage, was held to be within the scope of church discipline, and not to be in violation of this section. Kuryer Publishing Co. v. Messmer, 162 Wis. 565, 156 N.W. 948 (1916).


115 Wis. Stat. sec. 351.53 (1951). See, Wis. Stat. sec. 347.04 (1951) for defi-
dition of unlawful assembly. See, also, Heller, Freedom of Assembly, 25 Marq. L. Rev. 1 (1940); Werner, Freedom of Speech and Assembly, 10 Wis. L. Rev. 298 (1935).

116 Wisconsin Territorial Statutes 367 (1839). Wis. Stat. sec. 351.54 (1951) re-
stricts the selling of intoxicating liquor "within two miles of any camp meeting or other religious assembly." Wis. Stat. sec. 176.05(9m) (1951) for-
bits the issuance of a retail "Class A" or "Class B" liquor license "for premises less than 300 feet from any established public school, parochial
school, hospital or church." See, supra note 91. Services conducted by "Holy Rollers" are no violation of Wisconsin criminal laws. 12 Ops. Wis.
Att'y Gen. 29 (1923).
State ex rel. Garrabad v. Dering, a neglected forerunner of some modern Jehovah's Witnesses cases, concerned the validity of a City of Portage ordinance which made it unlawful for

"any person or persons, society, association, or organization . . . to march or parade . . . upon [certain named streets], shouting, singing, or beating drums or tambourines, or playing upon any other musical instrument or instruments, for the purpose of advertising or attracting attention of the public, or to the disturbance of the public peace or quiet."

without first obtaining permission from the mayor. The provision was not to apply to funerals, fire companies, regularly organized companies of the state militia, or "any political party having a regular state organization." Garrabad, a member of the Salvation Army, was imprisoned for violation of this ordinance.

Before the Wisconsin Supreme Court, in a habeas corpus proceeding, Garrabad claimed that the ordinance was state action denying him the equal protection of the laws contrary to the Fourteenth Amendment of the United States Constitution. Equal protection was denied, he insisted, for the reason that fire companies, the militia, and political parties are arbitrarily exempted, and that the mayor has the discriminatory authority to issue permission.

The Supreme Court agreed. Through Judge Pinney, it declared:

"It cannot be maintained that any . . . society [has] any right for religious purposes or as religious bodies to use the streets for purposes of public parade because the purpose in view is purely religious and not secular, but they certainly have the same right to equal protection of the laws as secular organizations."

This ordinance resembles the means of imposing a "petty tyranny," and appears to be more "the result of prejudice, bigotry, and intolerance, than any fair or legitimate provision in due exercise of the police power." Judge Pinney characterized it further as "entirely un-American," which is "in conflict with the principles of our institutions and all modern ideas of civil liberty." And he concluded:

"The people do not hold rights as important and as well settled as the right to assemble and have public parades and processions . . . in support of any laudable or lawful cause, subject to the power of any public officer to interdict or prevent them."

Although written sixty years ago, Judge Pinney's opinion could have

117 84 Wis. 585, 54 N.W. 1104 (1893).
118 "A large place in the Army's endeavors is given to music and song. In every country the band—usually a brass band—is a feature of the Army work. The strains of such a band, reaching farther than the human voice, draw members within earshot of the Army's message who would otherwise not be attracted." 19 ENCYCLOPEDIA BRITANNICA 913 (1946).
119 84 Wis. at 591, 54 N.W. at 1106.
120 84 Wis. at 594-5, 54 N.W. at 1107.
121 84 Wis. at 595, 54 N.W. at 1108.
been written yesterday. It states modern law on the subject and is worthy of being referred to as basic and parent authority in support of the right to worship curiously in Wisconsin.

The recent Jehovah's Witness case of *Milwaukee County v. Carter* is the only other religious assembly decision in Wisconsin's experience. Carter, presiding minister of the South Unit of Milwaukee Congregation of Jehovah's Witnesses, filed an application with the Milwaukee County Park Commission for permission to hold a series of public meetings in the South Shore Park, a public park under the Commission's jurisdiction. The Commission denied the application for the reason that the meetings would constitute religious services in the park in violation of the county ordinance which provided:

"No service or demonstration by any organization, creed or sect, excepting only nondenominational or interdenominational Easter sunrise services, shall be allowed within the limits of any park or parkway of Milwaukee county. This shall not be construed to forbid the offering of an invocation, prayer, or hymn in connection with church picnics or other similar gatherings."

Regardless of the Commission's ruling, the Congregation assembled in the park for a meeting "at a convenient place situated so that it in no way interfered with the ordinary use of the park for recreational purposes by other persons." The statement of facts continued:

"The defendant, David Carter, was assigned to address the assembly... and he began addressing them on the subject, 'The Two Great Commandments of Life,' and used a sound amplifying system to reach the audience. The amplification of his voice did not annoy or disturb anyone. His talk was based upon... the Bible. His manner was not boisterous and his speech and tone of voice were suitable and appropriate, and his attitude was kindly. He did not excite anyone to violence or unlawful acts, and no one in the audience or in the park for recreation was annoyed or offended at anything he said or did."

Carter was convicted for violating the ordinance by Judge Steffes of the Municipal Court of Milwaukee County. Judge Steffes reasoned that the First and Fourteenth Amendments of the United States Constitution did not create "a license for particular sectarian organizations for the dissemination of religious beliefs in organized form to utilize tax-supported public property for those purposes." And he based his decision upon that clause of the Wisconsin Constitution which forbids public funds being expended for religious purposes.

---

122 258 Wis. 139, 45 N.W.2d 90 (1950).
123 Milwaukee Co. Ord. §47.02(6).
124 258 Wis. at 142, 45 N.W.2d at 91.
125 258 Wis. at 142-3, 45 N.W.2d at 92.
Wisconsin Bible reading decision, *State ex rel. Weiss v. District Board of Edgerton*, 127 definitely held that the use of public property for sectarian purposes was prohibited by that clause.

Upon Carter's appeal, Chief Justice Fritz agreed for the unanimous Wisconsin Supreme Court that

"it is well-established law in this state that neither tax-supported public-school property nor funds so raised for public-school purposes can be used for sectarian . . . purposes . . . However . . . no such restriction is considered applicable under the recent decisions of the United States supreme court to the use of public parks or streets by the people in their constitutional right to peaceably assemble in the free and orderly exercise of their religion and the freedom of speech, and of the press, as provided in the First amendment to the United States constitution. 128

*Saia v. New York* 129 is controlling here. In that case the United States Supreme Court held unconstitutional an ordinance which prohibited the use of sound amplifiers in public places except with permission of the chief of police. Saia, a Jehovah's Witness, gave lectures in a public park, and, when a permit was refused him, he used sound equipment without a permit. And Chief Justice Fritz cited Justice Douglas' concurring opinion to the effect that the Court must give preferred treatment to freedom of speech and religion.

The Chief Justice then turned his attention specifically to the Wisconsin Constitution. He said:

"When, in sec. 3, art. I, the Wisconsin constitution guarantees the right of free speech, it does not exempt or restrict speech on the subject of religion and, if it should, such restriction would be void because in conflict with and subordinate to . . . the United States constitution . . . Speech on religious topics is just as free, and no freer, under the constitution as speech on other subjects and on no subject is it free from reasonable regulation to insure public order and safety and to reconcile the exercise of this right with the simultaneous enjoyment of equally sacred rights by others." 130

But the ordinance here not only regulates but prohibits speech on religious subjects. 131 And Chief Justice Fritz concluded by cogently defining the lawful sphere of the police power with respect to the right of assembly. "Government may," he said, "in the interests of public order, safety, and the equitable sharing of facilities, exercise reasonable

127 76 Wis. 177, 44 N.W. 967 (1890).
128 258 Wis. at 144, 45 N.W.2d at 92.
129 334 U.S. 558 (1948).
130 258 Wis. at 145-6, 45 N.W.2d at 93.
131 "Sec. 47.02(2) of the ordinance provides: 'No sermon, discussion, harangue, or speech shall be delivered by any person for political purposes or in connection with the sale of any article or which constitute a public criticism or abuse of any religious organization or representative thereof.'" *Ibid.*
control over when, where, and under what conditions public meetings may be held on public property; but to deny to the people all the use of the people's property for the public discussion of specified subjects is an unconstitutional interference of rights expressly guaranteed by both state and federal constitutions."

Neither the trial court nor the Wisconsin Supreme Court mentioned the Garrabad case. But the Carter and Garrabad decisions, taken together, appear to point to the conclusion that any Wisconsin governmental action alleged to abridge freedom of religious assembly will be presumed unconstitutional by the Wisconsin Supreme Court until every doubt is clearly removed.

Jehovah’s Witnesses in Wisconsin, no less than elsewhere, have been successful in creating state constitutional law that favors religious liberty in its conflict with the police power.

**PUBLIC HEALTH AND SAFETY**

The police power of the state encompasses the power to enact reasonable laws and regulations for the preservation of the public health and safety. That state governments have the authority to enact vaccination laws and health laws of every description is well settled. In fact, the police power of the states has been successfully challenged in but few cases where matters of public health have been at issue. Often challenges are made on religious grounds.

At issue in *State ex rel. Adams v. Burdge* was a vaccination order of the State Board of Health requiring all Wisconsin school children to present a certificate of vaccination in order to be permitted to attend any public or private school. A Christian Scientist petitioned the circuit court for a writ of mandamus to compel the Beloit school board to admit

---


133 Another case involving a Jehovah's Witness in Wisconsin was the federal case of United States v. Mroz, 136 F.2d 221 (1943). Mroz, although classified as a conscientious objector by the Milwaukee selective service draft board, refused to comply with an order to report to a camp for conscientious objectors on the ground that he was a "Minister" and should have had exempt status. He was prosecuted and convicted in the U.S. District Court for the Eastern District of Wisconsin. Upon his appeal to the Circuit Court of Appeals, 7th Circuit, his conviction was affirmed. Circuit Judge Evans said for the Court: "At once the question arises. What is meant by the word 'minister'? Surely it could hardly be said that every Jehovah's Witness, because he 'has made a covenant with God,' is a minister within the meaning of the statute. The officers of the Jehovah's Witnesses did not so construe the word 'minister.' Neither did the Government. Nor do we." 136 F.2d at 266. To the same effect is United States v. Gormly, 136 F.2d 227 (1943). See, also, McKenna, *The Right to Keep and Bear Arms*, 12 Marq. L. Rev. 138 (1928).


135 One such exceptional case was Weaver v. Palmer Bros., 270 U.S. 402 (1926), where the Court held that the use of shoddy, properly sterilized, might not be prohibited in the making of comfortables.

136 95 Wis. 390, 70 N.W. 347 (1897).
his children without the certificate. The petitioner, according to the statement of facts,

"refused to allow his children to be vaccinated, and said children refused to be vaccinated, on account of their belief, as Christian Scientists, that the operation or treatment of vaccination was morally wrong, and that the laws of God permit no such operation or treatment, and that to permit it is a breaking of such laws. . . ."

The circuit court granted the writ, and the Wisconsin Supreme Court affirmed for the reason that the Board of Health had no existing statutory authority to issue such an order. The religious issue was not discussed by the Court. The Board's rule was void, because

"the fatal vice of the rule . . . is that there was no precedent or existing law under which it could be framed and adopted as an adjunct or act of administrative authority, to effectuate its purposes and carry it into effect."137

Ten years later, in 1907, the Wisconsin legislature enacted a measure which required that each local board of health "shall forthwith" prohibit attendance at school, upon the appearance of smallpox, except persons who presented proof of successful vaccination.138 The legislature attempted to accomplish, therefore, what the State Board of Health had previously failed to accomplish.

In 1908, Dr. C. A. Harper, Secretary of the State Board of Health, asked Attorney General Gilbert whether this 1907 provision applied to parochial or sectarian schools.139 The Attorney General replied that since the law was not a penal statute, it must be construed liberally. And since its purpose is to preserve public health and safety by preventing the spread of smallpox, it was his opinion that compulsory vaccination applied to parochial or sectarian schools.

"The law being for the protection of children and the public in general, it would be robbed of much of its force and effect if parochial and sectarian schools in cities could not be regarded as coming within its provisions. I do not think that such a supervisory jurisdiction over parochial schools can be regarded as an infringement upon the rights and liberties of the children attending said schools or their parents. While parochial and sectarian schools are not mentioned in said law by name, still the police power is so broad that in cases of necessity and emergency public gatherings of even adults may be prohibited, when public health and safety demand it."140

The Attorney General has since interpreted the statute as not permitting a local board of education legally to make a rule requiring vacci-

137 95 Wis. at 402, 70 N.W. at 350.
138 Wis. Laws ch. 113 (1907), now Wis. STAT. sec. 143.13 (1951).
139 REPr. OF ATT'Y GEN. 340 (1908).
140 Id. at 341.
RELIGION AND POLICE POWER

nation before attendance at school. An only local board of health has such authority, which extends to private and parochial, as well as public, schools. An 1898 legislative provision, granting discretionary authority to the Board of Health for the quarantine and disinfection "of persons, localities and things infected" and "for the proper sanitary care of jails, asylums, schoolhouses, hotels and all other public buildings," was construed by the Attorney General in 1908 to include parochial schools in Wisconsin. A parochial school building is not a public building in the sense that it is controlled and owned by public authority for public use. But it is used and frequented by the public, as in the case of hotels.

"A parochial school is used for the purpose of public instruction and it is my opinion that it is a public building in the sense in which the term is used in the statute. ..."

It follows that public expenditures for the protection of health and safety in church-connected institutions, which are used and frequented by the public, do not constitute the drawing of money from the treasury for sectarian or religious purposes, as expressly forbidden by the Wisconsin Constitution.

In 1949, the question was presented to Attorney General Fairchild whether compulsory physical examinations of entering students at the

---

241 4 Ops. Wis. Att'y Gen. 70 (1915).
244 Rept. of Att'y Gen. 650 (1908).
245 Id. at 651.
246 Summer camps operated by churches for educational or recreational purposes, and which limit attendance to members, are not "tourist rooming houses" requiring permits from the state board of health to operate within the meaning of sec. 160.01(4), Stats., unless such camps furnish sleeping accommodations to the general public, such as transients and tourists. 35 Ops. Wis. Att'y Gen. 449 (1946). A county board, therefore, may not appropriate money to aid children to attend summer camps owned by private individuals, for this would constitute an unconstitutional public expenditure for a private purpose. 11 Ops. Wis. Att'y Gen. 416 (1922). Similarly, a county board has no power to appropriate money for charitable institutions, such as the Salvation Army [23 Ops. Wis. Att'y Gen. 832 (1934)], or the Y.M.C.A. or Y.W.C.A. for the purpose of furnishing welfare services and entertainment to members of the armed forces of the United States. 33 Ops. Wis. Att'y Gen. 51 (1944). See, also, 2 Ops. Wis. Att'y Gen. 189 (1913). But the state superintendent of public property may make free distribution of certain public documents to Marquette University. 4 Ops. Wis. Att'y Gen. 990 (1915). See, also, 21 Ops. Wis. Att'y Gen. 727 (1932) which held that a hospital built in part by county funds could be transferred by deed with a condition subsequent, or by valid lease, to a Catholic sisterhood or other religious body to be maintained as a public nonsectarian hospital without violating Art. I, sec. 18, Wis. Const., or the rule that "a county has no authority to raise by taxation moneys for other than a public purpose or for the benefit of private individuals or private societies. . . . Thus, the deed should contain . . . a clause that the title shall revert in case the property is used for different purposes. If the deed contains a forfeiture clause, it will be construed to be a condition subsequent and will restrict the property to the uses specified in the deed," Id. at 729.
Milwaukee State Teachers College infringed the religious rights of members of an undesignated religious society. The Attorney General replied:

"I assume without question that no religious tests of any character are imposed in connection with the physical examinations . . . and while the rights guaranteed under the first and fourteenth amendments to the federal constitution and under secs. 18 and 19, art. I, Wisconsin constitution, should be jealously guarded, it must at the same time be kept in mind that there is a duty and an obligation on the part of the state to see that students at its colleges are given proper protection in matters of health from the ravages of such devastating diseases as tuberculosis or other contagious maladies. Reasonable regulations directed to that end by discovering the existence of such diseases through required physical examinations appear to constitute without doubt a reasonable exercise of the state's police power."

It should be observed, however, that Wisconsin law provides that:

"None of the . . . laws of the state regulating the practice of medicine or healing shall be construed to interfere with the practice of Christian Science, or with any person who administers to or treats the sick or suffering by mental or spiritual means, nor shall any person who selects such treatment for the cure of disease be compelled to submit to any form of medical treatment." Christian Scientists must observe quarantine laws despite this section. Thus, a Christian Science healer is not a physician or clergyman so as to be authorized by statute to visit a quarantined place without a written permit from a health officer. But persons, not authorized medical practitioners, who practice healing through the use of Scriptures and the laying-on of hands, and even make suggestions that patients drink grape juice or olive oil or refrain from eating certain foods, are exempt from the state medical laws so long as no pecuniary considerations are involved.

A 1913 Wisconsin law required any male applying for a marriage

---

148 Id. at 222-3. "Note . . . the words of the court in State ex rel. Weiss v. District Board, 76 Wis. 177, 200, where Justice Lyon said: ' . . . For example, a Mormon may believe that the practice of polygamy is a religious duty; yet no court would regard his conscience in that behalf for a moment, should he put his belief into practice.'" Id. at 223.
149 Wis. Stats. secs. 147.19 (1951), originally Wis. Laws ch. 438, sec. 2 (1915); see also, Wis. Stats. secs. 102.42(1), 143.07(13), and 143.14(4) (1951).
150 5 Ops. Wis. Att'y Gen. 642 (1916).
151 See, Wis. Stats. sec. 143.05(4) (1951).
152 17 Ops. Wis. Att'y Gen. 157 (1928); see also, 7 Ops. Wis. Att'y Gen. 68 (1918).
153 17 Ops. Wis. Att'y Gen. 502 (1928). "Temporary medical relief," however, as used in sec. 49.18(1), Stats., includes only care given by authorized medical authorities, and does not include Christian Science or chiropractic treatment, or mental or spiritual healing. 33 Ops. Wis. Att'y Gen. 133 (1944), citing Reissmann v. Jelinski, 238 Wis. 462, 300 N.W. 164 (1941), and disapproving 25 Ops. Wis. Att'y Gen. 452 (1936).
license to file a certificate that he was free from any venereal disease. One Alfred Peterson asked four doctors to examine him in compliance with the statute, but each refused on the ground that the statutory fee of $3.00 was too low for a Wasserman test. Peterson then petitioned the circuit court for Milwaukee County for a writ of mandamus to compel the county clerk to issue him a marriage certificate. Circuit Court Judge Eschweiler granted the writ and held the statute void for the reasons, among others, that the fee was "unreasonably small" and that the eugenics law violated religious rights provisions of Article I, section 18 of the Wisconsin Constitution. Upon appeal to the Wisconsin Supreme Court in Peterson v. Widule the lower court's decision was reversed. For a majority, Judge Winslow was emphatic in justifying the exertion of the police power in this instance.

"The power of the state to control and regulate by reasonable laws the marriage relation, and to prevent the contracting of marriage by persons afflicted with loathsome or hereditary diseases, which are liable either to be transmitted to the spouse or inherited by the offspring, or both, must on principle be regarded as undeniable. Society has a right to protect itself from extinction and its members from a fate worse than death." In regard to the religious issue, he said: "We have not been able to appreciate the force of the contention that the law interferes in any respect with religious liberty. We know of no church which desires its ministers to profane the marriage tie by uniting a man afflicted with a loathsome disease to an innocent woman." Judge Timlin, concurring, also could not see how religious rights were infringed by the statute. And he added: "The notion that marriage was a sacrament, not a civil contract creating a status, once vigorously asserted, has long since passed away."

**Religious Tests and Oaths**

In addition to the detailed provisions of the Wisconsin Constitution adopted to secure the greatest measure of religious liberty in the state, the framers stipulated in Article I, section 19, that

"No religious tests shall ever be required as a qualification for any office of public trust under the state, and no person shall be rendered incompetent to give evidence in any court of law or equity in consequence of his opinions on the subject of religion."

Two practices were thereby prohibited: religious tests for public offices, and religious oaths as a requirement for the competency of witnesses.

---

154 Wis. Stat. sec. 2339m (1913); the relevant provision now is Wis. Stat. sec. 245.10 (1951).
155 157 Wis. 641, 147 N.W. 966 (1914).
156 157 Wis. at 647, 147 N.W. at 968.
157 157 Wis. at 655-6, 147 N.W. at 971.
158 157 Wis. at 670, 147 N.W. at 974. Judge Marshall, with whom Judge Vinje concurred, dissented without mentioning the religious issue.
Public Employment and Services

The legislature has specifically prohibited religious discrimination in public employment with respect to Wisconsin civil servants and public school teachers.

No question in any form to elicit information concerning the religious opinions of a civil service applicant is permitted, either in his application or examination. It is further provided that: "No discrimination shall be exercised, threatened, or promised, by any person in the civil service against or in favor of any applicant, eligible, or employee in the classified service because of his . . . religious opinions or affiliations." On the basis of this latter limitation, therefore, the only question that may legally be before the Civil Service Commission concerning the removal of an employee is whether or not the reasons assigned for his removal, on their face, are sufficient and are not religious in character.

No questions may be asked concerning the religious affiliation of any applicant for a teaching position in Wisconsin public schools, according to express statutory provision, and no religious discrimination may be practiced in their employment. In 1936, Attorney General Finnegan answered negatively to the question whether this statute violated the free speech provisions of the United States and Wisconsin constitutions.

Another legislative prohibition of religious discrimination relating to "any office of a public trust" is that forbidding such discrimination in the membership of the Wisconsin national guard, "notwithstanding any rule or regulation prescribed by the federal government or any officer or department thereof." With respect to the federal constitution, the Attorney General relied on the doctrine "that the first ten amendments to the United States constitution do not apply to the state governments but only to the federal government." This is no longer true insofar as decisions by the United States Supreme Court since 1936 have conclusively resulted in the application of the free speech and press provisions of the First Amendment to state governments. The citations may be found in: Fellman, Separation of Church and State in the United States: A Summary View, 1950 Wis. L. Rev. 427 at n. 4.

159 Wis. Stat. sec. 16.14 (1951); see, also, Wis. Stat. sec. 16.11(1) (1951).
163 25 Ops. Wis. Att'y Gen. 376 (1936). With respect to the federal constitution, Chaplain applicants are required to state their "denomination" in filling out the "Application for Federal Recognition as a National Guard Officer and Warrant Officer . . ." War Department form No. 62, which is used by the Wisconsin national guard. No other state forms requiring religious designation have been found except that used by the Department of Public Welfare entitled: "Application for Voluntary Patient." The governing statute, in this instance, Wis. Stat. sec. 51.10 (1951), contains no such requirement.
Although the board of regents of the University of Wisconsin is empowered to determine the "moral" qualifications of applicants for admission, "no sectarian...tests shall ever be allowed or exercised in the appointment of regents or in the election of professors, teachers or other officers of the university, or in the admission of students thereto or for any purpose whatever." Similarly, the 1949 legislature provided that no child may be excluded from any public school on account of his religion, and no "separate school or department shall be kept for any person or persons on account of his religion..." 

Private Action

Whether a private organization may impose a religious test as a condition of membership was the issue in Barry v. Order of Catholic Knights. The Order was incorporated under Wisconsin laws for the benefit of Roman Catholics, and provided death benefits of $2,000 to the beneficiaries of deceased members. As a condition for membership its articles of incorporation provided that any member shall be expelled from the Order and be deprived of all its benefits if he should cease to be "a practical Catholic, or a communicant" of the Catholic Church. Barry had agreed to this when he joined the Order, in 1885. In 1890, however, he was married by a Protestant minister to a woman who had not been legally divorced from her previous husband, a fact he did not disclose to the Order. On learning this, in 1893, the Order expelled Barry for the reason that his marriage by a Protestant minister had automatically excommunicated him from the Church. Upon his death, his widow commenced an action to require the Order to issue the death benefit of $2,000 on the ground that its membership provisions were contrary to Article I, sections 18 and 19 of the Wisconsin Constitution which prohibit the imposition of religious tests and violation of one's freedom of conscience.

The Wisconsin Supreme Court rejected this claim upon appeal. For the Court, Judge Winslow said:

"The objection seems puerile. By these provisions no man's conscience is coerced, nor his freedom of worship curtailed. Membership is purely voluntary. If a man chooses to join an organization having such requirements, and agrees that he shall forfeit his right to benefits on failure to live up to them, he is at liberty to do so. All men may make contracts as they choose, so long as they be not contrary to law or public policy." 

165 Wis. Stat. sec. 36.06(1) (1951). But a professor in the university is not a public officer in any sense that excludes the existence of a contract relation between himself and the board employing him. His is purely a contract relation. Butler v. Regents, 32 Wis. 124 (1873).


167 119 Wis. 362, 96 N.W. 797 (1903).

168 119 Wis. at 366, 96 N.W. at 799.
A Wisconsin law of 1903 required a license from the state insurance commissioner before any organization could conduct an accident or health insurance business. But specifically exempted were fraternal organizations having a lodge system "with ritualistic work," and any benefit society connected with any church or religious society.\footnote{Wis. Laws ch. 413 (1903).} Attorney General Sturdevant was forthright in his opinion that this law imposed a religious test in violation of the equal protection of the laws.

"Under this act an association may do an insurance business if its members have certain religious opinions, so as to conform to the creed of a church or religious society. Others doing the same business in the same community and not belonging to a church or religious society may not do these acts without incurring the penalty of the law. A classification based upon such distinctions as these . . . cannot stand. The State cannot deprive persons of the equal protection of the laws. It cannot grant special privileges to one citizen and deny them to another similarly situated. The Fourteenth Amendment of the Constitution of the United States was designed to prevent any person or class of persons from being singled out as special subjects of discriminating and hostile legislation. . . . In my opinion, classification cannot be based on the use of ritual or on religious belief; nor, as to individuals, can it be based on membership in a church.\footnote{Rept. of Att'y Gen. 279, 282-3 (1904). For discussion of the purposes of the 14th Amendment from the point of view of the intent of its framers, see: Fairman, \textit{Does the Fourteenth Amendment Incorporate the Bill of Rights?} 2 Stan. L. Rev. 5-139 (1949). A mutual insurance company (Aid Association for Lutherans) can prohibit its members from affiliating with certain secret societies upon penalty of expulsion and forfeiture of accumulations. 4 Ops. Wis. Att'y Gen. 992 (1915).}

The distinction between the \textit{Barry} case and this opinion of the Attorney General is clear. The latter concerned governmental imposition of a religious test which is illegal. But the \textit{Barry} case held that private religious tests are permissible. Thus, in an action for construction of a will, the Wisconsin Supreme Court upheld a bequest of a mother to her son conditioned upon his regular attendance at a Lutheran church. On the basis of the \textit{Barry} case, Judge Kerwin said for the court:

"It is not easy to see how the conditions attached to the will in any manner infringe . . . constitutional provision. The condition in question is neither against public policy nor contrary to law, nor can it be said that it interferes with the right of the legatee to worship God according to the dictates of his own conscience . . . The testatrix has the right to so dispose of her property and the legatee might accept or reject the gift voluntarily without restriction upon his will or coercion on his conscience."\footnote{In re Paulson's Will, 127 Wis. 612, 618-9, 107 N.W. 484, 487 (1906).}
Competency of Witnesses

The legislature of the Wisconsin Territory provided in 1839 that any person believing in "any other than the christian religion" should be sworn according to the ceremonies of his religion. Or his belief in the existence of a "supreme being" was sufficient to admit him to be sworn, if he was otherwise competent. But even this was not necessary if his "belief or unbelief" in a supreme being could be proved by other competent authority. The first state legislature incorporated these provisions without change.

The statutes became more secular in 1858 with the deletion of any reference to a "supreme being" and permitting merely a "solemn declaration or affirmation" for anyone having "conscientious scruples against taking any oath, or swearing in any form." The widely known "so help you God" oath was introduced in 1878, and a secular affirmation was framed for those who had "conscientious scruples."

The law has remained generally unchanged since 1878. Thus, today, in all judicial proceedings, witnesses must swear to this oath:

"Do you solemnly swear that the testimony which you shall give in [here indicating the action, proceeding or matter on trial or being inquired into], shall be the truth, the whole truth and nothing but the truth, so help you God."

By merely raising his hand the person being sworn may manifest his assent. But this form is not exclusive for it is also provided that

"Any oath or affidavit required or authorized by law may be taken in any of the usual forms, and every person swearing, affirming or declaring in any such form shall be deemed to have been lawfully sworn."

Those having "conscientious scruples" must make their solemn declaration or affirmation, with an "uplifted hand," as follows:

Do you solemnly, sincerely and truly declare and affirm that the testimony you shall give in [here indicate the action . . .] shall be the truth, the whole truth and nothing but the truth; and this you do under the pains and penalties of perjury.

172 Wisconsin Territorial Statutes 240-41 (1839).
178 Wis. Stat. sec. 326.03 (1951). The record of a 7-year-old child's examination and her answers to the questions put to her both by the magistrate to determine her competency and by counsel to determine facts of an automobile accident sufficiently showed that she was capable of understanding the obligation to make truthful answers to questions asked. In the circumstances, the receiving of her testimony in the preliminary examination, without administering an oath, was not error. State ex rel. Shields v. Portman, 242 Wis. 5, 6 N.W.2d 713 (1942).
It is evident that the state, through its police power, may protect the public welfare by requiring persons to swear or declare that they will tell the truth before they may become competent witnesses in judicial proceedings. But in Wisconsin no religious act has ever been necessary to establish such competency. Wisconsin’s laws concerning the administration of justice for the protection of the public welfare thus contain specific safeguards that preclude invasion of the right of conscience. There is no conflict between religion and the state here.180

CONCLUSION

Wisconsin has a good record in the exercise of its police power from a religious liberty frame of reference. Indeed, the state has “leaned over backwards” to accommodate nonconforming religious practices while seeking to protect the public welfare. Special provisions have been adopted by the legislature to obviate giving offense to Quakers and Christian Scientists. Jehovah’s Witnesses need not fear obstruction in the distribution of their literature or the holding of religious meetings in public places, so long as they—or anybody—do not abuse these privileges. Clergymen of all faiths stand equally before the law, and as a class they actually enjoy certain privileges not accorded others.

If there be any religious persecution or discrimination in Wisconsin, the state may not legally be a party to it. In a few instances, individuals have mistakenly claimed discrimination when the state’s police power has been reasonably exercised. The foregoing discussion seems to add up to the conclusion, however, that while the state must jealously guard the religious rights of each individual—even to the extent of according to religious liberty preferred treatment—the state must also protect the rights of the community to enjoy health and safety, and a moral and comfortable environment.

180 Unless an oath was legally administered, a conviction for false swearing in making an affidavit cannot be sustained. But the oath must be considered to have been administered whenever the attention of the affiant is called to the fact that the statement is not a mere assertion but must be sworn to and he does any unequivocal corporal act in response thereto. The mere recitation of the affidavit that it was upon oath is \textit{prima facie} evidence that the oath was legally administered and strong and convincing proof to the contrary is necessary to rebut such a presumption. 21 \textsc{Opfs. Wis. Att'y Gen.} 194, 196-7 (1932), citing United States v. Mallard, 40 Fed. 151, 151-2 (1889) to the effect that no religious act is necessary in the swearing of witnesses. See: Swancara, \textit{Non-Religious Witnesses}, 8 \textsc{Wis. L. Rev.} 49 (1932); Platz, \textit{A Code of Evidence for Wisconsin? Various Privileges}, 1945 \textsc{Wis. L. Rev.} 239. It is to be noted that \textsc{Wis. Stat. sec. 328.09(2)} (1951) provides that church, parish, or baptismal records may be admitted as \textit{prima facie} evidence of any fact relating to any birth, stillbirth, marriage, or death.