<u>In Re: Booth</u>
3 Wis. 1 (1854)

What has become known as the Booth case is actually a series of decisions from the Wisconsin Supreme Court beginning in 1854 and one from the U.S. Supreme Court, Ableman v. Booth, 62 U.S. 514 (1859), leading to a final published decision by the Wisconsin Supreme Court in Ableman v. Booth, 11 Wis. 501 (1859). These decisions reflect Wisconsin's attempted nullification of the federal fugitive slave law, the expansion of the state's rights movement and Wisconsin's defiance of federal judicial authority. The Wisconsin Supreme Court in Booth unanimously declared the Fugitive Slave Act (which required northern states to return runaway slaves to their masters) unconstitutional. The U.S. Supreme Court overturned that decision but the Wisconsin Supreme Court refused to file the U.S. Court's mandate upholding the fugitive slave law. That mandate has never been filed.

When the U.S. Constitution was drafted, slavery existed in this country. Article IV, Section 2 provided as follows:

> No person held to service or labor in one state under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Based on this provision, Congress in 1793 passed a law that permitted the owner of any runaway slave to arrest him, take him before a judge of either the federal or state courts and prove by oral testimony or by affidavit that the person arrested owed service to the claimant under the laws of the state from which he had escaped; if the judge found the evidence to be sufficient, the slave owner could bring the fugitive back to the state from which he had escaped. The law also set a penalty of $500 for obstructing its execution or concealing a known fugitive slave.

The law remained intact until 1850, by which time the moral sentiment of the North against slavery had become aroused; the Liberty Party had been organized, the underground railroad had flourished and northern men and women refused to act as slave catchers or assist in perpetuating slavery. As northern sentiment against slavery grew, the sentiment in the South in favor of the "divine institution" became more determined.

Because of the increasing difficulty the slave holders faced in reclaiming runaway slaves, Congress passed the Fugitive Slave Act of 1850. The law placed the mechanism for capturing runaway slaves in the hands of federal officers. It provided that these cases would be heard by a federal judge or court commissioner and allowed the slave owner to prove the debt owed by the slave but precluded testimony from the fugitive entirely. The new law also increased the penalties for resistance and for concealment of fugitives.

Although it was intended as a compromise, the new law actually fueled the flames of anti-slavery sentiment and from 1854 to 1861, Wisconsin politics was dominated by the question of whether the state had to defer to the federal government's efforts to enforce the Fugitive Slave Act.

In the spring of 1852, a slave named Joshua Glover escaped from a Missouri plantation and made his way to Racine, where he found work at a sawmill. Two years later, his owner,

Bennami Garland, tracked him down and had him apprehended by federal marshals under the Fugitive Slave Act. Glover was held in the Milwaukee County Jail pending a hearing.

When Sherman M. Booth, editor of the Milwaukee abolitionist newspaper, *The Free Democrat,* heard of the capture, he mounted his horse and galloped through the streets of Milwaukee shouting: "Freemen! To the rescue! Slave catchers are in our midst! Be at the courthouse at 2:00!" Booth sought counsel from James H. Paine and his 27-year-old son, Byron, both Milwaukee lawyers, on legal measures that could be taken to free Glover. The lawyers persuaded a Milwaukee County Court judge to issue a writ of habeas corpus directing the U.S. marshal to bring Glover before the county judge and justify his detention.

Before the hearing could take place, Booth appointed a committee to prevent the "kidnapping" of Glover by the federal authorities. After Booth made a fiery speech, a mob led by one of the other committeemen, John Ryecraft, battered down the jail doors, freed Glover and spirited him away to Canada.

The federal authorities filed complaints against Booth charging him with unlawfully assisting Glover's escape. Booth was released on bail but two months later, at his own request, the bondsman delivered him to the U.S. Marshal requesting that he be detained. Booth's voluntary surrender was calculated to bring a test case challenging the constitutionality of the fugitive slave law in state court. On the day after the surrender, Booth's attorney, Byron Paine, successfully applied to Wisconsin Supreme Court Justice Abram D. Smith for a writ of habeas corpus.

At that hearing, Smith asked the parties to address the constitutionality of the fugitive slave law. Paine, citing Thomas Jefferson's writings, asserted that the states possessed the right to impose their authority where their sovereign rights are violated by the federal government. Paine argued that Congress had no authority to make laws based on Section 2, Article IV (the Fugitive Slave Clause of the Constitution) and that the Act of 1850 was unconstitutional because it denied a trial by jury and vested judicial powers in court commissioners.

On June 7, 1854, Smith ordered that Booth be released. Justice Smith not only found the warrant of commitment defective, but then also adopted Payne's points and declared the fugitive slave law unconstitutional. <u>In Re: Booth</u>, 3 Wis. 1 (1854).

When United States Attorney General Kaleb Kushing in Washington D.C. was informed of Booth's release, he directed U.S. Attorney Sharpstein to petition the Wisconsin Supreme Court for a full court certiorari review of Justice Smith's decision. With the approval of President Franklin Pierce, Sharpstein retained an eminent Wisconsin lawyer, Edward G. Ryan (later to become Chief Justice of the Wisconsin Supreme Court), to assist him in the argument before the full state court and also to help prosecute Booth and Glover's other rescuers in federal court.

When the case of <u>Ableman v. Booth</u> was heard before the full Wisconsin Supreme Court in late June of 1854, Attorney Payne made substantially the same arguments he had made before Justice Smith. U.S. Attorney Sharpstein and Attorney Ryan on the other hand, citing grounds of comity, the primacy of the federal judiciary in cases involving the federal constitution and laws, and the lack of power in both federal and state courts to discharge each other's prisoners upon habeas corpus, insisted that the acts of the federal court commissioners were acts of the federal court and that the jurisdiction of the federal court could not be ousted. Sharpstein asserted that Booth's writ of commitment contained "mere formal inaccuracies" which did not

entitle Booth to habeas corpus; Sharpstein also vigorously defended the constitutionality of the fugitive slave laws of 1793 and 1850.

Finding the writ of commitment defective because it did not precisely state that Booth had aided a "fugitive from labor" to escape from custody, the Wisconsin Supreme Court on July 19, 1854, unanimously affirmed Justice Smith's earlier decision releasing Booth. In separate opinions, Chief Justice Edward V. Whiton and Justice Smith declared the 1850 law unconstitutional while Justice Samuel Crawford, although finding Booth's writ of commitment to be invalid, concluded the fugitive slave law was constitutional. Ableman v. Booth, 3 Wis. 49 (1854). (Justice Crawford took the unpopular position that the laws of the United States and the judgments of the federal courts within their proper jurisdiction were supreme and could not be set aside by state courts. His opinion in the Booth case contributed significantly to his defeat when he ran for reelection to the Wisconsin Supreme Court in April, 1855; his successful opponent in that election was Orasmus Cole.).

U.S. Attorney Sharpstein urged U.S. Attorney General Kushing to appeal the decision of the Wisconsin Supreme Court to the U.S. Supreme Court on writ of error. While that request was being considered, the U.S. Federal District Court convened in Milwaukee and a grand jury returned indictments against both Booth and John Ryecraft for aiding, assisting and abetting the escape of Glover. Booth again applied to the Wisconsin Supreme Court for another writ of habeas corpus. This time, however, the Wisconsin Supreme Court unanimously denied the writ on the ground that jurisdiction had now attached to the federal court and could not be interfered with by state process before a judgment was rendered in the federal court. Ex parte Booth, 3 Wis. 134 (1854). The court applied the familiar rule of comity which provides that when jurisdiction of a matter has been acquired by one court, another court of concurrent jurisdiction will not interfere.

Both Booth and Ryecraft were then tried in federal court, found guilty, and sentenced to short terms of imprisonment in the county jail and ordered to pay fines of $1,000. The Wisconsin Supreme Court then issued writs of habeas corpus after the court concluded that on habeas corpus review it could address the question of the jurisdiction of the federal court and could discharge prisoners, even when the federal court had tried the case and passed judgment upon them. In Re: Booth and Ryecraft, 3 Wis. 157 (1855).

In the meantime, U.S. Attorney General Kushing had decided to appeal the Wisconsin decisions by writ of error to the United States Supreme Court. Two writs of error were subsequently issued by U.S. Supreme Court Chief Justice Roger Taney directing the clerk of the Wisconsin Supreme Court to make a return of the record in both the 1854 case of Ableman v. Booth, and the 1855 case of In Re: Booth and Ryecraft. A return was made to the first writ of error without objection; however, when the second writ was issued and served in June of 1855, the justices of the Wisconsin Supreme Court directed the clerk to make no return to the writ. The Wisconsin justices asserted that no writ of error could run from the U.S. Supreme Court to the supreme court of a state, and that the federal Judiciary Act of 1789 purporting to authorize such a proceeding was unconstitutional.

The court's action in refusing to make a return to the writ of error issued by the U.S. Supreme Court was tantamount to judicial nullification of § 25 of the 1789 federal act which by that time had served as the basis for federal review of almost 200 cases, including one from Wisconsin (Walworth v. Kneeland, 15 How. 348 (1853)). This refusal to make a return to the writ of error was also inconsistent with the Wisconsin Supreme Court's earlier action in 1854 when it had assented to a writ of error in the Ableman v. Booth case; it was also inconsistent with Wisconsin Supreme Court

Chief Justice Edward Whiton's acknowledgment in his original opinion in that case, that the decisions of the federal supreme court were final and conclusive upon all state courts.

The Wisconsin Supreme Court's refusal to return the record in obedience to the writ of error issued by the U.S. Supreme Court did not prevent the consideration of the case by the U.S. Supreme Court, but it did delay it. In the meantime, Jeremiah S. Black became the new Attorney General of the United States when President Buchanan took over from President Pierce. When it became apparent that no official return would be made to the writ of error, the U.S. Supreme Court ordered that a certified copy that Black had obtained would be sufficient. The two cases were then argued together before the U.S. Supreme Court in January of 1859.

U.S. Attorney General Black argued the case for the United States but no counsel appeared on the other side. However, Booth had sent to the U.S. Supreme Court a pamphlet containing a copy of the argument Byron Payne had made in the Wisconsin Supreme Court, along with copies of the opinions issued by the Wisconsin Supreme Court in the Booth matter.

On March 7, 1859, Chief Justice Taney, speaking for a unanimous U.S. Supreme Court, reversed both Wisconsin decisions. Ableman v. Booth and U.S. v. Booth, 21 How. 506 (1859). Chief Justice Taney vigorously insisted on the constitutionality and necessity of the U.S. Supreme Court's appellate jurisdiction; his opinion for the U.S. Supreme Court denied the power of state judges and courts to interfere by habeas corpus before or after trial to defeat the jurisdiction of federal tribunals. In addition, the U.S. Supreme Court pronounced the Fugitive Slave Act to be constitutional. The opinion also prescribed the course to be followed by federal marshals when confronted with state writs of habeas corpus: Chief Justice Taney explained that if a state by use of judicial process or otherwise, should attempt to deprive the U.S. Marshal of custody of a federal prisoner, "it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference."

Angered by that opinion and unwilling to accept the logic of Chief Justice Taney who had written the infamous Dredd Scott case, the Wisconsin legislature passed a series of resolutions denouncing the actions of the U.S. Supreme Court as "an arbitrary act of power ... without authority, void and of no force," and urging "positive defiance" by the states as the "rightful remedy."

Only a month after the U.S. Supreme Court issued its opinion in the Booth matter, Byron Payne was elected to succeed Justice Smith on the Wisconsin Supreme Court. That election was seen as a referendum on the state's rights position advocated by Payne in his representation of Booth and an approval by the state electorate of the idea that the state could and should nullify and defy a law of the United States--even one which the federal courts had pronounced constitutional and valid--provided such law was thought by the courts of the state to be unconstitutional.

Coincidentally, only a short time after that election, on April 12, 1859, Chief Justice Winton died. Governor Randall appointed 34 year old Luther S. Dixon to fill the vacancy. Thus, Byron Payne, who was then only 32, and Dixon took seats upon the Wisconsin Supreme Court on the same day.

Those two new and young Wisconsin Supreme Court Justices, along with Justice Orasmus Cole, were soon confronted with a request to file the U.S. Supreme Court's mandates reversing the judgments and dismissals in the Booth cases. Justice Payne recused himself because he had been Booth's lawyer. Thus, the issue of determining whether the U.S. Supreme Court's mandates in the Booth case should be filed in this state fell to Chief Justice Dixon and Justice Cole. Justice Cole, reaffirming his earlier view that the federal court had no power to review the judgments of the state supreme court, voted not to file the mandates in the Booth cases. That meant that the mandates would

not be filed no matter how Justice Dixon voted because even if Justice Dixon thought the mandates should be filed, there would be an equal division of the two justices participating and consequently, no affirmative action could be taken. However, Chief Justice Dixon, displaying political courage, voted to file the U.S. Supreme Court mandates and issued a formal opinion explaining his reasoning. Ableman v. Booth, 11 Wis. 501 (1859). Although he personally agreed that the Fugitive Slave Act was unconstitutional, Chief Justice Dixon admonished the state's rights advocates that in their desire to strike a blow at slavery, they should not cripple the rule of law. Chief Justice Dixon exposed the flaw of the state's rights position when he wrote:

> [The state's rights position] would place it in the power of any one state, beyond all peaceful remedy, to arrest the execution of the laws of the entire union, and to break down and destroy at pleasure every barrier created and right given by the constitution ... [even] if it be granted that both Congress and the Supreme Court have improperly discharged the high trusts reposed in them by the American people, it has no tendency to prove or disprove the existence of this power. Ableman v. Booth, 11 Wis. at 513.

By issuing that opinion, Chief Justice Dixon almost guaranteed that when he came up for election in 1860, he would have opposition. State's rights advocates nominated Andrew Scott Sloan (who later became the Wisconsin Attorney General who successfully prosecuted the railroad cases in 1874) to run against him. The April 1860 election was very close with Dixon succeeding but with only a 395 vote margin.

In the meantime, Booth was still involved in legal difficulties. In May of 1859, he was accused of "seduction" by a 14 year old girl. He was prosecuted on that charge by Attorney Edward G. Ryan (later Chief Justice Ryan); that trial, however, resulted in a hung jury. In addition, Booth had still not paid his fine nor served the jail time imposed following his convictions in federal court. D.A.J. Upham, the U.S. Attorney in Milwaukee who had replaced John Sharpstein when the Buchanan administration took over, had asked the Wisconsin Supreme Court to file the U.S. Supreme Court's mandates in the Booth matter; after that was refused, he filed a motion in federal court in Milwaukee asking Judge Miller to order the re-arrest of Booth. Booth was then re-arrested and placed in federal custody in Milwaukee on March 1, 1860. Another petition for habeas corpus was filed in the Wisconsin Supreme Court, but an evenly divided court then refused to grant it. Ableman v. Booth, 11 Wis. 517 (1859) at 555-558. Booth's short term of imprisonment thereafter expired but he remained confined in the federal custom house in Milwaukee because he refused to pay his fines. Requests that his fines be remitted or that he be pardoned were rejected by President Buchanan and U.S. Attorney General Black.

After eight unsuccessful attempts to free Booth, on August 1, 1860 several armed men forcibly rescued Booth from the federal custom house in Milwaukee and took him to Waupun where the State Prison Commissioner, Hans Heg (whose statue commemorating Heg's heroism and death in the Civil War now stands at the Main-Pinckney Street entrance to the State Capitol) gave him protection. Booth continued to speak out in support of state's rights position at numerous political meetings in the area. Finally, on October 8, 1860, Booth was recaptured by federal marshals at a meeting at Berlin, Wisconsin and again taken back to the custom house at Milwaukee. After Abraham Lincoln's election to the presidency but before he was inaugurated,

Booth again applied to President Buchanan for a pardon. This request was vigorously opposed by U.S. Attorney General Black who asserted "the fact that in all this criminal folly and insolence, he [Booth] has been aided, comforted and abetted by a state court and by other lawless persons who pretend to justify him, makes the vindication of the law in this particular case absolutely necessary by way of example."

In his fourth annual message to Congress on December 3, 1860, President Buchanan stated that the universal judicial acceptance of the constitutionality of the Fugitive Slave Act of 1850 was marred only by the defection of the Wisconsin Supreme Court. That decision, however, President Buchanan continued, "has not only been reversed by the proper appellate tribunal, but has met with such universal reprobation that there can no longer be danger from it as a precedent."

On the day before President Lincoln's inauguration, outgoing President Buchanan pardoned Booth. *

* Sources utilized in this report are Winslow, The Story of a Great Court (1912). Beitzinger, "Federal Law Enforcement and the Booth Cases," 41 Marquette Law Review 7 (1957). Ranney, "Molders and Shapers of Wisconsin Law;" Wisconsin Lawyer, March, 1993.

In a eulogy for Paine, Ryan recalled this case:

> The first opportunity I had of forming an estimate of his high ability, was in the famous case under the fugitive slave act, in 1854 and 1855. He was employed for the defendant; I, for the United States. We both brought to the case, not only ordinary professional zeal, but all the prejudices of all our lives. He was a frank and manly abolitionist. I was as decidedly what was called pro-slavery. We were both thoroughly in earnest…I thought him a fanatic. He probably thought me one. Possibly we both were.

Attorney General ex rel. Bashford v. Barstow

4 Wis. 567 (1856)

This case established the independence of the Wisconsin Supreme Court (which was then in its infancy) and also established the important principle that the Court has the power to construe the state constitution. In a unanimous opinion, a three-justice panel entered a judgment removing an incumbent governor from office. Chief Justice Edward V. Whiton wrote the opinion.

The attorney general filed suit seeking to remove William Barstow, the Democratic incumbent, from the office of governor. Although Barstow had been certified by the board of canvassers as the winner (by a 157-vote margin) of the 1855 election, it was later discovered that his victory was the result of fraudulent returns from nonexistent precincts.

The attorney general asserted that Coles Bashford, the Republican challenger and a former state senator, had in fact won the election and that he, and not Barstow, was entitled to hold the office of governor.

Barstow claimed that the result of the canvass was conclusive and that the Supreme Court did not have the authority to remove him from office. Barstow argued that the executive, legislative and judicial branches of government were coordinate branches and that each was the final judge of the election and qualification of only its own members. The Supreme Court disagreed, saying under Wisconsin's constitution and laws, it was the election to an office and not the canvass of the votes that determined the right to the office. The court also held that it had the same power to remove a person who had unlawfully intruded into the office of governor as it had in case of intrusion into any other office.

Barstow also argued that the Supreme Court could not entertain a proceeding to remove a sitting governor from office because such an action was without precedent. The Court rejected this argument, saying, "Cases frequently arise from which no precise precedent can be found" and "[n]ever before was a cause defended, or the jurisdiction of a court denied, on the ground that the counsel had been unable to find any case exactly like it."

Justice Smith, concurring, urged the court to look to the Wisconsin Constitution for guidance:

> I have felt bound to sustain that fundamental law – the constitution of the state, according to its true intent and meaning. That is the great charter of our rights, to which the humblest may at all times appeal, and to which the highest *must* at all times submit. (emphasis added)
>
> Let us then look to that constitution, adopted by the people of Wisconsin, and endeavor to ascertain its true intent and meaning…. [L]et it be remarked, that our conclusions must be guided and determined, not by theories of speculators upon the science of government, not by the opinion of jurists of other states reasoning upon philosophical abstractions or political postulates, but by the plain, simple, but authoritative and mandatory provisions of our own constitution. We made it ourselves. We are bound to abide by it, until altered, amended or annulled….
>
> The people then made this constitution, and adopted it as their primary law. The people of other states made for themselves respectively, constitutions which are construed by their own appropriate functionaries. Let them construe theirs – let us construe, and stand by ours.

The Court concluded that it did have jurisdiction to act in the matter. It further found that Bashford was the duly elected governor of the state and it entered a judgment of ouster removing Barstow from office.

Chamberlain v. Milwaukee and Mississippi Railroad Company

11 Wis. 248 (1860)

In an early effort to give rights to injured workers, the Wisconsin Supreme Court determined in this case that an employer can be held responsible when the negligent actions of one employee result in injury to another employee. Justice Byron Paine wrote the opinion. Justice Orsamus Cole wrote a concurring opinion.

Chamberlain, the plaintiff, was working as an express messenger for James Holton & Company and was a passenger on a Milwaukee and Mississippi Railroad Company freight car traveling from Milwaukee to Madison and back. Prior to departure, railroad Deputy Superintendent Merrill asked Chamberlain (a minor) to act as brakeman for the trip. While employed as brakeman he was thrown from the train and seriously injured as a result of the negligent conduct of the engineer.

This case came before the Wisconsin Supreme Court twice. The first time, the Court ordered a new trial. At that trial, the lower court sought to determine whether Chamberlain was, at the time of his injury, a passenger or an employee of the railroad. The judge instructed the jury that if it found Chamberlain was a passenger and if he was in an improper place for a passenger at the time of the accident, "then the injury resulted from his own carelessness, and the defendant is not liable." The jury returned a verdict for the defendant. Chamberlain appealed.

The case came back before the Supreme Court. This time, the central issue was the instruction the circuit judge gave to the jury at the second trial. Justice Paine wrote that the trial judge's refusal to instruct the jury that if Chamberlain was in an improper place for a passenger because of a request from the company, then the company could be held liable, was "calculated to mislead the jury."

The Court also sought to determine whether an employee could recover damages from a company for injuries caused by the negligence of another employee. While most other cases regarding this issue found that the employee could not recover, Paine wrote that it was not the Court's duty to simply "count the cases on each side of a question," but analyze the development of the law. He wrote: "The great object of this common law principle is not to protect those in one department against those in another, but to protect every one from injury by the negligence of another."

The Court dismissed the argument that prohibiting employees from recovering damages for injuries caused by a colleague would encourage all employees to take more care in their duties. Paine wrote that just the opposite was true, saying that employers, faced with such liability, would hire the most qualified individuals to reduce the chances of an incident.

Justice Cole's concurring opinion, agreeing that the circuit court improperly instructed the jury, did not judge whether an employee could recover damages from an employer in this situation. He wrote: "decisions upon that point … are quite unanimous that recovery could not be had under such circumstances. But whether these decisions rest upon sound reason and an enlightened public policy, I will not now undertake to say."

In re Kemp

16 Wis. 382 (1863)

In this case, the Wisconsin Supreme Court ruled unanimously in favor of the petitioner, Nicholas Kemp. Separate opinions were written by each justice: Chief Justice Luther S. Dixon, Justice Byron Paine and Justice Orsamus Cole.

In this case, the Wisconsin Supreme Court ruled that the president of the United States could not suspend the writ of *habeas corpus* (which preserves one's right to due process) for civilians when martial law was not in effect.

Here are the facts: On November 10, 1862, during the Civil War, Nicholas Kemp and others staged a riot in Port Washington (Ozaukee County). They allegedly destroyed draft records and violently resisted the draft. Governor Edward Salomon requested that military troops seize the men involved. Two days later, Kemp was arrested and imprisoned at Camp Randall.

On December 4, the Wisconsin Supreme Court issued a writ of *habeas corpus* to General W. L. Elliot, commander of the Northwest Department, ordering him to bring Kemp before the Court on December 16. The Court said that Kemp's "riotous behavior," if proven, violated state law and therefore, only a civil or criminal tribunal could order his detention—making Kemp's military imprisonment illegal. Elliot responded with a letter to the Court claiming he held the prisoner by order Number 141[1][*], issued by President Abraham Lincoln, which declared all those offering "resistance to volunteer enlistments or militia draft" subject to martial law and made legal the suspension of the writ of *habeas corpus*. The U.S. attorney general also wrote a letter to support Elliot's position.

Kemp, the petitioner, was represented by Attorney Edward G. Ryan (who later joined the Wisconsin Supreme Court and served as chief justice from 1874-1880). The respondent chose not to appear before the Court.

The Wisconsin Supreme Court addressed three main points in this case:

- the legality of a suspension of *habeas corpus;*
- state of law in Wisconsin (was martial law declared?) and
- the president's power to change law.

Addressing the first issue, Chief Justice Dixon referred to Article I, Section 9 of the Constitution[**] which states that a writ of *habeas corpus* cannot be suspended "unless when in Cases of Rebellion or invasion the public Safety may require it." He said that Kemp's actions did not endanger public safety, thus the suspension was illegal.

Justice Cole acknowledged that the president, by order of Chapter 201, Laws of the United States, could call a militia draft, but could not declare "the act of discouraging enlistments or resisting militia draft" subject to martial law. He further stated that allowing military jurisdiction and suspending *habeas corpus* in this circumstance would "render void all the guaranties of personal rights secured by the Constitution."

Justice Paine, in a concurring opinion, said the "power to suspend the writ of *habeas corpus* would naturally have been entrusted to the legislature, and not to the executive alone."

Because of Wisconsin's geographic distance from the "theater of war" and because civil authorities were able to preserve the order, the Court unanimously agreed that the state was not

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[1]

[*] Order 141 (issued on September 24, 1862) said: "all persons discouraging volunteer enlistment, resisting militia drafts, or guilty of any disloyal practice affording aid and comfort to rebels against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts martial or military commissions. Second, That the writ of *habeas corpus* is suspended in respect to all persons arrested, or who are now or hereafter during the rebellion shall be imprisoned in any fort, camp, arsenal, military prison, or other place of confinement. By any military authority, or by sentence of any court martial or military commission."

[**] U.S. Constitution, Article I: "The Privilege of the Writ of *Habeas corpus* shall not be suspended, unless when in Cases of Rebellion or invasion the public Safety may require it."

under martial law. Since this was the case, military commanders had no authority to imprison Kemp.

The Court also found that the president's order, Number 141, changed the existing laws. Paine wrote: "The power to issue the writ is given by law. It requires a law to change a law, and the president cannot make a law." The responsibility to change and write law rested then, as it does today, in Congress; the president's charge was to execute existing law, a distinction which applied even in war time.

In his opinion, Paine also considered justifications made by the U.S. attorney general, who argued that the president had the "political power" to "arrest those whom he believes to be friends of and accomplices in the insurrection." The attorney general wrote that the judicial branch, having no "political power," could not "take cognizance of the political acts of the president, or undertake to reverse his 'political decisions.'" Paine responded:

> On the contrary, that matter [the writ of *habeas corpus*] was deemed of such vital importance that the people regulated it in the fundamental law of their politics, and provided that "no person shall be deprived of his life, liberty or property without *due process of law*." The constitution knows no "political" process, no political cause of imprisonment. There must be "a process of law," a legal cause of restraint. And the power to determine what is a legal imprisonment, and to discharge from any that is illegal, is, except when the writ is suspended, a power conferred on the judicial department.

While the Wisconsin Supreme Court ruled that the writ of *habeas corpus* could not lawfully be suspended, they did not free Kemp. Hoping to avoid a clash between state and federal government they instead issued their opinion, believing, as Cole stated: "They [federal authorities] will undoubtedly review their action, or take such steps in the premises as may be consistent with justice and public tranquillity."

<u>Whiting v. Sheboygan & Fond du Lac Railroad Co.</u>
25 Wis. 167 (1870)

This split decision established the important principle that a tax for a private purpose is invalid. In an opinion by Chief Justice Luther S. Dixon, joined by Justice Orsamus Cole, the Supreme Court of Wisconsin reversed a circuit court decision in favor of the defendant railroads. Justice Byron Paine filed a dissent.

This case concerned the validity of an 1867 state law that allowed Fond du Lac County to provide financial assistance for the completion of a railroad that linked the cities of Fond du Lac, Ripon and Sheboygan. The railroad was to be owned by the named defendant and another, both private companies. While the county would not be given ownership interest in the railroad lines or the companies, it would be able, for a ten-year period, to require the railroads to carry wheat between these locations. This was important for the local agricultural economy.

Specifically, the law allowed the county board to provide the companies with $150,000 (a considerable sum at the time) if voters approved the expenditure on a referendum. The board could then levy a tax on county residents to raise the funds.

A vote was held and voters approved the scheme. Then, the plaintiff (a county taxpayer) challenged implementation of the plan. This person would apparently have gained nothing from the wheat-hauling arrangement but would have to pay his share of the tax..

The two-member majority on the state Supreme Court held that this was *not* a legitimate exercise of the government's taxing power.

While acknowledging that railroads are public entities in a limited sense because they have the power of eminent domain (that is, authority to condemn private land in order to construct tracks), the Court held that railroads otherwise are private corporations "in the fullest sense of the term." The fact that they served a public purpose – as did, for example, steamboats and stagecoach lines -- did not change their status. The majority suggested that this taxation scheme was "legal robbery, less respectable than highway robbery."

In his dissent, Justice Paine labeled the ‘legal robbery’ comment "idle exaggeration." Paine would have ruled that since the railroad lines would serve a public purpose, their "technical character" as a private corporation should be ignored. He was significantly influenced by his perception of railroads as the "great public highways of the world along which its gigantic currents of trade and travel continually pour...the most marvelous invention of modern times."

Paine downplayed the railroads’ profit motive, calling their profit from operation of the lines “comparatively petty and unimportant."

Gillespie v. Palmer and others
28 Wis. 544 (1866)

In a unanimous opinion, the Supreme Court reversed the Milwaukee County Circuit Court. The majority opinion was written by Justice Jason Downer. A concurring opinion came from Chief Justice Luther S. Dixon Justice Orsamus Cole wrote a one-paragraph statement agreeing with both Downer and Dixon.

In this case, the Wisconsin Supreme Court extended the right to vote to black residents of the state.

The issue before the Court was whether a vote in a November 1849 general election truly extended the right of suffrage to "persons of African descent" by amending Article III, Section 1 of the Wisconsin Constitution.[*] Voters in the November 1849 election had approved the question of extending the vote to blacks by 5,265 in favor to 4,075 opposed.

However, when a black man (Gillespie) attempted to vote in the November 1865 general election, election inspectors (Palmer and others) turned him away. They argued that the vote in November 1849 which extended the franchise to black people was invalid.

They said the Wisconsin Constitution mandated that any single issue on the ballot in a general election must be approved by a majority of *all votes cast* in that election. In other words, if 100 people voted in the election, 51 would have to vote to extend the franchise to blacks. This question had been approved by a majority of votes cast *on this specific issue*, but not by a majority of all votes cast in the election. To continue the example of the 100 voters, perhaps just 60 of them answered the question on extending the vote to blacks. If the vote were 31 to 29, Gillespie would argue that blacks won the right to vote, while Palmer and the other election inspectors would argue that the question failed by not receiving at least 51 votes.

Gillespie, through his attorney, Byron Paine (a well-known abolitionist who had been a justice of the Wisconsin Supreme Court from 1859 to 1864, and re-joined the Court in 1867), argued that the election inspectors "wrongfully and illegally refused to receive the plaintiff's vote, or to deposit the same in the ballot box, for the sole reason that he was a person of African descent."

In his opinion, Justice Downer said it was obvious that the framers intended the vote to be counted on each separate issue:

> To declare a measure or law adopted or defeated – not by the number of votes cast directly for or against it, but by the number cast for and against some other measure, or for the candidates for some office or offices not connected with the measure itself, would not only be out of the ordinary course of legislation, but, so far as we know, a thing unknown in the history of constitutional law. It would be saying that the vote of every person who voted for any candidate for any office at such election, and did not vote on the suffrage question, should be a vote against the extension of suffrage.

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[*] This mandated that the only qualified voters were: white males, over the age of 21, residents of the state for one year preceding any election, citizens of the United States or people who had declared an intention to become citizens "and also certain persons of Indian blood."

Attorney General v. Chicago & Northwestern Railroad Company
35 Wis. 425 (1874)

This case which has become popularly referred to as Attorney General v. Railroad, marked the beginning in this state of the great struggle between corporate power and privilege on the one hand, and the people represented by the legislature on the other. At the time this case arose, two railway corporations were operating in this state, the Chicago, Milwaukee & St. Paul, and the Chicago & Northwestern companies. These two railroads covered practically the whole state, but their headquarters were in adjoining states. Both railroad charters issued by the state gave them full powers to regulate freight rates and passenger fares as they chose; thus, the railroads could either make or break a community or locality by setting rates. Many in the state began to share the view that railroad freight rates were exorbitant, arbitrary and discriminatory. By the 1873 state elections, a coalition of democrats and reform republicans holding this view were elected to the legislature when William Taylor was elected governor. This anti-railroad legislature was elected on the platform advocating rate regulation. Accordingly, in 1874, the legislature enacted a law fixing maximum freight rates and passenger fares charged by the railroads of the state; this act, known as the "Potter Law" (named after the state senator from Waushara County who had sponsored the bill, was supported and approved by Governor Taylor.

The Potter Law divided the railroads operating in the state into three classes, according to volume of business. The law fixed maximum passenger rates per mile for each class, divided freight into special classes, and fixed the maximum rates to be charged for the transportation of each class. This law also created a three-member Railroad Commission with the power to investigate the actual cost of the railroads, their gross and net receipts and indebtedness, and to set schedules of maximum railroad freight rates between points within the state.

Both railroads quickly challenged the Potter Law on the ground that it changed the terms of their charters and thus constituted an unconstitutional impairment of contract. Attorney John C. Spooner, who later became a three-term U.S. senator from Wisconsin, represented the railroads and persuaded a circuit court to hold the law unconstitutional; however, the Potter Act was upheld in two cases brought in Wisconsin federal courts. Wisconsin Attorney General, Andrew Scott Sloan, then brought the case that was to become known as the Attorney General v. Railroads. He filed motions in the state supreme court asking for writs of injunction against both railroad corporations to restrain them from charging greater passenger and freight rates than were permitted under the Potter Law. However, before the question of the power of the legislature to regulate rates could be resolved, the supreme court had to address two preliminary questions: (1) the extent of the original jurisdiction of the supreme court and whether such original jurisdiction covered a case like this; and (2) whether the framers of the state constitution when they listed the writ of injunction in § 3 Art. VII of the Wisconsin Constitution with what were strictly "prerogative writs" (i.e. affecting sovereignty of the state) like mandamus and habeas corpus, intended to imbue the writ of injunction with the functions of a prerogative writ, or whether the framers intended to leave the injunctive writ simply as a judicial writ or order issued by a court in aid of a judgment.

The supreme court held that its original jurisdiction was properly invoked in this case because the question was one affecting the sovereignty of the state, its franchises and prerogatives. This opinion was one of the first to clarify the previously ill-defined field of the original jurisdiction of the supreme court. This case extended the reasoning in Attorney General v. Blossom, 1 Wis. 317 (1853) where the supreme court held that the power to issue writs

enumerated in the third clause of § 3 Art. VII of the Wisconsin Constitution was not merely to enable the court to enforce the jurisdiction conferred upon it by other parts of the constitution, but constituted a grant of jurisdiction to issue the writs mentioned in all proper cases. The Railroad case also went beyond the decision in State ex rel. Bashford v. Barstow, 4 Wis. 567 (1856) which held that the court had original jurisdiction of the writ of quo warranto.

In addition to clarifying the scope of the supreme court's original jurisdiction, the opinion in the Railroad case as written by Chief Justice Edward G. Ryan was also viewed as a landmark case granting the legislature power of control over corporations. Chief Justice Ryan's opinion pointed out that § 1 of Art. XI of the Wisconsin Constitution reserved to the legislature the right to amend corporate charters at any time. The court held that this provision gave the legislature broad powers over railroads, short of destroying their essential identity, and that the Potter Law constituted an amendment of every railroad charter in the state. Chief Justice Ryan in language that still resonates today, expressed concern that the law in general was not keeping pace with the growth of the railroads and other technological changes in society. He noted that "the difficulty arises probably from applying old names to new things; applying the ancient definitions of private corporations to corporations of a character unknown when the definition arose." He asserted that it was essential for the state to preserve its right to control "great corporations [which were] independent powers within the states ... baffling state order, state economy, state policy." 35 Wis. 567-68.

As an historical footnote, the legislature's victory in the Railroad case was short lived. In the 1875 election, Governor Taylor and many of the legislators in the reform coalition were defeated. The next year, the new legislature stripped the Railroad Commission of its regulatory powers. The new law merely required railroad rates to be "reasonable;" however, it did not create any mechanism by which the state could enforce that provision. Under the new law, the Railroad Commission became little more than an agency for collecting statistics and information. *

- Sources utilized in this report are Winslow, The Story of a Great Court (1912).
- Ranney, Joseph, "Law and Railroads in Wisconsin," Wisconsin Lawyer June, 1993.
- Hunt, R.S., Law and Locomotives (1958).

Motion to admit Miss Lavinia Goodell to the Bar of this Court
39 Wis. 232 (1875)
and
Application of Miss Goodell
48 Wis. 693 (1879)

In a unanimous opinion, a three-justice panel determined that women should not be allowed to practice law before the Supreme Court. Chief Justice Edward George Ryan wrote the opinion. Three and a half years later, on appeal (Application of Miss Goodell), the Court voted 4-1 in favor of admitting her. Justice Orsamus Cole wrote the majority opinion granting Goodell's admission, while Ryan dissented.

This case stands as a testament to the obstacles women faced in the 19th century as they attempted to work in traditionally male professions. It focused on the state statute governing admission to the bar. This statute (then and now) refers to a "person" being admitted to the bar and uses the masculine pronoun throughout. It was up to the Supreme Court to determine whether the statute was intended to prohibit the admission of women to the bar.

In November 1874, Rhoda Lavinia Goodell, a Janesville lawyer, was retained to represent a widow in a probate matter. The case presented a novel question and Goodell eventually appealed it to the Wisconsin Supreme Court. At the time, practice before the Supreme Court required admission to a separate bar. Customarily, this admission was automatic for lawyers who already had been admitted to the circuit court bar (as Goodell had); however, since Goodell was the first woman to seek admission to the Supreme Court bar, her application was carefully scrutinized.

As Chief Justice Ryan was well-known for his belief that a woman's place was in the home, Goodell watched him closely when the Court convened to hear oral argument on whether to admit her to the bar. Later, she wrote that Ryan "bristled all up when he saw me, like a hen when she sees a hawk, and did not recover his wonted serenity during my stay. It was fun to see him! I presume I was the coolest person present."[*]

In making Goodell's case for admission to the bar of the Supreme Court, Assistant Attorney General I.C. Sloan, a leading Janesville lawyer, made it clear that he was presenting an argument prepared by Goodell. The argument for admission centered on three issues:

First, Goodell (through Sloan) demonstrated that state law did not exclude women from admission to the bar. The statute in question referred to admission of a "person" and used the male pronoun in the text; however, another statute provided that male pronouns in state laws should be construed as extending to females as well.

Second, she showed that, based on an Illinois case, a Supreme Court's discretion on whom to admit should be based on what will promote the proper administration of justice. Through Sloan, Goodell argued that the proper administration of justice "would be better

[*] Letter of December 20, 1875

promoted by the admission of women to the practice of law than by their exclusion" for several reasons:

1. a class of people cannot truly obtain justice in courts where its members are not represented;

2. the inclusion of women would result in a combination of "the peculiar delicacy, refinement and conscientiousness attributed to woman with the decision, firmness and vigor of men";

3. it was unfair to the community to curtail "free and wholesome competition of the best existing talent" and

4. it was unjust to shut anyone with ability and interest out of a lucrative and honorary profession.

Finally, Goodell showed that only Illinois and Washington, D.C. (in the Court of Claims) had refused women admission to the bar. On the other hand, women had been admitted in Iowa, Missouri, Michigan, Maine, the District of Columbia and federal district courts in Illinois and Iowa.

In February 1876, the Court denied Goodell's petition. Writing for the Court, Ryan said that the Legislature's use of the masculine pronoun in the statute indicated an intent that it should apply only to men. Reading the statute to include women would, he wrote, lead to "judicial revolution, not judicial construction."

Ryan then added his thoughts on why women were not suited to practice law, discussing "the peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling." He summed up with:

> (I)t is public policy to provide for the sex, not for its superfluous members; and not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours. There are many employments in life not unfit for female character. The profession of law is surely not one of these.

When Goodell learned that she had lost the case, she focused on legislation as the next step.[**] She worked to have a bill introduced that would prohibit gender-based denial of bar admissions. The Legislature passed it on a voice vote and Governor Harrison Ludington signed it on March 22, 1877.

Goodell's second application for admission to the bar of the Wisconsin Supreme Court was heard on April 22, 1879. Sloan again made the motion on her behalf and on June 18, the Court issued an opinion granting her petition. Chief Justice Ryan dissented.

Goodell died the following March, at age 40.

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[**] Catherine B. Cleary, "Lavinia Goodell, First Woman Lawyer in Wisconsin." *Wisconsin Magazine of History* (summer 1991)

Vassau v. Thompson
46 Wis. 345 (1879)

In a 3-2 ruling, the Wisconsin Supreme Court affirmed a Polk County Circuit Court decision.. Justice Orsamus Cole wrote the majority opinion and Chief Justice Edward G. Ryan wrote the dissent.

This case shows a humorous side to the Court, and is an example of the type of cases the courts handled in the 19th century.

The case focuses on the actions of the defendant's dog, which chased the plaintiff's cow and bit its tail – resulting in its death. The jury found the defendant's dog guilty of killing the cow and ordered the defendant to pay $45, the value of the cow.

The defendant appealed, claiming there was no evidence that he had any prior knowledge of his dog's "mischievous disposition" and therefore he was not responsible for the animal's actions. He also argued the lawsuit should be dismissed because there was no *cause of action*, meaning that the plaintiff had no legal right to sue.

The plaintiff's attorney argued that the cause of action was the defendant's alleged order to his dog to chase the cow. The jury found that the evidence supported this claim.

The Supreme Court said that the complaint against the defendant was "defective," but still upheld the jury's verdict since it was based on sufficient evidence.

In a colorful dissent, Chief Justice Ryan stated there was no evidence to suggest the dog was acting on his master's command. He wrote: "The subject of the complaint is a dog and a cow, hereditary enemies since the days of the House that Jack built. But in this case, it was the dog that killed the cow….this dog presumably acquired a personal taste for oxtail." Ryan stated that it would be "a violent and irrational presumption" that an animal who had been trained to do something (in this case, bite cow's tails) would never "indulge in the vice for his own gratification, without orders."

Brown v. Phillips and others

71 Wis 239 (1888)

In a unanimous opinion, the Supreme Court reversed the Racine County Circuit Court. Justice John B. Cassoday wrote the opinion for the Court.

In this case, the Wisconsin Supreme Court declined to expand women's right to vote. In doing so, the Court ruled that Chapter 211 of the Laws of 1885 could not be broadly interpreted to extend the rights of suffrage for women beyond school-related elections.[*]

Here are the facts of the case: Olympia Brown attempted to vote in a Racine municipal election. On the ballot were candidates for mayor, city clerk, comptroller, alderman and supervisor. Brown argued that these were positions pertaining to school matters and that, therefore, women should be allowed to cast ballots.

The respondents (the election inspectors who refused to receive her vote) countered with the argument that under Article III, Section 1 of the Wisconsin Constitution only citizens who were male and at least 21 years old were allowed to vote.[**] The Court disagreed. Justice Cassoday wrote: "(T)he language is not 'that the legislature may at any time extend, by law, the right of suffrage to' such other 'male' persons or classes having the general qualifications mentioned, but 'to *persons* [emphasis in original] not *herein* enumerated."

But the Court declined to interpret the statute broadly, as the petitioner requested. The justices asserted that they had "no power to grant suffrage to any one . . .To attempt, . . .to extend the act to objects beyond its purpose, would be nothing less than the usurpation of powers not only belonging to the legislature but to the qualified electors of the state."

The Court then examined the legislative history preceding the passage of the bill. At the same time that the statute governing who would be allowed to vote was working its way through the Legislature, a bill to extend the right of suffrage to women was defeated. The Court stated it did not believe it possible that the same body could, on the same day, take two completely antithetical stands on women's suffrage. Therefore, the Court concluded, "we are necessarily forced to the conviction that it was never intended thereby to extend an unlimited right of suffrage to women."

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[*] Chapter 211 of the Laws of 1885 gave women the right to vote in elections "pertaining to school matters."
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State ex rel. Weiss and others vs. District Board, etc.
(aka Edgerton Bible case)
76 Wis. 177 (1890)

In an unanimous opinion, the Wisconsin Supreme Court reversed the Rock County Circuit Court. The opinion was written by Chief Justice William P. Lyon. Concurring opinions were issued by Justices John B. Cassoday and Harlow S. Orton.

In this case, which came to be known as the Edgerton Bible case, the Wisconsin Supreme Court determined that Bible reading in public schools is unconstitutional.

The Court ruled that this constitutes sectarian instruction, in violation of Article X, Section 3[*] and Article I, Section 18[**] of the Wisconsin Constitution.

The issue was brought before the Court after the petitioners—Edgerton residents, taxpayers and parents of children attending the public school—appealed to the district school board and Rock County Circuit Court without success. They were outraged by some teachers' practice of reading the King James version of the Bible to pupils during school hours. The readings were not followed by comment or instruction. As members of the Roman Catholic Church, they viewed the King James version of the Bible as an incorrect and incomplete translation. They also believed the Catholic Church was the only "infallible" interpreter of the scriptures and feared the reading of the Bible by non-authorized teachers could lead to "dangerous errors."

Because the Edgerton school was a public school, the parents argued that the Bible readings amounted to use of state funds to support a place of worship and that the readings violated the separation of church and state.

Responding to the petitioners' concerns, the school board said students were not required to remain in the school during the Bible readings, but rather were "at liberty to withdraw during such reading if they desire to do so." They also denied that the Roman Catholic Church is the only "infallible" interpreter of the Bible, stating "that every person has the right to read the Bible and interpret it for himself."

The board also argued that the Bible was used as a "textbook" for teaching a "universal" moral code and for general instruction. The board said it had the right and authority, under state law, to determine which textbooks should be used and that the King James Bible was a valid textbook because the state superintendent of public instruction recommended it for use in public schools.

Chief Justice Lyon's majority opinion addressed the board's argument that the drafters of the state Constitution did not intend to ban reading of the Bible in public schools. Lyon recounted the period and climate in which the Constitution was drafted. He suggested that the

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[*]Wisconsin Constitution, Article X, Section 3: The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 40 years; and no sectarian instruction shall be allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours.

[**] Wisconsin Constitution, Article I, Section 18: The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without 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.

framers were eager to see the state develop and grow; therefore, the intent of the Constitution, and Article X, Section 3 in particular, was to ensure that:

> (I)n addition to the guaranties of the right of conscience and of worship in their own way, the free district school in which their children were to be, or might be, educated, were absolute common ground, where the pupils were equal, and where sectarian instruction, and with it sectarian intolerance, under which they had smarted in the old country, could never enter.

Lyon further stated that it is "universally known" that there is a difference between the King James and the Douay (adhered to by the Roman Catholic Church) versions of the Bible in that many details representing important components of various religious sects' canons differ. Furthermore, certain passages read at the Edgerton school suggest the divinity of Jesus Christ, predestination and eternal punishment. These ideas are not accepted by all religious sects, thereby showing Bible reading as sectarian instruction.

Justices Cassoday's and Justice Orton's concurring opinions considered whether the reading of the Bible in public school forced taxpayers to support a place of worship and addressed the issue of the separation of church and state. They agreed with the petitioners that the only use of state treasury funds, by law, must be entirely secular. They stated that many, if not most, religious sects view the reading of the Bible as a part and even the essence of worship, therefore the practice in question is a violation of the Wisconsin and U.S. Constitutions.

The Supreme Court concluded that even though the State Department of Public Instruction recommended the King James Bible as a textbook, the issue was a question of law, not to be decided by the "learned chiefs" of educational policy. They ruled that Bible reading in public schools is illegal and issued a writ of *mandamus*, ordering the district board to end Bible reading in the Edgerton public school.

The State ex rel. Attorney General v. Cunningham
81 Wis. 440 (1892)
and
The State ex rel. Lamb v. Cunningham
83 Wis. 90 (1892)

From the time Wisconsin gained statehood, there have been various power struggles between the three branches of government. These cases involved a dispute between the Wisconsin Supreme Court and the Legislature. The Supreme Court held that that an act to apportion and district the members of the state Senate and Assembly was unconstitutional. The first decision was unanimous and Justice Harlow S. Orton wrote the opinion. In the second case, a split court reaffirmed the principles set forth in first decision. Justice John B. Cassoday wrote the majority opinion. Justice John B. Winslow dissented.

In these cases, the court outlawed "gerrymandering," which is creating legislative districts to preserve partisan political advantage.

Article IV of the Wisconsin Constitution provides that every ten years the Legislature shall "apportion and district anew" the members of the Senate and Assembly, according to the number of inhabitants in each district. Assembly districts are to be bounded by county, precinct, town or ward lines, to consist of contiguous territory (that is, a block of land rather than islands here and there) and be as compact as practicable. Senators are to be elected by single districts of convenient contiguous territory. No Assembly district may follow the same exact lines as a Senate district.

In the first case, the attorney general appeared on behalf of the state to ask the Court to stop the secretary of state from giving the notices of the election for members of the Senate and Assembly under the new apportionment act. The attorney general argued that the apportionment act violated the constitutional provisions discussed above because:

- districts were not drawn according to the number of inhabitants;
- many Assembly districts were not bounded by county, precinct, town, or ward lines;
- many districts were not as compact as practicable and
- some Senate districts did not consist of convenient contiguous territory.

The lawyer representing the secretary of state argued that the attorney general had no authority to challenge the law and that only a person who has suffered an actual injury to himself, his property or rights may make such a challenge. The attorney general argued that the question involved was one of public right in which all the citizens of the state were concerned and that the person bringing the suit need not have any individual or private interest.

The Supreme Court concluded that since the issues raised were of public right, the case was appropriately brought by the attorney general. It then found the act unconstitutional.

After the first decision, the Legislature reconvened and passed another apportionment law. This time, a private citizen asked the Supreme Court to stop the secretary of state from giving notice of the election.

The majority of the court held that the private citizen had a right to bring the action and that the apportionment law was again unconstitutional. While the first law had formed assembly

districts that crossed county lines, the second law created districts with a significant disparity in population. The majority explained:

> The requirement that assembly districts must be as nearly equal in population as the other constitutional provisions will permit is just as applicable to two or more assembly districts in a single county as to an assembly district composed of two or more counties. While the act here in question in the main conforms to those requirements of the constitution which *prevent equality of representation,* yet it almost wholly disregarded the only constitutional requirement particularly *designed to secure such equality as near as practicable.* (emphasis added)

Justice Winslow dissented, saying he would conclude that the private party who brought the suit had no right to sue because he had suffered no wrong as a result of the law. He also said he did not believe the disparity in population between the districts was significant enough to render the act unconstitutional. Winslow said he feared the Court was entering into a period in which the Legislature would keep enacting laws and the Court would keep striking them down. He wrote: “By the time this process has been repeated several times more, it will be a serious question whether the law finally resulting is the offspring of the legislature or of the court…. Has not the court in fact made the law, and thus invaded the province of its co-ordinate branch of the government?”

<u>Nunnemacher v. State</u>
129 Wis. 190 (1906)

The Wisconsin Supreme Court found for the respondent, the State of Wisconsin, in this case. Justice John B. Winslow wrote the majority opinion and Justice Joshua Eric Dodge and Chief Justice John B. Cassoday filed dissenting opinions.

In this case, the Court upheld the state's right to tax inheritances, distinguishing itself from many courts across the nation.

Nunnemacher had filed a complaint against the state, asking the Court to order reimbursement for the amount of tax he paid on an inheritance. He argued that Chapter 44 of the Laws of 1903[*], which gave the state the authority to tax inheritances, was unconstitutional.

The Court had previously dealt with this issue in *Black v. State*[*], but in that case found the statute unconstitutional. However, the basis for that decision was that the law discriminated in its classifications of who was, and was not, taxed.

In <u>Nunnemacher</u>, the Court did not question the belief that property rights were inherent and protected by the government; however, it did question the assertion that inheritance taxes were forbidden. The Court asserted that the inheritance tax was based on the right of governments to regulate and tax certain transactions.

The petitioner argued that the Wisconsin Constitution only allowed for taxes to be collected on property. Justice Winslow, writing for the Court, noted that the issue of whether only property was taxable had not been dealt with previously: "it seems strange that, notwithstanding the lapse of nearly three score years since the adoption of the Constitution, this question has never been authoritatively decided in Wisconsin." Examining records from the state constitutional convention, the Court found that the framers did not intend to prohibit an inheritance tax.

The Court also dealt with the issue of whether Chapter 44 of the Laws of 1903 provided for the levying of taxes in a discriminatory manner. For discrimination to be justified, the Court said, there must be a real basis for the different classifications. For example, the Court said, no one would argue that a case involving the inheritance of a "wife or daughter deprived by death of the care and support of her natural protector" called for the same treatment as a case arising from the inheritance of a distant relative. The Court found that the classification in this law was not unjustly discriminatory.

Justice Marshall wrote in his dissenting opinion that he believed the classifications to be unjustly discriminatory. He wrote: "Nothing seems to me more an outrage upon equal rights than

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[*] Wis. Stat. ch. 44 (Laws of 1903) dealt with the tax rate which was determined based on the property value of the inheritance: "(1.) Upon all in excess of twenty-five thousand dollars and up to fifty thousand dollars one and one-half the primary rates. . . [in exemptions section] (2.) Property of the clear value of ten thousand dollars transferred to the widow of the decedent, and two thousand dollars transferred to each of the other persons described in the first division of section two shall be exempt." These included brothers, sisters, nieces, nephews, daughters-in-law, and sons-in-law of the deceased.

[*] 113 Wis. 205

discrimination by the law in favor of or against either the poor or the rich by reason of that fact, and nothing seems more to threaten the permanence and safety of society."

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Borgnis and others v. The Falk Company

147 Wis. 327 (1911)

In this case, the Wisconsin Supreme Court reversed a ruling of the Milwaukee County Circuit Court. The majority opinion was written by Chief Justice John B. Winslow. Justices John Barnes and Roujet D. Marshall wrote concurring opinions.

In this case the Wisconsin Supreme Court unanimously upheld the constitutionality of the Workers Compensation Act of 1911.

The respondents in the case (Borgnis, et al) were employed in supervisory positions at Falk Co., a Milwaukee manufacturing company. Falk argued that although workplace safety conditions needed to be improved, the Act should not be extended to include people who were, like Borgnis, working in "non-hazardous trades." The Court disagreed.

Adding 32 sections to the Wisconsin Statutes, the Workers Compensation Act outlined, Chief Justice Winslow wrote:

> (A) way by which employer and employed may, if they so choose, escape entirely from that very troublesome and economically absurd luxury known as personal injury litigation and resort to a system by which every employee not guilty of willful misconduct may receive at once a reasonable recompense for injuries accidentally received in his employment under certain fixed rules, without a lawsuit and without friction.

Justice Marshall agreed on the value of the new law, writing:

> May it (the legislation) be the beginning of a well rounded out constitutional system making every one who consumes any product of labor for hire pay his proportionate amount of the cost of the creation representing the personal injury misfortunes of those whose hands have enable him to secure the objects of human desire…

Among other things the Act stated that all injured parties must have an examination by a physician, upon the employer's request. The Act also clearly spelled out the definition of an employee.

Winslow stated that the Workers Compensation Act was a legislative response to a public demand to meet or remedy a problem brought on by modern industrialism. Marshall said the Legislature had intended to induce employers to voluntarily "become parties to the new system designed to better conserve human life and human happiness." The Court's role, the justices emphasized, was simply to determine if any provisions of the Act violated the Constitution.

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<u>Wait v. Pierce</u>
191 Wis. 202 (1926)

In a 4-3 ruling, the Wisconsin Supreme Court reversed the Winnebago County Circuit Court. Justice Marvin B. Rosenberry authored the majority opinion and Justice Franz C. Eschweiler wrote the dissent.

In this case, the Wisconsin Supreme Court broadly interpreted a state statute to grant married women the right to sue their husbands.

The case arose when the plaintiff, Mathilda Wait, sued two defendants - Pierce and Borenz - for injuries that resulted from negligent operation of a car. The car was driven by an employee of Pierce and Borenz.

The defendants wanted Wait's husband, George Wait, to be held liable for her injuries because he had also been found to be partly responsible for the accident; however, the circuit court ruled that Wait could not bring legal action against her husband to redress injuries caused by his negligence. The case was dismissed and Pierce and Borenz appealed the summary judgment to the Wisconsin Supreme Court.

The key issue for the Court was whether state law permitted a wife to sue her husband for injuries. The justices noted that this was a novel issue and involved interpreting the scope of the Amendment of 1881[*] which granted married women the right to legal action in the case of injury.

The Court first noted that there was no exception to the rule outlined in the statute. Citing Chapter 17 of the Laws of 1905 and Chapter 529 of the Laws of 1921, the court concluded that the Legislature intended to place women and men, regardless of their marital status, equal before the law.[*]

In *Thompson v. Thompson, supra*[*], the U.S. Supreme Court wrestled with similar issues and reached a different result; however, the Wisconsin Supreme Court found that the reasoning of the U.S. Supreme Court did not apply to the set of facts in this case.

In his dissent, Justice Eschweiler argued that the intent of the law was not to do away with the "firmly established and well recognized common law rule" which prohibited spouses from suing each other. He warned that the implications of the majority decision went far beyond what was intended by the statute and argued that Chapter 539 of the Laws of 1921 should have been

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[*] Wis. Stat. ch. 99 (Laws of 1881): "And any married woman may bring and maintain an action in her own name for any injury to her person or character the same as if she were sole, and any judgment recorded in such action shall be the separate property and estate of such married woman, provided that nothing herein contained shall affect the right of the husband to maintain a separate action for any such

[*]Wis. Stat. ch. 17 (Laws of 1905) gave married women the right to maintain an action against a third person "for the alienation of her husband's affections and the loss of his society." Chapter 529 of the Laws of 1921 (sec. 6.015 Stats.) states: "Women shall have the same rights and privileges under the law as men in the exercise of suffrage, freedom of contract, choice of residence for voting purposes, jury service, holding office, holding and conveying property, care and custody of children, and in all other respects. The various court, executive and administrative officers shall construe the statutes where the masculine gender is used to include feminine gender unless such construction will deny to females the special protection and privileges which they now enjoy for the general welfare. The courts, executive and administrative officers shall make all necessary rules and provisions to carry out the intent and purpose of this statute.

[*] Thompson v. Thompson, supra, 218 U.S. 611, 31 Sup. Ct. 111

interpreted to create new rights for women but rather to remove barriers to the exercise of previously established rights.

<u>John F. Jelke Co. v. Emery</u>
193 Wis. 311 (1927)

In this case, the Wisconsin Supreme Court unanimously affirmed the ruling of Judge August C. Hoppman, Dane County Circuit Court. Justice Marvin B. Rosenberry wrote the opinion.

In this case, the Wisconsin Supreme Court ruled that making and selling margarine was legal.

This decision voided Chapter 279, Section 352.365 of the Laws of 1925[*] which had prohibited the manufacture and sale of a butter substitute containing milk fats (known as oleomargarine or oleo) in Wisconsin.

Emery was dairy and food commissioner for Wisconsin. Arguing that it was his duty to enforce the provisions of Chapter 279, he petitioned the Court to prohibit the respondent, John F. Jelke Company, from producing and selling oleo in the state.

Justice Rosenberry's majority opinion called Chapter 279 an "exercise of the police power" in that it prohibited the operation of a legitimate business and the sale of a product widely accepted as wholesome. He stated that "prohibition can only be justified upon the ground that it is necessary in order to protect the public health, public morals, public safety, prevent fraud, or promote public welfare." Rosenberry referenced numerous cases offering evidence that oleomargarine was accepted as a "nutritious, wholesome, healthful food" which did not endanger public health or safety.

Futher, while the Court agreed that oleo was a substitute for butter, it determined that the oleomargarine industry marketed and sold the product based on its own merits—showing no evidence of fraudulent activity. Rosenberry wrote that there was "certainly no question of morals" regarding this issue.

Considering the petitioner's argument that the sale of oleomargarine created "unfair competition" for Wisconsin's dairy industry, Rosenberry concluded that:

> From the standpoint of constitutional right the legislature has no more power to prohibit the manufacture and sale of oleomargarine in aid of the dairy industry than it would have to prohibit the raising of sheep in aid of the beef-cattle industry or to prohibit the manufacture and sale of cement for the benefit of the lumber industry.

The Supreme Court determined that prohibiting the sale of oleomargarine was to the "advantage to a particular class of citizens and to the disadvantage of others." Therefore, the Court said it had a duty to nullify the "oppressive acts" of legislation.

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[*] Wis. Stat. ch. 279, sec. 352-365 (Laws of 1925): "It shall be unlawful for any person, firm or corporation, by himself, his servant or agent, or as servant or agent of another, to manufacture, sell or solicit or accept orders for, ship, consign, offer or expose for sale or have in possession with intent to sell, any article, product or compound which is or may be used as a substitute for butter and which is made by combining with milk or milk fats or any of the derivatives of either any fat, oil or oleaginous substance or compound thereof other than milk fat."

State ex rel. Drankovich v. Murphy
248 Wis. 433 (1945)

In this case, the Wisconsin Supreme Court, by a vote of 4-2, vacated a judgment and sentence of the Marinette County Circuit Court. Justice Chester A. Fowler wrote the majority opinion and Justice Edward T. Fairchild wrote the dissent. Justice James W. Rector did not participate.

In this case, the Wisconsin Supreme Court strengthened the right to legal counsel of defendants in criminal cases by clarifying what trial judges must do in order to protect that right. The Court said the judge must provide a defendant with a lawyer—at public expense if necessary -- even if he or she does not request one. Further, the Court said that the defendant must be made aware of his or her right to have a lawyer.

This is especially imperative, the Court said, where the defendant is poor, illiterate, unacquainted with legal proceedings and isolated from friends and family. The Court said due process, as provided in the 14th Amendment[*] to the U.S. Constitution, requires this.

In this case, Victor Drankovich, an immigrant from Poland who spoke very little English, pleaded guilty to murdering Stanley Skibinski on December 26, 1934 and was sentenced to life in prison on January 5, 1935. The judge did not specifically inform him of his right to counsel. On the day of his sentence, Drankovich told the judge: "I don't mean to kill (the victim) that day…I was happy."

After his sentence, Drankovich filed a petition for a writ of *habeas corpus*, asking the Wisconsin Supreme Court to free him on the grounds that he had been tried and convicted without a lawyer and had not been made aware that he was entitled to legal counsel.

The Court referred the case to Judge S.E. Smalley of the fifth circuit to determine the circumstances under which the guilty plea was entered and sentence imposed. Judge Smalley considered the evidence and took testimony from the murder victim's wife on Drankovich's ability to speak and understand English. He found that Drankovich did not "intelligently waive" the right to counsel.

With all the facts before them, the justices of the Supreme Court determined that the trial judge should have refused to accept the guilty plea and instead should have appointed counsel at public expense for Drankovich. The majority wrote: "It is true that the petitioner was by no means feeble-minded, but he was, through ignorance of the law and illiteracy, utterly incapable of making his own defense."

The dissenting justices argued that Drankovich had been sufficiently advised of his rights, noting that the trial judge initially refused to accept his guilty plea and appointed an interpreter to confer with him. Justice Fairchild wrote: "The evidence satisfies me that he understood not only the nature of the crime he committed but the consequences of his waiver of a trial and of his pleading guilty."

The Court (with two justices dissenting) vacated the judgment and sentence and ordered that Drankovich be given a new trial.

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[*] U.S. Constitution, 14th Amendment: "…nor shall any State deprive any person of life, liberty, or property, without due process of law…"

State v. Yoder
49 Wis. 2d 430 (1971)

The Wisconsin State Supreme Court reversed a Green County Circuit Court decision. The majority opinion was authored by Chief Justice E. Harold Hallows. Justice Connor T. Hansen concurred and was joined by Justices Horace W. Wilkie, Bruce F. Beilfuss and Robert W. Hansen. Justice Nathan S. Heffernan dissented. The case was appealed to the U.S. Supreme Court, which affirmed the state Supreme Court's ruling in a 6-1 decision authored by Chief Justice Warren E. Burger. Justice William O. Douglas dissented in part from the majority. Justices William H. Rehnquist and Lewis F. Powell, Jr. did not take part in the case.

In this case, the Wisconsin Supreme Court held (distinguishing itself from other state courts) that Amish parents could remove their children from public schools after the 8th grade as an exercise of their right to religious freedom. The Amish separate themselves from modern society and provide their children with their own system of education structured in accord with their beliefs.

The appellants were the parents of three teenagers who had attended the New Glarus public schools. The parents were fined for refusing to enroll the children in the high school in the fall of 1968. This was in violation of the compulsory school law.[*] The respondent, the state of Wisconsin, argued that the state had a legitimate interest in compelling children to attend school and that this outweighed the interference with religious freedom.

In making its decision, the Court weighed the appellants' constitutional right to religious freedom[*] against the state's interest in compulsory education. In determining how heavy a burden the statute placed on the Amish, the Court considered the beliefs of the Amish religion. Justice Hallows wrote:

> The period of adolescence is critical in the religious and cultural development of the child because at this time the child enters gradually into the fullness of Amish life, is given responsibilities which would be directly interfered with if he were compelled to go to high school . . To the Amish, secondary schools. . . teach an unacceptable value system . . . We view this case as involving solely a parent's right of religious freedom to bring up his children as he believes God dictates.

The Court then looked at whether the state's interest was compelling in this case. The state argued that some Amish children may choose to leave their community upon reaching adulthood, but forcing a "worldly" education on all Amish children, the Court determined, in order to benefit the few children who might later leave, did not constitute a compelling state interest.

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[*] Pertinent sections of Wis. Stat. sec. 118.15 are quoted in the Wisconsin Supreme Court decision: "(1) Unless the child has a legal excuse, any person having under his control a child between the ages of 7 and 16 years shall cause such child to attend school regularly, during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session, to the end of the school term, quarter or semester of the school year in which he becomes 16 years of age."

[*] U.S. Constitution, First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

Furthermore, while an individual is free to choose a religion as an adult, the Court ruled that parents have the right to choose what religion they will raise their children. The state, the Court declared, should not infringe on this right by enforcing educational requirements.

In closing, the Court articulated its belief in the importance of the guarantees of the First Amendment, including: free speech, freedom of the press and freedom of religion. Hallows wrote: "the right to worship your God or to practice your religious beliefs are as important as the right to speak or print freely and may, to the individual involved, be more important."

In Justice Heffernan's dissent, he asserted that the majority had misinterpreted the facts of the case. He wrote that the state did demonstrate a compelling interest and he pointed out that the appellants had alternatives to sending their children to public school. Other states had dealt with this issue and the Amish in these states established their own private schools to satisfy compulsory education requirements. Heffernan was particularly concerned about the rights of Amish children. He argued that under the majority opinion the state was not preparing Amish youth for "modern American life." He wrote:

> On the basis of the religious beliefs of their parents, the Amish children are without a hearing consigned to a life of ignorance - blissful as it may seem to the author of the principal opinion, who apparently views the Amish as 'the noble savage,' uncorrupted by the world . . . No part of our law requires a student to go to a school not of his own religious choice. It merely requires that he go to a school.

The case was appealed to the U. S. Supreme Court. The U.S. Court affirmed the state Supreme Court, declaring that the state's interest in education is not exempt from a "balancing process" when dealing with fundamental rights. The U.S. Court agreed that the Amish demonstrated that continuing their children's education beyond the 8th grade would hinder the exercise of their religious beliefs.

State v. Stevens

123 Wis. 2d 303 (1985)

In the 1980s and 1990s many cases have come to the courts challenging the validity of a search or seizure under the federal and state constitutions. In this case, the Wisconsin Supreme Court on a 4-3 vote affirmed in part and reversed in part a decision of the Court of Appeals. Justice Roland B. Day wrote the majority opinion and Chief Justice Nathan S. Heffernan wrote the dissent. The case originated in Milwaukee County Circuit Court.

In this case, the Supreme Court determined that there is no reasonable expectation of privacy in curbside garbage. And under the facts of this case, the Court said this includes garbage obtained by a garbage collector who is working as a secret agent of the police and collects the garbage for the sole purpose of turning it over to authorities.

The defendant, David Stevens, was under investigation for suspected drug activities. A deputy from the Milwaukee County Sheriff's Department wanted to search Stevens' garbage for drug-related evidence. The deputy told the municipal garbage collector to bring Stevens' garbage to him after the next scheduled pickup.

On the day that the garbage collector normally picked up Stevens' trash, he found the cans empty and knocked on Stevens' door to ask for his garbage. Stevens did not know that the collector was acting on behalf of the deputy. Stevens opened his garage door and let the collector take the garbage from inside. The collector picked up four garbage bags and left. He then gave them to the deputy to search.

The deputy found enough evidence in the garbage bags to obtain a search warrant for Stevens' home. Cocaine, marijuana, drug paraphernalia and money in the home led to Stevens' arrest. He was charged with possession of cocaine with intent to deliver and possession of marijuana with intent to deliver.

The defendant claimed that searching his garbage was unlawful and, therefore, the warrant to search his house (which was based on the evidence found in the garbage) was improperly given. The trial court, Court of Appeals and Supreme Court all disagreed.

The Supreme Court found that the seizure and search of the defendant's garbage did not violate his rights under the U. S. or Wisconsin Constitutions.[*] Justice Day wrote:

> (B)ecause there is no reasonable expectation of privacy in garbage that is removed by municipal garbage collectors in routine collection, the defendant had no reasonable expectation of privacy in garbage which was removed by the municipal collector pursuant to his consent.

Dissenting, Chief Justice Heffernan wrote:

> It is difficult to believe that anyone would seriously contend that there is not a reasonable expectation of privacy in garbage against the prying eyes of government…Almost all the intimate details of one's personal life may be revealed by what is placed in the trash, including personal matters which would cover

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[*] U. S. Constitution, Fourth Amendment and Wisconsin Constitution, Article 1, Section 11: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

the gamut from how one's alimentary canal functions to the brand or quantity of liquor consumed in the household.

Furthermore, Heffernan wrote, people must dispose of garbage. Since they know that the purpose of garbage collection is destruction, it is reasonable, he wrote, that people have an expectation of privacy and an expectation that the garbage will be handled in the usual manner, without interception by state agents.

State v. Mitchell
169 Wis. 2d 153 (1992)

This case illustrates legislative action against bigotry and the possible conflict between such laws and the free speech guarantees of the federal and state constitutions. In an opinion authored by Chief Justice Nathan S. Heffernan, the Wisconsin Supreme Court reversed a decision of the Court of Appeals by a 5-2 vote. Justices Shirley S. Abrahamson and William A. Bablitch wrote separate, dissenting opinions. The U. S. Supreme Court reviewed the case and reversed the majority opinion.[*] *The case originated in Kenosha County.*

In this case, the Wisconsin Supreme Court declared unconstitutional a state statute which enhanced the penalty a defendant could receive if the victim was selected on the basis of race, religion, color, disability, sexual orientation, national origin or ancestry.[**] The U.S. Supreme Court reversed that decision.

On October 7, 1989, Todd Mitchell, who was 19, was socializing with friends at an apartment complex in Kenosha. The men were discussing a scene from the movie "Mississippi Burning" in which a white man beats a young black boy who is praying. Mitchell asked the group: "Do you all feel hyped up to move on some white people?" A short time later, a 14-year-old white boy walked by the apartment complex. Mitchell counted to three and pointed at the victim. The group beat him severely and stole his tennis shoes. He spent four days in a coma and possibly suffered permanent brain damage.

Mitchell was convicted of aggravated battery, party to a crime. Because the jury found that he had selected the victim on the basis of race, the hate crimes statute kicked in and the maximum sentence jumped from two years to seven. Mitchell received a four-year sentence.

Mitchell appealed, focusing on the constitutionality of the hate crimes statute. The Court of Appeals affirmed the trial court, finding the hate crimes statute to be neither overly broad nor vague.

At the state Supreme Court, Chief Justice Heffernan wrote for the majority:

> The hate crimes statute violates the First Amendment[*] directly by punishing what the legislature has deemed to be offensive thought and violates the First Amendment indirectly by chilling free speech…A statute specifically designed to punish personal prejudice impermissibly infringes upon an individual's First Amendment rights, no matter how carefully or cleverly one words the statute…Punishment of one's thought, however repugnant the thought, is unconstitutional.

In her dissent, Justice Abrahamson (who became chief justice of the Court in 1996) noted that the case presented a difficult question in that it brought together three competing societal values: freedom of speech, equal rights and protection against crime.

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[*] *Wisconsin v. Mitchell*, 508 U.S. 476 (1993)
[**] Wis. Stat. sec. 939.645 (1989-1990)
[*] U.S. Constitution, First Amendment: "Congress shall make no law…abridging the freedom of speech…" (The Wisconsin Constitution contains a similar provision in Article I, Section 3: "Every person may freely speak, write and publish his sentiments on all subjects…"

Abrahamson disagreed that the statute punished abstract beliefs or speech, writing: "Bigots are free to think and express themselves as they wish, except that they may not engage in criminal conduct in furtherance of their beliefs." She also wrote:

> The state's interest in punishing bias-related criminal conduct relates only to the protection of equal rights and the prevention of crime, not to the suppression of free expression. The enhanced punishment justly reflects the crime's enhanced negative consequences on society. Thus interpreted the statute prohibits intentional conduct, not belief or expression. The only chilling effect is on lawless conduct.

In his dissent, Justice Bablitch called the hate crimes statute "a law against discrimination – discrimination in the selection of a crime victim." Bablitch pointed out that numerous state and federal laws exist which prohibit discrimination in the selection of, for example, who is to be hired, fired or promoted. "Yet," he wrote, "the majority says one is constitutional, one is not. I submit it is pure sophistry to distinguish the two. In its effort to protect speech, the majority's constitutional pen gets too close to the trees and fails to see the forest."

Writing for the U.S. Supreme Court, Chief Justice William Rehnquist agreed with both Abrahamson's and Bablitch's reasoning. He noted that the U.S. Supreme Court previously rejected First Amendment-based arguments against such legislation as Title VII of the Civil Rights Act of 1964, which "makes it unlawful for an employer to discriminate against an employee 'because of such individual's race, color, religion, sex, or national origin."

He further wrote that:

> To be sure, our cases reject the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea…Thus a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.

Thompson v. Benson
199 Wis. 2d 674 (1996)

In an opinion authored by Chief Justice Roland B. Day, the Supreme Court voided the education provisions of 1995 Wis. Act 27. Justice Jon P. Wilcox filed a concurring opinion and was joined by Justice Donald W. Steinmetz.

In this case, the Wisconsin Supreme Court decided that the duties of the elected state superintendent of public instruction could not be reallocated or diminished by the appointment of an education commission and education secretary.

The petitioner, Governor Tommy G. Thompson, asked the Court to uphold an action that would permit appointees of the governor to fulfill some of the duties of the state superintendent. The respondent, State Superintendent John T. Benson, argued that such action would take away powers granted to the elective office in Article X of the Wisconsin Constitution.[*]

In deciding the case, the Court interpreted 1995 Wis.Act 27[*], focusing on four areas:

- the meaning of the words in the text;
- the debates over the amendment by the framers of the state constitution
- the context within which the amendment was written and
- the Legislature's first interpretation of the amendment.

The governor argued that the wording of Article X, Section 1, "[t]he supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct" implies that the superintendent's power is to be shared.

However, the Court, when looking at the 1847-48 constitutional convention records, found that, as the framers debated Amendment X, they "rejected the very framework proposed by 1995 Wis.Act 27." Furthermore, the "other officers," the Court found, were meant to be subordinate to the superintendent of public instruction.

The Court found that "the constitutional difficulty with the education provisions of 1995 Wis.Act 27 is not that it takes power away from the office of the SPI, but rather that it gives the power of supervision of public education to an 'other officer' instead of the SPI."

Justice Wilcox wrote in his concurring opinion that although he agreed that the provision was unconstitutional he disagreed with the Court's interpretation of Article X which concluded that the "other officers" were meant to be subordinate. He argued that the Court's decision reduced the Legislature's flexibility to administer future changes to Wisconsin's educational system.

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[*]1995 Wis.Act 27 created the Department of Education, a new Education Commission and a new office, the Secretary of Education. This officer is appointed by the Governor and is head of the Department of Education.

[*] The 1902 amendment to Article X, Section 1, of the Wisconsin Constitution states: "The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties, and compensation shall be prescribed by law. The state superintendent shall be chosen by the qualified electors of the state at the same time and in the same manner as members of the supreme court, . . . The term of office, time and manner of electing or appointing all other officers of supervision of public instruction shall be fixed by law."

<u>Libertarian Party of Wisconsin v. Thompson</u>
199 Wis.2d 790 (1996)

In a unanimous opinion, the Wisconsin Supreme Court upheld the constitutionality of a law creating a special tax to raise funds for a new baseball stadium in Milwaukee. Justice William A. Bablitch wrote the majority opinion for the Court. Chief Justice Shirley S. Abrahamson did not take part in the decision.

In this case, the Court held that the Legislature could raise public funds to build a new baseball stadium. The Libertarian Party argued – unsuccessfully -- that the Stadium Act (1995 Wisconsin Act 56[*]) violated the state Constitution on several grounds.

Governor Tommy G. Thompson filed an original action in the Court asking it to declare the statute constitutional. The Libertarian Party, which had previously begun an action in opposition to the Stadium Act in Milwaukee County Circuit Court, was added to this case.

The Libertarian Party (the petitioner) argued that the Stadium Act violated the Wisconsin Constitution in 15 separate ways. The Court considered only those alleged violations which it determined might have merit.

The petitioners claimed the statute provided for a private law, which, they said, violated Wisconsin Constitution Article IV[**] by creating a tax that applied only to five counties and exempting the stadium from property taxes. The Court ruled that the statute "contains classifications which are open, germane, and relate to true differences between the entities being classified," and therefore, did not create a private tax law.

The petitioner also argued that the Stadium Act did not serve a valid public purpose as provided under Article VIII[***] of the Wisconsin Constitution. The Court found that the Act's purpose was to "encourag[e] economic development and tourism, by reducing unemployment and by bringing needed capital into the state for the benefit and welfare of people throughout the state," which it determined was a valid public purpose.

The Court further found that the Stadium Act did not violate the municipal debt limitation or pledge state credit, but instead promoted the:

> welfare and prosperity of th[e] state by maintaining and increasing the career and job opportunities of its citizens and by protecting and enhancing the tax base on which state and local governments depend upon. It is clear that the community as a whole will benefit from the expenditures of these public funds.

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[*] 1995 Wisconsin Act 56, known as the Stadium Act, provides for "the creation of local professional baseball park districts to include any county within the state with a population in excess of 500,000 and all counties that are contiguous to the county and not already included in a different district….A district is empowered to construct and operate professional baseball park facilities, although the initial construction costs of the facility may not exceed $250 million."

[**] Wisconsin Constitution Article IV, Section 32: "The legislature may provide by general law for the treatment of any subject for which lawmaking is prohibited by section 31 of this article. Subject to reasonable classifications, such laws shall be uniform in their operation throughout the state."

[***] Wisconsin Constitution Article VIII, Sections 4 and 7(2): "The state shall never contract any public debt except…(t)o acquire, construct, develop, extend, enlarge or improve land, waters, property, highways, railways, buildings, equipment or facilities for public purposes."

<u>Risser v. Klauser</u>
207 Wis.2d 177, N.W.2d (1997)

This case began and ended in the Wisconsin Supreme Court; the Court took original action rather than sitting (as it normally does) as an appellate court. Its 4-3 decision served to define further the veto power of the governor and, in the process, the constitutional separation of powers between the executive and legislative branches. The majority opinion, written by Chief Justice Shirley S. Abrahamson, stopped an attempt by the governor to expand his authority to veto pieces of the state budget. The dissent, led by Justice N. Patrick Crooks, would have allowed it.

A 1930 amendment to the Wisconsin Constitution gave the governor what is popularly referred to as a "partial" or "write-in" veto power. This permits the governor to approve, "in whole or in part," appropriation bills (bills that involve expenditures or set aside public funds for a particular purpose). The scope of this power has been in dispute ever since.

This was the eighth in a series of cases going back to 1935 that have attempted to set boundaries for the exercise of the veto power. The prior cases established that:

- the portion of the bill remaining must be complete, workable and related to the original bill;
- the veto can only be exercised on a bill that contains an appropriation; however, it can be used to alter any part of such a bill, not just the appropriation amount;
- words and digits can be struck from the bill but not individual letters within a word;
- a smaller number can be written in for one that is struck so long as it relates to an appropriation.

In this case, the plaintiffs -- primarily several Democratic state legislators -- sought to stop the Republican governor and his administration secretary from lowering a revenue bonding limit in a transportation appropriation bill. The governor's authority to lower the appropriation was not in dispute; however, the bill also contained a monetary limit for the revenue bonds the state was going to issue to raise the funds for the actual appropriation, a limit which the governor also attempted to alter.

The Court majority rejected the governor's argument that the veto power extended to all dollar amounts in an appropriation bill, rather than just those figures relating to the actual appropriation, or, in the alternative, that the bonding limit figure was actually an appropriation figure. Chief Justice Abrahamson wrote that "the dangers of the Governor's approach are obvious" because:

> At the core of our tripartite system of government is the principle that the power of each branch must know limits. Wisconsin governors have perhaps more extensive power to alter legislation that do other state governors. But a governor's power to craft legislation necessarily must have constitutional limits. A write-in veto power which extends far beyond the reduction of appropriation amounts intrudes too far into the constitutional grant of legislative power vested in the Senate and the Assembly. The court felt that well-defined limits on the veto power are particularly appropriate so that both the executive and legislative branches of government can define their actions accordingly without the constant intercession of the judicial branch to resolve disputes.

The dissenting side would have held that the governor could alter any dollar amount in an appropriation bill, particularly where – as the dissent believed to be the case here -- the various amounts are "inseparably connected" to the actual appropriation.