SUPREME COURT OF WISCONSIN

No. 16-01

IN THE MATTER OF THE PETITION TO REPEAL WISCONSIN STATUTES 885.16, 885. 17 885.205 AND AMEND STATUTE 906.01

On April 19 2016 a petition was filed before the Supreme Court seeking repeal of sections 885.16 and 885.17 which were legislatively enacted more than 150 years ago and which statutes were unsuccessfully sought to be amended or repealed on several occasions. The present petition is based on sec. 751.12 of the Wisconsin statutes. The court acted in granting the petition to repeal said statutes and amend sec. 906.01.

This matter is brought on as a motion for reconsideration based on the following grounds:

1. **The action by the Court in repealing said sections is a violation of the constitutional prohibition of laws that define the jurisdiction and legislative rights, the violation of which contravenes the separation of powers doctrine as enunciated by appellate courts of Wisconsin and of the United States in that:**
   - **A. The Supreme Court's act of repealing legislatively enacted statutes in this case was an infringement of**

the right of the legislature to determine the public policy of Wisconsin, on which right the legislature originally enacted said two statutes and thus violated said constitutional prohibition.

B. The act of repealing legislatively enacted statutes by the Supreme Court was not a power granted to the Supreme Court under the Wisconsin Constitution and thus constituted an act described by the Supreme Court case law as acts of a "superlegislature" and not valid under the separation of powers doctrines of the Wisconsin Constitution and the Federal Constitution.

C. The act of repealing the said legislatively enacted acts could not nullify or repeal said legislation unless it would be by amendment of the Wisconsin Constitution and is thus ineffective as the Wisconsin Constitution has not been amended to be applicable to support the repeal.

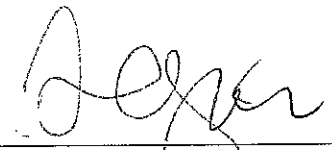
D. Sections 885.16 and 885.17 are not procedural statutes but are substantive statutes with the force of law and also not within the provisions of 752.12.

E. The legislative repeal and apparent re-enactment as a new statute was designed to regulate and legislate public policy and not a power of the Supreme Court, and was without any support of invalidity of said statutes under either the state or federal constitutions and was an infringement of the powers of the legislature to enact and not the power of the Supreme Court to legislate by enactment.

F. The legislature did not affirm the repeal in violation of its power and right to refuse or reject such repeal.

G. The governor of Wisconsin did not sign into law any bill required to be presented to him for approval of such legislative action by the Wisconsin Supreme Court and the bill consequently has no executive enforcement to be effective and the enactment of said bill without the head of state approval by signature is an additional act of superexeution.

H. The repeal of said acts and their re-enactment as section 906.01 is violative of the due process rights of persons relying on the repealed acts, guaranteed to such persons by the 5th and 14th amendments to the federal constitution, as the re-enacted statute did not set forth any restrictions against retroactive application of rights that arose prior to the date of application of said two acts.



S.A. SCHAPIRO pro se
Attorney at law 01008871
2925 E. Kenwood
Milwaukee Wis, 53211
Mailing address:
Box 11574
Milwaukee Wis. 53211
414-962-7474

BRIEF OF MOVANT

I. THE SEPARATION OF POWERS DOCTRINE DOES NOT PROVIDE FOR THE JUDICIAL BRANCH TO REPEAL AND ENACT STATUTES , PARTICULARLY WHEN THE LEGISLATION WAS ENACTED BY A LEGISLATURE AND WITHSTOOD ATTEMPTS AT LEGISLATIVE AMENDMENT OR REPEAL IN THE PAST.

There is no separation of powers doctrine set forth in the Wisconsin constitution, but it is acknowledged as essential in governmental operation. ***State ex rel Frederick v. Circuit Court for Dane County 531 NW2d 32 192 Wis. 2d 1(1995).***

The statutes were first enacted in laws 1858, chapter 134 Sec. 2 and since then were amended and reconsidered 13 times, by the legislature none of which succeeded in a repeal of the so called "deadman's" provisions yet those provisions were among those amended (1993 Act 486, Sec. 502 for 885.16 and 1993 Act 486 sec. 503 for 885. This is reflective of the legislature's approval of the statutes as it stood during this lengthy period with no significant change relating to the admissibility of testimony in cases involving interaction between deceased persons and witnesses testimony relating to those persons. In no documents filed nor in any arguments is it alleged that either of these two enacted statutes are unconstitutional.

During the period these two statutes have been in effect, the Supreme Court has enunciated an appellation of what is known more commonly

as super legislation as done by "super legislatures" which is indicative of a disapproval of legislation done by courts engaging in adopting, framing or repealing laws of their own design. In *Flynn v. Department of Administration 216 Wis. 2d 521, 576 NW2d 245, (1998*In *Flynn, supra*, a citizen sued arguing that a law was invalid under the separation of powers constitutional application and on appeal the Court said, in agreeing that the law challenged was proper for court use and constitutional, said, nevertheless, that it was an issue for the legislature to determine how state funds should be disbursed, and not one for the courts to determine as the statute had so required:

> **"The power of this court to declare invalid duly enacted legislation is an awesome one. It is a power that is largely unchecked, most always final*. If we are to maintain the public's confidence in the integrity and independence of the judiciary, we must exercise that power with great restraint, always resting on constitutional principles, not judicial will. We may differ with the legislature's choices, as we did and do here, but must never rest our decision on that basis lest we become no more than a super-legislature. Our form of government provides for one legislature, not two. It is for the legislature to make policy choices, ours to judge them based not on our preference but on legal principles and constitutional authority. The question is not what policy we prefer, but whether the legislature's choice is consistent with constitutional restraints.* We find that it is in this case. (Emphasis added).**
>
> **See *also Haferman v, St. Clare Healthcare Foundation Inc. 286 Wis. 2d 621, 707 NW2d 853, 2003 WiApp 1307; Kukor v. Grover 148 Wis. 2d 469, 436 NW2d 568(1989); Wisconsin Medical Society v. Morgan 328 Wis. 2d 469, 787 NW2d 22, 2010 WI 94, 2009 AP***

728 which repeat the same appellation involving infringements by one branch of government onto another.

The issue present in the statutes herein which were repealed presented substantive issues, and not solely procedural issues. The situation of assessment of competency is substantive and has widespread application to all civil actions, and covers issues relating to property, mental competency, and family law, should not be subject to purely procedural evaluation since it has the force of law. The substantive provisions of any enactments when not properly performed in the enactment process is violative of procedural due process and the enactment so involved is ineffective without the force of law. ***State ex rel Martin v. Zimmerman 288 NW2d 44, 233 Wis. 26. (attached).***

Although the United States Supreme Court in ***Funk v. United States 290 U.S. 371, 54 S.Ct. 212, 78 L. ed 2d 369(1933)*** has taken the same perspective as the petitioners do in this case, but in ***Funk***, Congress had no applicable statutes to apply for use in courtroom issues, and thus, it was done by judicial common law decree and not by intruding into Congress's jurisdiction. Petitioner has argued that ***Funk*** is in accord with its position and asserts that ***Funk*** answers the question affirmatively. That question :

> "is it not the duty of the court, if it possess the power to decide it in accordance with present-day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past?"

An affirmative answer of "yes" to the negatively propounded question indicates the party replying agrees with the text of the negatively phrased question, and thus, the answer to the question of "YES" means that there is agreement between the two persons, which was that, yes, it is not the duty of Court to decide the question in the manner the question sets forth. This case specifically holds that where there is no statute on the issue, the change can be judicially made, as the US Supreme Court then did, but only where there is no statute. The case specifically sets forth an exception to the rule the petitioner urges to be in point. The petitioner is in error. This is the exception the petitioner fails to overcome, and not even mention with respect to the ruling in *Funk.*

Furthermore, there is no part of the federal constitution that provides for separation of powers of the three branches of government. Common law was better suited for judicial change in the federal court but, unlike in Wisconsin where the legislature sits and enacts and repeals, the legislature cannot be bypassed after 150+ years of enactment, modifications and reviews. In Wisconsin, in order that there be made exceptions to the operation of constitutional provisions, those changes can be properly maid only in the method prescribed and by the entity that properly functions in amending the constitution, which method is set forth in the constitution itself and in the manner in which it is carried out by the legislature in this case as set forth

in Article 12 sec. 1 which was not amended during the time in which the petitioner has presented its argument. That article 12 requires that the amendment process proceed as follows:

1. **Proposed in either house, and if agreed upon, to be referred to the next legislature chosen at the next election. This is the bill set forth in Article 17 sections 1 and 2 and is required for enactment by Article 17 sec. 2.**
2. **The proposed amendment must be published for 3 months before such election.**
3. **If the new legislature after that agrees by a majority of the members of each house, then the amendment proposed is to be submitted to the people.**
4. **If the people approve and ratify the amendment by a majority of the voters such amendment then becomes part of the state constitution.**

None of the foregoing 4 requirements were performed by the legislature and no submission to the electorate was ever made. Apparently no bill was ever prepared or used.

The Supreme Court could not act as it did without the power of the legislature being carried out in the foregoing manner. The enactment of 751.12 did not excuse the amendment to the constitution being bypassed as it involved amending the law. Categorizing the scope of the two repealed statutes as solely

procedural and thus, within 751.12 would not properly justify the means taken to require all of the foregoing actions to be taken before it was appropriate to present the matter to the Supreme Court, Article 4 specifically and clearly says what it says:

> **" The legislative power shall be vested in a senate and in an Assembly."**

The legislative power covers amendment of laws an enactment of laws and amendment of laws.

The legislative power includes the power to repeal a law and there is no constitutional power of the Supreme Court to repeal a legislative enactment or remove it in any way via a ruling, unless the law is found to be unconstitutional and at bar, no argument to the court in this case alleged unconstitutionality on either of the two pertinent statutes.

There is little room for invasion of another branch into the legislature's statutorial dominion other than for ministerial-sized situations or other activity which would not usurp any of the legislature's work or interfere with its functions.

It is appropriate to alert the Court as to the judicial activity of the court as respects the Executive Branch, even though this case does not yet involve any such issue, yet the ruling and order of

the Supreme Court has invaded also into the dominion of the Executive Branch of the government of the State of Wisconsin. The Wisconsin statutes also prescribe the power of the Executive. (Article 5 sec. 1 (terms of years for governor and lieutenant governor). His duties are such that no act of law made by legislative creation by any court would be enforceable, much less valid. His duties are to execute the law. (Article 4 sec. 4 and 10). Pursuant to section 10 an act cannot become a law without being approved by the governor who must sign all laws before a bill becomes a law. According to the information available at this time, the governor has not been presented with any bill, nor approved of any act of the Supreme Court relating to the new statute the court has announced will be going into effect in 60 days. That leaves a situation in effect that there could be no law whatsoever in effect at this time.

The result, with no governor executing the law by signature, leaves still further questions unresolved as to the status of the laws the Court indicated it was enacting or it was repealing.

II. THERE IS NO BASIS FOR THE ARGUMENTS OF THE PETITIONER THAT IT AS A "ONE WAY STREET" CAUSING DEATH, AND THAT IT AUTOMATICALLY MEANS THAT THE LIPS OF ONLY THE SURVIVOR OF THE CRASH ARE TO BE CREDIBLE SO THAT THE JURY ONLY HEARS THE SURVIVOR SPEAK, WHEN THE DECEASED CANNOT IS THE PROPER ROAD FOR JUSTICE, AS IF THE SURVIVORS HAVE THE BENEFIT OF THEIR FIRST HAND INFORMATION, WHEN THE DECEASED CANNOT SPEAK. IF BOTH ARE ALLOWED TO GO INTO ALL

THE FACTS, THE EDGE WILL GO TO THE SURVIVORS AND THE ONE SUFFERING DEATH AND HIS OR HER HEIRS HAVE NOTHING TO SAY. AND OF COURSE, THE SURVIVORS CAN MAKE UP ANY STORY THAT THE DECEASED IS UNABLE TO REBUT.

Can anyone reasonably conclude that the survivors will be automatically credible and not assert demands on the deceased and his or her family?

Who is more likely to suffer from fraudulent claims: the family of the deceased or the survivors, when the survivors have no factual equality to the truth? The fear and likelihood of misrepresentation falls the same on each side equally under the un-repealed law. Without the deadman's rule, settlements will be less likely as parties will get their witnesses with no hesitation of any kind.

The proponents in their briefing belittle time and human nature as components subject to arise in a wide open courtroom battle with survivors in charge of most of the facts with a view of the 21st century as a new era of morality of sorts. As long as mankind has existed, temptation remains to lead man in the wrong direction. The movant and an accompanying proponent of the Supreme Court order of enactment and repeals, as portrayed by them as a re-awakening of rationality and morality in the 21 century, justifying a new insight into righteousness in litigation is illusory and outright error. *See*

Genesis 37-40 **(the life experiences of Joseph) and** ***United States (Securities and Exchange Commission) v. Bernard Madoff 2009 U.S. Dist. LEXIS 21572 (SDNY); 2009 U.S. App. LEXIS 5985, March 20, 2009, ; 2009 U.S. Dist. LEXIS 30712 (SDNY), Fed. Sec. L. Rep. (CCH) P95,070; 826 F. Supp. 2d 699, 2011 U.S. Dist. LEXIS 137962 (S.D.N.Y., 2011)*****; 2009 U.S. Dist. LEXIS 132713, June 26, 2009; 626 F. Supp. 2d 420; 2009 U.S. Dist. LEXIS 52676; 37 Media L. Rep. 2038, June 17, 2009.**

And what about the situation where there is no establishment of the time the statutes would go into effect, at the time of the death of the now deceased person, time of filing the action, status of minors. Will there be situations allowing testimony as to facts before the death or the particular person, as to whom he talked to and what was said, or by whom? The "re-enacted" statute is silent. This can be asserted as a procedural and substantive due process infringement in litigation.

It is prayed the court reconsider its action and its rulings and vacate them.

January 11 2017

Respectfully,

S.A. Schapiro pro se
Attorney at law
2925 E. Kenwood Blvd.
Milwaukee Wis. 53211
Mailing address:
Box 11574
Milwaukee Wis. 53211
414-962-7474

Disclaimer

State ex rel. Martin, Attorney General, Plaintiff, v. **Zimmerman,** Secretary of State, Defendant

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF WISCONSIN

233 Wis. 16; 288 N.W. 454; 1939 Wisc. LEXIS 4

November 10, 1939, Argued
November 16, 1939, Decided

PRIOR HISTORY: [***1] Original Action of mandamus brought in this court pursuant to leave granted. The attorney general sues on behalf of the people of the state of Wisconsin to require the secretary of state to publish an act of the legislature. The facts are as follows: The legislature of the state of Wisconsin prior to adjourning sine die at 4:15 o'clock p. m. on October 6, 1939, duly enacted Bill No. 563, S., and caused the bill, properly authenticated by the officers of both houses of the legislature, to be presented to the governor for his approval at 10:40 a. m. on October 7, 1939. The governor in the exercise of the power vested in him by virtue of the provisions of sec. 10, art. V, of the Wisconsin constitution, approved Bill No. 563, S., in part and disapproved it in part on October 14, 1939, or within the six-day period prescribed by sec. 10, art. V, which is printed in the margin. [1]

1 Sec. 10, art. V, Wisconsin constitution. "Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large upon the journal and proceed to reconsider it. Appropriation bills may be approved in whole or in part by the governor, and the part approved shall become law, and the part objected to shall be returned in the same manner as provided for other bills. If, after such reconsideration, two thirds of the members present shall agree to pass the bill, or the part of the bill objected to, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of the members present it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the members voting for or against the bill or the part of the bill objected to, shall be entered on the journal of each house respectively. If any bill shall not be returned by the governor within six days (Sundays excepted) after it shall have been presented to him, the same shall be a law unless the legislature shall, by their adjournment, prevent its return, in which case it shall not be a law."

[***2] Thereafter on October 14, 1939, at 10:16 o'clock a. m., and within six days (Sunday excepted) after the bill had been presented to him for approval, the governor deposited the bill in the office of the secretary of state in the form in which he approved it. In view of the conclusion which has been reached, it is not necessary for us to set out the bill or to indicate which parts of the bill were approved and which were disapproved.

The secretary of state has refused to publish the bill as he is required to do by sec. 21, art. VII, of the constitution and secs. 14.29 (10) and 35.64 of the statutes, on the ground that the act deposited in his office was not validly enacted and approved, specifically it being his contention that the power of partial veto vested in the governor by sec. 10, art. V, of the constitution, cannot be exercised after the adjournment of the

legislature and the bill was therefore not properly approved in part and should not be published.

The secretary of state further contends that while he has no power to pass upon the constitutionality of the law, he does have power to determine whether or not the bill was validly enacted and approved so far as [***3] procedural steps are concerned, whether those procedural steps are prescribed by the constitution or the legislature.

DISPOSITION: Let the writ issue.

CASE SUMMARY

PROCEDURAL POSTURE: In an original action of mandamus brought to the court (Wisconsin) pursuant to leave granted, the Attorney General (Wisconsin), on behalf of the people of Wisconsin, sought to require the Secretary of State (Wisconsin) to publish an act of the legislature. The issues included whether the act at issue was a "law," as that term was used in the Wisconsin Constitution and statutes and whether mandamus lay.

OVERVIEW: The position of the Secretary of State was that the act was not a law because it was not constitutionally approved and he was therefore not required to publish it because publication would be a futile act. The court commented that an act of the legislature could not operate as a law until it had been officially published. Thus, when, in Wis. Const. art. VII, § 21, the legislature was required to provide for the speedy publication of all statute laws, and it was further declared that no general law would be in force until published, the term "law" was used in a narrower sense. The term "law" as there used referred to an act of the legislature that had been deposited in the office of the Secretary of State, properly authenticated by the presiding officers of the two houses, and approved by the Governor (Wisconsin) to become effective as a rule of conduct when published. The court pointed out that the Secretary of State neither officially nor personally had any interest in the publication of the act. No person could raise the constitutionality of an act who was not in his official capacity or personally affected by it. No one was affected as yet because there was no law.

OUTCOME: The court issued the writ.

CORE TERMS: secretary of state, governor, publish, power to pass, prescribed, deposited, constitutional amendments, rule of conduct, attorney general, statutory duty, authenticated, futile, statute laws, general law, general sense, constitutional requirements, substantive provisions, discretionary, prescribing, officially, personally, mandamus, logical, invalid, speedy, notice, vested, audit, ministerial officers, ministerial

LexisNexis® Headnotes

Governments > Legislation > Enactment

HN1 See Wis. Const. art. VII, § 21.

Governments > Legislation > Enactment
Governments > State & Territorial Governments > Employees & Officials

HN2 See Wis. Stat. § 14.29(10).

Governments > Legislation > Enactment

HN3 See Wis. Stat. § 35.64.

Governments > Legislation > Enactment

HN4 See Wis. Stat. § 14.18.

Evidence > Authentication > General Overview
Governments > Legislation > Enactment
Governments > Legislation > Interpretation

HN5 The term "law," as used in Wis. Const. art. VII, § 21, refers to an act of the legislature which has been deposited in the office of the Secretary of State (Wisconsin), properly authenticated by the presiding officers of the two houses, and approved by the Governor (Wisconsin) to become effective as a rule of conduct when published.

Governments > Legislation > Interpretation
Governments > State & Territorial Governments > Employees & Officials

HN6 **The Secretary of State (Wisconsin) is not vested by virtue of his office with the power of interpreting the Wisconsin Constitution for other officers in the discharge of their duties.**

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Abuse of Public Office > Neglect of Office > Elements
Governments > State & Territorial Governments > Employees & Officials

HN7 **When the Secretary of State (Wisconsin) refuses to perform a duty imposed upon him by law on the ground that some other official has not performed his duty in accordance with the provisions of the Wisconsin Constitution, he acts judicially and exercises a power not conferred upon him.**

Governments > Legislation > Enactment
Governments > Legislation > Interpretation

HN8 **An act of the legislature that is not authorized by the Wisconsin Constitution is no more a law than an act that has not been properly adopted because the necessary procedural steps have not been followed. In either event no effective law results.**

Governments > Legislation > Interpretation

HN9 **An unconstitutional law stands as if the law had not been passed.**

Civil Procedure > Justiciability > Standing > General Overview
Civil Procedure > Parties > Capacity of Parties > General Overview
Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview

HN10 **No person may raise the constitutionality of an act of the legislature who is not in his official capacity or personally affected by it.**

COUNSEL: For the plaintiff there were briefs by the Attorney General and James Ward Rector, deputy attorney general, and oral argument by Mr. Rector.

Robert M. Rieser of Madison, for the defendant.

JUDGES: Rosenberry, C. J.

OPINION BY: ROSENBERRY

OPINION

[*18] [**456] Rosenberry, C. J. Sec. 21, art. VII, of the Wisconsin constitution provides:

HN1 "The legislature shall provide by law for the speedy publication of all statute laws. . . . And no general law shall be in force until published."

Sec. 14.29, Stats., provides:

HN2 "The secretary of state shall: . . .

"(10) *Publish proposed constitutional amendments and* laws. To publish the laws as provided by section 35.64. . . ."

[*19] Sec. 35.64, Stats., provides:

HN3 *"Publication of all laws.* Every law shall be published in the official state paper immediately after its passage and approval, in type not smaller than six point; and until so published shall not take effect."

Sec. 14.18, Stats., provides:

HN4 *"Deposit of acts; notice.* The governor shall cause all legislative acts which have become laws by his approval [***4] or otherwise to be deposited in the office of the secretary of state without delay, and shall inform thereof the house in which the respective acts originated."

The position of the secretary of state is that the act deposited with him by the governor as alleged in the petition is not a law because it was not constitutionally approved, and he is therefore not required to publish it for the reason that its publication will be a futile act. This contention requires us to consider the meaning of the term "law" as used in the constitution and in the statutes with respect to publication of acts of the legislature approved by the governor. It is apparent that the word "law" was not used in its broad general sense. When so used it is defined as "the aggregate of those rules and principles of conduct which the governing power in a community recognizes as those which it will enforce or sanction." *State v. Lange Canning Co.* (1916) 164 Wis. 228, 235, 157 N.W. 777, 160 N.W. 57. In that sense an act of the legislature can never be a law until it is published as required by the constitution and the statutes. If that argument were sound, the secretary of state could prevent any act of the legislature [***5] from becoming a law by merely refusing to publish it. Under the constitution and the statutes it is clear that an act of the legislature cannot operate as a law until it has been officially published. Therefore when in sec. 21, art. VII, of the constitution the legislature is required to provide for the speedy publication of all statute laws**, and it is further declared that no general law shall be in force until published, the term "law" is used in a narrower sense. It is [*20] plain that HN5 the term "law" as there used refers to an act of the legislature which has been deposited in the office of the secretary of state, properly authenticated by the presiding officers of the two houses and approved by the governor to become effective as a rule of conduct when published.**

We do not need to consider in this case acts of the legislature which become laws otherwise than by the approval of the governor for the governor in this case approved the act in part and the part approved thereby became a "law" within the meaning of that term as used in sec. 10, art. V, of the constitution. When an act so approved reaches the office of the secretary of state, the legislature has commanded that he immediately [***6] publish it. Upon its publication, unless otherwise provided, it then becomes a law in the broad sense of prescribing a rule of conduct. Neither the constitution nor the laws enacted pursuant thereto confer upon the secretary of state

any discretion with respect to what he shall do with an act which reaches his office in the manner prescribed by law and in the form of law. No discretionary power to pass upon the constitutionality of acts so authenticated and deposited with him can be inferred. The statute is mandatory and imposes upon him the duty to publish which is a purely ministerial function.

The constitution prescribes and defines the powers of the legislative and executive departments of the government, and all officers in the discharge of their functions are under an obligation to comply with its requirements. HN6 The secretary of state is not vested by virtue of his office with the power of interpreting the constitution for other officers in the discharge of their duties. HN7 When the secretary of state refuses to perform a duty imposed upon him by law on the ground that some other official has not performed his duty in accordance with the provisions of the constitution, he acts judicially [***7] and exercises a power not conferred upon him.

The whole governmental process would be thrown into utter confusion if ministerial officers in one department in the [*21] absence of legislative authority assumed to exercise the power to pass upon the validity and constitutionality of the acts of officers of co-ordinate departments of government. If [**457] one ministerial officer or one officer in the performance of a ministerial duty may constitute himself a tribunal to pass upon the acts of other officers, such power might be assumed by all officers and the governmental process would be brought to a halt.

Upon the oral argument it was ably contended on behalf of the secretary of state that the power of the secretary of state was limited to determining whether the procedural steps prescribed by the constitution had been followed, and it was not to be supposed that the secretary of state had power to pass upon the validity of acts because they violated what may be referred to as substantive provisions of the constitution. HN8 An act of the legislature which is not authorized by the constitution is no more a law than an act which has not been properly adopted because the necessary procedural steps [***8] have not been followed. In either event no effective law results. This court has said with respect to HN9 an unconstitutional law that the matter stands as if the law had not been passed. *Bonnett v. Vallier* (1908), 136 Wis. 193, 116 N.W. 885. While the present incumbent of the office disclaims any such power, if the power he does claim is vested in him, his successors in office would have a perfectly logical right to proceed the whole way and assume the power to pass upon the validity of the acts of the legislature upon substantive as well as procedural grounds. Despite the ingenious argument made with respect to limiting the discretionary power of the secretary of state to procedural matters, we see no logical ground upon which such a distinction may be based. If the act is invalid for any constitutional reason it is no law and the publication of an act which is enacted in violation of the substantive provisions of the constitution is just as futile an act as the publication of one passed in violation of procedural requirements.

[*22] We direct attention to three cases. In *State ex rel. Bentley v. Hall* (1922), 178 Wis. 109, 189 N.W. 265, it was held that the secretary of state [***9] was not required to submit a proposed constitutional amendment at the ensuing election where it appeared that a resolution published gave notice that two independent propositions were to be voted on contrary to the express provisions of sec. 1, art. XII, of the constitution. In that case the secretary of state having been advised by the attorney general that the proposed publication would be insufficient to meet constitutional requirements with respect to amendments to the constitution, the secretary of state announced that he could not properly comply with the apparent direction of ch. 479,

Laws of 1921, the reason being that in the proposal passed by the legislature in 1921 certain provisions contained in the proposal adopted by the legislature in 1919 did not appear. There was, therefore, a failure to comply with the constitutional requirement that the proposal be approved by two legislatures each of which should be published. The question raised here was not raised in that case. We need not consider what the result would have been if the question had been raised. The secretary of state did not decline to publish the act of the legislature. The attorney general advised the secretary [***10] of state that the proposed constitutional amendment was not in proper form for consideration by the people. The case on its facts is very different from the case now under consideration.

In *State ex rel. Wisconsin Tel. Co. v. Henry* (1935), 218 Wis. 302, 260 N.W. 486, the secretary of state published the bill in the form in which it was received by him, and at the suit of a private party the question of the validity of the publication was considered. Manifestly, that case has no bearing upon this case.

In *State ex rel. Finnegan v. Dammann* (1936), 220 Wis. 143, 264 N.W. 622, 103 A. L. R. 1089, the secretary of state [*23] had published an act in the form in which it reached him. The question in the case was as to the effect of a partial veto of the act. So far as we are able to discover, no case in this state has dealt with the refusal of the secretary of state to perform his statutory duty with respect to the publication of an act of the legislature which has been duly authenticated by the signatures of the speaker of the assembly and the president of the senate and approved by the governor.

On behalf of the secretary of state it is further argued that *mandamus* does [***11] not lie because the court will not require the secretary of state to publish a law which is unconstitutional and so compel him to perform a futile act. We think this position is untenable. The attorney general brings this action on behalf of the people of the state of Wisconsin, asking [**458] that one of the officers elected by the people be required to perform his statutory duty. The secretary of state neither officially nor personally has any interest whatever in the matter of the publication of this act. If it turns out that an invalid law is published the responsibility therefor rests with the governor, not with the secretary of state. It is a thoroughly well-established principle of law that HN10 no person may raise the constitutionality of an act of the legislature who is not in his official capacity or personally affected by it. *Appeal of Van Dyke* (1935), 217 Wis. 528, 259 N.W. 700. No one is affected as yet because there is no law, using the term in its broad general sense of prescribing a rule of conduct.

If and when the secretary of state is called upon to audit warrants issued under and pursuant to the act, he has duties of an entirely different nature to perform. Those duties [***12] are prescribed by secs. 14.30 and 14.31, Stats. Under those sections he is required to examine, determine, and audit *according to law* the claims of all persons against the state. It is considered that it is too plain for argument that under the facts of this case a writ of *mandamus* will lie to compel the [*24] secretary of state to perform his clearly prescribed statutory duty. *State ex rel. Attorney General v. Cunningham* (1892), 81 Wis. 440, 51 N.W. 724.

We do not enter upon a consideration of the contention of the secretary of state with respect to the validity of the act, because that question is not now before the court. When the act is published, and the interest of some officer or citizen is adversely affected by the act, that question may be presented in a proper case. No court of last resort in the land is more liberal or more prompt than this court in the exercise of its

original jurisdiction in cases where the prerogatives of the state or the duties and acts of its constitutional officers are involved.

By the Court. -- Let the writ issue.
