



Wisconsin Legislative Reference Bureau

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# The Legislature's Relationship with the Courts: The Role of Judicial Review in Legislating Wisconsin

Michael Gallagher, Senior Legislative Attorney  
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One East Main Street, Suite 200  
Madison, Wisconsin 53703  
608-266-3561

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## **The Legislature's Relationship with the Courts: The Role of Judicial Review in Legislating in Wisconsin**

Political authority in Wisconsin is divided among the legislative, executive, and judicial branches of government. The role of courts in this arrangement is to adjudicate legal disputes and determine the constitutionality of statutes and other governmental actions. This power to determine constitutionality is called the power of judicial review. To grasp fully the role of the judiciary in legislating in Wisconsin, one must understand the special place of the judiciary and its power of judicial review in our system of government, the unique threat of judicial supremacy, and the limitations upon the judiciary that help mitigate that threat.

### **THE JUDICIAL BRANCH**

Mirroring article III of the U.S. Constitution, article VII, section 2, of the Wisconsin Constitution vests the state's judicial power in the courts. Under the doctrine of separation of powers, the judiciary is generally self-regulating and free in its core functions and powers from interference by the other branches. The Wisconsin court system is primarily composed of circuit courts, a court of appeals, and a supreme court.

Serving as the state's trial courts, Wisconsin's circuit courts have original jurisdiction over virtually all state criminal and civil actions. Circuit court judges are elected to six-year terms. There are 69 circuits in the state, with 249 judges as of May 2016.

An intermediate "error-correcting" court, the Wisconsin Court of Appeals must review all appeals of final circuit court decisions and may also review certain nonfinal circuit court decisions. The court of appeals consists of 16 judges elected to six-year terms, from four districts with headquarters in Madison, Milwaukee, Waukesha, and Wausau. Although the court of appeals is divided into districts, it acts as a single court, making decisions that apply statewide.

Just as the U.S. Supreme Court is the highest court in the land for federal law, the Wisconsin Supreme Court is the "court of last resort" in Wisconsin. While all of the state's courts have the power of judicial review, the Wisconsin Supreme Court has the final word with respect to Wisconsin law—including the constitutionality, under the Wisconsin Constitution, of state statutes. Unlike the state's lower courts, the Wisconsin Supreme Court has the discretion to determine which cases it takes, and it normally takes only those cases that will develop or clarify Wisconsin law. There are seven justices on the Wisconsin Supreme Court, each of whom is elected to a term of ten years.

Wisconsin's courts, like those of other states, are separate from the federal court system, which is divided into 94 district trial courts, 12 federal circuit courts of appeals, and the nine-member U.S. Supreme Court. There is, however, some overlap in the jurisdictions of state and federal courts. State courts have primary jurisdiction over cases pertaining to state law, but a state court must apply and follow federal law when necessary. Federal courts have primary jurisdiction over cases pertaining to federal law.

### **THE HISTORY AND THEORY OF JUDICIAL REVIEW**

Although neither the state nor the federal constitution explicitly grants courts the power to strike down legislative acts that fail to pass constitutional muster, that power has traditionally been seen as inherent in the constitutional grant of judicial power to the courts. In *The Federalist* No. 78—the definitive account of the role of the judiciary under the U.S. Constitution—Alexander Hamilton wrote that the "interpretation of the laws is the proper and peculiar province of the courts." For Hamilton, if the constitution conflicts with a statute, "the Constitution ought to be preferred to the statute" because the constitution is a "fundamental law" that trumps all legislative enactments.

In 1803, in *Marbury v. Madison*, the U.S. Supreme Court confirmed the power of the courts to void laws as unconstitutional. Writing for a unanimous court, Chief Justice John Marshall reasoned that “a legislative act contrary to the constitution is not law.”<sup>1</sup> Echoing *The Federalist* No. 78, Marshall added, “It is emphatically the province and duty of the judicial department to say what the law is.” Under *Marbury* a court may overturn a law the court deems unconstitutional.

By the mid-1850s, all then-existing states had incorporated some form of judicial review into their jurisprudence. The Wisconsin Supreme Court’s first definitive statement on the matter came in 1855 in *Attorney General ex rel. Bashford v. Barstow*, a case that attorney and Wisconsin legal historian Joseph A. Ranney has called Wisconsin’s *Marbury v. Madison*.<sup>2</sup>

In *Bashford*, the Wisconsin Supreme Court was pulled into the fray of the 1855 gubernatorial election. The incumbent Democrat, William Barstow, defeated his Republican challenger, Coles Bashford, by a narrow margin: 157 votes out of 72,553 total votes cast. Bashford, however, cried foul, alleging false returns in Governor Barstow’s favor from several northern counties. State militia forces sympathetic to the sitting governor encamped in Madison, ready to defend Barstow’s reelection by force if necessary, and Barstow famously declared he would not give up his office alive.

Bashford challenged Barstow’s reelection in the Wisconsin Supreme Court. But Barstow petitioned dismissal, asserting that the supreme court lacked authority over a political dispute. The supreme court disagreed and dismissed the case, conclusively establishing its power under the Wisconsin Constitution “to ascertain and enforce rights as fixed by that instrument,” including the election and constitutional qualifications of the putative governor. The court emphasized that “this entire judicial power is vested in the courts, without limitation or restriction. Whether this was a wise grant of power is not now open for controversy.”<sup>3</sup>

Remaining obstinate, Governor Barstow dropped out of the court proceeding, but not before he ominously announced, “I shall deem it my imperative duty to repel, with all of the force vested in this department [of the governor], any infringement upon the rights and powers which I exercise under the constitution.”<sup>4</sup> A constitutional crisis was averted, however, and the controversy ended quietly, without any serious skirmish. After public opinion turned against him, Barstow relinquished the governorship on March 21, 1856. The court determined that there had in fact been significant irregularities in key election results supporting Barstow and unanimously declared Coles Bashford governor.

While *Bashford* raised a question about a specific gubernatorial election, not a statute’s constitutionality, Wisconsin courts since *Bashford* have assumed that what’s good for the gubernatorial goose is good for the legislative gander—courts have the power to void the legislature’s enactments as unconstitutional. Indeed, close to the time *Bashford* was decided, the Wisconsin Supreme Court took an extremely expansive view of its own power of judicial review. The court asserted it had the authority even to declare an act of the U.S. Congress unconstitutional, in this case the Fugitive Slave Act of 1850, which in part required officials in free states, such as Wisconsin, to return escaped slaves to their owners in slave states.

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<sup>1</sup>*Marbury v. Madison*, 5 U.S. 137, 177 (1803).

<sup>2</sup>*Att’y Gen. ex rel. Bashford v. Barstow*, 4 Wis. 567 (1856); Joseph A. Ranney, *Trusting Nothing to Providence: A History of Wisconsin’s Legal System* (University of Wisconsin Law School, 1999), 79–80.

<sup>3</sup>*Bashford*, 4 Wis. at 746.

<sup>4</sup>Governor William Barstow, letter to Wisconsin Supreme Court, March 8, 1856.

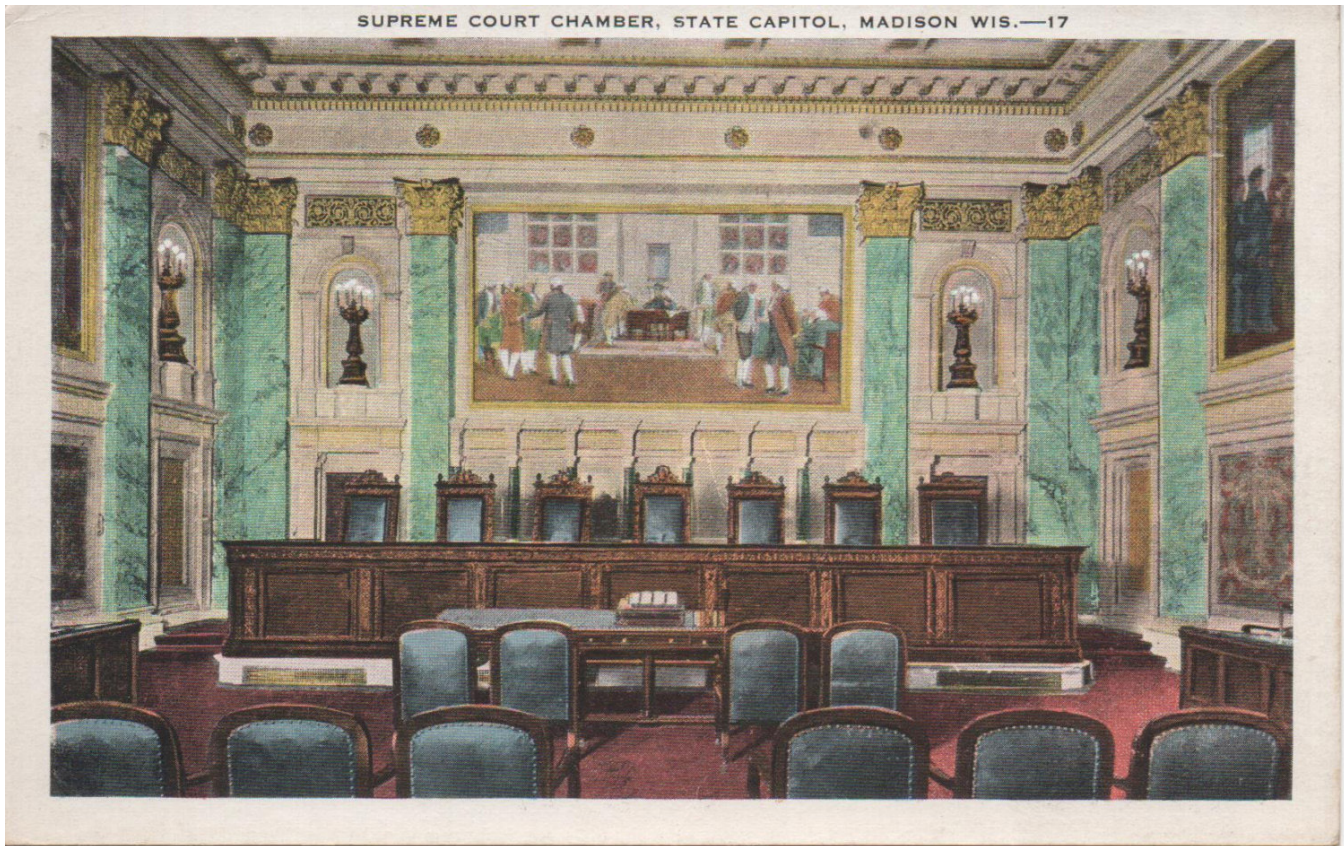


Image courtesy of the Wisconsin Historical Society.

In *Ableman v. Booth*, however, the U.S. Supreme Court rejected that assertion, but in turn outlined its own power of judicial review: “If it appears that an act of Congress is not pursuant to and within the limits of the power assigned to the Federal Government, it is the duty of the courts of the United States to declare it unconstitutional and void.”<sup>5</sup> Thus, Wisconsin had a vital part to play in the development of the doctrine of judicial review at the federal level. As for the Fugitive Slave Act of 1850, the U.S. Supreme Court did not actually void the act in *Ableman v. Booth*, but only reserved for itself the right to do so. As a prelude to the conflict yet to come, the act was openly opposed and went largely unenforced in many free states. After the fractured country saw more than half a million battle-slain bodies in its forests and fields, Congress finally repealed the act in 1864.

### THE THREAT OF JUDICIAL SUPREMACY

The *Bashford* affair shows one way in which judicial review empowers the courts to curb abuses of power in the other branches of government. Alexander Hamilton and other Founding Fathers believed that judicial review is indispensable to protect the constitutional rights of individuals and political minorities against the “tyranny of the majority.” But, taken to its extreme, judicial review can itself lead to a kind of tyranny—the tyranny of the courts. Often called judicial supremacy, this potential abuse of the judicial power threatens representative democracy by undermining the majoritarian legislature’s proper functioning as the preeminent lawmaking body. The Anti-Federalists, to whom in large part the *Federalist Papers* were penned as a response, put it this way: “But the judges under this

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<sup>5</sup>*Abelman v. Booth*, 62 U.S. 506, 520 (1859).

constitution will control the legislature, for the [members of the] supreme court are authorized in the last resort, to determine what is the extent of the powers of the Congress; they are to give the constitution an explanation, and there is no power above them to set aside their judgment. . . . In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.”<sup>6</sup>

### **LIMITATIONS ON JUDICIAL REVIEW**

There are a number of limitations on the courts’ power of judicial review that help minimize the threat of judicial supremacy. In fact, Wisconsin courts have only rarely struck down state statutes.

Wisconsin judges and justices are elected by the people to serve specified terms, subject to reelection—unlike federal judges and justices, all of whom are appointed by the president, confirmed by the U.S. Senate, and serve for life. That means that the Anti-Federalists’ concern that the courts are not answerable to the people has less force in Wisconsin. One could argue, of course, that it also means Wisconsin judges and justices are more beholden to the people than their unelected federal counterparts and perhaps less inclined to thwart the will of an errant majority as a result. It should be remembered, however, that the terms served by Wisconsin circuit and appellate court judges—six years—and by the justices of the Wisconsin Supreme Court—ten years—are significantly longer than the terms served by state assembly representatives (two years), state senators (four years), and the governor (four years). The judiciary’s longer terms insulate Wisconsin courts to some extent. Also, unlike some other states, Wisconsin judges and justices are elected in nonpartisan contests. That places the courts, at least ostensibly, somewhat above the political fray.

Courts also self-impose certain traditional limitations on their exercise of judicial power. For example, a court will not review the legality of governmental actions unless there is an actual case or controversy at hand. The courts do not sit as a kind of super-legislature, ordaining which laws are constitutional and which are not; instead, before a court gets involved, there must be a concrete dispute in which the constitutionality of a law is challenged. Accordingly, before a Wisconsin court could weigh in on the constitutionality of Wisconsin’s voter ID law, 2011 Wisconsin Act 23, there had to be at least one individual who claimed the law impaired his or her right to vote.

Courts also seek to resolve legal disputes on non-constitutional grounds to avoid turning every legal dispute into a constitutional case. And, because the power of the legislature in Wisconsin is plenary and limited only to the extent it is circumscribed by the state and federal constitutions<sup>7</sup>, Wisconsin courts entertain a strong presumption that the legislature’s enactments are constitutional. As a result, a party challenging the constitutionality of a statute in Wisconsin generally has the burden to prove beyond a reasonable doubt that the law is unconstitutional—the same high standard of proof to which the prosecution is held in criminal cases where a defendant’s fundamental freedoms are at stake.

Additionally, courts will refuse to rule on questions that are purely political. Nor are the courts authorized to rule on the wisdom of statutes or whether the legislature followed its own procedures in passing a statute. Thus, just as the judiciary is generally free in its core functions and powers from interference by the other branches of government, the judiciary traditionally does not interfere with the legislature’s core power to make laws according to its own judgment and procedures.

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<sup>6</sup>Anonymous author (“Brutus”), *New York Journal*, March 20, 1788.

<sup>7</sup> Richard Champagne, *Legislating in Wisconsin*, no. 1, “The Foundations for Legislating in Wisconsin” (Madison, WI: LRB, 2015) 1.

## THE ROLE OF STATUTORY INTERPRETATION

Courts must interpret statutes every day. In many cases, the operation of a particular statute is not obvious under the circumstances, and lawyers on opposing sides are arguing for conflicting interpretations of the same statutory language. While a judge's task of interpreting a statute is not always an easy one, it is vital. As the Wisconsin Supreme Court has said, it is "a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature."<sup>8</sup> When a court applies principles of statutory interpretation, it demonstrates another important way in which courts show deference to the legislature as the preeminent lawmaking body in state government.

A court's interpretation of a statute generally begins with the court's understanding of the purpose of statutory interpretation itself. Different courts frame that purpose in different ways. It is not uncommon for courts to say that the primary purpose of statutory interpretation is to give effect to legislative intent, i.e., whatever remedy or goal the legislature intended to achieve by enacting the law. To that end, a court might look to legislative debates and other legislative history indicative of intent. However, the legislature is composed of two houses, each of which is itself composed of individual legislators who may not share a common intent when a statute is passed. As a practical matter, the intent of any one legislator, let alone that of each house or of the whole body, may be undiscoverable, especially in Wisconsin, where legislative history is scant and there is no official verbatim record of the legislature's committee meetings or floor debates. Moreover, a court may have to apply a statute to a situation that the legislature simply did not contemplate. And, what is perhaps most fundamental, it is arguably undemocratic and unfair to hold citizens accountable to what legislators intended rather than to the written law itself. After all, it is the statute's text, not its history, that has met the constitutional requirements to become a law, and of which the public may reasonably be expected to have notice.

In light of these and other problems associated with legislative intent, the Wisconsin Supreme Court has clarified that the purpose of statutory interpretation in Wisconsin is not to discover the intent of the legislature but to determine the meaning of the statute's text. If the meaning of a statute is plain from its text, the court must generally give effect to that plain meaning. The court presumes that a statute's plain meaning accurately reflects legislative intent. A Wisconsin court may normally rely on legislative history only if the court first finds that a statute's text is ambiguous, and then only to resolve that ambiguity in the meaning of the text, not to divine legislative intent.

Courts also tend to apply other, more specific principles of statutory interpretation to help determine the meaning of statutes. One commonly used principle of statutory interpretation is known by its Latin moniker, *noscitur a sociis*, and holds that a court may glean the meaning of an ambiguous word in a statute from its associated words. For example, in *State v. Johnson*, the appellant argued that he was not guilty of possessing a short-barreled shotgun because the relevant statute defined "short-barreled shotgun" in part as "a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder or hip . . .," and he did not actually intend to fire the gun from his shoulder or hip.<sup>9</sup> The court of appeals, however, affirmed the appellant's conviction by interpreting the word "intended" in the context of its associated words "designed" and "made." The court held that "intended" did not refer to the intent of the weapon's possessor, but to the intent of the manufacturer.

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<sup>8</sup>*State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44.

<sup>9</sup>*State v. Johnson*, 171 Wis. 2d 175 (Ct. App. 1992).

*Noscitur a sociis* and the other principles of statutory interpretation are only rules of construction, not rules of law, and courts are free to ignore them depending on the case. As noted, Wisconsin courts employ principles of statutory interpretation primarily as a way to discern the meaning of statutory text. According to the Wisconsin Supreme Court, “Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. . . . It is the enacted law, not the unenacted intent, that is binding on the public. Therefore, the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.”<sup>10</sup> All other rules of statutory interpretation are subordinate to that end.

## CONCLUSION

In Wisconsin, the legislature and the judiciary are separate and independent but coequal branches of government, each having its own core functions and powers. While separate and independent, the legislature and the judiciary must necessarily interact for government to work. In particular, the judiciary must apply, in concrete cases, the laws passed by the legislature, and in so doing, the judiciary is empowered to say what the law is and pass judgment on a given law’s constitutionality through the exercise of judicial review. Judicial review, therefore, plays a key role in legislating in Wisconsin.

Yet, there is a tension between judicial review and representative democracy. That tension was captured well by Abraham Lincoln in his First Inaugural Address: “If the policy of the government upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.” While the exercise of the judicial function has traditionally been subject to various limitations that check the power of judicial review, those limitations, under the doctrine of separation of powers, are largely enforced by the courts themselves. As a consequence, like a tightrope upon which our republican form of government balances, that tension remains.

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<sup>10</sup>*State ex rel. Kalal*, ¶ 44.