–Atty. Joseph A. Ranney, DeWitt, Ross & Stevens

Wisconsin is one of a very few states still using its original constitution; in fact, Wisconsin has the oldest state constitution outside of New England.[1] The constitution's birth, however, was difficult. It required two separate constitutional conventions, one in 1846 and one in 1847-48. The two conventions had to wrestle with many of the most controversial political issues of the day. Some of the decisions that were made have become mere historical curiosities; but some still play a vital part in the state's life today.

The constitution's social background

Several lines of political and social thought played a major role in shaping the Wisconsin Constitution. In 1846 Wisconsin, although it was growing rapidly, was still very much a frontier state. "Both in fact and in the eyes of their people, states like Wisconsin ... stood ... in a colonial relationship to the Eastern states. The Easterners had the capital, the manufacturers, and the markets on which the younger states depended. Out of this background men made strong movements in the law." In Wisconsin the main movements arising out of this sentiment were directed at the abolition of banking in the new state and at laws making life easier for debtors.[2]

Another widespread sentiment in Wisconsin, which is reflected in many parts of the constitution, was a general

distrust of government and a desire to limit its powers as much as possible.[3] After American independence most states had created a weak executive and a strong legislature as part of their constitutional system, in line with the intense feeling against the English monarchy at that time. Over the next 70 years, however, legislative mistakes and abuses multiplied and disenchantment with strong legislative systems set in.[4]

The first constitutional convention, 1846

The first convention convened in October 1846. Democrats made up an overwhelming majority of the convention delegates: 103 Democrats and 18 Whigs were elected to the convention. However, the Democrats encompassed a broad variety of views. Most Democrats supported the social reform-minded "Barnburner" wing of the Jacksonian movement, but a substantial minority supported the party's conservative "Hunker" wing.[5] The Barnburners generated much of the conflict at the 1846 convention by trying to incorporate into the constitution many Jacksonian social reforms, which were still very new and very controversial.

Curiously, the articles that created the fundamental structure of Wisconsin's government generated little controversy. The convention adopted a bill of rights that was copied mainly from the New York and Michigan state constitutions but really had its roots in the federal bill of rights. The 1846 Constitution included two major provisions not in the federal bill of rights: a ban on slavery and a guarantee that foreigners would have the same rights with respect to property as U.S. citizens.[6]

In accord with the prevailing mid-19th century distrust of strong government, the convention created both a weak executive and a fairly weak legislature. The governor was elected for two years only; after some debate, his salary was whittled down to $1,000 per year. He was given a veto but the veto was subject to override by a two-thirds vote of each house of the legislature. He was not given any appointive power. His main duty was to "expedite all measures resolved upon by the legislature."[7] The legislature was given broad power to enact laws, but the constitution prohibited it from enacting certain specified types of legislation. To prevent political "rings" from dominating the state, the Barnburners inserted a provision that no state official could be elected to Congress or any other federal office during his term of office.[8]

Controversy began when the 1846 convention passed beyond these basic topics and considered which items on the Barnburners' menu of reforms should be enshrined in the constitution. Several of the reforms that the Barnburners succeeded in pushing through the convention, most notably a provision that the state's judges would be chosen by the people rather than the governor or legislature, generated little controversy. But three of the reforms-a strong antibank article, a homestead exemption and a guarantee of separate property rights to married women-ultimately led the voters to reject the 1846 Constitution.

The antibank article. Four days after the 1846 convention opened, Edward G. Ryan of Racine submitted an article that effectively prohibited all banking in Wisconsin. Ryan's article prohibited the legislature from creating or authorizing any banks; forbade all banking business within Wisconsin; and provided for a rapid phase-out of small paper currency in the expectation that Wisconsin's economy could be run on gold and silver only.[9] Ryan and the antibank article's other defenders maintained that legislatures were all too subject to bribery and undue influence by banks; therefore, an antibanking law must be placed in the constitution to put banking beyond the legislature's reach.[10]

Ryan's proposal was too "inflamed and revolutionary" even for some of his fellow Barnburners. Said Samuel Beall, a Barnburner delegate from Taycheedah: "Let the old and rotten hulks of special charters and exclusive privileges be exploded. Assert the antibank doctrine in this respect to its fullest extent; but if the time should arrive in the progress of free trade and the wisdom of those who sent us here, when a system of general banking, open to everyone under proper restraints, shall be deemed advisable for the well-being of the state, let not the avenue of escape be sealed."[11]

On Oct. 19 the convention passed Ryan's proposal by a vote of 79 to 27. However, as the convention wore on many of the delegates heard vocal objections from their constituents to the banking article. In November a motion was made to reconsider the article. It failed, but the vote showed that Ryan had lost many of his supporters.[12]

The homestead exemption. In 1846 the homestead exemption was a novel and controversial idea. Imprisonment of debtors had ended in Wisconsin only nine years before, and most courts and legal commentators firmly hold that any exemption of debtors' assets from the reach of creditors would violate the sanctity of contract. However, in the 1830s several groups, including the

Barnburners and the National Reform Association, adopted the homestead exemption as one of their priorities.[13]

In the 1846 convention the Barnburners, led by David Noggle of Janesville, advocated a $1,000 homestead exemption on the grounds that it would help the poor continue to contribute to the economy without hurting their creditors unduly.[14] Exemption opponents, led by Marshall Strong of Racine, complained that the provision "offers a splendid bounty to all the villains in the world to resort to Wisconsin." They also suggested that the exemption's nature and amount would need regular adjustment as social and economic conditions changed, and for that reason an exemption law should be left to the legislature rather than embedded in the constitution. Noggle retorted that Strong "preaches false doctrine when he assumes that making men independent makes rascals of them." In early December the convention passed the exemption provision by a vote of 68 to 27.[15]

Married women's property rights. In 1846 the law treated married women as little more than legal extensions of their husbands. A married woman's property was completely within the control of her husband, and she could not use it in any manner without his consent.[16] The Barnburners, led by General William R. Smith of Mineral Point, proposed that married women be given the exclusive right to control their property, and that their property be insulated from attachment to satisfy their husbands' debts. They criticized existing law as a remnant of the feudal era. The Barnburners linked married women's property rights closely with the homestead exemption: they felt that both provisions were essential to achieving their broader aim of equalizing economic opportunity for all.

Led by Ryan, most of the Hunkers and Whigs opposed the provision on the grounds that it would force women to operate outside the domestic sphere for which nature best fitted them and would require them to become speculators.[17] Noggle replied sarcastically that "for true merit the female sex stand much higher than the male. They know but little of the low, truckling, vacillating demagogism that pervades the male portion of creation, and in that particular their ignorance is a jewel." On Dec. 7 the convention passed the married women's property rights provision by a vote of 58 to 37.[18]

Black suffrage. There was a vigorous debate over whether the few blacks in Wisconsin should have the vote. In the 1840s most delegates, and most Wisconsin settlers, abhorred slavery but felt that blacks were inferior to whites; they looked askance at abolitionism and equal rights for blacks. A few of the more idealistic Barnburners felt otherwise. Charles Burchard of Waukesha eloquently argued that the Jacksonian vision of equal rights for all could not truly be fulfilled unless blacks were included in it:

"We live, as has often been repeated in this hall, in an age of progressive democracy. ... In its political effects it discards the prerogative of a few to govern and looks to the rights of all. And whether you deem it practicable or not, you, who prattle about democracy, this spirit is opening a grand law of humanity more comprehensive than all others, that looks farther than the skin to say who shall have rights and who shall be maintained in the free enjoyment of what the God of nature has given them. You cannot guide this tendency of the age to sympathize alone with the serfs of Europe and the barbarians of Asia and leave untouched and unnoticed those in our midst who suffer either from the oppression of laws or for want of their protection."[19]

The provision's opponents stated baldly that blacks were not the equals of whites and were not fit to vote. Moses Strong of Mineral Point predicted that a constitution allowing blacks to vote would not get 50 votes west of the Rock River. As debate progressed, it became clear that a majority of delegates would not support unqualified inclusion of black suffrage in the constitution. Alexander Randall of Waukesha proposed, as a compromise, that a separate article allowing black suffrage be submitted to the people separate from the rest of the constitution. Randall's proposal narrowly passed by a vote of 53 to 46.[20]

The convention concluded its business in December 1846. Many of the delegates openly expressed their uneasiness about the constitution's chances of passage. Although they originally had wanted to make the constitution "a general declaration of what is morally right and what is morally wrong ... to be set before legislators as a warning for all time, and a first spring whence all their laws are to proceed," the final product was weighed down with too much detail and too many pronouncements on controversial issues. The banking article and the homestead exemption had divided the convention badly. In particular, many delegates felt that the failure of the motion to reconsider the banking article was "a clincher" that laid to rest any remaining hope that the constitution might pass.[21] The delegates' uneasiness proved to be amply justified. Despite a vigorous campaign by Ryan and others for the constitution, in April 1847 Wisconsin voters rejected it by a vote of 20,233 to 14,119 (59 percent to 41 percent). The article on black suffrage was defeated by an even wider margin of 14,615

against to 7,664 for (66 percent to 34 percent).[22]

The second constitutional convention, 1847-48

Although the 1846 Constitution had gone down to defeat, there was little question that Wisconsin's voters were eager for another convention and for statehood. Accordingly, in October 1847 territorial governor Henry Dodge called a second convention. This convention was smaller and had a more even party balance than the first: it consisted of 43 Democrats, 25 Whigs and three independent delegates. Only five of the delegates had attended the first convention. The delegates generally agreed that most of the 1846 Constitution was sound and that the new convention should use it as a starting point; but almost all of them, including the Barnburners, felt that they had to be more careful than their predecessors about incorporating social reforms into the constitution.[23]

Banking. It was apparent from the convention's beginning that a majority of delegates favored leaving the door open for some sort of banking system in Wisconsin. The antibank delegates fell back on a proposal that the legislature be allowed only to pass special laws chartering individual banks, not general banking laws, and that no individual law would be valid until it passed a public referendum. This was too much for the moderate delegates: many of them, led by Stoddard Judd of Racine, protested that they didn't like banks but that special banking laws would promote monopoly and destroy the Jacksonian ideal of equal opportunity for all. Judd and Byron Kilbourn of Milwaukee stressed that in order for Wisconsin to participate fully in the American economy in the coming decades, it would have to allow a banking system to develop.[24]

The pro-bank, moderate and antibank factions wrangled for more than a month. No proposal could be found that would command majority support. Finally, Charles Larkin of Milwaukee broke the deadlock by proposing the following compromise: when the constitution was voted on, the voters would be asked to vote separately on the question of "bank" or "no bank." If they voted "bank," the legislature could enact either a general banking law or special banking laws, none of which would go into effect until passed by referendum. Larkin's proposal was hailed as "the first glimpse of day after groping ... in the dark," and it quickly passed by a vote of 46 to 15.[25]

Homestead exemption and married women's property rights. Several delegates to the 1847 convention opined that these provisions, more than any others, were responsible for the defeat of the 1846 Constitution. There was virtually no sentiment in the 1847 convention for dealing with the issue of married women's property rights in the constitution.[26]

A small group of unreconstructed Barnburners continued to argue that a detailed homestead article should be placed in the constitution. A majority of the delegates, however, favored simply making a general statement in the constitution that there must be some sort of homestead exemption and leaving the details to the legislature. Morgan L. Martin of Green Bay proposed that the legislature be instructed to exempt "the necessary comforts of life" from collection by creditors. Some delegates argued this would discriminate against the poor, who had a more modest idea of "necessary comforts" than the rich, and some argued that any homestead exemption would make it difficult for people of modest means to get credit. But Martin's idea found favor with the convention, the homestead provision passed on a 38 to 26 vote.[27]

Black suffrage. Even though the voters had decisively rejected black suffrage earlier in the year, its proponents continued to press their case in the 1847 convention. The motion to strike the word "white" from the suffrage clause was again defeated, but 21 of 69 delegates voted for the motion (compared to 14 of 125 at the 1846 convention). Near the convention's end, Louis Harvey of Clinton proposed that the legislature be authorized to allow black suffrage, subject to popular referendum. Harvey's proposal appealed to many delegates because a vote for it could be defended back home as a vote for popular sovereignty rather than black equality or abolitionism. The proposal passed by a vote of 45 to 21.[28]

The second convention completed its work in February 1848. The campaign over ratification of the new constitution proceeded quickly and quietly. Most of the 1846 Constitution opponents were satisfied with the changes that the second convention had made; the main opposition to the new constitution came from abolitionists, who were unhappy about the lack of black suffrage, and from a hard core of banking opponents. The voters approved the new constitution by a margin of 16,799 to 6,384, and on May 29, 1848, Wisconsin was formally admitted to the Union.[29]

Epilogue

Why has Wisconsin's constitution endured while so many other state constitutions of the mid-19th century have been superseded? There are probably three main reasons. First, most features of the basic governmental framework that the Wisconsin constitution established– the bill

of rights and the limited powers of the governor and legislature in particular– were well within the mainstream of what other states had created during the preceding 70 years.

Second, the 1847-48 convention exercised better judgment than the 1846 convention about which social and legal reforms should be placed in the constitution and which should not. The convention shied away from using the constitution to resolve such issues as banking and married women's property rights because it sensed that there was no popular consensus on those issues that could safely be made part of the state's organic law.

Third, the constitution has survived because Wisconsin has never gone through a period of truly radical political or social change. Many multiple-constitution states have gone through such periods. For example, most southern states enacted new constitutions in the early 1860s when they seceded from the Union, in the late 1860s and early 1870s when Reconstruction governments took over, and again in the 1880s and 1890s after Reconstruction had ended. Rhode Island enacted a new constitution after the extremely narrow suffrage provisions of its original constitution triggered the "Dorr Rebellion," a near civil war, within the state in 1842.[30] Wisconsin voters have amended the constitution some 126 times since 1848,[31] but apparently they have felt, and continue to feel, that necessary changes can be accomplished by tinkering with the 1848 Constitution rather than building a new one.

Ironically, several of the Barnburners' proposals for social reform that led to the defeat of the 1846 Constitution were enacted as law in Wisconsin with little controversy within a few years of the defeat. The legislature passed a general banking law in 1852, but the law contained several safeguards that might almost have come from the pen of Edward Ryan himself.[32] The Legislature passed a broad debtors' property exemption law in 1849.[33] The Legislature passed a law giving married women separate property rights in 1850.[34] The voters approved black suffrage by a narrow margin shortly after statehood.[35]

The features of the Wisconsin Constitution that generated the most controversy and debate when they were enacted have for the most part become noncontroversial or simply obsolete. Some features that generated little controversy in the 1840s have become the subject of controversy since then– most recently, in the debate since the late 1980s over the scope of the governor's veto power and the balance of power between the governor and the legislature, and in the recent amendments to the constitution's antilottery clause.[36] It is useful for us as lawyers, and indeed for Wisconsin citizens in general, to reexamine the origins of our constitution today not only to appreciate its basic and enduring strengths but also to remind ourselves that even strong, stable constitutions inevitably change in both form and meaning as the times change.

Endnotes

1 The Wisconsin Constitution was enacted in 1848. The only states that have older constitutions are Massachusetts (1780), New Hampshire (1784), Vermont (1793), Maine (1820) and Rhode Island (1843). *See generally* Nick Papastravros, ed., *Constitutions of the United States, National and State* (Dobbs Ferry, N.Y.: rev. ed., 1992).

2 J.W. Hurst, T*he Growth of American Law: The Law Makers* at 8-9 (Boston, 1950); M. Quaife, *The Movement for Statehood 1845-46* at 35-36 (Madison, 1918) (hereinafter *Movement for Statehood*); Brown, *The Making of the Wisconsin Constitution*, 1949 Wis. L. Rev. 648, 652-53. For a good general discussion of the evolution of the Jacksonian sentiment against banks and for lenient treatment of debtors, see A. Schlesinger Jr. *The Age of Jackson* at 76-80, 134-37, 334-39 (Boston, 1945).

3 Quaife, *Movement for Statehood* at 30.

4 Still, *State Making in Wisconsin*, 20 Wis. Mag. Hist. at 34, 37-40, 51-53 (1936); L. Friedman, *A History of American Law* at 106-9, 302-4 (New York, 1973).

5 Brown, *The Making of the Wisconsin Constitution*, Wis. L. Rev. at 656-59. The names of the two factions originated in New York. Reformers in that state gibed that conservative Democrats supported Jackson only because they "hankered" after office; the conservatives said that the reformers' program was like a farmer burning down his barn to get rid of rats. Schlesinger, *The Age of Jackson* at 397-98. Neither the Hunkers nor the Barnburners were solidly united on the bank issue. The Whigs were united more by their dislike of Jackson than by anything else, although they generally favored banking, government support of internal improvements and other measures which would facilitate the United States' transition from an agrarian to a commercial and industrial economy. *See* R. Remini, *Henry Clay: Statesman for the Union* at 461-64 (New York, 1991).

6 Brown, *The Making of the Wisconsin Constitution*, 1949 Wis. L. Rev. at 655; Brown, *The Making of the Wisconsin Constitution: Part II*, 1952 Wis. L. Rev. 23, 59; Wis. Const. (1846) art. XVI. The 1846 Constitution is set forth in full at Quaife, *The Convention of 1846* at 732-35 (Madison, 1918) (hereinafter *Convention of 1846*). Both the 1846 and the 1848 constitutions borrowed heavily from New York law, particularly the New York constitution of 1846, for many of their provisions. *See* Alexander, Wisconsin, *New York's Daughter State*, 30 Wis. Mag. Hist. 11, 24-25 (Sept. 1946).

7 Wis. Const. (1846) art. III §§ 4, 5, 11.

8 Wis. Const. (1846) art. VI and art. VIII, § 6.

9 *Journal of the Convention of 1846* (hereinafter 1846 *Journal*), Oct. 9, 1846, reprinted in Quaife, *Convention of 1846* at 70-71.

10 *Madison Democrat*, Oct. 31, 1846 (reporting remarks of David Noggle) and *Madison Express*, Oct. 20, 1846, both reprinted in Quaife, *Convention of 1846* at 103-14.

11 *Madison Argus*, Oct. 12, 1846, reprinted in Quaife, *Convention of 1846* at 127.

12 *Madison Express*, Nov. 24, 1846, reprinted in Quaife, *Convention of 1846* at 512.

13 London, *Homestead Exemption in the Wisconsin Constitution*, 32 Wis. Mag. Hist. 176, 177 (Dec. 1948); A.E. Smith, *The History of Wisconsin Vol. I: From Exploration to Statehood* at 389-90 (Madison, 1973).

14 *Madison Democrat*, Jan. 2, 1847, reprinted in Quaife, *Constitution of 1846* at 658-70.

15 *Madison Express*, Dec. 15, 1846 (reporting Marshall Strong's remarks) and *Madison Democrat*, Jan. 2, 1847 (reporting Noggle's remarks), reprinted in Quaife, *Convention of 1846* at 647-58, 666.

16 See Friedman, *A History of American Law* at 184-86, quoting Chancellor James Kent, *Commentaries Vol. II* (2d ed. 1832). The first state to enact a married woman's property rights law was Mississippi in 1839.

17 Ryan generally sided with the Barnburners on economic issues-for example, he was a fervent antimonopolist-buthe was much more conservative about social reforms and tended to side with the Hunkers in that area, A. Beitzinger, *Edward G. Ryan: Lion of the Law* at 19-22 (Madison, 1960).

18 *Madison Argus*, Dec. 8, 1846 (reporting Smith's and Ryan's remarks) and *Madison Democrat*, Jan. 2, 1847 (reporting Noggle's remarks), reprinted in Quaife, *Convention of 1846* at 631-32, 662.

19 *Madison Express*, Oct. 27, 1847, reprinted in Quaife, *Convention of 1846* at 243.

20 *Madison Express*, Oct. 27, 1846 (reporting Strong's remarks), reprinted in Quaife, *Convention of 1846* at 215.

21 *Madison Express*, Nov. 24, 1846 (quoting the convention chair, Don A.J. Upham of Milwaukee), reprinted in Quaife, *Convention of 1846* at 512.

22 The vote totals are found in Leslie H. Fishel Jr., *Wisconsin and Negro Suffrage*, 46 Wis. Mag. Hist. 180, 183 (Spring 1963).

23 *Journal of the 1847-48 Convention* (hereinafter *1847-48 Journal*), Dec. 16, 1847, reprinted in M. Quaife,ed., *The Attainment of Statehood* at 179 (Madison, 1928) (hereinafter Quaife, *Attainment of Statehood*).

24 *1847-48 Journal*, Dec. 23, 1847 (antibank proposal), Jan. 10, 1847 (Judd's remarks) and Jan. 11, 1847 (Kilbourn's remarks), reprinted in Quaife, *Attainment of Statehood* at 240-41, 489-90, 499-503.

25 *1847-48 Journal*, Jan. 13, 1848, reprinted in Quaife, *Attainment of Statehood* at 548-49; Wis. Const. (1848) art. XI, § 1.

26 *1847-48 Journal*, Dec. 16, 1847 (remarks of Kilbourn), Dec. 28, 1847 (remarks of Experience Estabrook), Dec. 20, 1847 (remarks of Morgan L. Martin), reprinted in Quaife, *Attainment of Statehood* at 179, 285, 290.

27 *1847-48 Journal*, Dec. 28, 1847 (remarks of Warren Chase and John Doran and introduction of Martin amendment), Jan. 27, 1848 (remarks of Abram Vanderpoel and Chase), reprinted in Quaife, *Attainment of Statehood* at 284-86, 295, 759-64, 797; Wis. Const. (1848) art. I, § 17.

28 *1847-48 Journal*, Jan. 3, 1848, reprinted in Quaife, *Attainment of Statehood* at 398-400; Wis. Const. (1848) art. III, § 4.

29 Quaife, *Attainment of Statehood* at vii-viii. The vote totals are taken from *1991-92 Wisconsin Blue Book* (Madison, 1991) (hereinafter *1991-92 Blue Book*) at 213.

30 Friedman, *A History of American Law* at 105, 302-3.

31 *1991-92 Blue Book* at 212.

32 L. 1852, ch. 479. For example, the banking act provided that banknotes could only be issued by the state comptroller (section 4). The comptroller could give the notes to banks for circulation by the banks, but only when the banks deposited securities equal in value to at least 125 percent of the face value of the notes (sections 5, 9). The act provided extensive safeguards to ensure that only solid securities would be given for notes (sections 6-8). The voters approved the banking law by a lopsided margin of 32,826 to 8,711 in November 1852. *1991-92 Blue Book* at 213.

33 L. 1849, ch. 102, §§ 51-58.

34 L. 1850, ch. 44.

35 See L. 1849, ch, 137. The vote on this question was lower than for state offices which were up for election at the same time. Because the vote for black suffrage was not a majority of all votes cast at the election for any office, Wisconsin officials refused to let blacks vote in subsequent elections. However, in 1866 the Wisconsin Supreme Court ruled that because a majority of those voting on the black suffrage question in 1849 had voted for black suffrage, Wisconsin had in fact enacted black suffrage in 1849. *Gillespie v. Palmer*, 20 Wis. 572 (1866). *See generally*, Fishel, *Wisconsin and Negro Suffrage*, 46 Wis. Mag. Hist. at 184-85, 194-96.

36 The governor first received line-item veto power with respect to appropriations bills in 1930 when art. V, section 10 was amended to create that power. The veto provision was amended again in 1989 to bar the governor from making "Vanna White vetoes," that is, creating new words by striking letters from words in a bill. The 1846 convention approved the antilottery provision of the constitution by a wide margin and with no debate, and the 1848 convention preserved it intact without debate. *1846 Journal*, Nov. 13, 1846, reprinted in Quaife, *Convention of 1846* at 453; Wis. Const. (1848) art. I, § 24. It was not amended in any way until 1965; it has been amended four times since then. *See 1991-92 Blue Book* at 178-79.

–Craig Thompson, WCA Legislative Director

Some of the information provided in this article is derived from "TEN YEARS OF TABOR: A STUDY OF COLORADO'S TAXPAYER'S BILL OF RIGHTS" authored by The Bell Policy Center, a non-partisan, non-profit organization WCA invited to speak at the 2004 Legislative Exchange.

The cover of this issue of *Wisconsin Counties* features our state's Constitution. The reason, obviously, is to highlight an extremely significant debate that is occurring in Madison and throughout our state over whether to amend the constitution to place greater restrictions on all levels of government regarding spending and place more control in the hands of the voting public.

Assembly Joint Resolution 55 (AJR 55) as of the writing of this article is in the process of being revamped in order to "Wisconsinize" it. AJR 55 as originally introduced, however, was modeled almost directly after a constitutional amendment currently in place in Colorado commonly referred to as the Taxpayer Bill of Rights or TABOR. In fact the Joint Resolution is also being referred to as TABOR here in Wisconsin.

The TABOR proposal in its original form would limit state government, county government, city government, village government, town government and schools spending increases from year to year to no greater than Consumer Price Index (CPI) plus population growth (state), new construction (counties, cities, villages and towns) or enrollment (schools). If revenues from existing rates of taxation would exceed those limits the excess would be rebated back to the taxpayers and the tax rate would be lowered.

These constitutional spending caps could be exceeded by placing a referendum before the voters explaining for what purpose the cap would be exceeded and by how much. The voting public would then decide whether to allow the spending cap to be exceeded for that specific purpose.

As our lawmakers are contemplating changes to the original TABOR proposal, I would encourage everyone at the county level to become involved in this public discussion. The issues and principles being raised by this debate are central to every other issue that confronts counties and the state.

As this discussion continues, there are several points I would like to put forward that should be considered before moving forward.

- How has TABOR worked in Colorado?
- How would TABOR work in Wisconsin (specifically keeping in mind the unique state-county relationship)?
- If some form of TABOR is ultimately approved how should that effect our current governmental structure in Wisconsin?
- Do we in Wisconsin want to move to more government by referendum or remain more of a Representative Democracy?

TABOR & Colorado

There has been a tremendous debate over how TABOR has "worked" for Colorado since it was adopted back in 1992. Both proponents and detractors point to different statistics coming out of Colorado to bolster their argument.

Proponents cite, among other things, that: "in the last recession, while Wisconsin lost 78,000 manufacturing jobs, Colorado's economy boomed. The U.S. Small Business Administration reports that Colorado ranked fifth in new business creation from 2000 to 2001, while Wisconsin ranked 36th with a meager growth". Another argument is the growth in Colorado's gross state product. Colorado "ranked 7th in the nation from 1996 to 2000 with a 17.4 percent increase, while Wisconsin ranked 20th with a 12.6 percent increase, below the national average of 13.4 percent, according to the Department of Commerce". (Both citations taken from Wisconsin Manufacturers & Commerce (WMC) Web site).

Detractors of TABOR, however, argue that Colorado's economic success during the 1990's had no relationship to TABOR. The entire region including Arizona, Utah, Idaho and Nevada all experienced an economic boom that outpaced Wisconsin, but those other states did not have TABOR, not to mention that the boom began prior to Colorado's adoption of TABOR. On the contrary, many argue that once that regional boom slowed down, TABOR has handcuffed Colorado's ability to respond and caused devastating consequences. Data was released at the end of January showing Colorado now ranks 49th in personal income gains-after ranking first three years ago. The latest data from the third quarter of '03 showed Coloradans' income rose by 0.63 percent (half the rate of the national average of 1.1 percent.) In year-over-year personal income growth from the third quarter of 2002 to the third quarter of 2003 Colorado ranked dead last among states, with a 2 percent increase. For the first time since 1939 when the Bureau of Labor Statistics first began tracking employment data, Colorado showed a negative job growth for two consecutive years.

Both sides tend to draw the correlation between the economy and TABOR when it helps their argument and dismiss its relevance when it hinders their argument. TABOR's effect on government spending and government services has a much more direct and reliable correlation. TABOR undeniably has had the intended effect of controlling Colorado's taxing and spending. Colorado is 4th lowest in tax burden in the country and has returned $3.2 billion to the taxpayers since FY1998. The level of taxes of course does dictate what level of services will be provided as well and this is what detractors of TABOR are pointing out. Colorado is 50th in public school spending per $1,000 of personal income; is almost at the bottom in high school graduation rates; has the highest rate of uninsured low-income children in the nation and is almost last in spending on higher education as well.

TABOR & Wisconsin

While the above arguments relate to TABOR's effect on Colorado, the authors of TABOR for Wisconsin have recognized that there may be some problems with Colorado's version of TABOR and are currently attempting to "Wisconsinize" it.

What exactly "Wisconsinizing" it means remains to be seen, but it does beg the question whether the *concept* of TABOR is sound for Wisconsin provided we can learn from the experiences from Colorado and avoid some of the same pitfalls.

One of the characteristics of Wisconsin that has to be taken into effect is the role of county government in our state. Counties, under our constitution as it currently reads are an administrative arm of state government. Therefore, counties do not have "Home Rule" authority and can only deliver services that the state specifically mandates or authorizes. Counties and the state have an age-old argument raging over this issue of being required to provide services on behalf of the state while only receiving partial reimbursement. Counties were forced to spend over $400 million of property taxes last year to simply comply with the states mandate to administer the state court system, the human service delivery system and juvenile justice programs. These are clearly government programs that are not going to be eliminated, but the question is should one level of government be deciding the eligibility and the scope of these services without having to adjust the funding to correspond to those decisions. And perhaps more importantly, do we really believe the property tax is the appropriate tax to fund these services?

If TABOR, in some form resembling AJR 55 as originally introduced, is going to work in Wisconsin we absolutely must change that relationship between state and county government. If we do not it will simply mean that within a relatively short period of time, the amount counties continue to be forced to spend by state statute and the courts on the aforementioned services will consume all of the allowable room under the constitutional caps and the "discretionary" services that the majority of the county property taxpayers consume such as roads, parks etc.. will be squeezed out.

Fortunately, Senator Bob Welch has introduced an amendment which his colleagues in the Senate are considering that would make unfunded mandates unconstitutional. This is the only honest way to proceed with TABOR in Wisconsin. If we are going to constitutionally limit the amount we spend and the services we provide, we clearly cannot allow the level of government furthest removed from the citizens to offer expanded eligibility or "new" programs and tell the people back in the communities carrying out the services to cut local services to pay for them. Nor should we force the local officials charged with delivering the services to explain to residents seeking services why although their state legislator told them they were eligible for the service the answer is actually "no".

One of the other aspects we should consider for Wisconsin is whether using the Consumer Price Index

(CPI) is a reasonable gauge for limiting government spending. CPI tracks the price of consumer goods which does not necessarily correlate to the cost of maintaining a workforce and paying for health insurance increases.

We should simply be aware of what we are deciding upon. It is one thing to say we will limit the "growth" of government to some indicator of inflation. But if the reality is that the cost nondiscretionary programs like corrections and Medical Assistance grow faster than, say CPI, the result is all the other areas will need to receive a *reduction* in order for that to occur. That may be what the Wisconsinites ultimately want, but it needs to be properly explained.

If TABOR, What Happens to Our Current Governing Structure?

If we adopt constitutional caps on spending at all levels of government and require direct action of the electorate in order to spend money on perceived needs above that amount, we will be fundamentally changing our system of decision-making and governance in Wisconsin. So what does that mean to our structure?

The purpose of TABOR is clearly to limit the size and impact of government in our lives and place more decision-making back in the hands of the general populace. So, would we still need 132 legislators and would we need a full-time legislature?

Wisconsin is currently in the minority of having a full-time Legislature, but we do bestow a good deal of responsibility to that body. If we are moving more toward governing by referendum is that still appropriate?

Does Wisconsin Want to Move Away from Representative Democracy and Toward Direct Democracy?

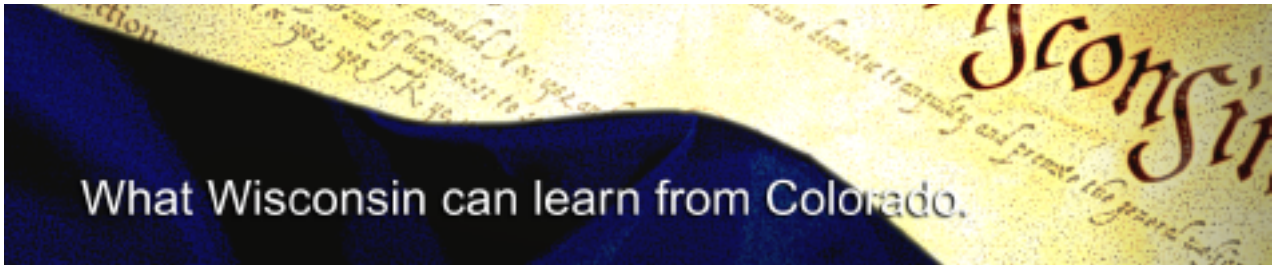
This debate is as old as the U.S. Constitution itself. As our founding fathers met in Philadelphia at the Constitutional Convention in 1787 this was a fundamental debate. The problem was striking the balance between Jean Jaques Rousseau's theory of a Social Contract in which he spoke of the "supreme decision of the general will" and John Locke's version of a social contract where each person had certain "natural or inalienable rights" such as "life liberty and property".

This debate about whether direct democracy would lead to "mob rule" or whether representative democracy was too far removed from the will of the people was argued between many at the Constitutional Convention but most notably between James Madison and Thomas Jefferson. Jefferson arguing for a more direct form of democracy stated "I know of no safe depository of the ultimate powers of society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but inform their discretion. James Madison countered that "Pure democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been short in their lives as they have been violent in their deaths".

Ultimately, Madison's view of a Constitutional Republic won out. In fact the term "democracy" does not appear in the Constitution, but rather Republic appears in every place referring to the type of government.

Since that time, however, there have been numerous decisions in our history to move closer to a direct democracy. The 17th amendment changed Senators from being appointed by the House of Representatives to being elected in a popular election. And, in state's like California and Colorado referenda and initiative referenda have become a central part of their governance structure.

As we move forward with this debate in Wisconsin the citizens of Wisconsin will hopefully be engaged in this very important dialogue in regard to these and many other issues that surround the TABOR proposal. A dialogue regarding: what level of services we desire and feel we can afford; whether we want a full or part time legislature; how we align taxing and spending decisions; and whether we lean more toward a direct or representative form of democracy and a host of other issues needs to occur in this state before we move ahead with such a momentous decision. Whichever direction we decide to move an educated electorate is essential.



–Wade Buchanan, President, The Bell Policy Center

Even while Wisconsin struggles with severe state budget shortages, State Rep. Frank Lasee (R) has introduced a bill that would implement a so-called "Taxpayer's Bill of Rights" (AJR 55) modeled after a Colorado constitutional amendment passed in 1992. As part of a growing coalition of Coloradans—including the Republican state treasurer, community leaders, and state and local government officials from both sides of the political aisle—calling for TABOR reform, our message to our friends in Wisconsin is: **Voters, beware.**

While most states operate with some tax or spending limits, TABOR is the *most* restrictive in the nation. Some of the restrictions in TABOR make sense. Colorado voters strongly support its two main ideas: Limiting government growth and requiring voter approval of all tax increases. But the devil is in the details. In truth, TABOR has created a stranglehold on government services — from public health to education to transportation — and will make it much more difficult to recover from the current economic downturn.

TABOR supporters like to credit it with, among other things, contributing to the economic boom of the 1990s, even though there is no evidence to support this claim. What has been proven is that the amendment has not allowed essential services, such as education and human services programs, to keep pace with need or growth and has also impaired the state's ability to invest and innovate for the future.

Here are just a few examples of how TABOR has shrunk Colorado's already-lean programs to anorexic levels:

By 2000, Colorado had fallen to 50th in K-12 spending per $1,000 of personal income. By that same year, the state spent less than most other states on public health care services (as a percent of GSP), was at the bottom in on-time immunization rates, was at the bottom in prenatal care, had the highest rate of uninsured low-income children in the nation, was almost last among states in high school graduation rates, ranked almost last in state investment in higher education and the arts, and had a growing list of unfunded highway projects.

This precipitous slide in services was created because the state couldn't use all the money it was collecting from the state's already-low taxes. Instead, TABOR mandated $3.2 billion in rebates to taxpayers. This retreat from public service occurred as Colorado outpaced the nation in personal income during the last decade.

And then the economy sputtered.

In November 2002, the National Conference of State Legislatures reported that Colorado had the third worst budget gap in the nation.

Even after nearly half a billion dollars in annual tax cuts, TABOR will force an additional $1.2 billion out of state coffers between now and 2009. In real terms—dollars adjusted for inflation—this means that per capita spending on services will be at least 10% lower in 2009 than it was in 2002. This is because TABOR's revenue formula is not linked to productivity and cannot respond to the ups and downs of the economic cycle. To add insult to injury, these stringent spending limits leave the state no room to build a "rainy day" fund.

These frightening statistics mean that services in Colorado will never recover from the cuts made during the economic downturn because TABOR permanently lowers the base from which limits are calculated (the "ratcheting effect"). The ratcheting effect has had such a serious impact on Colorado's fiscal well being that even the state's conservative governor, a staunch supporter of TABOR, recently predicted that it will be changed.

Far from "protecting" Colorado during the economic downturn, as supporters have claimed, TABOR has put Colorado in an uncompromising vise where families, students, the elderly, the poor, and the sick come in last.

We hope our friends in Wisconsin will look beyond partisan politics and the unsubstantiated rosy picture offered by this bill's supporters and learn from Colorado's mistakes. If not, they could be biding farewell to fundamental and critical services and welcoming even more financial woes.

Wade Buchanan is president of The Bell Policy Center, a nonpartisan, nonprofit organization dedicated to promoting opportunity and self-sufficiency in Colorado. www.thebell.org

–Frank Lasee, State Representative, 2nd Assembly District

The philosophy behind Lasee-Wood Taxpayer Bill of Rights (TABOR) is based on one simple question: is it okay for elected officials to reach deeper into the taxpayer's pockets than we already do without asking their permission first?

As a local elected official – a town chair – I learned about this first hand. In town government, the voters have to give their approval at a town meeting for tax, spending, and bonding decisions. Town government has to obtain the voters' approval before raising taxes.

That's okay with me. I know it isn't with some of you. Some of us elected officials feel that voters just aren't smart enough to understand all the issues. They aren't smart or generous enough to fund everything that elected officials believe are needed. Not smart enough to make decisions on how much they can afford, but somehow smart enough to pick elected officials to make decisions for them.

The world is changing rapidly. We're becoming ever more competitive, not only with other states, but with other nations. We compete for jobs, for senior citizens (whose pensions, investments, and social security money are added to the economy), for college graduates. I believe Wisconsin can't compete over the long term unless we get a handle on our tax burden and on our smothering, bureaucratic over-regulation.

If we don't slay these two dragons, Wisconsin is in danger of becoming a poor, backwater state. Our per-capita personal income now lags Minnesota by 11%. We used to be ahead of them. Their economy is on the way up. Ours is at a crossroads.

As county officials, you are in a difficult position. I have a close relationship with county officials in the counties I represent, so I understand your discomfort with your role as administrative units of the state. Let's be honest: local governments in WI are creations of the state. The state legislature decides what business you can conduct, and how you conduct it. Just try to ignore the open meetings law, for instance, or go into a whole new service not authorized by statute.

The fact of the matter is that we can't separate the state and local governments from one another. State and local government in Wisconsin are intertwined. We're in this together, and we need to work together to solve the problem of our ever-increasing tax burden.

By limiting all government spending in Wisconsin, by restricting the state's ability to mandate services and spending, we can create a system that is more accountable and more efficient. Lasee-Wood TABOR is designed to do this.

At the end of the day, I believe we will have a Taxpayer Bill of Rights that not only includes a budget stabilization fund, to take the edge off revenue shortfalls, but will also address the "ratchet effect." It will include language to transform the relationship between the state and local governments, by empowering you to throw off unfunded mandates. It will allow the state, counties, other local governments to increase spending every year, and will require that we ask for permission to spend beyond reasonable increases.

There are those who don't like that idea. The Bell Policy Center, a Denver-based, liberal, big-government think tank, has spent considerable effort lobbying Wisconsin, including the Counties Association, to oppose TABOR. They don't like it, because it requires trust in the voters and limits government's ability to spend taxpayer money.

But there are others who do like the idea, and who think TABOR works. The Independence Institute, for example, based in Golden, has produced its own literature, showing that TABOR in their state has not only allowed government spending to grow more rapidly than opponents would like to admit, it has also been the cause of economic growth there.

Why listen to one, but not the other?

I ask you, county officials, to look past your initial opposition to "another decree from the state," to look at this responsibly, and help us craft good policy. My door is open to you (not all at once, please!). Let's work together to make government accountable, and to keep Wisconsin a great place for all our citizens to live.