

Wisconsin's Legal Giants

Key Figures, Some Almost Forgotten Now, Shaped the Law in Wisconsin and Beyond

Joseph A. Ranney is serving as Marquette Law School's Adrian P. Schoone Visiting Fellow in Wisconsin Law. He is using the occasion to write a book examining the role that states have played in the evolution of American law, with a particular focus on the contributions made by Wisconsin. In a series of posts this year to the Marquette Law School Faculty Blog, Ranney offered some reflections growing out of the project—Schoone Fellowship Field Notes, as he termed them. We include four of those posts here.



Joseph A. Ranney

Has Wisconsin Produced Any Great Judges?

What makes a great judge? Who are the great state judges? Thousands of judges have helped build the edifice that is American state law. Only a few have received great acclaim. What are the elements of judicial greatness, and has Wisconsin produced any great judges? Let me consider the matter, excluding any current or recent judges.

Roscoe Pound's "top ten" list of great American judges in *The Formative Era of American Law* (1938) is the most famous pass at the question, but Pound did little musing on the criteria of judicial greatness. Judge Richard Posner made a more ambitious effort to address the question in his *Cardozo: A Study in Reputation* (1990), focusing on both quantitative measures (number of decisions, books, and articles written and number of times cited by other jurists) and more-elusive qualitative measures (e.g., whether a judge has a long-range vision of the law and, if so, her tenacity in pursuing that vision and her ability to persuade her colleagues to follow it).

Years of poring through American state case law and historical literature have led me to several conclusions. First, although it is not easy to articulate what makes a judge great, it is not difficult to spot the judges who qualify. They all wrote well, had strong views, were unusually good at bringing their colleagues around to those views (some in more dominating ways, some in gentler ways), and often took their case to the public outside the courtroom. Above all, they were persistent.

Second, some great judges have been duly recognized as such—for example, Benjamin Cardozo and James Kent

(New York), Thomas Cooley (Michigan), and Roger Traynor (California). But others have languished in comparative obscurity, including John Dillon (Iowa), Joseph Lumpkin (Georgia), Richmond Pearson (North Carolina), George Robertson (Kentucky), Rousseau Burch (Kansas)—and John Winslow of Wisconsin. These judges deserve to be better known than they are. One of my goals in the Schoone project is to make that happen for Winslow.

Who were the greatest Wisconsin judges?

The *Yale Biographical Dictionary of American Law* (2009), the most recent anthology, places three Wisconsin judges in the pantheon: Luther Dixon, Edward Ryan, and Shirley Abrahamson. Do they deserve that status? Ryan's was a "lifetime achievement" greatness: he made his mark through a 40-year career as a constitution-maker, lawyer, and politician. Ryan accomplished important things: his decision in the *Potter Law Case* (1874), upholding the state's right to regulate railroads and other large corporations, is arguably the most important decision that the Wisconsin Supreme Court ever issued. But his time on the court was short (six years) and was a coda to his life's work. Dixon's most important work came in dissent; he left a real stamp on the law but not a giant one. Abrahamson's career is not yet done, and it seems too early to evaluate her place in history.

The case for John Winslow.

Winslow's story will be more fully told in the book that will come out of the Schoone Fellowship, but here is the short case for his greatness. Life instilled in him an unusual sensitivity to outside points of view, reinforced by the fact that, as a Democrat in a predominantly



Group portrait of the Wisconsin Supreme Court in 1903, the year in which a constitutional amendment approved expansion of the court from five to seven justices. Seen here (left to right) are Joshua E. Dodge, John B. Winslow, John B. Cassoday, Roujet D. Marshall, and Robert G. Siebecker. The portraits of former justices hang on the wall behind them. The location was the former state capitol. *Wisconsin Historical Society*

Republican state at a time when judicial elections were still partisan, he repeatedly had to struggle for reelection even though he commanded universal respect. Winslow's outsider sympathies manifested early: as a circuit judge in the 1880s, he interpreted an election law liberally in order to give Wisconsin women a meaningful right to vote in school elections, but he was overruled by the Supreme Court.

During the early years of the Progressive Era, signs surfaced, most notably in *State ex rel. Zillmer v. Kreuzberg* (1902), that Winslow and his colleagues would use substantive due process with a free hand against reform laws. But as Progressive criticism of the courts grew, Winslow fashioned himself as an honest broker between the two camps. His opinion in *Nunnemacher v. State* (1906) was a model of creative draftsmanship, clothing a decision in favor of the state's new inheritance tax in language highly deferential to conservative sensibilities. After Winslow became chief justice of the Wisconsin Supreme Court in late 1907, he lectured and wrote extensively, explaining to Progressives the importance of judicial conservatism to preservation of social stability and individual liberties, and explaining to conservatives the importance of a flexible, socially adaptive constitutionalism.

Winslow's colleague Roujet Marshall, a devout constitutional originalist, was a worthy opponent, but over time Winslow's more flexible view proved better suited to the times, and it prevailed. In one of Winslow's last major cases, *State v. Lange Canning Co.* (1916), he

persuaded his colleagues to usher in an era of openness to government by administrative agency. Winslow's contribution to Wisconsin's Progressive legacy is less well known than Robert LaFollette's, but I hope to show in the forthcoming book that it is equally important.

Lighting Out for the Territories

Territorial judges: an overlooked force in American law.

As Willard Hurst observed, during the past 150 years, lawyers have been implementers rather than creators of law. We whose days are spent staring at a screen and poring over paperwork sometimes wish we could take a way-back machine to the days of legal creationism, if only for a little while. Yet an important group of creators—judges appointed from Washington, starting in the 1780s, to establish the law in America's far-flung, largely unsettled new territories—are nearly forgotten today. Territorial judges were often, in the words of the French observer Achille Murat, “the refuse of other tribunals” or seekers after sinecures, and if they are remembered at all, it is as much for their escapades as for their jurisprudence. But some of the territorial judges, including Wisconsin's James Doty, stand out in American political and legal history, and the vital contributions they made to institutionalizing American law are often overlooked. The book being written under the Schoone Fellowship's auspices will attempt to remedy that. ▶▶



Portrait of James Doty, whose career included service as judge and as governor of the Wisconsin Territory.
Wisconsin Historical Society

How did territorial judges help institutionalize law?

Many territorial judges were the first agents of the American legal system to appear in their new jurisdictions. Most of them faced populations that until recently had operated under French or Spanish law and were hostile to change. In long-settled areas such as Louisiana, careful negotiation of a blended system was required. Newer frontier areas, such as Doty's Wisconsin, wanted no formal law at all. Frontier judges had to travel among widely scattered settlements—often an adventure in itself—and establish courthouses, create or prop up local law-enforcement systems, and, perhaps most importantly, instill basic respect for American law and authority. The latter task was often difficult. During his first year as a judge, Doty encountered open resistance requiring a physical confrontation to subdue. Other frontier judges, including Andrew Jackson in 1790s Tennessee, also had to meet and pass physical tests of authority.

Territorial judges also had to create a body of legal precedent. They had more tools to do so than is commonly realized: early territorial decisions show that in addition to Blackstone, copies of English reports and treatises and even some American reports were available on the frontier. But for many judges, precedent was based on half-remembered legal mentoring they had received in the East. Some, such as Alabama's Harry Toulmin, filled the gap by publishing treatises and practice manuals of their own; a few, including Doty, kept journals of their decisions to pass on to successors.

Judges' political and cultural adventures.

It was common for territorial judges to plunge into politics. That was partly a function of their statutory role: the Northwest and Southwest Ordinances conferred legislative functions on judges during the first stage of territorial status. It was also a matter of necessity: men with formal education and administrative and organizational skills were rare on the frontier and

were needed to help develop economic and cultural structures as well as legal ones.

Some judges made a permanent imprint on their states' early history. Doty became a champion of Indian rights and authored the first dictionary of the Sioux language; he became a major land developer and served as a territorial governor and congressman from Wisconsin after his time as a judge ended. After Jackson defeated the Creeks in the Red Stick War (1813–1814), Toulmin helped adjust Indian relations and smooth the way for white settlement and Alabama statehood (1819). Augustus Woodward designed Detroit's modern street plan and helped found the University of Michigan, and Henry Brackenridge of Louisiana and Florida published a number of books on philosophy and travel.

Brackenridge in a sense was a second-generation territorial judge. His father, Hugh Brackenridge, helped found Pittsburgh and, as a member of Pennsylvania's supreme court in the 1790s, participated in the court's efforts to extend the state's judicial system to central and western Pennsylvania, then in the process of settlement. A later generation would produce another great territorial judge, James Wickersham, who brought stability to gold-rush-era Alaska by clarifying and enforcing mining laws and laws governing relations between whites and Alaska Natives. After his judicial service ended, Wickersham represented Alaska in Congress and helped it create a post-gold-rush economy and gain full territorial status.

The territorial legacy.

Territorial judges' legacy to American law is subterranean but real. Most territorial judges tried to implant existing American law rather than change it. Doty was one of the few exceptions: he believed strongly that American criminal law should not be applied to intramural Indian disputes. In 1830 he tried to advance that belief by overturning a verdict of murder against Menominee Chief Oshkosh for killing another Indian under circumstances where tribal law permitted the killing, but Doty's decision changed no judicial minds and effectively ended his chances of reappointment when his term expired.

State supreme court decisions quickly superseded territorial decisions, which are seldom cited today.

But the seeds of American legal authority and court systems that the territorial judges planted were vital. Without them, the task of building American law west of the Appalachians, and of settling the western lands generally, would have been considerably more difficult and precarious than it was.

Wisconsin: The Final Firework in the Antislavery Legal Movement

Putting Wisconsin's antislavery heritage in perspective.

Wisconsin takes great pride in its antislavery heritage, particularly the Northwest Ordinance (1787), which ensured that Wisconsin would be a free state, and the *Booth Cases* (1854, 1859), in which Wisconsin stood alone in defying the federal government's attempt to turn Northerners into slavecatchers. This pride is justified but needs perspective. When Wisconsin arrived on the American stage as a new state (1848), American slavery was two centuries old, and the legal reaction against slavery had been underway for 70 years. The *Booth Cases* were important, but they were merely the final fireworks in the drama of American law and slavery.

Slavery: a legal dilemma in both North and South.

Slavery in the South raised many legal questions. Should the law limit masters' power over their slaves? Should it limit masters' power to free their slaves? Should slaves be given any measure of liberty and basic rights? These questions produced complex, often-conflicting statutes and case law that provide a revealing picture of the antebellum South.

But slavery also affected the North, which produced a lesser-known but equally rich body of antislavery law. Slavery did not magically disappear in the North. Most Northern states, beginning with Pennsylvania in 1780, enacted gradual emancipation statutes designed to protect owners' property rights in the current generation of slaves. As a result, the last slaves did not disappear from census rolls of Northern states until the 1850s.

Sojourn and fugitive cases.

With gradual-emancipation laws in place, Northern lawmakers' attention turned to two issues: the treatment of fugitive slaves and the less well-known "sojourn" issue of whether slaves traveling with their masters became free when they entered free states. During the early nineteenth century, courts in all sections held that slaves entering free states became free if their master intended to stay on free soil indefinitely. But in *Commonwealth v. Aves* (1836), Massachusetts' chief justice, Lemuel Shaw, broke new ground, holding that slaves became free the minute they stepped on free soil. Other Northern courts came over to Shaw's side. Many Southern courts, most notably Missouri's in *Dred Scott v. Emerson* (1852), responded by moving in the other direction: no amount of time spent on free soil could confer freedom. No sojourn cases ever arose in Wisconsin, which was far from the South and from most slaveholders' routes of travel, but Wisconsin was given a chance to make its mark in the fugitive-law controversy. It made the most of the opportunity.

In the 1820s, Pennsylvania and some New England states enacted personal-liberty laws requiring that fugitives be given a hearing with full procedural due process in order to determine whether they should be returned south. In *Prigg v. Pennsylvania* (1842), the U.S. Supreme Court overturned these laws, holding that they were preempted by more-summary federal hearing procedures. Many Northern states reacted to *Prigg* by enacting new laws prohibiting their citizens and officials from assisting in slave recapture. In 1850, Congress responded by passing a new Fugitive Slave Act that required Northerners to assist federal officials in recapture efforts upon demand.

The law galvanized Northern antislavery opinion: antislavery lawyers asked Northern judges to declare the 1850 Act unconstitutional, but in *Sims's Case* (1851), Chief Justice Shaw, the author of *Aves*, defined how far judges would go. Shaw emphasized his personal distaste for the law but held that deference to federal authority was paramount: the Supreme Court had said in *Prigg* that, in fugitive matters, states must follow federal authority, and he would do so. ▶▶



Orsamus Cole (1819–1903) served as a Wisconsin Supreme Court justice (1855–1880) and chief justice (1880–1892). Cole was elected to the court in 1855 in large part because of his position on the Fugitive Slave Act, which led to his ruling in the *Booth Cases*.
Wisconsin Historical Society

Wisconsin was the only state to break ranks. The story of the *Booth Cases* is well known: In 1854 the Wisconsin Supreme Court, invoking states' rights, held that it was not bound by *Prigg* and that the 1850 federal act was unconstitutional. The *Booth* decision attracted abolitionist encomiums and even grudging respect in the South: Georgia senator Robert Toombs excoriated Wisconsin as "the youngest of our sisters, who got rotten before she was ripe," but at the same time grudgingly complimented the state's fidelity to a concept of states' rights that the South was finding increasingly useful as war approached.

The *Booth Cases* were both less and more than is commonly realized. When the U.S. Supreme Court reversed the *Booth* decision in 1859, the Wisconsin Supreme Court refused to accept the reversal, but Chief Justice Luther Dixon's dissent caused many Wisconsinites to pause and reflect. That turned out to be a turning point in the Wisconsin states' rights movement. Nevertheless, *Booth* inspired other antislavery judges: Ohio's supreme court missed joining Wisconsin by one vote (*In re Bushnell*, 1858), and Maine's court joined Wisconsin on the eve of the Civil War (*In re Opinion of the Justices*, 1861).

The spirit of *Booth* also produced a final states' rights fireworks display after the Civil War. The war's decision in favor of union and federal supremacy did not change Wisconsin Justice Byron Paine's devotion to states' rights. In a series of postwar cases, most famously *Whiton v. Chicago & Northwestern Railroad Co.* (1870) and *In re Tarble* (1870), Paine persuaded his colleagues to contest federal removal statutes and assert the power to issue habeas corpus writs against federal officials. The U.S. Supreme Court's reversals of *Whiton* and *Tarble* (1872) definitively established the high court's position as the final authority on federal constitutional questions. The *Booth Cases* thus performed a crucial, albeit ironic and unintentional, role in cementing the fundamental change in the federal-state balance of power that the war had wrought.

A Rebellion of Giants: Dixon, Ryan, and Taming the Railroads in the Gilded Age



Luther Dixon (1825–1891)
at age 40.
Wisconsin Historical Society



Edward Ryan (1810–1880)
at age 65.
Wisconsin Historical Society

Eastern jurists such as John Marshall, James Kent, Oliver Wendell Holmes, Jr., and Benjamin Cardozo have received the lion's share of attention from law professors and historians over the years. Two fellow giants from the Midwest, Michigan's Thomas Cooley and Iowa's John Dillon, have been relegated to comparative obscurity.

Cooley and Dillon played a central role in shaping the contours of modern American constitutional law. They forged their philosophies in the heat of two critical judicial debates over the role of railroads in American society. Two Wisconsin justices, Luther Dixon and Edward Ryan, were also leaders in those debates, and their contributions to American constitutional law deserve to be better known.

Government railroad subsidies.

When railroads first appeared in the 1830s, many states and municipalities, including the states of Illinois and Michigan, built their own railroads or gave generous subsidies to private builders. The subsidies usually consisted of bonds or promissory notes in return for which they received railroad stock. States and municipalities hoped that returns on the stock would help pay their bond and promissory-note obligations. The railroads generally sold the bonds and notes to eastern and British financiers in return for cash that could be used to meet building and operating expenses.

Disaster ensued in 1837 when a depression bankrupted many roads and left many states and municipalities saddled with huge debts to the financiers, debts backed only by now-worthless railroad stock. Some states and municipalities tried to escape their predicament by arguing that their subsidies were unconstitutional, but most courts held that the subsidies were permissible (and the related obligations to financiers were enforceable) because railroads served a public purpose. History repeated itself when a new depression arrived in 1857. Wisconsin

municipalities argued that they should be excused from their debts because their subsidies violated the state constitution, but the Wisconsin Supreme Court held that the subsidies were legal.

Shortly after the Civil War, Cooley, Dillon, and Dixon led a revolt against the prevailing rule. In 1868, Cooley published his *Constitutional Limitations*, perhaps the most influential treatise of the late nineteenth century. In it, he conceded the rule that governments can spend to promote the public interest but suggested the concept applied only to protection of individual liberty and property, not to community interests. In *Hanson v. Vernon* (1869), Iowa's Dillon applied Cooley's concept: he confirmed that past obligations must be honored but held that because most railroads were private corporations, subsidies did not serve a public purpose. Cooley and his Michigan colleagues followed Dillon's lead in *People v. Township Board of Salem* (1870).

The same year, in *Whiting v. Sheboygan & Fond du Lac Railroad Co.* (1870), Dixon also joined the revolt—but on his own terms. Dixon did not want to repudiate the Wisconsin court's earlier decisions, so he attempted to draw a line between subsidies of purely private companies (not allowed) and of railroads that were subject to rate controls and other forms of government regulation. Dixon's colleague Byron Paine, who dissented, reflected the continuing sentiment of most American judges. Paine argued that railroads "have done more to . . . promote the general comfort and prosperity of the country . . . than all other mere physical causes combined" and that that, without more, was sufficient to create a public interest and justify subsidies. Dixon recognized that the line between public and private interest was indistinct when it came to railroads, but he concluded that a line must be drawn: "Thus far shalt thou go, and no further."

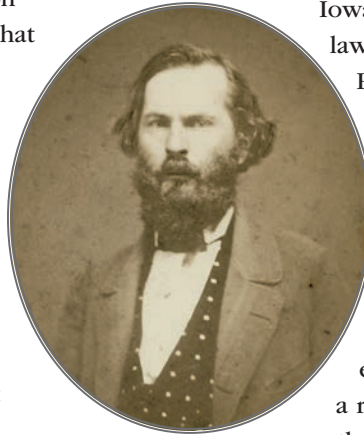
Whiting had enduring importance: Dixon was perhaps the first American judge to suggest that government subsidies carried with them a correlative right of governmental regulation. Other courts criticized *Whiting*, but the link that Dixon forged between governmental subsidy and control gradually took hold. It was the only enduring legacy of the Midwestern judicial revolt against subsidies.

The Granger laws.

The movement for more government control of railroads was already underway when *Whiting* was decided. Upper Mississippi Valley states (Wisconsin, Minnesota, Iowa, and Illinois) enjoyed a railroad boom after the Civil War, but rate increases and perceived rate discrimination led to political revolt in those states. In 1871, Illinois enacted the nation's first "Granger law," regulating railroad shipping rates and practices. Legislators reasoned that corporations that accepted state authorization to operate must also accept the limitations the states imposed on their operations.

Iowa and Minnesota also enacted Granger laws, and in 1874 Wisconsin enacted the Potter Law, the last but strongest of the region's Granger laws. One national railroad expert denounced the Potter Law as "the most ignorant, arbitrary and wholly unjustifiable law to be found in the history of railroad legislation." The Potter Law set maximum freight and passenger rates and allowed no exceptions even if the rates prevented a railroad from making a profit. When the Granger laws were challenged as unconstitutional, the Illinois Supreme Court struck down the first version of that state's law for lack of an exception provision, and the Potter Law's supporters feared the Wisconsin Supreme Court might do the same.

But in the *Potter Law Case* (1874), Ryan upheld the law in ringing terms. He dismissed the railroads' claim that the law would ruin them: "[T]hese wild terms," he said, "are as applicable to [the law] as the term murder is to the surgeon's wholesome use of the knife, to save life, not to take it." Ryan also dismissed concerns about lack of an exception provision, hinting that the court would carve out exceptions in the future if that proved necessary. Three years later, in *Munn v. Illinois* and a series of related cases (1877), the U.S. Supreme Court upheld all of the Midwestern Granger laws, using reasoning very similar to Ryan's. Debate would continue in legislatures and courtrooms over the details of corporate regulation, but Ryan had irrevocably established that states, as granters of corporate charters, have near-absolute power to set reasonable conditions for corporate operations. ■



Byron Paine (1827–1871).
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