

ON WISCONSIN: SOME FRIENDLY CONSTITUTIONAL ADVICE

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On reading the Constitution of the State of Wisconsin, I am reminded that one's understanding of a constitution is very dependent on a detailed understanding of the history of the political community for which it is presumably the higher law. In retrospect, when I wrote an article on the proposed constitution for the European Union,¹ I had a much better understanding of the relevant European history than my current understanding of the relevant Wisconsin history. So any number of provisions of the Wisconsin Constitution seem odd or puzzling to me, and I ask you to forgive a friendly stranger for my innocent mistakes. I am especially intrigued to understand why the longest section of the constitution is a detailed set of rules about gambling.² And why several sections describe the authority of state officials to repel an invasion³ or to charge someone with treason,⁴ not being aware that Wisconsin was ever threatened by invasion or subversion.

I. THE STATE OF WISCONSIN

As an economist, I am first inclined to survey the economy and government of a state before passing judgment about whether some change in the constitution is likely to be valuable. The data summarized in the following tables, most of which are in the *Statistical Abstract of the United States* for 2006,⁵ proved to be the most accessible and helpful.

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1. William A. Niskanen, *Advice from a Friendly American on the Proposed Constitution for the European Union*, in COERCIVE POWER AND ITS ALLOCATION IN THE EMERGENT EUROPE 17 (Geoffrey Brennan ed., 2005).

2. See WIS. CONST. art. IV, § 24.

3. See WIS. CONST. art. VIII, § 7(1).

4. See WIS. CONST. art. I, § 10.

5. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2006, available at <http://www.census.gov/compendia/statab/2006/2006edition.html>.

GENERAL ECONOMIC CONDITIONS

Annual Percentage Change 1990–2004	Nation	Wisconsin
Real Gross State Product ⁶	3.2%	3.6%
Population ⁷	1.2%	0.9%
Real Personal Income Per Capita ⁸	1.7%	2.0%
Recent Economic Conditions		
Personal Income Per Capita (2004) ⁹	\$32,937	\$32,157
Average Annual Salary (2003) ¹⁰	\$37,765	\$33,425
Employment Rate (2004) ¹¹	62.3%	68.1%
Unemployment Rate (2004) ¹²	5.5%	5.0%
Poverty Rate (2003) ¹³	12.7%	10.5%

For the most part, general economic conditions in Wisconsin are quite favorable. The increases in real gross state product and real personal income per capita from 1990 through 2004 were higher than the national average.¹⁴ The rate of population growth was somewhat lower than the national average, although higher than in any other state in the Great Lakes region.¹⁵ The Wisconsin economy appears to have adjusted better to the decline in manufacturing employment than any other state in this region, probably due to the higher diversity of manufacturing employment by industry.¹⁶ Recent economic conditions in Wisconsin are also quite favorable. Personal income per capita in Wisconsin is about the same as the national average despite a significantly lower average salary, primarily because of an unusually high employment rate.¹⁷ The primary economic policy challenge suggested by these data is to increase the average salary of Wisconsin workers; the most effective way to achieve this objective, according to

6. *Id.* at 446 tbl.654.

7. *Id.* at 21 tbl.17.

8. *Id.* at 452 tbl.662.

9. *Id.*

10. *Id.* at 427 tbl.630.

11. *Id.* at 390 tbl.581.

12. *Id.*

13. *Id.* at 471 tbl.692.

14. *Id.* at 446 tbl.654, 452 tbl.662.

15. *Id.* at 21 tbl.17.

16. *Id.* at 390 tbl.581.

17. *Id.* at 452 tbl.662, 427 tbl.630, 390 tbl.581.

Terry Ludeman, may be to provide incentives to reduce the substantial outmigration of Wisconsin college graduates.¹⁸ The general economic conditions in Wisconsin, however, are not sufficient to make the case for a significant change in the Wisconsin Constitution.

STATE AND LOCAL GOVERNMENT CONDITIONS

	Nation	Wisconsin
Expenditures Per Capita (2002) ¹⁹	\$6,026	\$6,251
Tax Revenue Per Capita ²⁰	\$3,143	\$3,421
Top Personal Tax Rate (2006) ²¹	5.5%	6.8%
Top Corporate Tax Rate (2006) ²²	6.9%	7.9%
Budget Balance Per Capita (2002) ²³	-\$160	-\$267
Employees Per 100 Residents (2003) ²⁴	5.42	5.26
Average Annual Salary ²⁵	\$43,056	\$44,298

Expenditures, taxes, and borrowing per capita by the Wisconsin state and local governments are each somewhat higher than the national average.²⁶ As in most states, the balance of general revenues and expenditures in Wisconsin was negative in 2002 but increased to a surplus by 2004; even in 2002, however, the outstanding state and local debt per Wisconsin resident was about 5% lower than the national average.²⁷ Somewhat surprising, the relatively high government expenditures per capita in Wisconsin is *not* due to an unusually high number of government employees; the number of full-time equivalent state and local government employees per capita is 3% lower than the

18. Terry Ludeman, former Chief Economist for Wis. Dep't. of Workforce Dev., Address at Wisconsin Constitution Conference – Is the Wisconsin Constitution Obsolete?, (Oct. 6, 2006), *audio available at* <http://law.marquette.edu/webcasts/events/wi/06-TerryLudeman.mp3>.

19. U.S. CENSUS BUREAU, *supra* note 5, at 285 tbl.431.

20. *Id.* at 287 tbl.432.

21. FED'N OF TAX ADM'RS, STATE INDIVIDUAL INCOME TAX RATES TABLE (2006), *available at* http://www.taxadmin.org/fta/rate/ind_inc.pdf.

22. FED'N OF TAX ADM'RS, STATE CORPORATE INCOME TAX RATES TABLE (2006), *available at* http://www.taxadmin.org/fta/rate/corp_inc.pdf.

23. U.S. CENSUS BUREAU, *supra* note 5, at 287 tbl.432.

24. *Id.* at 311 tbl.456.

25. *Id.*

26. *See supra* text accompanying notes 19–23.

27. U.S. CENSUS BUREAU, *supra* note 5, at 287 tbl.432.

national average, offset by an average salary that is about 3% higher.²⁸ The average salary of state and local employees in Wisconsin, however, is about one-third higher than the average salary of all employees in the state, whereas the national average salary of state and local employees is 14% higher than the average salary of all employees;²⁹ this raises the question whether some change in the structure of government in Wisconsin would make it possible to hire qualified employees at a lower salary to provide some tax-financed services.

A more important question is whether the residents of Wisconsin value the level and quality of government services in the state by enough to offset their higher taxes. For the moment, that seems to be the case; Wisconsin is the *only* state in the Great Lakes region to experience a net internal immigration from 2000 through 2004.³⁰ State and local government conditions in Wisconsin are also not sufficient to make a case for a significant change in the Wisconsin Constitution.

But good enough for government work is not good enough. The citizens of Wisconsin should consider changes to the Constitution of Wisconsin that would make their economic and political conditions demonstrably *superior* to those in other states.

II. THE FISCAL CONSTITUTION

Professor McChrystal asked me to address the constitutional rules bearing on spending and taxes and I agreed, subject to the opportunity to address one other topic as well. I have been thinking about state fiscal constitutions for about thirty years, first serving on the committee that drafted Proposition 1 in California³¹ (along with Anthony Kennedy, now a Justice of the Supreme Court), as chairman of the committee that drafted the Headlee Amendment in Michigan,³² and as a friend of several people that have recently been promoting TABOR-like amendments³³ in other states.

28. See *supra* text accompanying notes 24–25.

29. See *supra* text accompanying notes 10, 25.

30. U.S. CENSUS BUREAU, *supra* note 5, at 24 tbl.20.

31. Proposition 1 provided for tax and expenditure limitations on state government to be included in the California state constitution. See LEWIS K. UHLER, SETTING LIMITS: CONSTITUTIONAL CONTROL OF GOVERNMENT 175–177 (1989); see also California Ballot Proposition 1 (1973), available at http://library.uchastings.edu/ballot_pdf/1973s.pdf.

32. MICH. CONST. art. IX, §§ 25–34.

33. See, e.g., Assemb. J. Res. 55, 96th Leg., Reg. Sess. (Wis. 2003).

A. *The Wisconsin Fiscal Constitution*

My reading of the written Constitution of the State of Wisconsin, however, provided very little guidance about the effective fiscal constitution. For routine budget decisions, according to article VIII, section 5, the legislature is instructed to limit estimated expenditures to estimated revenues for each year with any actual deficit to be repaid in the following year.³⁴ The quorum for such decisions, according to section 8, is three-fifths of the members of each house.³⁵

For extraordinary expenditures, according to section 6, the legislature is allowed to contract debt with such debt to be retired within five years, “but such debts shall never in the aggregate exceed one hundred thousand dollars.”³⁶ (A reality check: the outstanding debt of the State of Wisconsin was nearly \$15 billion in 2002.)³⁷ Such debts must be approved by a majority of all members elected to each house.³⁸ And one wonders what might constitute an extraordinary expenditure, for section 10 states that “the state may never contract . . . debt for . . . internal improvement.”³⁹

The long and complicated section 7 appears to override any of the above fiscal constraints but provides no clear guidance about what is the effective fiscal constitution.⁴⁰ I have not studied the implicit fiscal rules of the Wisconsin legislature, but I doubt that they are consistent with any of these provisions of the written fiscal constitution.

B. *Changes to Consider*

What, if any, changes in the Wisconsin fiscal constitution should be considered?

First, I do *not* support a TABOR-like amendment for several reasons: such amendments limit the rate of growth of state spending to the inflation rate plus the rate of growth of the population, but they have not proven to be stable. As far as I know, all such amendments at the state level have been subject to suspension or the exemption of some major types of spending or revenues. Second, any temporary increase in spending has a ratchet effect on future spending. More important, such

34. WIS. CONST. art. VIII, § 5.

35. *Id.* art. VIII, § 8.

36. *Id.* art. VIII, § 6.

37. U.S. CENSUS BUREAU, *supra* note 5, at 296 tbl.440.

38. WIS. CONST. art. VIII, § 6.

39. *Id.* art. VIII, § 10.

40. *Id.* art. VIII, § 7.

amendments make state spending independent of real per capita income, and thus, do not give those who provide or most value state services a stake in economic growth. In some cases, of course, a general reduction in state spending and tax revenues may increase economic growth, but many other state policies also influence economic growth. For example, the composition of state spending, the level of marginal tax rates, the details of regulation and commercial law, etc., also affect economic growth but are not addressed by a general limit on state spending and tax revenues. A fiscal rule that permits some increase in state spending in response to an increase in real per capita income is necessary to encourage those who especially benefit from state spending to pay attention to these other policies that also affect economic growth.

Again, what, if any, changes in the fiscal constitution should be considered?

Let's start with the several objectives that you may, or maybe should, be trying to accomplish by an amendment to the constitution:

- Stabilize the state government spending and tax revenue share of personal income, *unless changed by a broadly supported political decision*,
- Stabilize the level of state government spending relative to temporary changes in state economic conditions,
- Improve the incentives of those who make the state's fiscal decisions,
- Reduce the dependence of the budget process on estimates, and
- Express the fiscal rules in clear, concise constitutional language.

The following fiscal rules, I suggest, are consistent with each of these objectives:

Suggested Fiscal Rules

1. State general expenditures in any fiscal year may not exceed one hundred ten percent of the state general revenues in the second prior fiscal year without the approval of a majority of those elected to each house of the legislature.
2. The rate or base of no state tax may be increased without the approval by a majority of those voting in the next election for members of the legislature.

3. The state must compensate local governments for the estimated incremental cost of any new state mandate on these governments.

Rule 1 establishes a limit on state general expenditures that is a fixed multiple of the known level of state general revenues in the second prior fiscal year. The specific percent in this rule should be based on the average two-year increase in some aggregate nominal measure of the state economy over an extended prior period. Over the period 1990 through 2004, for example, nominal personal income in Wisconsin increased at an average two-year rate of 10.4%.⁴¹ Since the Wisconsin tax structure is slightly progressive, a spending limit that is 110% of the revenues in the second prior fiscal year would maintain the spending share of personal income over any extended period.

The two-year lag between revenues and expenditures serves several objectives. Expenditures would be stabilized relative to short-run changes in the state economy; expenditures during the weak economy of 2002, for example, would be based on the revenues in the strong economy of 2000. The fiscal incentives of both voters and legislators would be better when any increase in tax rates must be approved by the voters two years before the legislature may approve a spending increase. In addition, as mentioned before, this type of spending rule increases the incentive to promote measures that increase economic growth, increasing tax revenues for any given tax rates. And the two-year lag greatly reduces the role of estimates in the budget process. There may be occasions when it is appropriate to increase the spending limit for a specific year; this decision can be left to the legislature because it has no ratchet effect on subsequent spending. The suggested quorum for this vote is that specified for extraordinary expenditures in the constitution.⁴²

Rule 2 establishes the level of state expenditures and tax revenues relative to the size of the state economy, a decision that should be made only by the voters. This rule also stabilizes the details of the tax code.

Rule 3 is necessary to constrain the state government from the incentive to shift some of the fiscal burden of its agenda to local governments. Any estimate of the incremental cost of a new state mandate, of course, should be expected to provoke some controversy. The experience in other states, however, also suggests that this rule

41. U.S. CENSUS BUREAU, *supra* note 5, at 451 tbl.661.

42. See WIS. CONST. art. VIII, § 8.

would increase the popular support for approving a general fiscal limit in the state constitution.

III. THE SUPPLY OF TAX-FINANCED SERVICES

There is broad support in Wisconsin for a number of tax-financed services. No *general* interest, however, is served by an explicit or implicit constitutional rule that any such service be supplied only by a government organization and government employees. There is no reason to expect better service from a government monopoly than from a private monopoly.

A. Education

The most important of these services, of course, is education. In a 1998 ruling on the amended Milwaukee Parental Choice Program, the Supreme Court of Wisconsin observed that “[e]ducation ranks at the apex of a state’s function.”⁴³ So it is important to evaluate the status of public education in Wisconsin and any changes in the constitution that would improve this status.

PUBLIC EDUCATION IN WISCONSIN

Costs and Inputs	Nation	Wisconsin
Annual Cost Per Student (2004) ⁴⁴	\$8,237	\$9,472
Teachers Per 100 Students ⁴⁵	6.3	6.8
Annual Teacher Salary ⁴⁶	\$46,800	\$42,900
Outputs		
H.S. Graduation Rate (2002–2003) ⁴⁷	73.9%	85.8%
College Board SAT (2005) ⁴⁸	1,028	1,191

43. Jackson v. Benson, 218 Wis. 2d 835, 897, 578 N.W.2d 602, 629 (1998).

44. U.S. CENSUS BUREAU, *supra* note 5, at 156 tbl.230, 164 tbl.243.

45. *Id.* at 156 tbl.230, 161 tbl.238.

46. *Id.* at 161 tbl.238.

47. MARILYN SEASTROM ET AL., NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T. OF EDUC., PUBL’N NO. NCES 2006-601, THE AVERAGED FRESHMAN GRADUATION RATE FOR PUBLIC HIGH SCHOOLS FROM THE COMMON CORE OF DATA: SCHOOL YEARS 2001–02 AND 2002–03, at 5 tbl.1 (2005), available at <http://nces.ed.gov/pubs2006/2006601.pdf>.

48. COLLEGE BOARD, TABLE 3: MEAN SAT REASONING TEST VERBAL AND MATH SCORES BY STATE, WITH CHANGES FOR SELECTED YEARS (2005), available at http://www.collegeboard.com/prod_downloads/about/news_info/cbsenior/yr2005/table3-mean-SAT-reasoning-test.pdf.

The record of public education in Wisconsin is impressive *relative* to the national average. The annual cost per student is 15% higher than the national average, despite a somewhat lower average teacher salary.⁴⁹ But both the percent of ninth-grade students that graduate from high school and the SAT scores are among the several highest in the nation.⁵⁰ Again, as with the general economic and state government records in Wisconsin, the record of public education is not sufficient to make a case for a significant change in the Wisconsin Constitution.

The problem, however, is that the current national average *grossly* underestimates the potential performance of American students. The difference between the relative and absolute performance of a school system is illustrated by the new Cato Index of Education Market Performance;⁵¹ Wisconsin has the highest score of any state on this index but with an absolute score of 26 on a 100 point scale.⁵² Professor Caroline Hoxby of Harvard has estimated that the average productivity of American schools *declined* by around 55% (based on math tests for nine-year-olds) or 73% (based on reading tests for seventeen-year-olds) between the 1970–1971 and 1998–1999 school years.⁵³ The *average* seventeen-year-old in the 1970–1971 school year had a score that fewer than 5% of American seventeen-year-olds now attain.⁵⁴ Wisconsin, in its own interests, has the opportunity to demonstrate to the nation that the academic performance of Wisconsin students could be *dramatically* increased. As Allan Odden has emphasized, “Wisconsin needs to move a ‘good’ education system to a ‘great’ education system.”⁵⁵

The education article in the Wisconsin Constitution, however, describes a quite bureaucratic system of public education that would be substantially regulated and financed by the state, without a hint of any role for tax-financed private suppliers. There is an intriguing opening in

49. See *supra* text accompanying notes 44, 46.

50. See *supra* text accompanying notes 47–48.

51. ANDREW J. COULSON, CATO INST., POLICY ANALYSIS NO. 585, THE CATO EDUCATION MARKET INDEX (2006), available at <http://www.cato.org/pubs/pas/pa585.pdf>.

52. *Id.* at 13, 14 tbl.2.

53. Caroline M. Hoxby, *School Choice and School Productivity: Could School Choice be a Tide that Lifts All Boats?*, in THE ECONOMICS OF SCHOOL CHOICE 287, 289 (Caroline M. Hoxby, ed., 2003).

54. *Id.*

55. Allan R. Odden, Professor, Dep't. of Educ. Leadership & Pol'y Analysis, Univ. of Wisconsin-Madison, Address at Wisconsin Constitution Conference – Is the Wisconsin Constitution Obsolete? (Oct. 6, 2006), audio available at <http://law.marquette.edu/webcasts/events/wi/06-AllenOdden.mp3>.

the initial Declaration of Rights, however, which states that “Nothing in this constitution shall prohibit the legislature from providing for the safety and welfare of children by providing for the transportation of children to and from any parochial or private school or institution of learning.”⁵⁶ So some amount and type of tax-financed support for students attending private schools has been authorized for forty years. More important, several decisions by the Supreme Court of Wisconsin have affirmed the constitutionality of the Milwaukee Parental Choice Program (“MPCP”) on the basis of the “public purpose doctrine,”⁵⁷ although this doctrine has no basis in any specific provision of the state constitution.

The MPCP has been one of the most successful policy experiments in many years. State-financed vouchers were first available to students from poor families in Milwaukee in 1990. The Wisconsin legislature has since expanded the number of voucher-eligible students from 1% of the Milwaukee public school enrollment to 15%, removed the restriction that participating private schools must be nonsectarian, and reduced the state regulations to which these schools are subject.⁵⁸ The most arbitrary of the remaining regulations is that the participating private schools may not charge a tuition higher than the state aid per student in the public schools, an amount about 60% of the total expenditures per student enrolled in the public schools; this regulation severely limits the number and types of private schools participating in the voucher program. As the Supreme Court of Wisconsin observed correctly, “the schools participating in the amended MPCP are also subject to the additional checks inherent in the notion of school choice.”⁵⁹ The value of the voucher is the lesser of state aid per student (\$5,734 in 2004) or the private school tuition, and state aid to the public schools is reduced by one-half the voucher amount. So each student that attends a private

56. WIS. CONST. art. I, § 23.

57. *Vincent v. Voight*, 2000 WI 93, ¶ 41, 236 Wis. 2d 588, ¶ 41, 614 N.W.2d 388, ¶ 41 (“[T]he purpose of [a] tax must be one which pertains to the public purpose of the district within which the tax is to be levied and raised.” (quoting *Buse v. Smith*, 74 Wis. 2d 550, 577, 247 N.W.2d 141, 153 (1976)); *Jackson v. Benson*, 218 Wis. 2d 835, 900, 578 N.W.2d 602, 630 (1998) (“[T]he amended MPCP does not violate the public purpose doctrine because it fulfills a valid public purpose, and it contains sufficient and reasonable controls to attain its public purpose.”); *Davis v. Grover*, 166 Wis. 2d 501, 513, 480 N.W.2d 460, 463 (1992) (“[T]he MPCP does not violate the public purpose doctrine.”).

58. Jay P. Greene et al., *Effectiveness of School Choice: The Milwaukee Experiment*, 31 EDUC. & URBAN SOC’Y 190, 194 (1999).

59. *Jackson*, 218 Wis. 2d at 899, 578 N.W.2d 602, 630.

school with a voucher increases both the state and local revenue per student remaining in the public schools.

A careful paper by several scholars found that the academic performance of the voucher students exceeded those voucher-eligible students who stayed in the Milwaukee public schools by their third or fourth year in a private school.⁶⁰ More interesting, Professor Hoxby's innovative study demonstrated that the productivity growth in those Milwaukee public schools most threatened by a potential loss of students to voucher schools was significantly higher than in Wisconsin schools with a similar mix of students that were not eligible for vouchers.⁶¹ Increased competition had a powerful effect, and almost every student was a winner. Moreover, private schools participating in the Milwaukee voucher program are much less segregated than the Milwaukee metropolitan area public schools, a finding consistent with the conclusion of similar studies of the Cleveland and Washington, D.C. schools.⁶² The only significant remaining opposition to this program has been that by public school administrators and teachers.

Based on this record, the Wisconsin legislature should now consider the MPCP as a model for a statewide voucher program. Some language such as the following should be considered as an amendment to the education article of the Wisconsin constitution:

Suggested Education Rules

1. Any student eligible to attend a public primary or secondary school is also eligible for a voucher to attend a private school, the value of the voucher equal to the lesser of the state aid per student in that school district and the tuition of the private school attended.
2. State aid to local school districts would be reduced by the amount of the vouchers to students in that district.
3. Local school districts are authorized but not required to increase the value of the vouchers to some local students from other revenues.

60. Greene, *supra* note 58, at 200.

61. Hoxby, *supra* note 53, at 323.

62. GREG FORSTER, SEGREGATION LEVELS IN MILWAUKEE PUBLIC SCHOOLS AND THE MILWAUKEE VOUCHER PROGRAM, (Milton and Rose D. Friedman Foundation Aug. 2006), available at <http://www.friedmanfoundation.org/milwaukee.pdf>.

Rule 1 would extend the MPCP rule to all students in the state, regardless of location or the income of the parents. Rule 2 would modify the MPCP rule by reducing the state aid to a local school district by the full amount of vouchers to students in that district; this would substantially increase the incentives of the public schools to avoid losing voucher students to private schools. Even in this case, a voucher student would increase the average local revenue per student remaining in a public school. Rule 3 would authorize a school district to augment the voucher from local revenues to meet the special expenses of some students or to close a public school with few enrolled students.

This suggested amendment would maintain a substantial role of the state in financing and monitoring primary and secondary education in Wisconsin. But it would dramatically change the supply of tax-financed education. Local school districts would have a much stronger incentive to meet the educational demands of local voters. Parents would have a much stronger incentive to monitor the costs and performance of the schools that their children might attend. Innovative school administrators and teachers would have more opportunity to experiment. And there is every reason to expect that the performance of Wisconsin students and the productivity of Wisconsin tax-financed education would dramatically increase.

B. Other Services

In conclusion, I would like to leave you with one other suggested constitutional amendment that would apply to *all* state services. Consider the following language, probably as an amendment to the Declaration of Rights:

Suggested Rule for All State Financed Services

1. Nothing in this constitution should be interpreted to imply that any service financed by the state must necessarily be supplied by a state or local government organization.

The primary value of this suggested rule is to avoid the type of lawsuits that significantly delayed the implementation of the Milwaukee voucher plan and, for the moment, have voided the Florida voucher plan.

On Wisconsin!