BY JOSEPH A. RANNEY

WISCONSIN:
The Path from Independence to Statehood, 1776-1848

Wisconsin's road to statehood was paved with territorial courts, land laws, constitutional experiments, and the radical promise of eventual equality with the Union. But the same legal order that made statehood possible also accelerated the displacement of Native Nations whose lands made that future possible.

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When delegates from the 13 Eastern seaboard colonies gathered in Philadelphia in July 1776 to sign the Declaration of Independence, they could not have foreseen the profound impact that action would ultimately have on Wisconsin. At that time, the territory that would become Wisconsin had just emerged from more than a century of French rule. It had only a handful of white settlers, clustered around forts at Michilimackinac, Green Bay, and Prairie du Chien; Native American Nations, including the Ho Chunk, Menominee, and Ojibwe, occupied the remainder.[1] Philadelphia and the budding American nation were far away.

Between 1776 and its admission to statehood in 1848, Wisconsin underwent an astonishing political and legal transformation. It became part of an American empire-building plan unique in world history, one that facilitated the influx of white settlers that began in the 1820s and paved the way for full membership in the American union but also imposed a high cost on Native Americans in Wisconsin. This article recounts both aspects of the story.

The Pre-American Era

The first Europeans entered Wisconsin in 1634 when the French explorer Jean Nicolet explored the Green Bay region.[2] During the 1600s and 1700s, France established a North American empire that encompassed eastern Canada, the Great Lakes region, and the Mississippi River Valley. The empire was fragile; outside the New Orleans region, it consisted of a handful of forts and clusters of fur traders and farmers. Justice was largely administered by local military commanders and justices of the peace, who seldom had any legal training and relied heavily on mediation to settle disputes. The system worked well, helping to preserve peace between white settlers and Native Americans.[3] It continued after Great Britain took control of the region from France in 1763 and it remained in place until the 1820s, long after the Wisconsin region had passed into American hands.[4]

The Land Ordinance and the Northwest Ordinance: Blueprints for Empire

A strong case can be made that the first major figures in Wisconsin legal history were Thomas Jefferson and James Monroe. At the close of the Revolution in 1783, Great Britain ceded the vast territory between the Appalachian Mountains and the Mississippi River to the United States. Jefferson and Monroe feared that if the Continental Congress did not organize those lands quickly, European powers might recolonize them.[5] In 1784, Monroe prepared, and Congress passed, a land ordinance that provided for the surveying and platting of all lands north and west of the Ohio River. The ordinance created a grid system consisting of townships square in shape and six miles long on each side. The townships in turn were divided into one-square-mile sections, making legal land descriptions for title purposes straightforward. Local land offices sold newly surveyed land to settlers at low prices. This system would give rise to disputes between speculators, squatters, and settlers for many years, but in the end, it proved remarkably successful in facilitating orderly white settlement.[6]

In 1787, Congress enacted the Northwest Ordinance, a revised version of a plan devised by Jefferson in 1784.[7] It would be difficult to overstate the Northwest Ordinance's importance to Wisconsin and American law. It created a three-stage colonial system unlike any other in history, founded on American ideals of freedom and representative democracy.

In the first stage, the Northwest Territory and new territories to be formed within it, as other parts of the Northwest Territory were admitted to statehood, would be ruled by a governor and three supreme court justices, all appointed by the national government. These officials formed a council authorized to create statutory law for the territory.

In the second stage, reached when a territory's population exceeded 5,000 people, the council would be replaced by a legislature elected by settlers.

In the third stage, reached when the territory's population exceeded 60,000 people, statehood would be granted after settlers drafted a state constitution and Congress ratified it.[8] Wisconsin, the last part of the Northwest Territory admitted to statehood, was in turn a part of the Northwest Territory (1787-1800), the Indiana Territory (1800-09), the Illinois Territory (1809-18), and the Michigan Territory (1818-36) before it gained separate territorial status (1836-48).[9]

The Northwest Ordinance contained other important provisions, including the first bill of rights to appear in any governmental plan, a clause prohibiting slavery in the Northwest Territory, and a navigation clause providing that all waters leading to the Mississippi and St. Lawrence Rivers "shall be common highways and forever free."[10] The freedom clause would undergird Wisconsin's fierce opposition to slavery during the antebellum era, and the navigation clause would play a central role in resolving disputes over timber companies' use of Wisconsin rivers to get logs to market in the late 19th century and the development of the public trust doctrine in the 20th century. The Northwest Ordinance remains a foundational document of Wisconsin law.[11]

Indian Law: Invasion and Legal Order

What position did Wisconsin's Native American Nations hold as the white legal order changed? Two facts shaped that position more than any others. First, Native Americans and white settlers held fundamentally different concepts of property rights. Protection of individual interests in personal and real property was a cornerstone of English common law, one that was unquestioningly adopted by American judges and lawmakers. Native Americans had a very different view: "My reason teaches me," said Chief Black Hawk, "that land cannot be sold … [S]o long as [persons] occupy and cultivate it, they have the right to the soil – but if they voluntarily leave it then any other people have a right to settle upon it."[12]

Second, as a practical matter, the tide of white settlement was irresistible. Early American lawmakers believed that the most they could do was ensure the process would take place in a legally orderly fashion. U.S. Supreme

From "Territory to Statehood": A Four-Part Series

In 2023, *Wisconsin Lawyer* published a four-part series of articles focused on Wisconsin's path from territory to statehood. Access those articles at www.wisbar.org/wl.

- *The Creation of Wisconsin: Part 1 – From Territory to Statehood*, 96 Wis. Law. __, June 2023; https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=96&Issue=6&ArticleID=29846.
- *From Territory to Statehood: Part 2 – The 1846 Enactment of Wisconsin's 'Enabling Act'*, 96 Wis. Law. __, July 2023; https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=96&Issue=7&ArticleID=29920.
- *From Territory to Statehood: Part 3 – A Tale of Two Constitutions*, 96 Wis. Law. __, Sept. 2023; https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=96&Issue=8&ArticleID=29991.
- *From Territory to Statehood: Part 4 – When Lincoln Stalled, But Could Not Stop, Wisconsin Statehood*, 96 Wis. Law. __, Dec. 2023; https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=96&Issue=11&ArticleID=30142. **WL**

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Court Chief Justice John Marshall, who was more sympathetic than were many of his contemporaries to Native Americans' plight, expressed this best. "To leave them in possession of their country was to leave the country a wilderness," he said. "The Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However, this restriction may be opposed to natural right, and to the usages of civilized nations, yet ... it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice."[13]

The veneer of order that federal lawmakers applied in Wisconsin and elsewhere prohibited the sale of land to settlers until the government formally acquired it from Native American nations active in that area. Beginning in 1804, the government negotiated a series of cession treaties with Wisconsin Nations; the Black Hawk War (1831-32) accelerated the process, which was completed in 1854.[14]

Congress also enacted laws attempting to protect Native Americans from abusive practices by white traders, which met with limited success, and laws giving the Nations limited authority to apply their own laws to acts committed on their lands, which had more success.[15] In 1830, a white jury convicted Oshkosh, a Menominee chief, of murder for killing a Pawnee who had accidentally killed a Menominee, an act that was permissible under Menominee law. Territorial judge James Doty refused to sentence Oshkosh, concluding that "it would be tyrannical and unjust to declare him, by implication, a malicious offender against rules which [federal] laws presume he could not have previously known." Doty lost his judgeship two years later, largely because of this decision.[16]

The Building Blocks of Statehood

James Doty and the Shaping of Wisconsin's Judiciary. Between 1823 and 1848, Wisconsin lawmakers devoted substantial time and effort to creating legislative and judicial branches of government, with the goal of eventual statehood in mind. The first branch to be built was the judiciary. The courts of the various territories, which included Wisconsin, were located hundreds of miles from Wisconsin settlements, making access to formal justice almost impossible. During the early 1820s, Wisconsin settlers demanded that Congress create a judgeship based in Wisconsin in addition to the three-judge Michigan territorial supreme court sitting at Detroit. In 1823, territorial governor

Lewis Cass and the private secretary James Doty, who had recently migrated to Michigan from New York, persuaded Congress to create the judgeship, and President Monroe appointed the 23-year-old Doty to the post.[17]

Doty faced a daunting task. The new law required him to hold court annually at Michilimackinac, Green Bay, and Prairie du Chien, all separated by hundreds of miles of trackless wilderness. He was also responsible for recruiting local court officials, finding places to serve as courtrooms, and, most importantly, establishing respect for American judicial authority in a region whose settlers viewed the federal government as an intermeddler and were not inclined to defer to a young judge with no prior legal experience. Doty worked hard and succeeded in establishing Wisconsin's first court system, cutting new trails between his courthouses and even physically facing down a prominent Prairie du Chien trader who, when arraigned for drunkenness, challenged Doty's authority. After his judgeship ended, Doty helped found Madison and make it the state's capital; he also served Wisconsin as a territorial governor and as a congressman.[18]

Edward Whiton and the Shaping of Statutory Law. Wisconsin established its own legislature when it became a territory in 1836, but initially, legislative operations were casual; when legislators passed new laws, they put them on a shelf and made no effort to inform the public. Furthermore, it was unclear whether Michigan territorial laws enacted during Wisconsin's time as part of that territory continued in effect. As a result, Wisconsinites often did not know what the law required of them.[19]

At the end of the 1830s, amid a national movement to codify and compile state laws, Edward Whiton, a Janesville legislator, decided to change things. Whiton headed a committee that, to create a complete legal code, compiled existing laws and recommended additional ones. After the legislature approved the code, Whiton arranged for a New York publisher to print it. The code was a far cry from the modern multivolume Wisconsin Statutes published every two years, but it was nonetheless a fundamental advance.[20] Whiton later became Wisconsin's chief justice (1853-59) and presided over his court with a firm hand during turbulent times.[21]

Wisconsin's Constitution: A Jacksonian Imprint. During the early 1840s, with Wisconsin's population exceeding 200,000, a movement for statehood arose. In 1846, Congress authorized the territory to hold a constitutional convention, which met that fall.[22] Jacksonian Democrats dominated the convention and produced a constitution that incorporated many Jacksonian legal reforms. The most controversial provision drastically limited banks' powers and outlawed paper currency. Many Democrats believed that a bank-based commercial system was necessary for future growth, and they could not stomach the anti-bank provision despite their concerns that existing banks were too powerful.[23] The 1846 constitution also created a homestead exemption designed to benefit debtors and a married women's property provision that lifted a major common-law restriction giving married women control over property they brought to their marriages.[24] The constitution also made Wisconsin one of the first states to choose its judges by popular election rather than gubernatorial or legislative appointment.[25]

The 1846 constitution proved too controversial. Voters rejected it, and in late 1847, another convention met to try again. The new convention was considerably more cautious than its predecessor. Its leaders argued that a constitution should be a general statement of democratic principles and a broad blueprint of governmental structure rather than a portfolio of social policies that might fall out of fashion in future years.[26] The convention left reform issues to the new state legislature, instructing lawmakers to consider enacting banking laws, a homestead exemption, and a married women's property law.

The legislature soon enacted all three reforms.[27] The convention also retained the elective judiciary system and, to attract new immigrants, allowed non-citizens who had applied for naturalization to vote.[28] It declined to extend suffrage to Black Wisconsinites, but it authorized a referendum on the issue. When the referendum was held in 1850, it appeared that Black suffrage had failed, but 16 years later, the Wisconsin Supreme Court interpreted the result differently and allowed Black adult males to vote.[29]

A New State, An Unfinished Debate

Voters ratified the new constitution by a healthy margin, and Congress admitted Wisconsin to statehood on May 29, 1848.[30] The new state would soon play an active role in national political affairs, particularly in the expanding controversy over slavery and the debate over whether the Declaration of Independence's vision of democracy, based on its proclamation that "all men are created equal," included not just white property owners but other human beings.

That debate continues to this day, perhaps showing that the Declaration's ideals have not yet been fully realized. But Wisconsin's experience confirms the success of the Founders' equally radical vision, embodied in the Northwest Ordinance, of an empire based on a path to statehood rather than permanent vassalage for territories acquired by the United States. Between 1776 and 1848, Wisconsin went from a largely unpopulated wilderness to a fully functioning, albeit imperfect, political entity that Wisconsinites could identify with. It could not have done so without the work of Jefferson, Monroe, Doty, Whiton, and many others who helped shape the governmental and legal system that was in place when Wisconsin made its leap to statehood. **WL**

ENDNOTES

[1]Alice E. Smith, *The History of Wisconsin, Vol. I: From Exploration to Statehood* 122-25 (1973).

[2]*Id.* at 7-8.

[3]Donald P. Kommers, *The Emergence of Law and Justice in Pre-Territorial Wisconsin,* 8 Am. J. of Leg. Hist. 20, 22 (1964); Smith, *supra* note 1, at 220; *see also* Roger L. Severns (John A. Lupton, ed.), *Prairie Justice: A History of Illinois Courts under French, English and American Law* 1-28.

[4]Kommers, *supra* note 3, at 20-25; Moses M. Strong, *History of the Territory of Wisconsin* 67-68 (1885).

[5]Jack E. Eblen, *The First and Second United States Empires: Governors and Territorial Governments, 1784-1912*, at 19-20 (1968) (citing *Journals of the Continental Congress* (1904-37), 17:806-08 and 18:915-16).

[6]Paul W. Gates, *History of Public Land Law Development* 59-71 (1968); Merrill D. Peterson, *Thomas Jefferson and the New Nation: A Biography* 284-85 (1970).

[7]Act of Congress, July 13, 1787; Eblen, *supra* note 5, at 28-43. The first Congress held under the new U.S. Constitution reenacted the Northwest Ordinance with minor modifications. 1 U.S. Stats. 50 (1789); Eblen, *supra* note 5, at 52-53.

[8]Act of Congress, July 13, 1787, §§ 3-9, art. V.

[9]Smith, *supra* note 1, at 201.

[10]Act of Congress, July 13, 1787, arts. I-III (bill of rights), art. VI (no slavery), art. IV (navigation clause).

[11]*See* Joseph A. Ranney, *Wisconsin and the Shaping of American Law* 15-17 (2017); James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915*, at 160-62, 215-16 (1964); Peter S. Onuf, *Statehood and Union: A History of the Northwest Ordinance* xiii-xiv, 1-5 (1987).

[12]*See* William Blackstone, *Commentaries on the Law of England* books 2 & 3, §§ 8-10 (1765-69); Lawrence M. Friedman, *A History of American Law* 202-03 (1st ed. 1973); Smith, *supra* note 1, at 140 (quoting Donald Jackson, ed., *Black Hawk: An Autobiography* 101 (1964)).

[13]*Johnson and Graham's Lessee v. McIntosh*, 8 Wheat. (21 U.S.) 543, 590-92 (1823).

[14]Joseph A. Ranney, *Trusting Nothing to Providence: A History of Wisconsin's Legal System* 15-16 (1999); 7 U.S. Stats. 84 (1804), 303 (1827), 342 (1831), 370, 405 (1832), 506, 517 (1836), 544 (1837), 591 (1842); 10 U.S. Stats. 1064, 1109 (1854).

[15]Ranney, *supra* note 14, at 17-18; Francis Paul Prucha, *American Indian Policy in the Formative Years* 191-94, 201-03 (1962).

[16]Smith, *supra* note 1, at 91-95; Elizabeth Gaspar Brown, *Judge Doty's Notes of Trials and Opinions*, 9 Am. J. Leg. Hist. 17, 359 (1965) (quotation).

[17]Alice E. Smith, *James Duane Doty: Frontier Promoter* 3-20, 28-33 (1954); 3 U.S. Stats. 722 (1823).

[18]Smith, *supra* note 17, at 54-58, 126; Ranney, *supra* note 11, at 22-24; Ranney, *supra* note 14, at 9-10.

[19]Silas U. Pinney, *Preface to Pinney's Reports*, 1 Pin. 9, 38-39 (1871); Strong, *supra* note 4, at 290.

[20]Pinney, *supra* note 19, at 38-39; *Statutes of the Territory of Wisconsin* (1839); Edward P. Alexander, *Wisconsin, New York's Daughter State*, 30 Wis. Mag. of Hist. 11 (Sept. 1946).

[21]See John B. Winslow, *The Story of a Great Court* (1912),; Ranney, *supra* note 14, at 84-86, 101-02.

[22]Smith, *supra* note 1, at 648-50; Milo M. Quaife, ed., *The Movement for Statehood, 1845-46*, at 13-26 (1918); Ranney, *supra* note 14, at 49-50.

[23]Milo M. Quaife, ed., *The Convention of 1846*, at 70-71, 103-14, 127, 512 (1919); Ranney, *supra* note 14, at 55-57.

[24]Quaife, *supra* note 23, at 631-32, 647-70, 747-48; Ranney, *supra* note 14, at 57-59; *see* Bernard R. Trujillo, *The Wisconsin Exemption Clause Debate of 1846: An Historical Perspective on the Regulation of Debt*, 1998 Wis. L. Rev. 747; Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 Georgetown L. J. 1359 (1983).

[25]Quaife, *supra* note 23, at 289, 303-04, 598; Ranney, *supra* note 14, at 52-53; Jed H. Shugerman, *The People's Courts: Pursuing Judicial Independence in America* 57-122 (2012).

[26]Milo M. Quaife, ed., *The Attainment of Statehood* 179 (1928); Ranney, *supra* note 14, at 60-62.

[27]Quaife, *supra* note 26, at 179, 240-41, 284-90, 295, 489-90, 499-503, 759-64; Ranney, *supra* note 14, at 63-65.

[28]Quaife, *supra* note 26, at 316-19, 337-47, 693-94; Ranney, *supra* note 14, at 53-54, 65-67; Wis. Const. (1848), art. III, § 1; art. VII, § 4; art. VIII, § 3.

[29]Ranney, *supra* note 14, at 536-40; Wis. Const. (1848), art. III, § 1; *Gillespie v. Palmer*, 20 Wis. 544 (1866).

[20]Quaife, *supra* note 26, at vii-viii; Ranney, *supra* note 14, at 67. **WL**