



BY JUSTICE REBECCA FRANK DALLET & JUSTICE BRIAN K. HAGEDORN

Top 10 Reasons You Should Pay Attention to the Wisconsin Constitution

Two Wisconsin Supreme Court justices highlight their top 10 reasons the Wisconsin Constitution can be useful to lawyers in their advocacy for clients.

Think back to the day you were sworn in as an attorney in the state of Wisconsin. Remember that (very long) oath you took? The very first promise you made that day was this: “I do solemnly swear I will support the constitution of the United States, and the constitution of the state of Wisconsin.” That’s right – you pledged your support to not one, but two constitutions.

Recently, one of us asked a high school Advanced Placement (AP) Government class if anyone knew that Wisconsin had its own constitution. None of the 30 students did. While this may speak to the condition of our civic education, even Wisconsin lawyers could use a reminder. In litigation before our court, far too few attorneys recognize that the Wisconsin Constitution has a story – and often a text – all its own. It can be a source of rights, protections, and legal claims distinct from the United States Constitution.¹

So, in the spirit of David Letterman’s top 10 lists (which may be dating us), here are the top 10 reasons why you should pay attention to the Wisconsin Constitution while advocating for your client.

10 The Wisconsin Constitution was adopted at a distinct moment in time – 1848 – well after the ratification of the U.S. Constitution in 1788 and the Bill of Rights in 1791, and before the ratification of the Fourteenth Amendment in 1868. Thus, although it draws on the U.S. Constitution in certain respects, it reflects the independent judgment of our state framers and ratifiers on what the state constitutional convention’s president called “those great principles which characterize the age in which we live, and which, under the protection of Heaven, will – nay, must – guard the honor, promote the prosperity, and secure the permanent welfare of our beloved country.”² Our constitution is therefore

our own, with its own story and meaning that need not mirror its federal counterpart.³

9 The Wisconsin Constitution shares similarities not just with the U.S. Constitution, but also with the constitutions of many other states. For example, Article I, Section 1 of the Wisconsin Constitution declares that “[a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.” This provision, which derives from the Virginia Declaration of Rights and largely mirrors the Declaration of Independence, appears in similar form in the constitutions of Illinois, Maine, New Mexico, Virginia, New Jersey, and Kansas.⁴ Cases in these states, and others whose constitutions contain similar provisions to Wisconsin’s, might help shed light on the meaning of the Wisconsin Constitution.

8 Many parts of the Wisconsin Constitution contain different and broader language than the U.S. Constitution and may thus provide broader protections. Take, for example, freedom of religion. The U.S. Constitution states, in relevant part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁵

By contrast, Article I, Section 18 of the Wisconsin Constitution provides the following:

“The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious

establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.”

This clause, the Wisconsin Supreme Court has held, “with its specific and expansive language, provides much broader protections for religious liberty than the First Amendment.”⁶ Other provisions of the Wisconsin Constitution may similarly provide greater protections for individual liberty than the U.S. Constitution. As former United States Supreme Court Justice William Brennan explained, “[s]tate constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.”⁷

7 Even when the Wisconsin Constitution and the U.S. Constitution use the same language, their meanings may differ. For example, the language of the Fourth Amendment and Article 1, Section 11 of the Wisconsin Constitution is identical. Yet in 1923, 37 years before the U.S. Supreme Court held that the exclusionary rule is the presumptive remedy for violations of the Fourth Amendment, the Wisconsin Supreme Court held that under the Wisconsin Constitution, evidence seized in violation of the right against unreasonable searches and seizures must be excluded from trial.⁸ In doing so, the court read Article 1, Section 11 in

conjunction with another provision, Article 1, Section 8, the protection against self-incrimination, concluding that both provisions of the Wisconsin Constitution were of “equal standing and equal value” and that “the courts are pledged to support and uphold them, be the consequences what they may.”⁹ Thus, even when the Wisconsin Constitution uses identical language to the U.S. Constitution, we can interpret the Wisconsin Constitution independently.

6 Since the earliest days of our state’s history, the Wisconsin Supreme Court has embraced its role as the principal interpreter of our state constitution. In 1855, the court declared that “[t]he people of this state shaped our constitution, and it is our solemn responsibility to interpret it.”¹⁰ More recently, we reiterated that we “will not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens’ liberties ought to be afforded.”¹¹ In other words, the Wisconsin Supreme Court has not just the power, but also the responsibility, to give independent effect to the Wisconsin Constitution.

5 Also reflective of our state history, the Wisconsin Constitution includes protections that have no equivalent in the federal Constitution. For example, it should be no surprise that the Wisconsin Constitution guarantees “the right to fish, hunt, trap, and take game subject to only reasonable restrictions as prescribed by law.”¹² Another example is Wisconsin’s long history of protecting victims’ rights. Wisconsin was the first state to pass the statutory Crime Victims’ Bill of Rights in 1980.¹³ Building on this foundation, in 1993, voters approved the first constitutional protections for victims’ rights in Article I, Section 9m. And in 2020, voters approved “Marsy’s Law,”

which amended Article I, Section 9m to increase the rights of victims in the judicial process, including the rights to privacy and to full restitution and notification of all proceedings of a criminal case upon request.¹⁴

4 Our state constitution may be more reflective of shifting priorities and values of a majority of Wisconsinites over time.¹⁵ As described by Professor Jessica Bulman-Pozen and Professor Miriam Seifter in their article *The Democracy Principle in State Constitutions*, “[u]nlike the federal constitution, [state constitutions] were drafted – and have been repeatedly rewritten and amended – to empower popular majorities.”¹⁶ Indeed, the Wisconsin Constitution has been amended more than 150 times, compared to the 27 amendments to the significantly older federal Constitution.¹⁷ Those amendments are an important part of our state’s history and have their own distinct ratification debates, historical traditions, and interpretations to draw on or develop.

3 As jurisprudence in federal courts has continued to evolve, state courts and state constitutions have taken on increased prominence. For example, after the U.S. Supreme Court held in *Kelo v. City of New London* that economic development can be a “public use” under the Takings Clause of the U.S. Constitution,¹⁸ the response was swift. Many states amended their statutes and constitutions to provide stronger protections for property rights, and state courts interpreted similar state constitutional provisions more narrowly than their federal counterpart.¹⁹ State constitutions and state courts have likewise taken center stage on issues such as legislative districting, abortion regulation, and others.²⁰

2 Prevailing on state constitutional grounds in state court may be easier



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than doing so on federal grounds, for several reasons. First, there are fewer barriers to bringing state constitutional claims. Standing is not a jurisdictional requirement in Wisconsin,²¹ and as a result, claims may proceed without having to satisfy the more stringent federal requirements of injury-in-fact, causation, and redressability.²²

Second, state courts may be less restrictive in how they interpret their constitution. As described by Judge Jeffrey S. Sutton in his book *51 Imperfect Solutions: States and the Making of American Constitutional Law*, “Three or so levels of scrutiny – rational basis, intermediate or strict – may be the best way to assess equal protection claims under the National Constitution, but they are hardly the ordained way and hardly the way *required* by original meaning,

living constitutionalism, pragmatism, or any other school of interpretation.”²³

Additionally, state courts may be receptive to interpreting state constitutional provisions before reaching federal constitutional arguments. In several states, such as Hawaii, state courts have made clear that they will resolve the state constitutional claims first and will consider a federal constitutional claim only if relief under the state claim is denied.²⁴

1 Lastly, but perhaps most importantly, in representing your clients, you should be prepared to make any and all (non-frivolous) arguments to the court. If raising a claim under the Wisconsin Constitution provides you with another way to prevail, you do your client no favors by ignoring it.

At the same time, give your state constitutional claims independent analysis grounded in the text’s meaning and the context of related provisions. Merely citing analogous Wisconsin constitutional provisions as an afterthought or a footnote to your federal constitutional claim isn’t enough. Our constitution is our own. It stands as a separate, independent legal authority requiring its own analysis supported by fully developed arguments.

For all these reasons, we invite you to take the Wisconsin Constitution seriously on its own terms. And, just maybe, doing so will help your clients in the process. **WL**

ENDNOTES

¹We are far from the first members of our court to make this observation. Former Justice Shirley S. Abrahamson wrote in 1985 that her “impression from briefs submitted in the Supreme Court of Wisconsin and from other state court cases [she] ha[d] read is that, all too frequently, counsel do not raise state constitutional issues in the trial or appellate courts, or make only passing reference to the state constitution.” Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 *Tex. L. Rev.* 1141, 1161 (1985).

²*The Attainment of Statehood* 883 (Milo M. Quaife, ed. 1928).

³To learn more about that history, you might consider consulting Wisconsin’s ratification debates, which are reproduced in Milo M. Quaife’s volumes collecting sources from the period leading up to statehood. See *The Movement for Statehood, 1845–1846* (Milo M. Quaife, ed. 1918); *The Convention of 1846* (Milo M. Quaife, ed. 1919); *The Struggle over Ratification, 1846–1847* (Milo M. Quaife, ed. 1920); *The Attainment of Statehood* 883 (Milo M. Quaife, ed. 1928). Some law review articles and books also review the history surrounding the adoption of the Wisconsin Constitution and Wisconsin’s broader legal history. See Ray A. Brown, *The Making of the Wisconsin Constitution (Part I)*, 1949 *Wis. L. Rev.* 648; Ray A. Brown, *The Making of the Wisconsin Constitution (Part II)*, 1952 *Wis. L. Rev.* 23; see also Joseph A. Ranney, *Trusting Nothing to Providence: A History of Wisconsin’s Legal System* (1999).

⁴*A.M.B. v. Circuit Ct. for Ashland Cnty. (In re Adoption of M.M.C.)*, 2024 *WI* 18, ¶ 49, 411 *Wis. 2d* 389, 5 *N.W.3d* 238 (Dallet, J., concurring); see also Illinois Const. art. I, § 1; Maine Const. art. I, § 1; New Mexico Const. art. II, § 4; Virginia Const. art. I, § 1; Kansas Bill of Rights § 1; New Jersey Const. art. I, ¶ 1.

⁵U.S. Const. amend. I.

⁶*Coulee Cath. Schs. v. Labor & Indus. Rev. Comm’n*, 2009 *WI* 88, ¶ 66, 320 *Wis. 2d* 275, 768 *N.W.2d* 868.

⁷William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 *Harv. L. Rev.* 489, 491 (1977).

⁸See *Hoyer v. State*, 180 *Wis.* 407, 415–16, 193 *N.W.* 89 (1923).

⁹*Id.*

¹⁰See *Attorney Gen. ex rel. Bashford v. Barstow*, 4 *Wis.* 567 (*567), 786 (*757) (1855).

¹¹*State v. Doe*, 78 *Wis. 2d* 161, 172, 254 *N.W.2d* 210 (1977).

¹²See *Wis. Const. Art. I, § 26*.

¹³See 1979 *Wis. Act* 219.

¹⁴See *Wisconsin Just. Initiative v. Wisconsin Elections Comm’n*, 2023 *WI* 38, ¶¶ 8–11, 407 *Wis. 2d* 87, 990 *N.W.2d* 122.

¹⁵Our state constitution is much easier to amend than the federal constitution. The Wisconsin Constitution may be amended either by a constitutional convention, Article XII, Section 2, or through ratification by the people at an election of an amendment or amendments proposed by the Wisconsin Legislature and passed by a majority in both houses in two consecutive legislative sessions. See *Wis. Const. art. XII, § 1*. By contrast, amendments to the U.S. Constitution must be passed by a two-thirds vote of both the House of Representatives and the Senate and ratified by three-fourths of state legislatures. See *U.S. Const. art. V*.

¹⁶Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 *Mich. L. Rev.* 859, 859 (2021).

¹⁷50 *Constitutions, Amendments to the Wisconsin Constitution*, <https://50constitutions.org/wi/timeline> (last visited Apr. 30, 2026).

¹⁸545 *U.S.* 469 (2005).

¹⁹See, e.g., Josh Blackman, *Popular Constitutionalism after Kelo*, 23 *Geo. Mason L. Rev.* 255, 258–71 (2016) (summarizing state legislative and constitutional changes after *Kelo* and state court decisions rejecting *Kelo* in interpreting state-constitutional takings provisions).

²⁰See, e.g., Serena Mayeri, *History and Tradition in Constitutional Interpretation: Resistance in the States*, 2025 *Wis. L. Rev.* 1351, 1369–74 (discussing state-court decisions interpreting state-constitutional provisions after the U.S. Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, 597 *U.S.* 215 (2022)); Avery E. Emery, Note, *Echoing Into the Void: Rucho’s State-Level Progeny*, 2024 *Utah L. Rev.* 1131, 1144–64 (analyzing state-constitutional decisions adopting or rejecting the Supreme Court’s conclusion in *Rucho v. Common Cause*, 588 *U.S.* 684, 718 (2019), which concluded that partisan gerrymandering claims are non-justiciable in federal court).

²¹See *Foley-Ciccantelli v. Bishop’s Grove Condo. Ass’n*, 2011 *WI* 36, ¶ 40 n.18, 333 *Wis. 2d* 402, 797 *N.W.2d* 789 (lead op.).

²²See *Lujan v. Defenders of Wildlife*, 504 *U.S.* 555, 560–62 (1992).

²³Jeffrey Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 18 (2018).

²⁴See, e.g., *State v. Wilson*, 543 *P.3d* 440, 445 (Haw. 2024). **WL**