

## Part 3 – From Territory to Statehood: A Tale of Two Constitutions

This article, focusing on Wisconsin's two constitutional conventions, is the third in a short series honoring the 175th anniversary of Wisconsin's admission as the 30th state in the United States on May 29, 1848.

Wisconsin's constitution is one of the oldest in the nation, well-honed during two lively constitutional conventions held even before the territory achieved statehood. In 1846, Wisconsin's march to statehood included three legal maneuvers:<sup>1</sup> the procurement of President James Polk's signature on the Enabling Act (the Act) authorizing the creation of a state government, the gaveling in of a constitutional convention, and the electorate's passage of a referendum approving a state constitution and state government.<sup>2</sup>

### The 1846 Constitutional Convention

Wisconsin's preternatural passage of the Act – within one session of the 29th Congress in August 1846 – inspired the territorial government to quickly establish a constitutional convention. Territorial leaders set a goal to secure statehood before the 1848 presidential election.

While the task of constitution drafting would be arduous, Wisconsin's delegates enjoyed an advantage over other territories' constitutional conventions: They circumvented debate on the most fiercely argued and passionately held topics of the time because of the exacting provisions of the Northwest Ordinance of 1787 (the Ordinance) and the Enabling Act (the Act). For Wisconsin delegates, the Ordinance and the Act created non-negotiable constitutional provisions such as the prohibition of slavery,<sup>3</sup> civil and religious liberties,<sup>4</sup> dedication of land for public schools and for the siting of universities, voter-approved constitutions, voter-approved state government, equality with other states, required federal

responsibilities, and the proposed state's boundaries and jurisdictions.<sup>5</sup>

Despite these settled questions, the convention was unruly and contentious. The 124 elected delegates<sup>6</sup> who convened from 27 then-existing counties argued for 10 weeks until a majority voted for a constitution to be sent for referendum. Political factions existed within the overwhelming number of 103 Democrat delegates; the minority of 18 Whig delegates presented warring interests with all the Democrats.<sup>7</sup> However, tensions between the delegates were greatest over their geographic and demographic interests – the eastern and southern delegates' interests conflicted with those of the northern and western delegates.

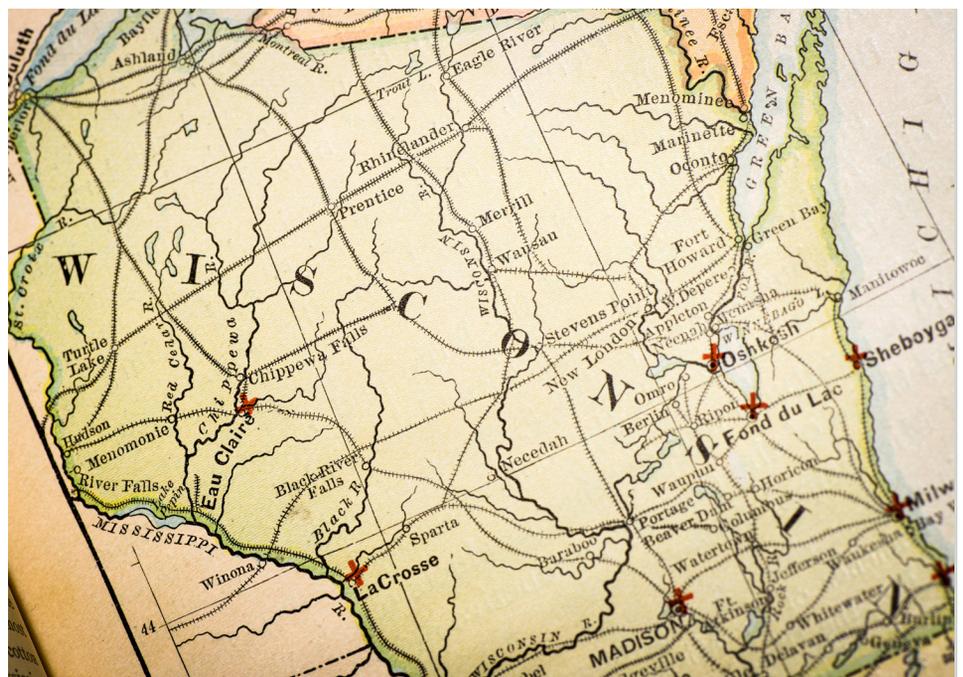
The delegates structured the convention around 22 committees (which eventually proved unwieldy) to address

BY HON. HANNAH C. DUGAN

Wisconsin's delegates circumvented debate on the most fiercely argued and passionately held topics of the time because of the exacting provisions of the Northwest Ordinance of 1787 and the Enabling Act.



**Hannah C. Dugan, U.W.** 1987, is a Milwaukee County Circuit Court judge. She is a Fellow of the Wisconsin Law Foundation. Access the digital article at [wisbar.org/wl](http://wisbar.org/wl).  
**Hannah.Dugan@wicourts.gov**



the various functions of government. Resolutions emanating from the committees were frequently heard by the committee of the whole. To bring some order and pacing to the proceedings, no resolution from committees was considered on the same day it was introduced to the entire body of delegates.

### Democratizing the Frontier

The convention's delegates represented a variety of political beliefs with colorful appellations: Democrats, Whigs, Barnburners, Locos, Tadpoles, Abolitionists, Jacksonians, and the "Rip Van Winkles of Old Hunkerism." The delegates slogged through the important albeit mundane topics of governmental structure and functions, steadily, with the "give and take" expected of conventioners. Some structural matters elicited more extended debate around the delegates' "take" on democracy. The most notable such debate centered on the judiciary: whether judges should be selected by election (championed by frontiersmen) or by appointment (preferred by the eastern elite), and whether it served the common person to purvey one or two distinct judicial tiers.

In contrast to these relatively sedate deliberations, several controversy-filled resolutions fueled ardent argument, resulting in the convention lasting an unexpected 10 weeks. In the spirit of the Jacksonian Era, the 1846 constitution's final draft incorporated such progressive ideas as 1) an article effectively prohibiting all commercial banking in Wisconsin,<sup>8</sup> 2) an article that allowed immigrants enfranchisement if they applied for citizenship timely and took an oath to uphold the U.S. Constitution,<sup>9</sup> 3) an article that provided for homestead exemptions,<sup>10</sup> and 4) an article that provided married women the right to own property.<sup>11</sup>

### Visionary Article Had Its Own Referendum

As controversial as the progressive articles were, suffrage issues elicited

## Resource Information

- Arthur J. Dodge, *Wisconsin's Admission as a State: The History of the Enabling and Admission Acts in the XXIXth and XXXth Congresses* (the Milwaukee Sentinel & the St. Paul Pioneer Press 1898).
- Library of Congress, *Primary Documents in American History: Northwest Ordinance*, <https://www.loc.gov/rr/program//bib/ourdocs/northwest.html> (last visited June 5, 2023).
- Mark Wyman, *The Wisconsin Frontier* (Bloomington: Indiana Univ. Press, circa 1998).
- Alice E. Smith, *The History of Wisconsin: From Exploration to Statehood, Volume 2* (Madison, State Historical Society of Wisconsin, 1973).
- Milo M. Quaife, *The Attainment of Statehood* (Madison, State Historical Society of Wisconsin, 1928).
- U.S. Congress, *The Congressional Globe, Volume 2-3: Twenty-Fourth Congress, First Session* (1836), <https://digital.library.unt.edu/ark:/67531/metadc30905/m1/615/> (last visited May 26, 2023).
- U.S. Congress, *The Congressional Globe, Volume 3-4: Twenty-Eighth Congress, Second Session* (1845), <https://digital.library.unt.edu/ark:/67531/metaph2366/m1/30/> (last visited May 26, 2023).
- U.S. Congress, *The Congressional Globe, Volume 2-3: Twenty-Ninth Congress, First Session* (1846), <https://digital.library.unt.edu/ark:/67531/metadc30905/> (last visited May 26, 2023).
- *Laws of Wisconsin Territory Passed by the Fourth Legislative Assembly* (Madison, Wisconsin Territory: 1844), [https://books.google.com/books/about/Laws\\_of\\_Wisconsin\\_Territory.html?hl=ms&id=mTiiAAAAMAAJ](https://books.google.com/books/about/Laws_of_Wisconsin_Territory.html?hl=ms&id=mTiiAAAAMAAJ) (last visited May 30, 2023).
- Ray A. Brown, *The Making of the Wisconsin Constitution Part I*, 1949 Wis. L. Rev. 648.
- The Green Papers, State and Local Government Constitutions of the Several States, <https://www.thegreenpapers.com/slg/constitution.phtml> (modified June 19, 2021).
- Constitution of Wisconsin, Message of the President of the United States, 29th Congress, 2nd session, Doc. 49, <https://www.sothebys.com/en/buy/auction/2021/constitutions-and-related-documents-from-the-collection-of-dorothy-tapper-goldman-part-2/wisconsin-an-early-printing-of-the-first-wisconsin> (last visited Aug. 9, 2023).
- "Suffrage debates during first convention," Wisconsin Historical Collections, vol. 27 at 210 (Madison: State Historical Society of Wisconsin, 1919). Online facsimile at <http://www.wisconsinhistory.org/turningpoints/search.asp?id=55> (last visited Aug. 10, 2023).
- Frederic L. Paxson, *A Constitution of Democracy - Wisconsin, 1847*, Mississippi Valley Historical Rev., Vol. 2, No. 1 (June 1915), <https://www.jstor.org/stable/1889103> (last visited Aug. 9, 2023). **WL**

their own contentiousness. At various times, resolutions were introduced on suffrage for including women, reducing the age of enfranchisement to 18 or increasing it to 25, increasing residency requirements, documenting immigrants' citizenship credentials, and deleting the word "white" from the

definition of eligible voter. However, the suffrage resolution proposing suffrage for "negro persons otherwise eligible to vote" dominated floor debate.

Even in this ardent abolitionist territory, opposition to suffrage for Black people was deeply felt; debate about it was mostly reflexive rather than

logical. For example, one delegate commenting on the provision “came down upon the abolition party like a perfect avalanche; was in favor of no half-way measures with them but would give them war – war to the knife, and the knife to the hilt!” The delegate from Menominee County with the highest number of Black constituents stood silent; other delegates unabashedly expressed the unnatural nature of allowing such suffrage as being contrary to “God’s insuperable mark of separation upon the two races” and therefore “it is not right to mingle together two races whom God had declared could not mingle.”

More practical and moderate arguments also were presented. Some delegates predicted that Wisconsin would be “overrun” by “fugitive slaves.” Another delegate opined that the constitution would not get “50 votes west of the Rock River,” implying its complete failure at the polls because of this one article. The abolitionists and their allies risked sinking the entire constitutional referendum – at the convention or at the polls – over this contemporary controversy.

Instead, factions wrought a resolution: submit to voters the proposed constitution referendum with a separate referendum asking whether the constitution should include suffrage for Black men otherwise eligible. The conciliatory resolution included that the Black suffrage referendum would be on the ballot “at the next general election, and, if approved shall become a part of the constitution.”<sup>12</sup>

In public arenas, meetings, and rallies, and in the press, voters debated the merits and demerits of the proposed constitution for four months. On April 6, 1847, eligible voters soundly rejected the progressive (to some, radical) constitution with 34,352 ballots cast – 14,119 (41%) for and 20,233 (59%) against.<sup>13</sup> The Black suffrage referendum also failed, with 22,279 ballots cast – 7,664 (34%) for and 14,615 (66%)

against. The article prohibiting banks proved to be the heaviest toll that barred passage.

### Second Constitutional Convention of 1847

After a cooling-down period, Governor Henry Dodge called a special session of the territorial government to determine the path to statehood; the legislature gavelled to order on Oct. 18, 1848, in Madison. After voting down a resolution that the body itself be

constituted as the constitutional delegates, the legislature reconnoitered a streamlined convention of 69 newly elected and demographically different delegates (only six members participated in both conventions).<sup>14</sup>

The 1847 convention delegates (about one-half the number of delegates as at the first constitutional convention) chose a Whig as chair, established six committees instead of 22, and met for seven weeks instead of 10. Rather than merely excising



Created in 1986 to  
fulfill a need...  
**continuing to exceed  
expectations in 2023.**

REDISCOVER WILMIC

WILMIC.com

the articles that torpedoed the 1846 constitution, the delegates started over and created a newly drafted constitution. Political factions were not as (proportionately) imbalanced as in 1848 – with 43 Democrats, 25 Whigs,

### Several controversy-filled resolutions fueled ardent argument, resulting in the convention lasting an unexpected 10 weeks.

and 1 Independent – and the delegates themselves and the convention's work product were markedly more moderate.

For example, the delegates incorporated the homestead exemption into “the declaration of rights” section. An entire committee dedicated to banking devised a compromise resolution;

it replaced constitutional bank prohibitions with a provision permitting legislature-proposed referenda for popular vote on banking issues. While abolitionists fervently sought Black suffrage again, the convention

excluded any additional changes to the suffrage provisions.

On Feb. 1, 1848, the convention delegates voted 60-9 in favor for the constitutional referendum to be submitted to popular vote.<sup>15</sup> Even as residents' drive for statehood increased, public discussion and interest in the particulars of the proposed state government had

waned. When the single ballot question was posed on March 13, 1848, 22,601 eligible voters approved the 1848 constitution referendum with 16,417 (72.6%) yeas and 6,184 nays (27.4%).

Having accomplished the penultimate step toward statehood, the territorial leaders – with an approved state constitution and state government design in hand – headed back to Washington, D.C., to secure Wisconsin's sovereign status in the Union. **WL**

#### ENDNOTES

<sup>1</sup>As discussed in parts 1 and 2 of this series, the creation of Wisconsin rests on six legal pillars: an ordinance, a territorial petition, a voter-approved statehood referendum, an Enabling Act, a voter-approved constitution, and Congressional ratification for admission. Part 1 of the series discussed the Ordinance of 1787, the territorial petition, and the territorial referendum initiating the statehood process. 96 Wis. Law. 39-41 (June 2023). Part 2 discussed passage of the Enabling Act. 96 Wis. Law. 49 (July/August 2023). Part 3 discusses the fifth “legal pillar” – a voter-approved constitution.

<sup>2</sup>On Aug. 6, 1846, federal officials authorized the Wisconsin Territory government to commence drafting and ratifying a state constitution and government to be admitted as a state commensurate with the original states. On Oct. 5, 1846, the state delegates mustered and gavelled in a constitutional convention. On Dec. 16, 1848, the convention voted to send two referenda to the electorate: 1) ratification of the proposed state constitution, and 2) enfranchisement of Black men.

<sup>3</sup>Northwest Ordinance § 6: “There shall be neither slavery nor involuntary servitude in said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted.”

<sup>4</sup>Individual liberties were generally protected, and the rights to jury trial and habeas corpus were specifically protected.

<sup>5</sup>The Enabling Act prescribed the boundaries as the northern corner of the northern line of Illinois, up through the Menominee River to the Mississippi River, to the mouth of the St. Louis River down to the mouth of the St. Croix River, to the Mississippi River down to northwest Illinois. Wisconsin had jurisdictional authority over specified islands northwest of the proposed state and concurrent jurisdiction over the Mississippi River.

<sup>6</sup>The delegates were identified as being from the following locations: 42 from New England, 55 from the middle states, 10 from the South, 1 from the Midwest, 13 foreign born, and 3 as unknown. The delegates' occupations were the following: 49 farmers, 26 lawyers, 18 tradesmen, 12 miners, 8 surveyors, 3 lumbermen, 3 physicians, 2 editors, 1 teacher, 1 “Indian agent,” and 1 “cooperative rural community operator.”

<sup>7</sup>Three delegates were designated as “Independent.”

<sup>8</sup>Racine County delegate Edward G. Ryan's resolution forbade legislative creation or authorization of banks, forbade all banking business in Wisconsin, and forbade the circulation of paper money greater than in denominations of \$20. The article passed by a two-thirds margin (79-27). Two of the “pro-passage” arguments were 1)

assertion and agreement with the national movement touting that coins were “safer” currency than paper, and 2) the acceptance of the allegation that legislators were susceptible to easy bribes from bankers and their ilk.

<sup>9</sup>This provision included the following: suffrage for white men, 21 years old or older, who were U.S. citizens or aliens who had filed their declaration of intention to become citizens and swore an oath to support the constitution of the United States. A revised provision required at least one year's residency (extended from six months) in the territory and 10 days in the county.

<sup>10</sup>“The privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure, or sale for the payment of any debt, or liability hereafter contracted.”

<sup>11</sup>“All property of the wife owned by her at the time of her marriage and that acquired by her afterwards by gift, devise, descent, or otherwise that from her husband shall be her separate property. Laws shall be passed providing for the registry of the wife's property and more clearly defining the rights of the wife thereto, as well as property held by her husband.”

<sup>12</sup>Resolved: “That at the same time when the votes of the electors shall be taken for the adoption or rejection of this constitution an additional section in the following word, viz: ‘All male citizens of the African blood possessing the qualifications required by the first section of the article on suffrage and the elective franchise shall have the right to vote for all officers and be eligible to all offices that now are or hereafter may be elective by the people after the adoption of this constitution,’ shall be submitted to the electors of this state for adoption or rejection....”

<sup>13</sup>Under territorial law, eligible voters were “white males, twenty-one years of age, citizens of the United States or aliens who had filed their declaration of intention to become citizens, who had resided six months in the territory and ten days in the county.”

<sup>14</sup>Demographically, of the 69 members, 26 were from New England, 25 from New York, 7 from Europe and the remainder (except two) from southern states. As for occupations, 33 were farmers, 19 were lawyers, and others worked in a variety of trades or businesses. There were no miners among the members, despite the substantial number of miners in Wisconsin. By age, 12 delegates were under 30, 32 were between 30 and 40, 23 were between 40 and 50, and two were over 50.

<sup>15</sup>Nine delegates voted against the second constitutional referendum because of the enfranchisement exclusion. **WL**