

Constitutional Highlights

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Wisconsin Constitution Article X, Section 2 THE COMMON SCHOOL FUND

[Certain proceeds] shall be set apart as a separate fund to be called “the school fund,”...

History and purpose of the section

Article X, section 2 of the Wisconsin Constitution concerns the creation and funding of a “common school fund.” Interest from the fund must be used to support and maintain the common schools, which are known today simply as public schools. Although the fund now provides only a very small portion of school budgets, it remains an important source of funding for public school libraries and is an occasional source of controversy.

Common school funds date back at least to the colonial period of American history, and were important sources of public school funding for the states during early American history. In 1785, Congress began granting lands to newly admitted states for the support of public schools. Wisconsin’s common school fund (hereinafter “school fund”), like those of other states, originated with such a land grant from the federal government upon Wisconsin’s admission into the union in 1848. The grant provided that the 16th section of Wisconsin’s approximately 1,500 townships be reserved for public schools. Another congressional act made an additional land grant to Wisconsin in 1849 for use on internal improvements, such as roads, railways, and bridges. Like some other states, however, Wisconsin opted to add this land to its school fund. Together, the two grants from the federal government amounted to nearly 1.5 million acres. According to the Wisconsin Board of Commissioners of Public Lands, approximately 4,300 acres of this land remain in state ownership as of 2009, the rest having been sold to benefit the fund. Proceeds from the sale of timber and firewood on remaining lands are deposited in the school fund.

In addition to the land grants from the federal government, Wisconsin’s Constitution provided that other proceeds are also deposited in the school fund, including: 1) money and the clear proceeds of property that is forfeited to the state; 2) money and the clear proceeds of property that escheats to the state; 3) the

clear proceeds of all fines collected for breach of the penal laws; and 4) all moneys arising from grants to the state for which no purpose is specified. The clear proceeds collected for breach of penal laws today generally refers to fines and civil forfeitures.

Unable to direct the above-listed proceeds for anything but the school fund, the legislature has created several surcharges, adding these to the amounts of criminal fines paid by offenders, to fund various state programs. These surcharges have been controversial. A 1989 report to the legislature by the Legislative Council opined that the surcharges improperly circumvent the constitutional mandate that the clear proceeds of all fines be deposited in the school fund, although Wisconsin appellate courts have never ruled on this issue. A 1989 proposed constitutional amendment would have eliminated the requirement that forfeited property and fines be deposited in the school fund, instead directing these funds toward programs for drug abuse, law enforcement, and victims, witnesses, and offenders. The amendment, however, failed to pass, in part due to fears that it would leave school libraries without these resources. Opposition to surcharges nonetheless remains. A 2001-2002 report by the director of state courts noted opposition among law enforcement to the proliferation of surcharges. As of 2008, the number of surcharges has risen to 32. Despite early concerns about fund mismanagement, the school fund today contains approximately \$700 million and disbursed \$28.2 million to public school libraries in 2006.

How courts interpret the section

As noted, article X, section 2 requires that specified property and proceeds be deposited in the school fund and used to support public schools. The funds may not be retained or used for other purposes. The only exception to this rule is when the term “clear proceeds” is used. In that case, the legislature may provide that a portion of the proceeds be used to reimburse informants or enforcers (i.e., county governments) for their enforcement or prosecution costs, but must direct the balance to the school fund. The Wisconsin Supreme Court has interpreted this section in several cases.

In *Lynch v. The Steamer “Economy,”* 27 Wis. 69 (1870), a statute made it illegal for steam-powered boats to operate without spark catchers, which were devices used to prevent fires. The statute provided that private informants could sue violators to enforce the statute, which carried a fine to be split between the informant and the county. The court held that the statute was unconstitutional, ruling that the county’s portion should instead go toward the state for the school fund.

In *Dutton v. Fowler*, 27 Wis. 427 (1871), a statute prohibited allowing sheep with “foot rot” out of their enclosures or onto roads and provided that 100 percent of the penalty for violating the statute go to private informants who brought actions against violators. The court struck down the statute, which the court accepted as penal in nature, because it directed none of the proceeds to the school fund.

In *State ex rel. Guenther v. Miles*, 52 Wis. 488 (1881), the statute challenged granted counties the authority to calculate and deduct their own costs of prosecution, but because the county’s cost estimates exceeded

the total amount it collected in fines, nothing remained for the school fund. The Wisconsin Supreme Court held this arrangement unconstitutional, as it did not guarantee that some amount would go toward the school fund.

In *State v. De Lano*, 80 Wis. 259 (1891), the legislature had set “clear proceeds” as leaving 33 percent of fines for the school fund. The court ruled that using 66 percent for costs of prosecution was reasonable, but warned that leaving a “nominal” amount for the school fund would probably not satisfy the constitution.

In *State ex rel. Sweet v. Cunningham*, 88 Wis. 81 (1894), the state had attempted to reserve some school fund lands for the creation of a state park. The court held that the withholding of school fund lands from sale was unconstitutional.

In *Estate of Payne v. Commissioners of Public Lands*, 208 Wis. 142 (1932), a statute directed escheated personal property (i.e., property other than real estate) to the Milwaukee County Orphans’ Board. Rejecting an argument that not all types of property “escheat” within the meaning of section 2, the court held that the statute was unconstitutional because it directed property away from the school fund. The court also said that the state, as trustee, could not waive schools’ rights to the funds.

The most recent case addressing the legislature’s power to define “clear proceeds” was *State ex rel. Commissioners of Public Lands v. Anderson*, 56 Wis. 2d 666 (1973). There, the court defined “clear proceeds” as the fine or fee minus an “actual or reasonably accurate estimate of the costs of prosecution.” In *Anderson*, the statute defined clear proceeds as 50 percent of traffic fines and 90 percent of fines for other (e.g., criminal) offenses. The court held that both numbers were reasonable under this standard and rejected an argument that the legislature must define “clear proceeds” the same for all types of offenses.

The Wisconsin Supreme Court has also addressed other questions involving section 2:

In *Village of Platteville v. Bell*, 43 Wis. 488 (1878), a saloon owner faced a fine for failing to close his establishment by 10 p.m., as required by a Platteville city ordinance. The saloon owner argued that article X, section 2 of the Wisconsin Constitution required that such fines be distributed to the school fund and that the ordinance was therefore unconstitutional. The court disagreed, holding that section 2, which refers to “penal laws,” does not include local municipal ordinances.

In *State ex rel. Johnson v. Maurer*, 159 Wis. 653 (1915), the court struck down a provision directing one-third of the proceeds from fishing and game laws to a fund for the protection of fish and game. The court held the statute unconstitutional because it permitted proceeds to be retained for a purpose other than what is specified in section 2 of the constitution.

Strategies for reconciling legislation with the section

Direct all required proceeds to the school fund and nowhere else

Article X, section 2 requires that all of certain moneys be deposited in the school fund. In other cases, only the “clear proceeds” must be deposited in the school fund; the legislature may deduct a reasonable amount for the purposes of reimbursing enforcement and prosecution costs. The Wisconsin Supreme Court has never established precise limits on the legislature’s authority to define “clear proceeds,” but laws that leave nothing or a nominal amount for the school fund may be held unconstitutional. Laws directing the use of school fund moneys for purposes other than the support of public schools would also likely be held unconstitutional.

As a way of using money from offenders to finance certain programs, the legislature has added surcharges to fines and forfeitures to fund programs that cannot be financed by money that must go to the school fund. Although the Legislative Council has opined that surcharges are an “end run” around the requirements of article X, section 2, and has warned that courts may look unfavorably upon attempts to use surcharges to avoid funding the school fund, no Wisconsin court has yet ruled on their constitutionality.

Use school fund interest only, and only for public school purposes

Interest from the school fund must be used for public schools. Currently, the interest is distributed annually to school districts for public school libraries and certain other library expenditures. Attempts to spend the principal of the school fund or to use the interest for other purposes would likely be held unconstitutional.



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