Eminent Domain Reform

Our Founders diligently argued and relentlessly fought for the Great American Right to own and possess their own property. With the Kelo decision in 2005, the use of eminent domain has expanded from “public use” to “public benefit.” The usual targets for the endeavors are typically those least able to defend themselves, especially minorities, the elderly, the poor, small businesses and farmers. Here we present reform suggestions to correct their mission creep.

Phil Hoyer, Project Manager.

LAW ENFORCEMENT INTERACTION WITH DHS

For decades law enforcement agencies worked well amongst one other with shared respect. In recent years that effort has operationally segmented because of the increased migration and sympathies growing among larger sized cities to become sanctuary places for illegal aliens. Further, the harboring of some criminal individuals has caused crimes in surrounding areas, exposing and hindering local police activity. Our approach to this dilemma proposes specific efforts to respectfully amend the logical differences and expresses citizen involvement to correct a pressing issue.

Bob Fischer, Project Manager.

CAMPUS FREE SPEECH

American universities and colleges have long exhibited a healthy competition to freely exchange all forms of information with students. In recent decades the intolerance level sharply increased to where some specific political, religious, and business speakers are banned from appearing. These actions absolutely infringe on our First Amendment, the freedom for speech. The schools enforce this practice by not providing proper security and endangering participants. We present constitutionally adapted corrections to protect and support our state’s students.

Kathy and Bob Mueller, Project Managers.

MINIMUM MARK-UP REPEAL

Wisconsin is the only state in America that lawfully permits all retailers to charge purchasers a hidden tax to provide them a guaranteed profit. This law has been in effect for 80 years and has long outlived its usefulness. This practice greatly inhibits commerce within the state and especially along 2,000+ miles with border-states. Wisconsin needs to move-on with fair trade and well into the 21st century.

Michele Dake and Norm Reynolds, Project Managers

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Eminent Domain Reform

Interpretation of the “Takings Clause" is one of the fundamental issues of contention with regard to American property rights today. In essence, the Takings Clause says the government cannot take someone’s private property unless it is for public use and provided the government pays just compensation to the owner. This historically is called "eminent domain" although that phrase occurs in English common law, it does not occur in the Constitution. The 5th Amendment states:

> ". . . nor shall private property be taken for public use, without just compensation."

Historically this power was reserved for roads and public buildings and the courts limited the taking of property for only public use. However, in 1954, the United States Supreme Court extended that interpretation from public use to “public purpose”. In 1981, the Michigan Supreme Court further extended the power to include economic development, which resulted in over 10,000 filed or threatened recorded condemnations of private property.

In 2004 the Michigan Supreme Court overturned the 1981 ruling, but in 2005, the United States Supreme Court broadened ‘public purpose’ to include ‘economic development’ and recast the power for “public benefit.” Since 2005 forty-two states, in response, have tightened their Eminent Domain laws to restrict eminent domain for public benefit.

In 2007 the Castle Coalition graded the fifty states from A to F regarding eminent domain laws. Wisconsin was given the grade of C+. The lower grade reflects Wisconsin law that only limits deceptive ‘blight’ designations for residential properties only. To improve Wisconsin eminent domain law, Wisconsin can emulate those laws of states that rank higher on the Castle Coalition ranking. The best eminent domain laws are in Florida, Michigan, North Dakota and South Dakota.

Wisconsin can improve its eminent domain law by replacing subjective terms with objective factors that can be conclusively demonstrated and by extending the same protections it has for residential property owners to all state’s citizens and businesses.

Views of Those Who Oppose Eminent Domain Reform:

- Government can only carry out orderly economic development through the exercise of the eminent domain power.
- Government needs the power to do whatever it believes necessary and eminent domain is a tool for the betterment of all.
- Loose definition of blight make government more flexible.
- Taking private property for the increase in property taxes or for other private concerns is necessary for economic development.
- Use of eminent domain can be applied to restructure mortgages on foreclosures resulting from the housing bubble.
- The term “just compensation” (5th Amendment) is arbitrary.

- Eminent domain can be implemented based solely on “under-utilization.”
- Eminent Domain puts the needs of the “collective” first.

Views of Those Who Support Eminent Domain Reform:

- Government has an appalling track record of stripping people of their property and their livelihoods through eminent domain.
- Eminent domain is most often used against the minorities, the elderly, the poor, and small business owners.
- Private property should never be subject for wealth redistribution.
- Eminent domain should be reserved for “public use” and not “public purpose” or “public benefit.”
- Private property rights must not be infringed upon except for in the strictest examples of public use.
- Eminent domain redistributes wealth to corporations and development companies.
- The question of what constitutes a "taking" for the purposes of the Fifth Amendment has proven to be a problem of considerable difficulty.
- Under the rubric of "eminent domain" and various zoning regulations, land use regulations by the Bureau of Land Management, property taxes, and "environmental" excuses, private property rights have become very diluted and tenuous.

Purpose of Reform:

- Eminent Domain respects the rights of the individual first.
- Blight definition is tightened and limited.
- “Blighted areas” or “blighted property” are specifically and legally defined by statute rather than arbitrarily defined by participating entities.
- TIF district definition is intact.
- Private to private transfer through a unit of government is not allowed.
- Public Use v. Public Purpose and/or Public Benefit is clarified.
- Financial speculation by a governmental unit is forbidden.
- Closes loopholes left by the SCOTUS Kelo decision.
- Preserves family farms and businesses.

Negative Affects of Eminent Domain:

- Blight definition is arbitrarily applied.
- 3 to 4 million Americans have been displaced from their homes and businesses since the end of WWII.
- Both parties use eminent domain to their advantage.
- Arbitrarily driven by local politics rather than standards and objective criteria.

- Gives large and well-connected property developers an advantage over existing homeowners and businesses.
- Enables private developers to circumvent the conventional real estate market and reap substantial financial gains at the expense of private property owners.
- Promotes the unjust redistribution of wealth.
- Enables private developers to join with Government Officials in a quid pro quo at the expense of the property owner.

Existing Law:

- Fifth Amendment in the Bill of Rights, Takings Clause.
- Wisconsin Constitution Article IX, Section 3; Article I, Section 13; Article XI, Section 2.
- Wisconsin Statutes Chapter 32 and 61.
- 1970 Uniform Relocation Assistance and Real Properties Acquisition Policies Act.
- Kline Law – special condemnation procedure for the City of Milwaukee.
- 2005 Wisconsin Act 233.

Legislation:

- Wisconsin's General Municipality Law (Wis. Stat. 66.1333(2m)(b)3), which in part, defines a blighted area as one which "substantially impairs or arrests the sound growth of the community.

- SB 83 (WI) (2007) Proposed stricter definitions on "blighted areas"/blighted properties regarding condemnation.

  Failed to pass: Adversely disposed of pursuant to Senate Joint Resolution (3/23/12).

- Texas SB 18 provided that private property may be seized under eminent domain only if needed for actual public use, clearly bans seizure for private use and requires the government to make a bona fide offer to the landowners. (Passed: 2/9/11) Reference: http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=SB18.

- Nevada SB 86, repealed a 130-year-old provision giving mining companies the right of eminent domain, thereby equalizing the rights of a private industry and landowners. (Passed & Effective: 4/29/11) Reference: http://www.leg.state.nv.us/Session/76th2011/reports/history.cfm?ID=205.

Court Decisions and Actions:

- 1951 Schumm v. Milwaukee County – WSC prohibited taking for private corporation use.

- 1954 David Jeffery Co. v. City of Milwaukee – required that taking be for Public Use only.

- 1954 Berman v. Parker – SCOTUS ruled that public use can be superseded by public purpose.

- 1992 Hawaii Housing Authority v. Midkiff – SCOTUS held that the federal government can take land from a few landowners and redistribute it to many people.

- 1980 Sigma Tau Gamma Fraternity House v. Menomonie – WSC held that certain findings must be made before proceeding.
- 1986 Clarmar Realty Co. v. Redevelopment Authority – WSC held that comparable properties are to be considered for determination of compensation.
- 1996 Grunwald v. City of West Allis – Court of Appeals allowed taking without reason!
- 2004 County of Wayne (Mich.) v. Hathcock – reversing Poletown Neighborhood Council v. City of Detroit – called Poletown a "radical departure from constitutional principles."
- 2005 Kelo v. New London – SCOTUS held that public purpose outweighs public use.
- 2006 City of Norwood v. Horney (Ohio) – Ohio SC repudiation of Kelo.
- Lamar Outdoor Advertising v. Country Side Restaurant (5/4/12). The issues involved the compensation to which sign owners are entitled when their permitted signs are taken for highway improvement or other public projects.
- E-L Enterprises, Inc. v. Milwaukee Metropolitan Sewerage District (7/2/10) While constructing a sewer, MMSD unreasonably removed groundwater from E-L's property, which caused the building to settle, amounting to a "taking" of E-L's property without just compensation. (WI Supreme Court ruled in favor of plaintiff by reversing Court of Appeals decision) Reference: http://www.wicourts.gov/sc/opinions/08/pdf/08-0921.pdf.
- Kaur v. New York State Urban Development Corporation (12/3/09) Involved expansion of Columbia Univ.
- Southwestern Illinois Development Authority v. National City Environmental (4/4/02) The Illinois Supreme Court ruled that "taking one owner's private property and giving it to another for private use is an unconstitutional use of the power of eminent domain."

In Dolan V. City of Tigard (1994). The U.S. Supreme Court decided that the city of Tigard, Oregon could not regulate Ms. Dolan's private property beyond that which was necessary to ensure compliance with flood plain regulations. The court rejected the city's argument that it had a right to require Ms. Dolan to allow unfettered access to her greenway in order to comply with the city's bicycle plan.

- Poletown Neighborhood Council v. City of Detroit (1981) The Michigan Supreme Court ruled that a community could be condemned to allow General Motors to build a factory (Overturned by Michigan Supreme Court 7/31/04).

Constitutionality:

The US Constitution grants the federal government the power to confiscate property for public use. The need is for that which cannot be done elsewhere and will remain in the public's hands. The Wisconsin Constitution also grants such power to all levels of government and to specific industries such as for power lines of airports. Certain non-governmental organizations have been granted the power of eminent domain including: school districts, Department of Health Services, the Department of Corrections, UW Regents, building commissions, any public board or commission, mosquito control commissions, a professional football stadium board, the adjutant general of Camp Douglas, any railroad, toll road commission, hydroelectric dam owner, drainage corporation, interstate bridge corporation, any corporation formed under Chapter 288, any telecommunications corporation for the purpose of constructing lines, any corporation furnishing gas, electric or power, any corporation improving streams or driving logs, any corporation with a pipeline for hydrocarbons, any rural electrical cooperative, among others.

The point of contention is due to the difference between public purpose and public use. Recent court cases have resulted in a widely expanded area in which eminent domain can be used to confiscate private property for the purpose of redistribution of wealth. Eminent domain was initially used to break up large tracts of land on ranches and plantations, but now is used to grant property to corporations and political donors. Under the terms of Wisconsin law, many corporations can claim the power of eminent domain.

The terms "public use" and "just compensation" have been blatantly distorted and abused via eminent domain.

Relationship to Constitutional Movement Principles:

Free Markets: Eminent domain does not need to be invoked when governments bargain in good faith and pay fair market value. Some property holders will balk and hold out for more but this is acceptable and the proper management of the project will prevent such problems.

Constitutionally Limited Government: Abuse of eminent domain causes a loss of trust in government at all levels by the public. Substituting public purpose for public use has led to mistrust of government and has promoted reckless public projects.

Fiscal Responsibility: Eminent domain use causes projects costs to rise and sticks the taxpayers with the increase in costs and in the legal acquisition costs.

Affect on Wisconsin:

Mayors and alderman and associations of developers oppose legislation to reform eminent domain, and specifically to define blight, as it will make it more difficult for government to operate and to abuse citizens. Closing the blight loophole will return more confidence by the public to government and force a closer, longer look at public projects.

Affect on Federal Officials:

None

Position of WGOL:

Wisconsin Statutes need to be re-written to clarify and legally define 'blight' in order to limit and prevent Wisconsin Governmental power from aiding a private entity in the pursuit of profit by the use or threat of eminent domain and to limit and prevent local municipalities from using eminent domain in pursuit of creating development projects.

http://www.wisconsineminentdomain.com/
http://www.wisbar.org/AM/Template.cfm?Section=Search_Archive1&template=/cm/htmldisplay.cfm&contentid=67063
http://wilawlibrary.gov/topics/landown.php
http://www.lwm-info.org/index.asp?Type=B_BASIC&SEC=%7BEC045466-9253-4B6B-A11B-F8820BD84CD1%7D&DE=%7B58A15482-5D21-43E8-A264-DE31935B8376%7D
http://www.lwm-info.org/index.asp?Type=B_BASIC&SEC={B3AF457C-5845-42F5-B9BC-6C6142165E0F}&DE={B0DE3AE8-7D71-472A-8278-32ABBC3F1D74}
http://legis.wisconsin.gov/lrb/pubs/ttp/ttp-01-2006.html
http://legis.wisconsin.gov/lc/comtmats/files/sb0083_20110504103933.pdf
http://legis.wisconsin.gov/lrb/pubs/consthi/05consthiV1.htm
http://eminentdomain.uslegal.com/state-laws-on-eminent-domain/wisconsin/
http://commerce.wi.gov/CD/docs/CD-bcf-cdbg-rpr-Landowners-3205.pdf

LAW ENFORCEMENT INTERACTION WITH DHS

This project focuses solely on the need for Wisconsin to pass legislation at the state level pertaining to local law enforcement's interaction with the Department of Homeland Security, Immigration and Customs Enforcement (ICE); more specifically, the need to protect local law enforcement's ability to determine best practices that meet their community's needs.

National Sanctuary City Laws or Policies:

- Specific policies enacted in many states define the parameters under which state and local law enforcement agencies may engage in immigration enforcement-related activities. Example: California Values Act.[1]
- These policies can force law enforcement to deny ICE detainer requests or require them to comply with detainer requests.
- The policies can even interfere with the ability for local law enforcement to determine a person's immigration status.
- They also have the potential to prevent local law enforcement from inquiring about federal immigration offenses in their investigations.
- In California, local law enforcement cannot arrest an individual for the federal offense of unlawful reentry unless that person was previously convicted of an aggravated felony.

Wisconsin Sanctuary City Policies, To Date:

- Milwaukee County Resolution 12-135 states that ICE detainer requests will only be honored if the subject of the request has a felony or two misdemeanor offenses, domestic violence, drunk driving, outstanding criminal warrants, or is a gang member or a suspected terrorist.
- Madison does not arrest based on immigration status alone. It does cooperate with ICE detainer requests. It does notify ICE in cases of serious or violent crimes.

Focusing on the Criminal Activity:

- U.S. D.H.S. data shows in 2016 there were 340,000 deportations, and 135,000 of those were criminal.
- Without a state legislative framework, local entities are able to create policies similar to those in other states that inhibit law enforcement's duty to protect.
- Sanctuary City policies potentially create carve-outs where certain participants of illegal activity are sheltered from federal investigation, however other criminal activity is reported.
- If a municipality in Wisconsin chose to enact a policy similar to California's Value Act, they could force local law enforcement to deny all ICE detainer requests without exception.[2]

[1] https://www.ilrc.org/sites/default/files/resources/sb54_advisory-gr-20180208.pdf

[2] https://www.ilrc.org/sites/default/files/resources/sb54_advisory-gr-20180208.pdf

Opposing Views of Sanctuary City Legislation:

In Support of Legislation That Forces Non-Compliance:

- Sanctuary Cities or "Safe Cities" prevent undocumented immigrants from being arrested based on their immigration status alone if they've not committed a crime.
- Cities still comply with ICE detainers if ICE provides a warrant.
- The Fourth Amendment applies to citizens and non-citizens.
- Local Law Enforcement does not have the authority to hold someone based on a federal request without a warrant.
- They likely violate 8 U.S. Code 1373, a federal statute that promotes information sharing related to immigration enforcement.[3]
- Laws and policies enacted in states like California could prevent the deportation of criminals of non-immigration related crimes such as human trafficking, gang violence and drug importation and distribution.
- ICE officers must establish probable cause to believe that the subject is an alien who is removable from the U.S. before issuing a detainer to Law Enforcement.[4]

In Support of Legislation That Neither Forces Compliance or Non-Compliance:

- Legislation should not be created by municipalities that require law enforcement to disregard ICE requests to detain suspected illegal aliens or require law enforcement to comply with ICE requests.
- Local law enforcement should be free to determine the best practices that meet their community's needs.
- Holding persons suspected of being in the country illegally longer than legally allowed, who have not committed criminal acts, violates their Fourth Amendment rights.
- State law enforcement cannot be commandeered by the federal government, or compelled to spend funds or perform work on behalf of the federal government.

[3] https://www.law.cornell.edu/uscode/text/8/1373

[4] U.S. Immigration and Customs Enforcement Policy 10074.2 Paragraph 2.4

- In a recent study in a Texas county, ICE issued 1% of its detainers to legal immigrants or to U.S. citizens.[5]
- The police need to have witnesses of criminal activity informing them, and if these witnesses are afraid of deportation, they will remain silent.

Existing Law:

- C.F.R. Title 8.Chapter 1. B, Part 287- Gives ICE its detainer authority., and this arises out of Immigration and Nationality Act under Section 103(a)(3).
- U.S. Code Title 8, Chapter 12, Subchapter 11, Part IX, 1373- A federal, state or local government entity or official cannot be prohibited from sending or receiving information regarding …..immigration status….of any individual.
- 8 U.S. Code 1324(a)(1)(A)(iii), Knowingly concealing an alien that entered or remains in the United States in violation of the law…or shield from detection….
- 18 U.S.C. Section 1505, paragraph two- Obstruction of an official proceeding
- 18 U.S.C. Section 371. Conspiracy to Defraud the United States-…in conspiracy for the purpose of impairing, obstructing, or defeating the lawful functions of any department of government,[6] Hass v. Henkel, 1909 the court states "The statute is broad enough in its terms to include any department of government."

SCOTUS Rulings:

- Printz v. United States June 27, 1996- The Brady bill required local chief law enforcement officers to perform background-checks on prospective handgun purchasers, until a federal system could be established. The Court ruled that the "Necessary and Proper Clause of Article I was not justification to compel state law enforcement to fulfill its federal tasks for it."[7]
- In a ruling on May 14, 2018 the Supreme Court struck down a federal 1992 law passed to stop sport betting. In doing so, the Court reinforced the "anti-commandeering principle" in which the federal government cannot force states to be enforcers of federal policy.
- The Supreme Court affirmed in Arizona vs U.S. (2012), which found that only the federal government had authority over the immigration enforcement.

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[6] *Hass v. Henkel*, 1909, 30 S. Ct. 249, 216 U. S. 462, 54 L. Ed. 569, 17 Ann. Cas. 1112 https://www.justice.gov/jm/criminal-resource-manual-923-18-usc-371-conspiracy-defraud-us

[7] https://www.oyez.org/cases/1996/95-1478

Position of WGOL:

Attempts by municipalities to enact “Sanctuary City” policies notwithstanding, Wisconsin should at least enact legislation enabling any state or municipal law enforcement agency to use their own discretion when cooperating with Federal Law Enforcement. We recognize that the federal government cannot force or “commandeer” state agencies to do the work of the federal government. However, we feel that state and local government should not have the authority to compel local law enforcement to refrain from cooperating with a federal agency, or force local law enforcement to comply with a federal agency. The decision to cooperate or not is to be left to the local law enforcement agency based on the best interest of the community they are tasked to protect.

CAMPUS FREE SPEECH

Overview:

The development and implementation of Campus Speech Codes began in the 1980s and 1990s as an answer to perceived increasing discrimination and harassment on college campuses. These policies prohibit speech that could be deemed offensive to any person or group based on race, national origin, age, disability, religion, gender, sexual orientation, etc.

The intention is to foster a productive learning environment where public speech, behavior, harassment or threats do not inflict emotional distress on the targeted persons.

While these policies may be well intended, they are often in conflict with the First Amendment of the United States Constitution, which protects the freedom of speech, even if that speech has content that is offensive. A distinction is sometimes made between harmful speech, such as in the First Amendment exception of not yelling "fire" in a theater, which is technically an action and not an utterance. This type of speech could easily cause individuals actual harm as opposed to speech that is seen as offensive rather than harmful. Since no actual serious harm occurs, these speech codes developed by state colleges and universities are seen as government censorship, a violation of the Constitution.

Speech codes are at the same time both broad and vague leaving their actual intent subject to the interpretation of school administration. Thus they are often extended to political speech which is characterized as "hate speech" rather than as simply an opinion.

Also related to the actual Campus Speech Code debate is the Constitutional right to Due Process for students accused of an infraction of the codes. Due process is a basic right of all individuals to fair treatment through the legal system. Some students who have been accused of violating speech codes are denied their due process as universities claim that the discipline is seen as educational to help the student see the error of their ways and not punitive. Therefore, the student is not entitled to due process.

In Support of Speech Codes on Campuses:

Speech codes exist to spare would-be victims any psychological or emotional damage that could impede their learning and future success.

If any speech seems to be offensive it must be eliminated. The offender must be punished, not just for justice but to also send a message to anyone else on campus. They may be investigated, harassed, ostracized, receive public shaming, censorship, firings, suspensions or expulsion without necessarily receiving due process.

- It is the job of the university to foster a productive learning environment where public speech, behavior, harassment or threats do not inflict emotional distress on its students.

- Speech codes state a policy about the university's stand on the dignity and civil rights of its students.
- By not having speech codes, a university may be held liable by students who were subjected to harassment.
- Speech codes benefit the students more than they restrict individual freedom.
- When students misuse freedom of expression, enforcement of campus speech codes help them to understand that their words are not acceptable, even if protected by the first Amendment.

Oppose Speech Codes on Campuses:

Speech codes violate the constitutional right to freedom of speech. The result is censorship where students with opposing views are not allowed to speak. Colleges and universities should be centers of academic inquiry where all opinions, viewpoints and ideas can be discussed and debated in an atmosphere of academic freedom. By hearing opposing viewpoints, students can learn, among other things, to reserve judgment, and tolerate opinions that might offend them.

Speech codes on campus create a type of artificial environment that shield students from the real world of diversity and celebrating that diversity within society.

- Speech codes violate the First Amendment's right to Freedom of Speech.
- Speech restrictions are a step toward censorship.
- Speech should not be restricted on college and university campuses, which are intended to be centers of academic thought, ideas, discussion and debate.
- While speech codes may restrict the expression of hate, they do not stop the hate. Discourse is more effective.
- Students with dissenting views are not allowed to present or discuss their viewpoints fearing accusations of speech code violations.
- Speech codes are often intentionally vague or broad leading to wrong interpretation.
- Due process is not always given to the accused.
- Students can be accused of a perception of harassment, which leads to false charges.

Existing Law:

Campus Speech Codes were not a direct result of any state or federal legislation. Free speech codes were written by universities in response to concerns of people who felt themselves objects of hate because of their race, gender, or religion.

Legislation has been passed to eliminate misleadingly labeled free speech zones on campuses in:

- Virginia, HB 258, 2014
- Missouri, SB 93, 2015
- Arizona, HB 265, 2016 and HB 2548, 2016

The following states have passed legislation to protect student free press:

- Arkansas, Student Publication Act, 2015729, 2015
- California
- Colorado, Student Free Expression Act
- Illinois, SB 0729, 2007
- Iowa
- Kansas, Kansas Student Publication Act
- Massachusetts
- North Dakota
- Oregon, Oregon Revised Statutes, 2011

SCOTUS Rulings:

The Supreme Court of The United States has not issued a direct ruling on the constitutionality of public college or university Campus Speech Codes.

Position of WGOL:

We propose to prompt Wisconsin legislators to pass a bill, and resulting into a state statute, prohibiting any Campus Speech Codes at state-supported, public colleges and universities.

MINIMUM MARK-UP REPEAL

Overview:

The state of Wisconsin's Minimum Mark-Up Law (MML) is a Depression-era scheme intended to provide uniform retail merchandizing competition. Due to a widespread effort at repeal, by the 1960's only 15 other states had MML's limited to alcohol beverages, tobacco, and gasoline. Today the world's only sovereign entity having retail MML is Wisconsin.

Wisconsin's MML has surely outlived its usefulness over 50 years ago, yet the state's citizens have been conditioned to accept this "business welfare" for every retailer in the state. The vast majority of citizens have no idea that this law exists and the taxing effect it has on purchasers. And for whose benefit?

There are no Depression-era prevailing conditions anymore. The mass-merchandising model has come to all retail stores which the Big Box stores can no longer claim as their own model. Consider the fortunes of Toys R Us, Radio Shack, HH Gregg, Gymboree, K-Mart, Payless Shoe Source, Gander Mountain and Boston Store. Next on the block appears to be the number one business too big to close, Sears, Roebuck & Co.

The Basics:

The Depression-era recovery was difficult with the prevailing economic conditions. Developing MMLs was the beginning of what is considered today as Protectionism, but only for the merchandiser and retailer. Simply stated, the laws prevented any product sold to consumers from being sold at a loss in cost. Merchandisers had to "pad" their cost with 3% above cost to retailers, and retailers did the same with 6% to their customers. Any merchandiser doing retail sales had to have a 9.18% bump for cost to customers. This established a floor for retailers.

Where did the 3, 6, and 9.18% factors come from? A good answer comes from when the minimum markup law was first enacted, it was 2% and within a year it became 3% to cover margins. These numbers are clearly arbitrary with no real or mathematical influence!

Costs were multiplied to increase an artificial cost to customers for competition. In today's markets, those costs can be divided by the same factor to become less customer cost AND still maintain competition. This is the logical approach to eliminating higher costs to customers that are strictly a "purchasers tax" payable to retailers.

The other MML facet is more intangible, that is being unable to sell products below cost as a loss-leader to gain customer interest in doing business in Wisconsin. This practice is performed in all the other states, especially Illinois, Iowa, Minnesota, and Upper Michigan, and they do take advantage of over 2,000 miles of Wisconsin border customers. Reduced cost is the only variable available to growing and maintaining business.

The Difficulty:

Primarily the difficulty is resistance to change. Ask anyone defending the MML practice and invariably it reduces to "because we've always done it this way." Wisconsinites have not known any other way to conduct business, and further, it has been guaranteed by state government for more than 80 years. The days of having customers drive to the stores are going fast with the advent of internet sales, and now same-day delivery. Change is coming and this ageless protectionist scheme is sunsetting.

The various state MMLs began with grocers and soon spread to other retail businesses. In those 80 years they have mined, refined, collaborated, promoted, and lobbied their interest as an investment into this retail scheme on consumers as the only way to do business.

History:

Over the years there have been numerous attempts and lawsuits to repeal, curb, even modify Wisconsin's MML, but it is still burdening consumers. The Federal Trade Commission has argued several times that there are existing federal laws that prohibit predatory pricing schemes and would actively pursue the Sherman Act, the Clayton Act, and any others that are applicable beyond whatever Wisconsin can enforce. In their research they have failed to find any justification for the percentages mandated within the law. Thus, it is arbitrary and without foundation**.**

Who Are The Players:

There are essentially two groups, all accumulated citizens and non-retail product businesses, making retail purchases. According to 2016 state statistics the shares are 92.68% and 6.03%, respectively, that total 98.68%. The third party is the retail businesses, 1.32%, that collect the state guaranteed profit from the other 98.68%.

The Exemptions:

Wisconsin's retail sales tax exemptions include food, prescriptions drugs, medical devices, burial caskets, modular and manufactured homes, and certain agricultural items. Current state sales tax is 5.0% and for the southeast corner of the state, 5.1% and the exemptions are a welcome relief.

Opposing Repeal:

- Believers hold that we have always done it this way for 80 years and no complaints, why shouldn't we keep the practice? It works for everyone involved.

- This method provides stable business environment that maintains the local economy in keeping the money flowing within the area and increase the need for local workers to earn stable income. Anything different upsets the stability and flow that will eventually cause collateral employment damage.

- Wisconsin has long exhibited stable prices and competitive environment with its MML, so why risk venturing into other price-gouging practices to consumers and businesses against competition?

Proposing Repeal:

- There is no logical reason for any government to be involved with basic business decisions, especially in determining costs and pricing. Governments exhibit difficult decision making in controlling their own costs and budgeting, so why should they be involved with consumer pricing at significantly much faster rates?
- When governments and special interests determine prices, the slippery-slope for anything else can be generated by a central committee. The consumers are no longer in a freedom-based nation and are at the mercy of these entities.
- If this is the Land of Opportunity, then government should not, with their laws and regulations, arbitrarily pick winners and losers. Products that are just as good or better for the same or lower cost is the purchasing value basis for Free Market Trade in America.
- Wisconsin's primary duty and responsibility is to provide the best opportunities and economic conditions to its citizens, not to promote for select businesses a profit scheme to maintain their own economic control of the citizens.

SCOTUS and Federal Court Rulings:

None relevant to Wisconsin.

Wisconsin Court Rulings:

- 2006 In the Flying J court case, Judge Randa stated that the minimum markup law infringed on the federal Sherman Act.
- 2007 Judge William Callahan dismissed the complaint saying the State of Wisconsin was not actively supervising its MML.
- 2009 Judge Randa rules that the MML violated the federal Sherman Act.
- 2010 appeals court reinstated the MML.
- 2015 Woodman versus Meijers: coffee priced lower than Minimum Markup.

Existing Law:

- Wisconsin's Unfair Sales Act (100.30) enacted in 1939 (Senate Bill 197) and based on the Model State Unfair Sales Act, prepared by the National Food and Grocery Conference Committee and comprised of leading associations in the retail, wholesale and manufacturing branches of the food and grocery trade. (source: Google Books Part II, Legislative History)

- Under the ACT, neither a retailer nor wholesaler may sell any item of merchandise at less than cost with the "intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor." (source: Google Books Part II, Legislative History)

- 1939 ACT was amended several times. Unfair Sales ACT remains relatively unchanged from its initial provisions. (source: Google Books Part II, Legislative History)

- Chapter 75, Laws of 1941 (source: Google Books, Wisconsin's Unfair Sales Act: An Overview, Staff Brief 80-10; WI Legislative Council Staff, July 9, 1980; State Capitol, Madison, WI; Part II, Legislative History)

- Chapter 323, Laws of 1947 1941 (source: Google Books, Wisconsin's Unfair Sales Act: An Overview, Staff Brief 80-10; WI Legislative Council Staff, July 9, 1980; State Capitol, Madison, WI; Part II, Legislative History)

Recent Legislation:

- Chapter 155, Laws of 1949 1941 (source: Google Books, Wisconsin's Unfair Sales Act: An Overview, Staff Brief 80-10; WI Legislative Council Staff, July 9, 1980; State Capitol, Madison, WI; Part II, Legislative History)

- Chapter 629, Laws of 1965 (1941 (source: Google Books, Wisconsin's Unfair Sales Act: An Overview, Staff Brief 80-10; WI Legislative Council Staff, July 9, 1980; State Capitol, Madison, WI; Part II, Legislative History)

- Federal Trade Commission ACT: Prohibits unfair methods of competition, and unfair or deceptive acts or practices. FTC has been involved in "below-cost" pricing issues and has expressed opposition to anticompetitive state and federal pricing legislation. (source April 22, 1987 Letter to John Norquist from the FTE/Chicago Regional Office)

- 1987 Senate Bill 140 which would repeal Wisconsin's Unfair Sales Act (Wis. Stat. 100.30 -1985-86)]

- 2003 Shirley Krug Letter to the FTC: asked four questions, "Does the law harm consumers by significantly raising prices to consumers? Does the current WI law duplicate existing protections against predatory pricing found in the federal antitrust law? Does the current WI law discourage or encourage competitive pricing? Are there any scholarly studies or court decisions in recent years that address the effect of below-cost pricing in relation to the creation of monopolies?"

- Repeal 2015 LRB 3145/1 ACT

Federal Constitutionality:

The federal constitution makes no mention of this type of market regulation but the matter is conducted at the state level and therefore is beyond the federal involvement. The state government is plenary so this type of market regulation is within the constitutional authority of the state to conduct.

Relationship to Constitutionalist Principles:

Free Markets: The imposition of an additional tax in the form of a minimum markup requirement places Wisconsin retailers at a disadvantage, particularly along on the borders with other states, none of who have a similar program in place. Within the state, the spending ability of consumers is diminished by the reduced buying power and for the those on the lower rungs of the economic ladder, the effect can be painful. Removing the markup will boost buying power and spur growth.

Limited Constitutional Government: The effect is a state issue and not a federal matter. The state is within its constitutional powers to impose the markup requirement.

Fiscal Responsibility: The state must maintain offices, staff and equipment to enforce the markup requirement. Removing the markup will reduce costs to the state as well as the consumers.

Position of WiGOL:

Wisconsin government's duty is to provide a fair and stable market for its residents. New business models abound with taking all facets into consideration for having the best possible values to consumers on a timely basis, while providing equitable returns to businesses, employees, and stockholders. The time has come for Wisconsin to take that last step into the 21st century by terminating its archaic and cumbersome MML that has outlived its usefulness. WGOL will actively and fully support repealing Wisconsin's MML in the next legislative session.

It is the right thing to do.