

# The Burger Court Opinion Writing Database

## *Wisconsin v. Constantineau*

400 U.S. 433 (1971)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

December 28, 1970

Re: No. 95 - Wisconsin v. Constantineau

MEMORANDUM TO THE CONFERENCE:

I enclose draft of a dissent I will file. It was prepared when the Conference vote was a summary affirmance. Meanwhile Hugo has decided to assign the majority opinion to Bill Douglas.

Ordinarily I let my "birds" get airborne before I shoot, but here I agree with the majority on the merits and dissent only to our reaching the merits.

Regards,

WBJ

Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

No. 95 - Wisconsin v. Constantineau

Warren E. Burger, dissenting.

From: The Chief Justice

Circulated: **DEC 29 1970**

Recirculated: \_\_\_\_\_

The Court today strikes down, as unconstitutional, a Wisconsin statute that has never been challenged or tested in the Wisconsin state courts. The judges of Wisconsin probably will be taken by surprise by our summary action since few, if any, have ever heard of this case.

Very likely we reach a correct result since the Wisconsin statute appears, on its face and in its application, to be in conflict with accepted concepts of due process.

The reason for my dissent is that it seems to me a very odd business to strike down a state statute, on the books for 40 years more or less, without any opportunity for the state courts to dispose of the problem either under the Wisconsin Constitution or the U.S. Constitution. For all we know, the state courts would find this statute invalid under the State Constitution, but no one on either side of the case thought to discuss this or exhibit any interest in the subject. Since no one could reasonably think that the judges of Wisconsin have less fidelity to due process requirements of the Federal Constitution than we do, this case is, for me, a classic illustration of one in which we should decline to act until resort to state courts has been exhausted. Mrs. Constantineau's counsel was candid in saying that he had deliberately avoided resort to state courts because he could secure, and indeed did secure, a three-judge Federal District

Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice White  
Mr. Justice Souter  
Mr. Justice Ginsburg  
Mr. Justice Breyer  
Mr. Justice Alito  
Mr. Justice Kagan

changes throughout

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# SUPREME COURT OF THE UNITED STATES

No. 95.—OCTOBER TERM, 1970

Circulated: JAN 19 1971  
Recirculated:

State of Wisconsin, Appellant, } On Appeal from the  
v. } United States District  
Norma Grace Constantineau. } Court for the Eastern  
District of Wisconsin.

[January 19, 1971]

MR. CHIEF JUSTICE BURGER, dissenting.

The Court today strikes down, as unconstitutional, a Wisconsin statute that has never been challenged or tested in the Wisconsin state courts. The judges of Wisconsin probably will be taken by surprise by our summary action since few, if any, have ever heard of this case.

Very likely we reach a correct result since the Wisconsin statute appears, on its face and in its application, to be in conflict with accepted concepts of due process.

The reason for my dissent is that it seems to me a very odd business to strike down a state statute, on the books for 40 years more or less, without any opportunity for the state courts to dispose of the problem either under the Wisconsin Constitution or the U. S. Constitution. For all we know, the state courts would find this statute invalid under the State Constitution,<sup>1</sup> but no one on either side of the case thought to discuss this or exhibit any interest in the subject. Since no one could

<sup>1</sup> Although the Wisconsin Constitution has no due process clause as such, Article I, § 1, of the Constitution has been held by the Wisconsin Supreme Court to be substantially equivalent to the limitation on state action contained in the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Pauly v. Keebler*, 185 N. W. 554, 175 Wis. 428 (1921).

WISCONSIN

WD  
TM

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HUGO L. BLACK

January 4, 1971

Dear Bill,

Re: No. 95 - Wisconsin v. Constantineau, and  
No. 26 - Groppi v. Wisconsin

I am writing you this note about the above two cases together because my vote was very much the same on each. My idea was that, if possible, the cases should be vacated and sent back to the Wisconsin Supreme Court. In the Constantineau case my views, for slightly different reasons, were similar to those expressed by the Chief Justice in his note stating he will dissent. In other words, since my vote was tentative on each, and I am noted as assigning you the Constantineau case, I thought it best to write you now.

I think there are special circumstances in each case which would justify no final action being taken on either until the State Supreme Court has had a chance to review each of them. It may be that, in view of the Chief's letter and my tentative votes, it might be best to take them up before the whole Conference on Friday.

Sincerely,

*H. L. B.*  
H. L. B.

Mr. Justice Douglas

cc: Members of the Conference

To: The  
 Mr. Justice  
 Mr. Justice  
 Mr. Justice  
 Mr. Justice  
 Mr. Justice  
 Mr. Justice  
 Mr. Justice

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# SUPREME COURT OF THE UNITED STATES

From: Black, J.

No. 95.—OCTOBER TERM, 1970

Circulated: JAN 7 1970

State of Wisconsin, Appellant, } On Appeal  
 v. } United States District  
 Norma Grace Constantineau. } Court for the Eastern  
 District of Wisconsin.

[January —, 1971]

MR. JUSTICE BLACK, dissenting.

I agree substantially with the dissent of THE CHIEF JUSTICE. I would vacate the District Court's judgment and remand with directions to withhold its proceedings to enable appellee to file a declaratory judgment or other action in state court challenging the action of the chief of police in posting notices in all Hartford retail liquor outlets forbidding sales or gifts of liquors to appellee for one year. As the Court's opinion, the cases there cited, and THE CHIEF JUSTICE's dissent point out, such a course of action is justified "where the issue of state law is uncertain" and where the state court might confine the state law's meaning so "as not to have any constitutional infirmity." The Wisconsin Act appears on its face to grant authority to a person's relatives, a mayor, town alderman, the county superintendent of the poor, town supervisor, sheriff, or district attorney to post notices forbidding liquor establishments from giving or selling any alcoholic beverages to the person so posted. The effect of such sweeping powers, if there is nothing else in the State's law to limit them, is practically the same as that of an old common law bill of attainder, against which our forebears had such an abhorrence that they forbade it in Art. I, § 9, of the Constitution. See, *e. g.*, *United States v. Lovett*, 328 U. S. 303 (1946). And here the Wisconsin law purports on its face to place such

WD

From: Black, J.

SUPREME COURT OF THE UNITED STATES

Circulated: \_\_\_\_\_

Recirculated: JAN 8 1970

No. 95.—OCTOBER TERM, 1970

State of Wisconsin, Appellant, } On Appeal from the  
v. } United States District  
Norma Grace Constantineau. } Court for the Eastern  
District of Wisconsin.

[January —, 1971]

MR. JUSTICE BLACK, dissenting.

I agree substantially with the dissent of THE CHIEF JUSTICE. I would vacate the District Court's judgment and remand with directions to withhold its proceedings to enable appellee to file a declaratory judgment or other state court action challenging the police chief's posting of notices in all Hartford retail liquor outlets forbidding sales or gifts of liquors to appellee for one year. As the Court's opinion, the cases there cited, and THE CHIEF JUSTICE's dissent point out, such a course of action is justified "where the issue of state law is uncertain" and where the state court might confine the state law's meaning so "as not to have any constitutional infirmity." The Wisconsin Act appears on its face to grant authority to a person's relatives, a mayor, town alderman, the county superintendent of the poor, town supervisor, sheriff, or district attorney to post notices forbidding liquor establishments from giving or selling any alcoholic beverages to the person so posted. The effect of such sweeping powers, if there is nothing else in the State's law to limit them, is practically the same as that of an old common law bill of attainder, against which our forebears had such an abhorrence that they forbade it in Art. I, § 9, of the Constitution. See, *e. g.*, *United States v. Lovett*, 328 U. S. 303 (1946). And here the Wisconsin law purports on its face to place such

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No. 95.—OCTOBER TERM, 1970

JAN 12 1971

State of Wisconsin, Appellant, } On Appeal from the  
v. } United States District  
Norma Grace Constantineau. } Court for the Eastern  
District of Wisconsin.

[January —, 1971]

MR. JUSTICE BLACK, with whom MR. JUSTICE BLACKMUN joins, dissenting.

I agree substantially with the dissent of THE CHIEF JUSTICE. I would vacate the District Court's judgment and remand with directions to withhold its proceedings to enable appellee to file a declaratory judgment or other state court action challenging the police chief's posting of notices in all Hartford retail liquor outlets forbidding sales or gifts of liquors to appellee for one year. As the Court's opinion, the cases there cited, and THE CHIEF JUSTICE's dissent point out, such a course of action is justified "where the issue of state law is uncertain" and where the state court might confine the state law's meaning so "as not to have any constitutional infirmity." The Wisconsin Act appears on its face to grant authority to a person's relatives, a mayor, town alderman, the county superintendent of the poor, town supervisor, sheriff, or district attorney to post notices forbidding liquor establishments from giving or selling any alcoholic beverages to the person so posted. The effect of such sweeping powers, if there is nothing else in the State's law to limit them, is practically the same as that of an old common law bill of attainder, against which our forebears had such an abhorrence that they forbade it in Art. I, § 9, of the Constitution. See, *e. g.*, *United States v. Lovett*, 328 U. S. 303 (1946). And here



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

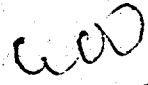
January fourth  
1971

Dear Hugo:

I have your memorandum in No. 95 -- Wisconsin v. Constantineau. When I got the assignment, I went to work on it. It went to the printer sometime back and will be circulated any time now so you can see what my thinking on it is.

It is, I think, uncomplicated by any state law question and that we must necessarily affirm. But the views are expressed in the opinion to be circulated and will speak for themselves.

As respects No. 26 -- Groppi v. Wisconsin: I had a rather uncomplicated view of it also. It seems to me it is a case where the statute on its face is unconstitutional and that we should decide it. But as I recall, the Conference discussion, the Court was more closely divided in No. 26 than it was in No. 95.

  
William O. Douglas

Mr. Justice Black

CC: The Chief Justice  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

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To: The Chief Justice  
 Mr. Justice Black  
 Mr. Justice Harlan  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES

No. 95.—OCTOBER TERM, 1970

State of Wisconsin, Appellant, } On Appeal from the  
 v. } United States District  
 Norma Grace Constantineau. } Court for the Eastern  
 } District of Wisconsin.

1/4/71

[January —, 1971]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellee is an adult resident of Hartford, Wis. She brought suit in a federal district court in Wisconsin to have a Wisconsin statute declared unconstitutional.<sup>1</sup> A three-judge court was convened, 28 U. S. C. § 2281. That court, by a divided vote, held the Act unconstitutional, 302 F. Supp. 861, and we noted probable jurisdiction. 396 U. S. —.

The Act, § 176.26 Wis. Stat., provides that designated persons may in writing forbid the sale or gift of intoxicating liquors to one who “by excessive drinking” produces described conditions or exhibits specified traits, such as exposing himself or family “to want” or becoming “dangerous to the peace” of the community.<sup>2</sup>

<sup>1</sup> 28 U. S. C. § 1343 (3) provides: “The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . . To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.”

<sup>2</sup> Section 176.26 reads as follows:

“(1) When any person shall by excessive drinking of intoxicating liquors, or fermented malt beverages misspend, waste or lessen his estate so as to expose himself or family to want, or the town, city,

Chas. Thurgood

To: The Chief Justice  
 Mr. Justice Black  
 Mr. Justice Harlan  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES Douglas, J.

No. 95.—OCTOBER TERM, 1970

State of Wisconsin, Appellant, } On Appeal from the  
 v. } United States District  
 Norma Grace Constantineau. } Court for the Eastern  
 District of Wisconsin.

[January —, 1971]

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To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

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From: Douglas, J.

SUPREME COURT OF THE UNITED STATES

No. 95.—OCTOBER TERM, 1970

State of Wisconsin, Appellant, } On Appeal from the  
v. } United States District  
Norma Grace Constantineau. } Court for the Eastern  
District of Wisconsin.

[January —, 1971]

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To: The Chief Justice  
 Mr. Justice Black  
 Mr. Justice Harlan  
 Mr. Justice Brennan ✓  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun

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SUPREME COURT OF THE UNITED STATES as, J.

No. 95.—OCTOBER TERM, 1970

State of Wisconsin, Appellant, } On Appeal from the  
   v. } United States District  
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1/5/71

[January —, 1971]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

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Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan ✓  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

From: Douglas, J.

6

Circulated: \_\_\_\_\_

**SUPREME COURT OF THE UNITED STATES** 1/8/71

No. 95.—OCTOBER TERM, 1970

State of Wisconsin, Appellant, } On Appeal from the  
v. } United States District  
Norma Grace Constantineau. } Court for the Eastern  
District of Wisconsin.

[January —, 1971]

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"(1) When any person shall by excessive drinking of intoxicating liquors, or fermented malt beverages misspend, waste or lessen his estate so as to expose himself or family to want, or the town, city,

January 7, 1971

Re: No. 95 - Wisconsin v. Constantineau

Dear Bill:

I am glad to join your opinion, with one minor suggestion. I think that it might be better to change the phrase "could possibly mean," in the third sentence of the first new paragraph on page 6, to "could fairly be taken to mean." This suggestion is prompted by the language in the last sentence of subsection 1 of the statute quoted in footnotes 2 of your opinion (p. 2).

Sincerely,

J. M. H.

Mr. Justice Douglas

CC: The Conference

January 5, 1971

RE: NO. 95 - Wisconsin v. Constantineau

Dear Bill:

I am not circulating this to the Conference but it occurred to me that Zwickler v. Koota might be an appropriate citation in support of the conclusion in the last paragraph of page 6 that there being no ambiguity in the state statute, the federal courts should not abstain but decide the federal constitutional claim.

Sincerely,

WB

Mr. Justice Douglas



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.


January 5, 1971

RE: No. 95 - Wisconsin v. Constantineau

Dear Bill:

Please join me in the above.

Sincerely,



W.J.B. Jr.

Mr. Justice Douglas

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

January 5, 1971

95 - Wisconsin v. Constantineau

Dear Bill,

I agree with your opinion for the  
Court in this case.

Sincerely yours,

P.S.  
✓

Mr. Justice Douglas

Copies to the Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

January 5, 1971

Re: No. 95 - Wisconsin v. Constantineau

Dear Bill:

Please join me in your opinion in this  
case.

Sincerely,

  
B.R.W.

Mr. Justice Douglas

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 11, 1971

Re: No. 95 - Wisconsin v. Constantineau

Dear Bill:

Please join me.

Sincerely,

  
T.M.

Mr. Justice Douglas

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

January 11, 1971

Re: No. 95 - Wisconsin v. Constantineau

Dear Chief and Hugo:

If you will permit me so to do, I would like to  
join each of you in your respective dissents in this case.

Sincerely,

H. A. B.

The Chief Justice  
Mr. Justice Black

cc: The Conference

January 25, 1971

MEMBERS OF THE CONFERENCE:

I thought you might be interested in the enclosed  
Midwestern news item concerning one of our recent  
litigants.

H. A. B.

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