

THE ADMINISTRATIVE STATE AND SEPARATION OF POWERS IN WISCONSIN

HON. BRIAN HAGEDORN*

INTRODUCTION

The administrative state in Wisconsin has undergone drastic changes since 2010. Two developments are primarily responsible. First, Governor Scott Walker and the Republican legislature—elected in the Tea Party wave of 2010—enacted a number of modifications to the administrative rules process that have altered the legal landscape.¹ Second, the judiciary has increasingly been asked to step in and address legal issues related to the administrative state, a development due in part to political polarization and the rise of divided state government after the 2018 election.²

This essay focuses first on the significant transformation in judicial doctrines of deference to interpretations of law by Wisconsin agencies. Then, I provide a brief overview of several recent cases addressing the administrative state and the associated

* Justice, Wisconsin Supreme Court.

1. Benjamin Wallace-Wells, *Will the Tea Party Era End Where It Started—In Wisconsin?*, THE NEW YORKER (May 23, 2018), <https://www.newyorker.com/news/news-desk/will-the-tea-party-era-end-where-it-started-in-wisconsin> [<https://perma.cc/2BJB-KVfV>]; David Striffling, *The Quiet Revolution in Wisconsin Administrative Law*, MARQ. U. L. SCH. FACULTY BLOG (Sept. 11, 2017), <https://law.marquette.edu/facultyblog/2017/09/the-quiet-revolution-in-wisconsin-administrative-law/> [<https://perma.cc/94HX-G6WE>]; Kirsten Koschnick, Comment, *Making “Explicit Authority” Explicit: Deciphering Wis. Act 21’s Prescriptions for Agency Rulemaking Authority*, 2019 WIS. L. REV. 993.

2. Jens Handelsman Shugerman, *Hardball vs. Beanball: Identifying Fundamentally Anti-democratic Tactics*, 119 COL. L. REV. ONLINE 85, 117–18 (2019); see, e.g., Lisa M. Lawless, *Top 10 Recent Supreme Court Decisions*, WIS. LAWYER, Dec. 2020, at 18–21, 24–25.

jurisprudential debates on our court. Finally, I conclude with some thoughts on the path ahead.

I. THE END OF AGENCY DEFERENCE

While federal courts continue to grapple with various deference principles, Wisconsin has proceeded on a very different path. Our own administrative procedure act prescribes that “due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it.”³ Over time, and in view of this statute (although not in strict reliance on it), the Wisconsin Supreme Court began to develop a three-tiered approach to reviewing the legal conclusions of state agencies.⁴

At the highest level, where an agency’s specialized expertise and technical competence grounded a longstanding interpretation of the law, courts gave that interpretation “great weight” deference.⁵ This meant courts deferred to an agency’s interpretation as long as it was reasonable, even if the court found another reading more reasonable.⁶

On the other hand, where a legal question was within an agency’s expertise and administrative responsibilities, but was less well-established or grounded in the unique capabilities of that agency, it was given a more modest “due weight” deference.⁷ Under this approach, an agency’s interpretation would govern unless the reviewing court found another interpretation more reasonable.⁸

Finally, if the question was one of first impression or an agency’s expertise or experience did not give it unique insight, courts would

3. WIS. STAT. § 227.57(10) (2019–20).

4. *See* Cnty. of Dane v. Lab. & Indus. Rev. Comm’n, 759 N.W.2d 571, 578 (Wis. 2009).

5. *Id.* at 578.

6. *Id.*

7. *Id.* at 578.

8. *Id.*

give no deference to an agency's reading of the law.⁹ The standard of review was purely *de novo*.¹⁰

Several observations are noteworthy. First, unlike in federal courts, this system of deference did not employ ambiguity as a threshold question.¹¹ Rather, the entire system was predicated on agency expertise with an eye toward uniformity and consistency in the way agencies administered a statutory scheme.¹² Second, this three-tiered scheme was highly malleable.¹³ The degree of statutory expertise could be in the eye of the beholder, which made the rubric less predictable.¹⁴ And in the real world, this line-drawing often had little practical significance.¹⁵ For example, the Wisconsin Supreme Court opined in 2009 that due weight deference and no deference often resulted in the same outcome because the court would engage in a serious construction of the statute under both standards of review—a task it apparently did not do when great weight deference was invoked.¹⁶

In 2017, however, the Wisconsin Supreme Court invited the parties, in a standard case reviewing an agency decision, to address the proper role of deference to state agencies.¹⁷ In a split opinion, the court jettisoned this longstanding three-tiered approach altogether.¹⁸

9. *Id.* at 578.

10. *Id.*

11. Compare *id.* at 578 with *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1629–30 (2018).

12. *Harnischfeger Corp. v. Lab. & Indus. Rev. Comm'n*, 539 N.W.2d 98, 102 (Wis. 1995), *abrogated by* *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21 (Wis. 2018).

13. Patience Drake Roggensack, *Elected to Decide: Is The Decision-Avoidance Doctrine of Great Weight Deference Appropriate in This Court of Last Resort?*, 89 MARQ. L. REV. 541, 548–60 (2006).

14. *Id.* at 556–58.

15. *County of Dane*, 759 N.W.2d at 578.

16. *Id.*

17. *Tetra Tech EC, Inc.*, 914 N.W.2d at 28.

18. *Id.* at 28.

Two justices argued that “only the judiciary may authoritatively interpret and apply the law in cases before our courts.”¹⁹ This, they stated, is a core judicial power that the executive may not invade and “the judiciary may not cede.”²⁰

Three other justices agreed that ending our policy of deference was appropriate.²¹ They expressed alarm, however, with the reach of the two-justice opinion’s broad constitutional declarations.²² Instead, they maintained that since our deference doctrines were simply judicial creations, they could be rescinded in the same manner.²³ What the judiciary giveth, the judiciary can taketh away. There was no need to dive into the unique constitutional role of the judiciary, they argued, lest that analysis extend into and unknowingly upend other areas of law.²⁴ In their view, restraint was the better course.²⁵

Several months following this decision, the legislature amended Wisconsin’s administrative procedure act and codified this no-deference approach.²⁶ The law now states: “Upon review of an agency action or decision, the court shall accord no deference to the agency’s interpretation of law.”²⁷

With all the debate nationally over judicial deference, Wisconsin provides an interesting laboratory both for how a change in deference can happen, and to what long-term effect. Based on my own short-lived experience with this change, its practical effect on the administrative state is unclear. Under the prior scheme, courts often applied due weight or no deference in cases with high stakes

19. *Id.* at 45 (Kelly, J., lead op.).

20. *Id.*

21. *Id.* at 73 (Ziegler, J., concurring); *id.* at 74 (Gableman, J., concurring) (joined by Roggensack, C.J.). The remaining two justices argued in support of the three-tiered scheme. *Id.* at 132 (A. Bradley, J., concurring) (joined by Justice Abrahamson).

22. *Id.* at 67–69 (Ziegler, J., concurring).

23. *Id.* at 67 (Ziegler, J., concurring); *id.* at 74 (Gableman, J., concurring).

24. *Id.* at 67–70 (Ziegler, J., concurring).

25. *Id.* at 67 (Ziegler, J., concurring); *id.* at 74 (Gableman, J., concurring).

26. 2017 Wis. Act 369, § 80.

27. WIS. STAT. § 227.57(11) (2019–20).

and those raising novel questions. Thus, the most acute impact moving forward should be felt in cases where longstanding agency interpretations are overturned by courts. And although not unheard of, these cases are rare. On a positive note, this overdue change has had the salutary effect of centering briefing on the text of the relevant law rather than on how much relevant expertise an agency has or whether a proffered agency interpretation is reasonable. It also may be that the most significant effects will involve how agencies do their jobs, rather than how courts review their work. When agencies know their interpretations of law can be reviewed in court and will be afforded no special treatment, it stands to reason that agencies will be less likely to stretch the law to achieve policy goals. Rather, they have a built-in incentive to get the law right, or least right enough to be held up in court.

II. SIGNIFICANT LITIGATION

In recent years, there has been a significant increase in litigation over the shape and permissible scope of the administrative state, with a particular focus on conflicts between the governor and the legislature. I highlight several cases to illustrate the breadth and diversity of these challenges.

In *Coyne v. Walker*,²⁸ the Wisconsin Supreme Court heard a challenge to statutory changes that gave the governor significant approval authority over the promulgation of administrative rules in state agencies.²⁹ While this may seem superficially unremarkable, it provoked an as-applied constitutional challenge to rules promulgated by the Department of Public Instruction.³⁰ This challenge was unique because that agency is headed by the Superintendent of Public Instruction—a separately elected constitutional officer in

28. 879 N.W.2d 520 (Wis. 2016), *overruled by* *Koschkee v. Taylor*, 929 N.W.2d 600 (Wis. 2019)

29. *Id.* at 524.

30. *Id.*

whom the Wisconsin Constitution vests the “supervision of public instruction.”³¹

While the court was not able to agree on why, four justices held that gubernatorial approval violated the constitution by giving the governor greater supervisory authority than the superintendent.³² Three years later, the issue presented itself again, and the court reversed itself. In *Koschke v. Taylor*,³³ the court concluded that rule-making itself is not an executive function; it is an exercise of delegated legislative power.³⁴ Therefore, enlarged gubernatorial authority does not implicate the executive power of the superintendent to supervise public instruction because it is not executive power at all.³⁵

This attempt to situate rulemaking as squarely and solely a legislative power is a consequential and controversial concept. There is a strong argument that at least some rulemaking might extend into what has traditionally been considered executive branch duties. For example, if the law requires the taxing of cigarettes, an administrative process that gives the legislature continued say over what is or is not a taxable cigarette could arguably be legislative intrusion into the execution of the law. This proposition also could have significant consequences for a revived nondelegation doctrine. If rulemaking is entirely an exercise of delegated legislative power, a prohibition on legislative delegations would seem to render all rulemaking unconstitutional.

In recent years, the COVID-19 pandemic coupled with divided government created a perfect storm for interbranch conflict; I will discuss three cases that arose as a result.

31. WIS. CONST. art. X, § 1 (“The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties and compensation shall be prescribed by law.”).

32. *Coyne*, 879 N.W.2d at 525 (Gableman, J., lead op.) (announcing the mandate of the court).

33. 929 N.W.2d 600 (Wis. 2019)

34. *Id.* at 602–03, 605.

35. *Id.* at 602–03, 611.

The first skirmish occurred in April 2020 during a statewide lockdown.³⁶ On the afternoon of April 6, 2020, the day before the spring nonpartisan election, Governor Evers issued an executive order purporting to unilaterally postpone the election until June.³⁷ This would have affected not only a race for the Wisconsin Supreme Court and the presidential primary, but also races for local school and county boards across the state.³⁸

An hour after the executive order was issued, the Wisconsin Supreme Court received a petition for an original action and a motion for temporary injunction from the legislature.³⁹ That same day, we issued an order granting an injunction against enforcement of the governor's order.⁴⁰ The governor relied on statutory emergency powers and several general provisions of the Wisconsin Constitution relating to the constitution's purpose and the governor's duty to execute the laws.⁴¹ None of these supported the governor's order.⁴² Rather, the governor's order, the court held, was an invasion of "the province of the Legislature by unilaterally suspending and rewriting laws without authority."⁴³ While proceeding with in-person voting presented challenges, the Wisconsin Supreme Court determined the governor simply did not have the authority he asserted.⁴⁴

Just weeks later, another major separation of powers challenge came before the Wisconsin Supreme Court: *Wisconsin Legislature v. Palm*.⁴⁵ The secretary-designee of the Wisconsin Department of Health Services had issued a statewide "Safer at Home" order commanding individuals in Wisconsin to stay at home except for

36. Wis. Leg. v. Evers, No. 2020AP608-OA, slip op. at 1 (Wis. Apr. 6, 2020).

37. *Id.*

38. Wis. Exec. Order No. 74, at 2 (2020).

39. Wis. Leg. v. Evers, No. 2020AP608-OA, slip op. at 4.

40. *Id.*

41. *Id.* at 2.

42. *Id.* at 2–3.

43. *Id.* at 4.

44. *Id.* at 2–3.

45. 942 N.W.2d 900 (Wis. 2020).

certain “essential” activities and services.⁴⁶ Violators risked fines and even imprisonment.⁴⁷

Litigation over the order was not brought by a citizen, church, or other person impacted by the lockdown order, but by the Wisconsin Legislature.⁴⁸ The legislature made two arguments. First, it argued that this order constituted an administrative rule as defined by Section 227.01(13) of the Wisconsin Statutes.⁴⁹ Because the secretary-designee did not follow the proper rule-promulgation procedures, the legislature argued that the court should declare the order invalid.⁵⁰ Second, the legislature contended that even if the “Safer at Home” order was properly issued, it exceeded the authority granted to the secretary-designee under Section 252.02 of the Wisconsin Statutes.⁵¹ The court agreed with the legislature on both points.⁵²

Before reaching the merits, the majority briefly addressed standing.⁵³ It asserted that the legislature’s claims were grounded in the Wisconsin Constitution’s separation of powers, and that this was sufficient to address the merits of the claim.⁵⁴

On the first question, the court concluded the secretary-designee’s order satisfied the definition of an administrative rule—it was “a general order of general application” because it applied statewide to a class of people described generally and because new members could join that class.⁵⁵ The court explicitly incorporated constitutional concerns into its statutory analysis, relying on “the constitutional-doubt principle.”⁵⁶ The majority reasoned that if the

46. *Id.* at 905–06.

47. *Id.* at 906.

48. *Id.* at 905.

49. WIS. STAT. § 227.01(13) (2017–18).

50. *Wis. Leg. v. Palm*, 942 N.W.2d at 905.

51. *Id.*

52. *Id.* at 905.

53. *Id.* at 907–08.

54. *Id.* at 908.

55. *Id.* at 912.

56. *Id.*

secretary-designee had broad and indiscriminate power to control the state's response to communicable diseases, that grant of power would raise serious questions regarding the statute's constitutionality.⁵⁷ The court therefore read the statute narrowly to avoid a construction that would amount to a "sweeping delegation of legislative power."⁵⁸ The majority further emphasized the need for procedural safeguards on the broad assertions of power; it found them in the structure supporting promulgation of administrative rules.⁵⁹ In other words, the rulemaking process, which requires some measure of legislative input and acquiescence, constituted a legislative check on executive power.⁶⁰ Without it, the secretary-designee's power could be used in an arbitrary or oppressive manner.⁶¹

Relatedly, the criminal penalties in the secretary-designee's order troubled the court.⁶² It argued that an agency's directive cannot create a crime absent an agency promulgating a rule.⁶³ The court's reasoning was also animated by constitutional concerns with an unelected agency official unilaterally defining new crimes without notice.

On the second issue, the court determined that, even assuming rulemaking was not required, the secretary-designee exceeded her authority.⁶⁴

Whatever the statutes authorized, this broad control over citizens and businesses was too much.⁶⁵ The court again drew upon the constitution for interpretive guidance and determined these broadly

57. *Id.*

58. *Id.* (quoting *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality)).

59. *Id.* at 913.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 905, 914–15.

65. *Id.* at 916.

worded statutory grants of power should be read narrowly to avoid potential constitutional intrusions.⁶⁶

Two concurrences took the separation of powers argument a step further.⁶⁷ One justice invoked the nondelegation doctrine and said that beyond the statutory claims, the secretary-designee simply does not have the power she asserts because the legislature could not have lawfully given her such broad, undefined powers.⁶⁸ Another justice similarly expressed that “[e]ndowing one person with the sole power to create, execute, and enforce the law contravenes the structural separation of powers established by the people.”⁶⁹

I dissented and brought a different focus to the questions presented.⁷⁰ I explained that no party raised a constitutional argument—even while acknowledging potential concerns “over the constitutional limits on executive power” implicated by the order.⁷¹ Instead, I argued that the court should have stayed focused on the statutory definition of an administrative rule because that was the issue presented.⁷² Conducting an in-depth statutory analysis, I concluded that while the secretary-designee’s directive was a “general order,” it was not one of “general application” and therefore did not meet the definition of a rule.⁷³ On the second issue related to the scope of the order, I concluded the legislature did not have standing.⁷⁴ I explained that this was a challenge to enforcement of the laws, and that “the legislature—as a constitutional body whose interests lie in enacting, not enforcing the laws—lacks standing to

66. *Id.* at 917.

67. *Id.* at 919–30 (R. Bradley, J., concurring); *id.* at 930–41 (Kelly, J., concurring).

68. *Id.* at 930–31 (Kelly, J., concurring).

69. *Id.* at 921 (R. Bradley, J., concurring).

70. *Id.* at 952–53 (Hagedorn, J., dissenting).

71. *Id.* at 952 (Hagedorn, J., dissenting).

72. *Id.* (Hagedorn, J., dissenting).

73. *Id.* at 968 (Hagedorn, J., dissenting).

74. *Id.* at 970 (Hagedorn, J., dissenting).

bring this claim.”⁷⁵ Persons harmed by the orders must be the ones to bring a claim like this.⁷⁶

This case profoundly affected the state and engendered widespread debate that continues today. And for legal purposes, the case presents an interesting example of the separation of powers impacting judicial analysis in different ways: the majority used it to circumscribe permissible interpretations and enforcement of a statute, and I used it to circumscribe what issues we could legitimately reach based on the parties and claims.

The third pandemic-related case, *Becker v. Dane County*,⁷⁷ brought nondelegation principles directly to the fore, but in a unique posture. During the pandemic, the Dane County⁷⁸ local health officer issued a series of orders affecting the citizens and businesses in the county.⁷⁹ Two citizens and a local business filed suit arguing that the local health officer did not have authority to issue an order.⁸⁰ Thus, the challenge was not to the substance of the order, but to the statutory and constitutional authority supporting its issuance.⁸¹ In particular, the plaintiffs argued that the court should revive the nondelegation doctrine in Wisconsin, and that this was the appropriate case to do so.⁸² While the court disagreed on both statutory and constitutional grounds, the opinions provide a case study in a court struggling to determine how to handle novel nondelegation claims.⁸³

As noted, this was not a traditional nondelegation case. It involved claims of sub-delegation from local municipal and county boards to the local health officer.⁸⁴ There was also debate over the

75. *Id.* at 952 (Hagedorn, J., dissenting).

76. *Id.* at 952, 970 (Hagedorn, J., dissenting).

77. 977 N.W.2d 390 (Wis. 2022).

78. Dane County is where Madison, the Capitol, is located.

79. *Becker*, 977 N.W.2d at 394.

80. *Id.* at 395.

81. *Id.* at 393.

82. *Id.* at 395, 401.

83. *Id.* at 404.

84. *Id.* at 394.

nature of the nondelegation claim at issue. Therefore, rather than focus on the specifics of the case, I will instead summarize the approaches taken in the various opinions.

The first approach – taken by three members of the court – explicitly rejected the invitation to modify Wisconsin law and largely applied existing precedent.⁸⁵ Under that precedent, the court examines the legislative grant of authority for an ascertainable purpose, and strives to ensure sufficient procedural and substantive safeguards.⁸⁶ The bar is low, with the rather functional aim of protecting against arbitrary exercises of power.⁸⁷ This means some cases may not require any substantive safeguards if the procedural safeguards are sufficient.⁸⁸ Applying this, these justices focused on the nature of the power exercised here: taking action to prevent and suppress a communicable disease.⁸⁹ They observed that the local health officer’s authority could be constrained in multiple ways – through either more focused judicial challenges to whether the order is reasonable and necessary or local revocation of authority.⁹⁰ Thus, they concluded, the substantive and procedural protections were sufficient to ensure power was not exercised arbitrarily.⁹¹

The second approach – taken by three justices in dissent – argued that we should overrule our cases and embrace a robust and broad view of nondelegation.⁹² It lamented the reliance on procedural safeguards in our cases and urged a renewed focus on substantive limitations.⁹³ In particular, although it focused on local sub-delegations of authority, it reasoned more broadly that “lawmaking means discretionary decisions that bind the public with the force of law,” and a complete and whole enactment must require “no

85. *Id.* at 401–02 (Karofsky, J., lead op.).

86. *Id.* at 401 (Karofsky, J., lead op.).

87. *Id.*

88. *Id.*

89. *Id.* at 402 – 03 (Karofsky, J., lead op.).

90. *Id.* at 403 – 04 (Karofsky, J., lead op.).

91. *Id.* at 404 (Karofsky, J., lead op.).

92. *Id.* at 414 (R. Bradley, J., dissenting).

93. *Id.* at 425, 434 – 35 (R. Bradley, J., dissenting).

further discretionary decisions of a substantive nature to carry its purpose into effect.”⁹⁴ Drawing a broad theoretical foundation, these principles were offered as a guide to nondelegation questions moving forward.

Finally, I concurred and wrote that I was open to reconsidering our approach to nondelegation, but that discarding one-hundred years of precedent for a new construct requires “a careful analysis of the original understanding of the Wisconsin Constitution.”⁹⁵ In my view, the parties did not provide that evidence.⁹⁶ However, based on my own research, I concluded a sufficiently analogous statute enacted immediately after adoption of the Wisconsin Constitution suggested the empowerment of a local health officer likely did not offend the original understanding of the separation of powers.⁹⁷ Taking a more narrow approach, I argued that historical evidence like this may prove a helpful way of navigating difficult nondelegation questions, and that establishing a broad judicial test for nondelegation was not necessary to decide the claim in this case.⁹⁸

CONCLUSION

Wisconsin is a microcosm of America. Its political divide is almost a perfect split.⁹⁹ And over the last four years, that has been reflected in divided government. Political activists and financial interests seem to be in a perpetual state of trench warfare. Each inch, each repository of power, is worth fighting for in the eyes of our battle-hardened activists.

94. *Id.* at 433 (R. Bradley, J., dissenting).

95. *Id.* at 406 (Hagedorn, J., concurring).

96. *Id.* (Hagedorn, J., concurring).

97. *Id.* at 411 (Hagedorn, J., concurring). I further stressed that other contrary evidence may exist and may shift the analysis but was not presented. *Id.*

98. *Id.*

99. Dan Balz, *Wisconsin: The Incubator for America's Tribal Politics*, THE WASHINGTON POST (Oct. 8, 2021, 11:12 AM), <https://www.washingtonpost.com/politics/2021/10/08/wisconsin-polarization-democrats-republicans/> [<https://perma.cc/7PEB-TKM8>].

It is no surprise that this political stasis has led to an increasing series of power struggles not just between competing political factions, but between the political and constitutional institutions supporting each side. Republicans in the legislature have sought to expand the reach of rulemaking, for example, seeing it as a needed check on the policy priorities of the Democratic governor.¹⁰⁰ And the governor has, at times, pursued sweeping executive action either directly or through state agencies while facing off with a legislature whose priorities do not align with his own.¹⁰¹

Future cases will continue to test how aggressive and active the Wisconsin judiciary wants to be in policing these fights. We will have to determine whether originalism will be our guide, or if we will pursue philosophies guided by practical or political concerns to direct our review. If, how, and when nondelegation principles will be brought to bear on the questions of the day remains to be seen. While our court has been a hotbed of high-profile and consequential legal battles, this much I am sure of: it is only the beginning.

100. Brandon Jubelirer, *Risky Precedents: A Brief Overview of the 2018 Wisconsin Lame Duck Laws & the Separation of Powers Doctrine*, MARQ. U. L. SCH. FACULTY BLOG (Mar. 22, 2019), <https://law.marquette.edu/facultyblog/2019/03/risky-precedents-a-brief-overview-of-the-2018-wisconsin-lame-duck-laws-the-separation-of-powers-doctrine/> [https://perma.cc/HS9S-J6S4].

101. *See, e.g., Fabick v. Evers*, 956 N.W.2d 856, 860, 869 (Wis. 2021).