INSTITUTE FOR REFORMING GOVERNMENT

# SAVING THE WALKER-ERA REFORMS: HOW TO ENSHRINE CRITICAL POLICY WINS IN THE WISCONSIN CONSTITUTION

On April 4th, Milwaukee County Circuit Court Judge Janet Protasiewicz won election to the Supreme Court of Wisconsin for a 10-year term. Her addition shifts the balance of power on the 7-justice court to a new liberal majority that also includes Justices Ann Walsh Bradley, Rebecca Frank Dallet, and Jill Karofsky.

There's no sugarcoating it: many of the most important reforms enacted or expanded during the era of former Governor Scott Walker are now at stake. For example, while still a candidate, Judge—soon Justice—Protasiewicz characterized Act 10 as unconstitutional. It is reasonable to question how she might rule if other matters relating to critical rights and reforms—school choice, Right to Work, and more—are brought before the Court by groups arguing that they should be struck down.[1]

Wisconsinites want to know what can be done to ensure these policies are protected. But in our system of government, the Supreme Court of Wisconsin has the last word on issues of state law, and its interpretations are binding on the legislative and executive branches. This leaves just one option: enshrining these important reforms in the Wisconsin Constitution directly.

## Why Amending the State Constitution Preserves Reforms

Put simply, codifying critical policy reforms in the Wisconsin Constitution prevents judicial rulings that the reforms violate the Wisconsin Constitution. In other words, if the Wisconsin Constitution itself mandates these important reforms, that document will provide no basis for striking them down.

[1] *See generally* Anthony LoCoco, *Potential Landmark Decisions of a New Supreme Court of Wisconsin*, Institute for Reforming Government (2023).

Consider something as basic as the right to a jury trial. While debate can be had about the contours of the right, no one can argue against its existence in Wisconsin because it is so clearly stated in our constitution.[2] But the rights provided by key Walker-era reforms are not constitutional in nature. Jurists can and have argued that they are not permitted in Wisconsin. Short, unambiguous constitutional provisions prohibiting the infringement of these rights can put much of the argument about them outside of the hands of ambitious litigants. And although federal challenges could still be asserted, unlike with state law rulings, the U.S. Supreme Court could provide an additional level of review (assuming the lawsuits were not first transferred to a federal forum). State constitutional amendments would thus pose a significant bar to the efforts of liberal interest groups seeking to invalidate the victories of recent decades.

## How to Amend the State Constitution

The process for amending the state constitution is straightforward and requires only the involvement of the Legislature and the People themselves. Under Article XII, § 1 of the Wisconsin Constitution, the constitution may be amended if a proposal obtains the approval of a majority of two successive state legislatures, followed by approval of a majority of the voting electorate.

This means that the legislature could pass proposed amendments now, by resolution; the next legislature could pass the proposals again in early 2025; and the proposals could be submitted to and approved by the electorate later that year.

Wisconsin can act to amend the state constitution by 2025, making celebrated policy and judicial accomplishments of the last few decades the law of the land for decades to come. For example, here are a handful of amendment proposals—by no means the only options—designed to protect some of the most critical wins of the last few decades:

### 1. PRESERVE ACT 10 FOREVER AND PROTECT WORKER FREEDOM

[2] *See* Wis. Const. art. I, § 5.

One amendment could protect key worker freedom rights arising from two landmark modern labor reforms: 2011 Wisconsin Act 10 and 2015 Wisconsin Act 1 (the "Right to Work" law). Both Act 10 and Act 1 were challenged in court, and as noted Judge Protasiewicz has already expressed her view that at least the former is unconstitutional. Safeguarding worker freedom constitutionally—as Tennessee recently did—is critical to ensure that unions do not claw back the power that was properly taken away from them years ago.

For instance, a simple amendment could mimic the central provisions in these laws prohibiting employers from forcing employees to join, leave, or subsidize labor unions via fees, dues, or other payments. This would allow employees to continue enjoying the freedoms afforded by Act 10 and Act 1.

## 2. PROTECT THE BAR ON AGENCY DEFERENCE

The most significant judicial achievement of former Justice Daniel Kelly, a Scott Walker appointee, was perhaps his authorship of the majority/lead opinion in *Tetra Tech v. Wisconsin Department of Revenue*, which "end[ed] [the Court's] practice of deferring to administrative agencies' conclusions of law."[3] For decades, the Supreme Court of Wisconsin had treated agency interpretations of statutes as sometimes binding on the Court itself if certain conditions were met.[4] This provided agencies with a significant advantage in litigation against private parties.

Although *Tetra Tech* was a 5-2 ruling on the question of whether to abolish the Court's deference doctrine, no majority existed for the rationale, making future reexamination more palatable.[5] The Supreme Court could easily decide in a future case to restore to agencies the ability to control judicial decision-making.

An amendment could prevent that from happening by making *Tetra Tech* state constitutional law and barring courts of this state from deferring to administrative agencies' conclusions of law. Similar protections exist in state

[3] 2018 WI 75, ¶3, 382 Wis. 2d 496, 914 N.W.2d 21.
[4] *See, e.g.*, *id.* at ¶¶14, 18-33.
[5] *Id.* at ¶3 n.3.

statute, but those protections may be vulnerable; lawmakers could consider making those changes permanent.[6]

## 3. AUTHORIZE AND EXPAND SCHOOL CHOICE

School choice programs have been a fixture of Wisconsin's educational landscape since 1990, resulting in a huge boost to child educational achievement in our state. Governor Walker fought hard to expand Wisconsin's choice offerings. But the road to choice was not easy. Multiple legal challenges were brought at Wisconsin's high court in the 1990s.[7] The hotly-contested school choice cases divided the Court on numerous state constitutional questions, demonstrating the potential viability of a renewed anti-choice litigation campaign.

Lawmakers could amend the Wisconsin Constitution to make clear that nothing in that document prohibits the legislature from establishing school choice programs. This was the same approach successfully taken by the people of Wisconsin in response to a decision of the Supreme Court of Wisconsin ruling that the legislature could not provide private school students with transportation. *See* Wis. Const. art. I, § 23 ("Nothing in this constitution shall prohibit the legislature from providing for the safety and welfare of children by providing for the transportation of children to and from any parochial or private school or institution of learning.")[8]

Lawmakers could even take the reform one step further by directing the Legislature itself to implement a universal school choice program that vindicates parents' rights to select the best school for their children. The provision could use language similar to the state constitutional provision directing the legislature to establish a uniform system of public schools.[9] Although the constitutional provision would likely have to leave much of the details of the school choice program to the Legislature, this is no different

[6] *See, e.g.*, Wis. Stat. § 227.10(2g).
[7] *See Davis v. Grover*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992); *Jackson v. Benson*, 218 Wis. 2d 835, 578 NW.2d 602 (1998).
[8] *See also Cartwright v. Sharpe*, 40 Wis. 2d 494, 162 N.W.2d 5 (1968).
[9] *See* Wis. Const. art. X, § 3.

than other similar constitutional mandates. *See, e.g.*, Wis. Const. art. IV, § 9(2).

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As noted above, these are not the only proposals available to the Legislature for protecting Walker-era achievements. The bottom line is that Tuesday's election requires conservatives to think creatively—and aggressively—about how to build on—or at least save—the progress they've already made in recent years. State constitutional amendments hold great potential to meet these goals.