



# THE WISCONSIN SUPREME COURT IS THE BACKSTOP AGAINST BUREAUCRAT OVERREACH

## OVERVIEW

Oftentimes lawsuits and legislative oversight are the last two lines of defense against the power-hungry moves of Madison bureaucrats set on running our lives, whether from the Department of Natural Resources or Department of Revenue. The state constitution embodies a simple but profound principle—the separation of powers—to ensure that our liberties are protected. Thanks to that idea, which is also a constitutional command, state agencies cannot wield unchecked power over our lives. They are accountable to legislators, the people we actually elect to make policy, and to judges to ensure they are operating within their prescribed authority. But bureaucrats are often working to expand their empire, and it's imperative we have a Wisconsin Supreme Court that keeps those efforts under control.

## WHAT YOU SHOULD KNOW

- » Wisconsin bureaucrats do not have unchecked authority to exert control over our lives. They derive their authority from the legislative branch and must answer to the judiciary.
- » The Wisconsin Supreme Court is the court of last resort when an agency action or inaction is challenged. In Wisconsin, conservative majorities in the Wisconsin Supreme Court have protected Wisconsinites and Wisconsin businesses from bureaucratic overreach.
- » The Court will decide in future years whether the Republican-led Legislature can act as a vigorous check on the Democrat-led executive branch.
- » [Wisconsin Voters](#) remain focused on reigning in the power of the bureaucracy, with 32% saying that the Legislature should make important policy decisions and only 8% favoring bureaucrats at state agencies in a recent [IRG poll](#).

## WHAT COULD HAPPEN

Checks-and-balances are an essential safeguard to our liberty. The Federalist Papers said that the concentration of all power—legislative, executive, and judicial—in one set of hands is the very definition of tyranny. Yet that's what happens all too often in the modern administrative state, where unelected bureaucrats write the rules, enforce them, and then have their own system of administrative law judges to adjudicate violations.

The Legislature acts as an essential check-and-balance on the Governor and Madison-based bureaucrats. So do the courts, when they take their job seriously as guardians of constitutional rights and structure. When courts abdicate their role, or cut back on the Legislature's powers of oversight, it undermines liberty and taxpayer accountability.

The Wisconsin Supreme Court is currently considering a case on whether the Legislature's Joint Committee for the Review of Administrative Rules ("JCRAR") can act as an effective check on policymaking by unelected bureaucrats through the administrative rules process. These touch on highly sensitive areas, like the First Amendment rights of Christian licensed professionals to provide counseling in accordance with their faith. (*Evers v. Marklein*, 23AP2020-OA). Moreover, if this legislative check is ended, it will extend out to every agency that adopts rules, from professional licensing boards to the Department of Natural Resources.

## WHAT'S NEXT

The Wisconsin Supreme Court is currently considering a case on whether the Legislature's Joint Committee for the Review of Administrative Rules ("JCRAR") can act as an effective check on policymaking by unelected bureaucrats through the administrative rules process. These touch on highly sensitive areas, like the First Amendment rights of Christian licensed professionals to provide counseling in accordance with their faith. (*Evers v. Marklein*, 23AP2020-OA). Moreover, if this legislative check is ended, it will extend out to every agency that adopts rules, from professional licensing boards to the Department of Natural Resources.

## LEGAL BACKGROUND

During the years of the conservative majority on the Court, Wisconsin was one of the first states in the nation to see its courts reinvigorate checks-and-balances on bureaucrats. In *Tetra Tech v. Department of Revenue*, 2018 WI 75, the Court held that it would no longer put a thumb on the scale in favor of state agencies when considering how to interpret rules and statutes.

During the Covid-19 pandemic, state agency bureaucrats asserted unprecedented levels of power to make policy affecting everyday people. These orders affected Wisconsinites' ability to gather and worship, send children to school and receive an education, and even go to work for an extended period of time. The Wisconsin Supreme Court – by only a one vote margin – was an essential check on the expansionist impulse to override any normal policymaking process by the secretary of health services. (*Wisconsin Legislature v. Palm*, 2020 WI 42)

That same year, in *SEIU v. Vos*, 2020 WI 67, the Court released a tangle of opinions on various bills adopted at the end of the Walker Administration. Importantly, the Court upheld the ability of the Legislature to intervene in litigation to defend state laws, which is especially important when the Attorney General (who normally has that job) has announced policy positions contrary to those laws. The Court also upheld a statutory codification of principles announced in *Tetra Tech*, ensuring that courts do not prefer bureaucrats over citizens when interpreting agency rules.

More recently, the liberal majority on the Wisconsin Supreme Court ruled that the legislature's Joint Finance Committee cannot act as a check on the Department of Natural Resources when it acquires new state lands (*Evers v. Marklein*, 2024 WI 31). The immediate result is that the Republican-led Legislature can no longer oversee individual land purchases by the state, but the broader impact is to empower the executive free from legislative oversight.

## ZOOM IN

The bottom line is that effective legislative oversight of state agencies is a key check on the Madison bureaucrats. The Wisconsin Supreme Court is often called upon to act as the referee between the other two branches. Especially in an era of divided government, this can easily slip into an issue of partisan preferences.

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