WISCONSIN LEGISLATIVE COUNCIL

IssueBrief

May 2020

Wisconsin's Separation of Powers Doctrine

Prepared by: Anna Henning, Senior Staff Attorney

Like the U.S. Constitution, the Wisconsin Constitution provides for three branches of government, each with its own powers. The separation of powers doctrine is a "fundamental principl[e] of the American constitutional system,"[1] but it can be difficult to apply in practice, particularly with respect to disputes between the legislative and executive branches.

KEY TENETS

Wisconsin's separation of powers doctrine derives "implicitly" from the state's three co-equal branches of government and is informed to some extent by the similar doctrine under the U.S. Constitution.[2] The Wisconsin Supreme Court has stated: "The Wisconsin constitution creates three separate coordinate branches of government, no branch subordinate to the other, no branch to arrogate to itself control over the other except as is provided by the constitution and no branch to exercise the power committed by the constitution to another." [*State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 11-12 (1995) (quoting *State v. Holmes*, 106 Wis. 2d 31, 42 (1982)).]

Under the doctrine, each of the three branches of government has exclusive "core powers" delegated to only that branch by the Wisconsin Constitution,[3] which provides that "[t]he legislative power shall be vested in a senate and assembly," "[t]he executive power shall be vested in a governor," and "[t]he judicial power of this state shall be vested in a unified court system."[4] An exercise by one branch of the core power of another branch is impermissible, and a branch "should not abdicate or permit others to infringe upon" the branch's core powers. [*League of Women Voters of Wis.*, 2019 WI 75 at ¶ 34 (quoting *Rules of Court Case*, 204 Wis. 501, 514 (1931).).]

Each branch of government also exercises "shared" powers, which "lie at the intersection of exclusive core constitutional powers." [*Gabler*, 2017 WI 67, ¶ 33.] When exercising a shared power, a branch of government may exercise power conferred on another branch only to an extent that does not unduly burden or substantially interfere with the other branch's exercise of its power. [*State v. Horn*, 226 Wis. 2d 637 (1999); *In re Grady*, 118 Wis. 2d 762, 775 (1984).]

Thus, a separation of powers analysis generally follows two steps. First, a court determines whether a power exercised by one branch is a core power granted exclusively to another branch by the Wisconsin Constitution. If so, the exercise of power is unconstitutional. If, instead, an exercise of power falls within an area of shared powers, the exercise is upheld unless it is shown to unduly burden or substantially interfere with another branch.

NOT "STRICT AND ABSOLUTE"

Although the doctrine's principles are easy to summarize, the Wisconsin Supreme Court has acknowledged that the doctrine is difficult to apply. [See, e.g., *In re Appt. of Revisor*, 141 Wis. 592, 597 (1910).] "In reality, governmental functions and powers are too complex and interrelated to be neatly compartmentalized. For this reason, the Supreme Court of Wisconsin analyzes separation of powers claims not under formulaic rules but under general principles. . . ." [*Panzer v. Doyle*, 2004 WI 52, ¶ 49.]

Quoting the U.S. Supreme Court, the Wisconsin Supreme Court has stated:

> The separation of powers doctrine was never intended to be strict and absolute. Rather, the doctrine envisions a system of "separateness but interdependence, autonomy but reciprocity". . . . This subtle balancing of shared powers, coupled with the sparing demarcation of

> exclusive powers, has enabled a deliberately unwieldy system of government to endure successfully for nearly 150 years.

[*Friedrich*, 192 Wis. 2d at 12-13 (quoting *Youngstown*, 343 U.S. at 635).]

Adding to the difficulty of applying a doctrine that is not "absolute" or "formulaic," courts have sometimes been reticent to address separation of powers disputes. Instead, quoting from the Federalist Papers, the Wisconsin Supreme Court has characterized the separation of powers doctrine as a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." [*Gabler*, 2017 WI 67, ¶ 7.] Generally, the concept of "self-executing" separation of powers means relying on the constitutional checks and balances that the branches may exercise.

NONDELEGATION DOCTRINE

Intertwined with separation of powers principles, the nondelegation doctrine prohibits the Legislature from impermissibly delegating its legislative power to an executive branch agency or other entity. In other words, rather than focusing on whether on a branch has usurped another branch's power, the nondelegation doctrine asks the opposite: Has the Legislature given too much of its power away?[5]

Early delegation cases recognized that, after expressing a law's "fundamentals," the Legislature often must delegate some legislative power to the executive branch. [*State ex rel. Thomson v. Giessel*, 265 Wis. 185, 190 (1953).] The nondelegation doctrine places limits on the lawmaking power that may be delegated.

Specifically, the doctrine prohibits the Legislature from delegating lawmaking authority to another branch of government unless the delegating statute has both: (1) an ascertainable purpose; and (2) sufficient procedural safeguards. [*Panzer*, 2004 WI 52 at ¶ 55 (citing *Gilbert v. State*, 119 Wis. 2d 168 (1984).] Examples of procedural safeguards might include limited duration for the exercise of power or clear standards guiding its exercise. [See *Martinez v. Dept. of Indus., Labor & Human Relations*, 165 Wis. 2d 687 (1992).]

Although Wisconsin courts have addressed the nondelegation doctrine relatively infrequently over the past several decades, it has been more frequently mentioned in some recent Wisconsin Supreme Court decisions.[6]

---

[1] *League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶ 30 (quoting *Goodland v. Zimmerman*, 243 Wis. 459, 466 (1943).

[2] See *Id.*; *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 11. Justice Robert Jackson's concurring opinion in a 1952 U.S. Supreme Court case, *Youngstown Steel & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), is often quoted in separation of powers cases, including by Wisconsin courts. In *Youngstown*, Justice Jackson argued that the President's inherent constitutional powers "fluctuate," from relatively high when authorized by Congress, to their "lowest ebb" when a president "takes measures incompatible with the express or implied will of Congress." He enumerated three specific categories of executive action: (1) actions supported by an express or implied grant of authority from Congress; (2) a "zone of twilight" between the other categories, in which "congressional inertia" can occasionally "enable, if not invite, measures on independent presidential responsibility"; and (3) actions that conflict with statutes or congressional intent, which lack constitutional authority unless they fall within the President's core powers.

[3] *Gabler*, 2017 WI 67 at ¶ 34; but see *In re Constitutionality of Section 251.18*, 204 Wis. 501, 505 (1931) ("The fact that the legislature has acquired a power, whether by express constitutional provision or otherwise, does not inevitably characterize the power as purely legislative.").

[4] Wis. Const. art. IV, s. 1; Wis. Const. art. V, s. 1; Wis. Const. art. V, s. 2. The Legislature has summarized the branches' powers as follows: "The legislative branch has the broad objective of determining policies and programs and reviewing program performance," "the executive branch carries out the policies and programs," and "the judicial branch [adjudicates] any conflicts which might arise from the interpretation or application of the laws." [s. 15.001 (1), Stats.]

[5] See *Panzer*, 2004 WI 52, ¶ 59 ("Since this case involves a statute forthrightly delegating legislative authority to the governor, the governor's action should not be analyzed as an uninvited usurpation of legislative power. This case involves a legislative transfer of power to a different branch. Accordingly, the facts should be viewed through the prism of Wisconsin's nondelegation doctrine.").

[6] See, e.g., *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 48 (Kelly, J.) ("The separation of powers prevents [a branch] from abdicating core power just as much as it protects [the branch] from encroachment by other branches.").