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Wisconsin Supreme Court Decision Limits Legislative Oversight of Administrative Rulemaking

On July 8, 2026, the Wisconsin Supreme Court issued a decision in *Evers v. Marklein*, 2025 WI 36 (*Marklein II*). On its face, the case was about the validity of five provisions of Wisconsin's administrative procedures law. But as the opinions issued in the case demonstrate, bigger questions about the basis of administrative rulemaking more generally lurk below the surface.

The case involved Governor Evers' challenge to five provisions in Wis. Stat. Chapter 227, which gave the Legislature's Joint Committee for Review of Administrative Rules (JCRAR) the authority to "pause, object to, or suspend administrative rules for varying lengths of time, both before and after promulgation." The challenged sections were:

- Section 227.19 (5) (c) Stats. — specifies that an agency may not promulgate a proposed rule until JCRAR completes a review of the proposed rule. A review is completed either through expiration of a 30- to 60-day passive review period, waiver of its jurisdiction, or after any objection of the committee and subsequent legislative activity is concluded. The Court referred to this provision as a "pre-promulgation pause."
- Section 227.19 (5) (d), Stats. — permits JCRAR to temporarily object to a proposed rule and prevents an agency from promulgating the rule for a period of time determined by legislative action on bills introduced by JCRAR in support of the objection.
- Section 227.19 (5) (dm), Stats. — permits JCRAR to indefinitely object to a proposed rule and prevents an agency from promulgating the rule unless a bill is enacted to authorize the promulgation.
- Section 227.26 (2) (d), Stats. — permits JCRAR to temporarily suspend an existing rule and prohibits an agency from enforcing the rule for a period of time determined by legislative action on bills introduced by JCRAR in support of the suspension.
- Section 227.26 (2) (im), Stats. — permits JCRAR to suspend a rule multiple times.

The Governor argued that these statutes resulted in an unconstitutional legislative veto of proposed administrative rules. The Legislature in response argued that rulemaking is an appropriate extension of legislative power and when an agency makes a rule, it must necessarily remain subordinate to the legislature with regard to it rulemaking authority. The Legislature's argument was grounded upon two earlier Wisconsin Supeme Court decisions that upheld the constitutionality of the suspension and multiple suspension provisions (*Martinez v. DILHR*, 165 Wis. 2d 687, 702, 478 N.W.2d 582 (1992) and *Serv. Emp. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶98, 393 Wis. 2d 38, 946 N.W.2d 35).

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Wisconsin Supreme Court Decision

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The Wisconsin Supreme Court, in an opinion authored by Justice Karofsky, agreed with Governor Evers and held each of the challenged statutes to be facially unconstitutional by violating the Wisconsin Constitution's bicameralism and presentment requirements. The majority pointed to four constitutional provisions that define the Legislature's power to make laws:

- Art. IV, Sec. 1: "The legislative power shall be vested in a senate and assembly."
- Art. IV, Sec. 17(2): "No law shall be enacted except by bill."
- Art. IV, Sec. 19: "Any bill may originate in either house of the legislature, and a bill passed by one house may be amended by the other"
- Art. V, Sec. 10(1)(a): "Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor."

The majority concluded that the five statutes at issue violated these constitutional requirements. The Court adopted the reasoning of the U.S. Supreme Court in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 952–59 (1983), which determined that bicameralism and presentment are required when legislative action alters the legal rights and duties of others outside the legislative branch. In this case, the court concluded, the five statutes at issue violate the principles of bicameralism and presentment because they improperly empower JCRAR (a legislative committee) to take action (the suspension of rules) that will alter the legal rights and duties of persons outside of the legislative branch. The majority rejected its prior decisions in *Martinez v. DILHR* and *SEIU v. Vos* as unsound in principle.

The majority notes that "the Legislature retains power over the administrative rulemaking process regardless of our determination here. The Legislature created the current process. It alone maintains the ability to amend, expand, or limit the breadth of administrative rulemaking in the other branches—as long as it adheres to the constitution, including the provisions of bicameralism and presentment." However, it is unlikely that such legislation could be adopted and withstand a veto.

As a result of this decision, the path for adopting new administrative rules will be less onerous. JCRAR will no longer have the power to pause, object to, or suspend the adoption of an administrative rule. While the Legislature will still have the authority to adopt legislation to prevent the promulgation of an administrative rule, any legislation would be subject to the Governor's veto.

Marklein II leaves for another day bigger questions about the legal status of administrative rules. If no law may be enacted except by a bill that meets the requirements of bicameralism and presentment - how then can an administrative rule become law? Where do administrative agencies get their rulemaking authority from? If agency authority is delegated from the legislature, why aren't agency rules subject to bicameralism and presentment if JCRAR action (which is also delegated from the Legislature) is subject to these requirements. If agency action flows from the executive, where does the executive's authority to create laws come from? These are some of the questions that Justice Hagedorn raises in his concurring/dissenting opinion and that will undoubtedly be raised in future cases.

— Lawrie J. Kobza

U.S. Supreme Court Eases Standard for Plaintiffs to Prove "Reverse Discrimination" Claims

Title VII prohibits employers from discriminating on the basis of race, gender (including sexual orientation and gender identity), religion, color, and national origin. These protections apply equally to all individuals regardless of whether they are a member of a minority group with respect to those traits. Stated a different way, with respect to race, white individuals receive the same protections under Title VII as people of color.

However, because Title VII was enacted in response to discrimination against minority groups, some courts had required plaintiffs from majority groups to offer more evidence of discrimination to prove their case. These courts had generally required majority group plaintiffs to show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority."

Recently, the U.S. Supreme Court held in *Ames v. Ohio Department of Youth Services* that this additional evidence requirement is *not* required for majority group plaintiffs to prove discrimination. That case involved a heterosexual woman, Marlean Ames, who was passed over for a promotion and a lesbian woman was hired to fill that position. Ms. Ames was then demoted from her role as a program administrator, and a gay man was later hired as a program administrator. Ms. Ames sued her employer alleging discrimination against her based on her heterosexual orientation. The trial court dismissed her claim because she failed to produce evidence of additional "background circumstances" to show that the employer discriminated against straight individuals. On appeal, the U.S. Supreme Court reversed that requirement and held that all plaintiffs are held to the same burden of proof regardless of whether they qualify as a minority. The

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Circuit Court Judge Upholds Local Wind Siting Ordinances

A Marathon County Circuit Court Judge has dismissed a lawsuit filed by a wind developer, Marathon Wind Farm LLC, that had sought to nullify the wind siting ordinances of the Towns of Brighton and Eau Pleine as being overly restrictive and thus violative of state law.

The case has been closely watched as a litmus test on the enforceability of local siting ordinances that impose requirements for the establishment, operation, and permitting of wind energy systems (*MLN* July/August, 2024).

The decision in *Marathon Wind Farm LLC vs. Town of Brighton and Town of Eau Plaine* (May 19, 2025, Case No. 2024CV000394)("*Marathon Wind Farm*") includes a detailed analysis of the interplay between local siting authority, state statute, and the regulatory role played by the Public Service Commission of Wisconsin (PSCW).

The case arose through a complaint filed by the developer seeking declaratory and injunctive relief from the town ordinances, which contain an initial licensing period of 15 years with a renewal term of ten years; pre-application consulting and detailed application requirements; decommissioning requirements; compliance monitoring; and a host of "subjective criteria" such as zoning or land-use designations, a review of "net economic liability" to the region, environmental and land use concerns.

The towns moved to dismiss the complaint, arguing that the developer had failed to state a claim upon which relief can be granted and, in particular, that the ordinances do not violate state law and are therefore valid. The developer objected on procedural grounds without briefing the merits of its position. The Court rejected the developer's procedural arguments and granted the towns' requested relief after undertaking a detailed legal analysis of the merits of the case.

Citing *Ecker Bros. v. Calumet County*, 2009 WI App 112, ¶21, 321 Wis. 2d 51, 772 N.W.2d 240, the Court hinges its analysis on the notion that the legislature expressly gives political subdivisions "the power to assist in the creation of renewable energy systems and thus become an integral and effective factor in the State's renewable energy goal". Thus, the restrictions in local siting authority contained in Wis. Stat. §66.0401(1m) do not require local ordinances to simply "parrot" PSCW regulations (*Marathon Wind Farm* at 7).

With respect to license term and renewal, for example, the Court rejects the developer's claim that a local ordinance is more restrictive than state statute when it includes a specific time limit for an initial license term and a renewal procedure because PSCW rules and accompanying guidelines expressly contemplate that local authorities must have a procedure to monitor compliance, even though the rules do not use the word "license" or specify a specific time period for the initial term or renewal period.

Similarly, on the inclusion of the various "subjective criteria" in the ordinances, the Court emphasizes that a local government remains subject under Wis. Stat. §66.0401 to a reasonableness standard and must issue its decision with written findings of fact supported by evidence that are subject to administrative review. The Court reasoned that in this instance the developer's complaint was unwarranted because the PSCW rules expressly limit the discretion of the local authorities by also subjecting them to a reasonableness standard. Here, according to the Court, that standard was met because the factors at issue concern safety, zoning, economic impact, health risks, nature, radar effectiveness, and impacts on the military, all of which are reflected in state law, explicitly enumerated in Chapter 128 of the administrative code and included in the PSCW's application guidelines. Hence, "the subjective criteria listed in the ordinances are not a basis to invalidate them" (*Marathon Wind Farm* at 17).

In the absence of the developer's briefing on the merits of its legal challenge to the town ordinances, *Marathon Wind Farm* is not definitive precedent that local governments have free reign to impose standards that may be deemed overly restrictive by wind developers. Quite the contrary; the case underscores the importance of drafting wind siting ordinances that adhere closely to the framework of PSCW rules and its guidance for local authorities.

— Richard A. Heinemann

U.S. Supreme Court Eases Standard for Plaintiffs

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Court noted that Title VII's disparate treatment provisions draw no distinctions between majority-group plaintiffs and minority-group plaintiffs. Rather the language states it is unlawful to refuse to hire or to discharge ***any individual***, or otherwise discriminate against ***any individual*** with respect to compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.

Moving forward, all claims for intentional discrimination under Title VII will be treated the same regardless of whether the plaintiff belongs to a majority group. There will no longer be a legal distinction between discrimination and so-called "reverse discrimination" under Title VII. This decision does not affect the defenses that employers continue to have. Thus, if employers have legitimate, non-discriminatory reasons for their decision not to hire or promote, they may be able to avoid liability.

Employers should continue to carefully assess their hiring and promotion decisions and the reasons they take adverse actions against applicants and employees.

— Storm B. Larson, Brian P. Goodman, & Douglas E. Witte

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