STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP416

PEGGY Z. COYNE, MARY BELL,
MARK W. TAYLOR, COREY OTIS,
MARIE K. STANGEL, JANE WEIDNER,
and KRISTIN A. VOSS,

Plaintiffs-Respondents,

v.

SCOTT WALKER and SCOTT NEITZEL,

Defendants-Appellants-Petitioners,

and

ANTHONY EVERS,

Defendant-Respondent.

ON APPEAL FROM THE OCTOBER 30, 2012, DECISION BY THE DANE COUNTY CIRCUIT COURT, CASE NO. 11-CV-4573, THE HONORABLE AMY R. SMITH, PRESIDING

PETITIONERS' BRIEF AND APPENDIX

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INTRODUCTION

This case presents important issues involving the constitutional separation of powers. The Court is called upon to clarify the relationship between the executive power of supervision of public instruction vested in the State Superintendent of Public Instruction ("the Superintendent") by Article X, § 1 of the Wisconsin Constitution, and the legislative power of the state vested in the two houses of the Wisconsin Legislature by Article IV, § 1 of the Constitution. Contrary to the plain language of Article IV, § 1, the lower courts wrongly held that a portion of the legislative power of the state is vested not only in the legislature, but also in the Superintendent. Such a holding, if allowed to stand, would upset the balance of governmental powers under the Wisconsin Constitution and deprive the legislature of its plenary constitutional authority to control the exercise of the legislative power of the state in the field of public education, as in all other areas.

Article X, § 1 provides that "[t]he 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." In *Thompson v. Craney*, 199 Wis. 2d 674, 698, 546 N.W.2d 123 (1996), this Court held that under Article X, § 1, the legislature may not reallocate the power of supervision of public

instruction to "appointed 'other officers' at the state level who are not subordinate to the superintendent." The plaintiffs-respondents (hereafter, "respondents") claim that, under *Thompson*, certain statutory provisions in 2011 Wisconsin Act 21 ("Act 21") are unconstitutional because they unlawfully infringe on the Superintendant's enumerated power of supervision over public instruction.

The challenged provisions of Act 21 give the Governor (and, in some circumstances, the Secretary of the Department of Administration)[1] the power to block the promulgation of a proposed administrative rule. The lower courts agreed with the respondents that, under *Thompson*, those provisions of Act 21 are unconstitutional as applied to the Superintendent because they give a portion of the power to regulate public education to the Governor. The lower courts erred, however, because the power to legislatively regulate public education policy is constitutionally vested *exclusively* in the legislature and can be delegated by the legislature to executive branch officers subject to any procedural safeguards that the legislature may choose to impose. Furthermore, even if the legislature and the Superintendent can be viewed as sharing constitutional

[1]The Secretary of the Department of Administration will be referred to herein as the Secretary. Except where otherwise specified, references to the Governor's powers under Act 21 are intended to also include the powers of the Secretary under that act.

powers related to public instruction, the lower courts erred by applying *Thompson* in a way that vests the Superintendent with exclusive control over those shared powers. This radical departure from established constitutional precedent should be reversed.

STATEMENT OF THE ISSUES

1. Administrative rulemaking is a legislative power delegated to non-legislative officials by the legislature. Article X, § 1 vests the executive power to supervise public instruction in the Superintendent and such other officers as the legislature may designate. Act 21 gives the Governor the power to block administrative rulemaking by the Superintendent. Does that power fall within the executive power of supervision vested in the Superintendent?

Both the court of appeals and the circuit court answered yes.

2. Alternatively, where constitutional power is shared between the legislature and a non-legislative constitutional officer, legislation affecting the shared power is invalid if it unduly burdens or substantially interferes with the officer's constitutional powers. Article X, § 1 creates a sharing of power by providing that the supervision of public instruction shall be vested in the Superintendent and such other officers as the legislature shall direct and by empowering the legislature to prescribe the powers and duties of the Superintendent and the other officers. Act 21

gives the Governor the power to block administrative rulemaking by the Superintendent. Does that power, delegated by the legislature, unduly burden or substantially interfere with the Superintendent's role in the supervision of public instruction?

Both the court of appeals and the circuit court implicitly answered yes.

STATEMENT ON ORAL ARGUMENT

The Court has ordered oral argument.

STATEMENT OF THE CASE

Act 21 was enacted on May 23, 2011, and took effect on June 8, 2011. It made changes to statutes governing the promulgation of administrative rules, including changes relating to agency rulemaking authority, Governor approval of statements of the scope of proposed rules and of final rule drafts, economic impact analyses for proposed rules, legislative review of proposed rules, and venue in certain court actions involving an administrative rule. *See* 2011 Wisconsin Act 21.

The respondents filed their complaint on October 11, 2011 (R. 2). They are public school teachers (R. 2, ¶¶ 2-3, 5, 7, 23), parents of minor children who receive services from public schools (R. 2, ¶¶ 4, 6, 8, 24), and/or taxpayers (R. 2, ¶¶ 25-26). The complaint named as defendants the Governor, the Secretary, and the Superintendent—all sued in their official capacities (R. 2).

The complaint challenged three sections of Act 21 (*see* R. 2, ¶¶ 19-21):

- **Section 4**, which provides that all agency scope statements must be submitted to the Governor for approval, and that an agency may not work on a proposed rule until the Governor approves the scope statement. Wis. Stat. § 227.135(2);

- **Section 21**, which provides that if the total expected economic impact of a proposed rule is $20 million or more, then agencies may not submit the proposed rule to the legislature until it has been reviewed and reported on by the Department of Administration and approved by the Secretary. Wis. Stat. § 227.137(6); and

- **Section 32**, which requires agencies to submit each proposed rule in final form to the Governor, who may either approve or reject it. Wis. Stat. § 227.185.

The complaint claimed that these provisions of Act 21 are unconstitutional as applied to the Superintendent because they allow the Governor—by rejecting a scope statement or a proposed rule—to block the Superintendent's ability to promulgate a rule.[2]

On October 21, 2011, the Superintendent filed an answer agreeing with the claims in the complaint (R. 3). On

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[2]The complaint also referenced sections 8 and 18 of Act 21, which repealed Wis. Stat. § 227.137(1) and amended Wis. Stat. § 227.137(4) (R. 2, ¶¶ 19-20). Those sections together impose economic impact reporting and analysis requirements on the Superintendent but do not authorize any state official to block the Superintendent's ability to promulgate a rule. The decisions of the circuit court and court of appeals that are the subject of the present appeal focused only on the portions of Act 21 that enabled the Governor to block a rule.

November 28, 2011, the Governor and Secretary (hereafter, "petitioners") moved to dismiss the case for lack of standing (R. 7). Before that motion was decided, respondents filed a motion for summary judgment (R. 13). On April 6, 2012, the circuit court denied the motion to dismiss (R. 18). Petitioners answered the complaint on April 27, 2012 (R. 19). On May 25, 2012, petitioners filed their own motion for summary judgment and opposed the respondents' previously filed summary judgment motion (R. 21).

On November 7, 2012, the circuit court issued a decision declaring Act 21 void as applied to rulemaking activities of the Superintendent (R. 29; P-Ap. 11-25). On November 26, 2012, the circuit court entered a final order which declared void all provisions of Act 21 "which require approval of the Governor or the Secretary of the Department of Administration over the administrative rule-making activities in which the State Superintendent of Public Instruction engages or supervises, with respect to the supervision of public instruction" (R. 33; P-Ap. 26-27).

On February 20, 2013, petitioners appealed from the circuit court's final order (R. 34). On February 19, 2015, the court of appeals affirmed the circuit court. *Coyne v. Walker*, 2015 WI App 21, 361 Wis. 2d 225, 862 N.W.2d 606 (P-Ap. 1-10). On March 20, 2015, petitioners petitioned this Court for review, and that petition was granted on June 12, 2015.

ARGUMENT

Article X, § 1 vests the "supervision of public instruction" in the Superintendent. Respondents claim that provision, as interpreted in *Thompson*, requires that the Superintendent must be supreme with regard to all powers of government involving the supervision of public instruction, including the legislative power to create administrative rules in the field of public education. The challenged provisions of Act 21, according to respondents, unconstitutionally deprive the Superintendent of supremacy with regard to such rulemaking, by giving the Governor the power to block rules proposed by the Superintendent.

Respondents are wrong for two reasons.

First, the "supervision of public instruction" cannot include supremacy with respect to administrative rulemaking because rulemaking is a legislative power. The supervision of public instruction, in the minds of the constitutional framers in 1848, was understood as an executive power. Because Article X, § 1, vests in the Superintendent an executive power of supervision, it does not require that the Superintendent have unchecked power over legislative rulemaking. The challenged provisions of Act 21—as applied to the Superintendent—do no more than impose procedural safeguards on the exercise of any rulemaking power that the legislature has delegated to the

Superintendent, but they do not impinge upon the Superintendent's executive powers of supervision.

Second, even if this Court concludes that the supervision of public instruction includes a legislative, rulemaking component, Article X, § 1 nonetheless provides that such rulemaking is a power shared between the Superintendent and the legislature. Legislation that affects a shared power is invalid only if it unduly burdens or substantially interferes with the overall constitutional functions of a non-legislative officer. Here, the challenged provisions of Act 21 affect only a small portion of the Superintendent's overall power and have not been shown beyond a reasonable doubt to unduly burden or substantially interfere with the overall supervision of public instruction.

I. Act 21 is a limit on legislative rulemaking power, and does not infringe on the Superintendent's constitutional power of supervision, which is executive in nature.

When faced with a claim that one part of state government has unlawfully intruded upon an area constitutionally reserved to a different part, courts analyze the claim under separation of powers principles. *See Panzer v. Doyle*, 2004 WI 52, ¶ 50, 271 Wis. 2d 295, 680 N.W.2d 666, *abrogated on other grounds by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408. Those principles are grounded in the millennia-old recognition by political philosophers that there are but

three powers of government: legislative, executive, and judicial. *See* Aristotle, *The Politics* 139 (Carnes Lord trans., Univ. of Chicago Press 1984) (350, B.C.); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 559-60 (1994) (identifying the "three, and only three, powers of government" and arguing against the existence of an "unvested, unenumerated, fourth 'administrative' power of government").

These traditional principles were embraced by the Founding Fathers, who recognized that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty," than the separation of the three powers of government. *The Federalist No. 47*, at 301 (James Madison) (Clinton Rossiter ed., 1961). At the same time, the unique innovation of the United States Constitution was to combine the separation of these powers with a system of checks and balances "the constant aim [of which] is to divide and arrange the several offices in such a manner as that each may be a check on the other." *The Federalist No. 51*, at 322 (James Madison) (Clinton Rossiter ed., 1961).

These principles were likewise embraced by the delegates to the Wisconsin constitutional conventions of 1846 and 1848. "All took it for granted that . . . there would be a popularly elected bicameral legislature, a governor with a limited power of veto, and a

judiciary." Ray A. Brown, *The Making of the Wisconsin Constitution*, 1949 Wis. L. Rev. 648, 655. "There had, of course, already been over a half-century experience in constitution making in the nation, and consequently there was little disagreement as to fundamentals." *Id.*

Accordingly, the recognition of three distinct powers of government is embodied in the clauses of the Wisconsin Constitution providing 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." Wis. Const. art. IV, § 1, art. V, § 1, and art. VII, § 2. In general, the legislative branch determines policies and programs and reviews performance of previously authorized programs, the executive branch carries out the programs and policies, and the judicial branch adjudicates any conflicts that might arise from the interpretation or application of the laws. Wis. Stat. § 15.001(1); *see also In re Appointment of Revisor*, 141 Wis. 592, 597, 124 N.W. 670 (1910) ("The legislative power . . . makes the laws; the executive . . . enforces them; and the judicial . . . expounds and applies them.").

In addition to the separation of powers among the legislative, executive, and judicial branches, the Wisconsin Constitution—like many state constitutions—also divides the powers within the executive branch among several officials who are separately elected on a statewide basis and

independently accountable to the voters. This approach can be traced to the 1830s when states began to embrace Jacksonian democracy, principal state officers began to be elected by popular vote, and control over executive branch administration came to be shared among a multiplicity of independently elected executive officials. *See* Scott M. Matheson, *Constitutional Status and Role of the State Attorney General*, 6 U. Fla. J.L. & Pub. Pol'y 1, 5-6 (1993).

In Wisconsin's divided executive system, the offices of the Governor, Secretary of State, Treasurer, Attorney General, and State Superintendent of Public Instruction are constitutionally established as independently elected state offices. Wis. Const. art. V, § 3, art. VI, § 1, and art. X, § 1. Because the Superintendent is an elected constitutional officer within a divided executive system, respondents' claim that Act 21 impermissibly intrudes upon the constitutional powers of the Superintendent is properly analyzed as a separation-of-powers claim.

Respondents contend that Act 21 violates the Constitution by taking constitutional powers from the Superintendent and giving them to the Governor: "Act 21 usurps the authority granted to the state superintendent of public instruction by Article X, § 1 of the Wisconsin Constitution." (R. 2, Compl. ¶ 1). This Court thus faces a threshold question: Does Act 21 affect the Superintendent's *constitutional* powers at all, or does it affect only legislative powers that are constitutionally vested exclusively in the

legislature and exercised by the Superintendent only through a statutory delegation from the legislature?

The basic inquiry is whether the powers respectively granted by Act 21 and by Article X, § 1 are legislative, executive, or judicial. That question "is to be solved by ascertaining the definition and scope of such powers at the time the Constitution was adopted." *In re Constitutionality of Section 251.18, Wis. Statutes*, 204 Wis. 501, 505, 236 N.W. 717 (1931). If Act 21's allegedly offending provisions involve *legislative* power, and Article X, § 1 grants the Superintendent only *executive* power, then Act 21 cannot "usurp the authority granted" to the Superintendent by the Constitution.

A. Act 21's powers govern the rulemaking process, and are therefore legislative powers.

It is "one of the axioms of modern government" that "a legislature may delegate to an administrative body the power to make rules." *State ex rel. Dyer v. Sims*, 341 U.S. 22, 30 (1951). The legislative power to make laws includes delegations to "administrative agencies [of] such legislative powers as may be necessary to carry into effect the general legislative purpose." *Clintonville Transfer Line v. Pub. Serv. Comm'n*, 248 Wis. 59, 69, 21 N.W.2d 5 (1945). "The general rule is that an administrative agency . . . cannot promulgate any rule which is not . . . authorized by the

legislature." *City of West Allis v. Sheedy*, 211 Wis. 2d 92, 97, 564 N.W.2d 708 (1997). The legislature has delegated such rulemaking authority to the Superintendent and the Department of Public Instruction (under the Superintendent's direction) in many statutes whose validity respondents have not challenged.[3] Agencies exercise this delegated legislative power by promulgating administrative rules under rulemaking procedures established in Subchapter II of Wis. Stat. ch. 227.

The legislature itself has characterized rulemaking as legislative power in Wis. Stat. § 227.19(1), which acknowledges that the legislature is constitutionally vested with "the power to make laws, and thereby to establish agencies and to designate agency functions, budgets and purposes," and the executive is vested with "the responsibility to expedite all measures which may be resolved upon by the legislature." Wis. Stat. § 227.19(1)(a). The statute further recognizes that "[i]n creating agencies and designating their functions and purposes, the legislature may delegate rule-making authority to these agencies to facilitate administration of legislative

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[3]*See, e.g.*, Wis. Stat. § 115.28(3m)(b), (5), (7)(a), (c), (e)2., and (h), (7m), (15)(a) and (b), (17)(a), (b), and (c), (31), and (59)(d); § 115.29(4)(b); § 115.31(8); § 115.345(8); § 115.36(3)(a)5.; § 115.366(1) and (2); § 115.383(3)(c); § 115.405(3); § 115.415(3)(a); § 115.42(4); § 115.43(2)(c); § 115.435(3); § 115.445(2)(b) and (3); § 115.745(3); § 115.817(5)(b)3.; § 115.88(1)(b); § 115.92(3); § 115.955(7); and § 115.99.

policy." Wis. Stat. § 227.19(1)(b). Such delegation "is intended to eliminate the necessity of establishing every administrative aspect of general public policy by legislation." *Id.* The legislature reserves to itself, however, the authority "to retract any delegation of rule-making authority," "to establish any aspect of general policy by legislation, notwithstanding any delegation of rule-making authority," "to designate the method for rule promulgation, review and modification," and "to delay or suspend the implementation of any rule or proposed rule while under review by the legislature." Wis. Stat. § 227.19(1)(b)1.-4. Under Wis. Stat. § 227.19(1), administrative rulemaking by an agency clearly is an exercise of legislative power constitutionally vested in the legislature and delegated to the agency subject to plenary legislative control.

This Court has agreed, explaining that "Wisconsin is in the forefront when it comes to the recognition" that rulemaking is a delegation of legislative power. *Schmidt v. Dep't of Res. Dev.*, 39 Wis. 2d 46, 58, 158 N.W.2d 306 (1968). The Court long ago held that the legislature can delegate a portion of its legislative power to administrative agencies. *See State ex rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N.W. 929 (1928). While the fundamentals of lawmaking—*i.e.*, declaring whether or not there shall be a law, determining its general purpose or policy, and fixing the limits of its operation—cannot be delegated, the legislature "may delegate to administrative agencies the authority to

exercise such legislative power as is necessary to carry into effect the general legislative purpose . . . 'to fill up the details.'" *Id.* at 505. The Court expressly characterized this "rule-making power of boards, bureaus, and commissions" as an aspect of legislative power and emphasized that "[i]t only leads to confusion and error to say that the power to fill up the details and promulgate rules and regulations is *not* legislative power." *Id.* at 506 (emphasis added). Rulemaking by an agency—including the Superintendent—thus is an exercise of delegated legislative power.

Therefore, based on the clear statements of the legislature and this Court, there is no doubt that the challenged provisions of Act 21 involve a legislative power.

B. The Constitution's grant of supervisory power to the Superintendent is executive.

Because Act 21's relevant provisions affect only a legislative power, the next step is to determine whether the Constitution grants any legislative power to the Superintendent, or whether the Superintendent's constitutional powers are exclusively non-legislative.

Article X, § 1 expressly vests "the supervision of public instruction" in the Superintendent; it makes no suggestion that supervision includes the exercise of legislative power. On the contrary, the plain text of the Constitution, the constitutional debates, and the first laws interpreting the Superintendent's power all show that the Superintendent's constitutionally granted power is not legislative, but

executive. *See Polk Cnty. v. State Pub. Defender*, 188 Wis. 2d 665, 674, 524 N.W.2d 389 (1994) (constitutional provisions are interpreted by considering the text, the debates, and the earliest interpretation by the legislature).

1. The text.

The first step in interpreting a constitutional provision is to review its plain language. *Id.* The provision at issue here reads:

> 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.

Wis. Const. art. X, § 1.

The power granted by the Constitution is the power of supervision. The word "supervision" is simple; it comes from two Latin roots—the prefix "*super-*" meaning "over" and the verb "*vidēre*" meaning to "to see." *Supervision*, Webster's Third New International Dictionary (Unabridged) (1986). Literally, supervision means "to oversee." A dictionary existing in 1848 similarly defines "supervision" as "[t]he act of overseeing; inspection; superintendence." *Supervision*, Webster's American Dictionary of the English Language (1828), http://webstersdictionary1828.com/Dictionary/supervision (last visited August 12, 2015). A leading legal dictionary elaborates that "supervision" is the "[t]he series of acts involved in managing, directing, or overseeing persons

or projects." *Supervision*, Black's Law Dictionary (10th ed. 2014).

The plain language of Article X, § 1 thus vests in the Superintendent the power to oversee, manage, direct, and inspect public instruction as prescribed by law. This type of power can only be described as executive in nature. Executive power is the power to enforce the law, *In re Appointment of Revisor*, 141 Wis. at 597. Such enforcement does not create the law; it executes a law already in existence. *See Executive Power*, Black's Law Dictionary (10th ed. 2014) (defining "executive power" as the "power to see that the laws are duly executed and enforced").

This conclusion is further supported by the language in Article X, § 1 that gives the legislature the authority to prescribe by law the powers and duties of the Superintendent, to direct that some portion of the supervision of public instruction shall be exercised by "other officers," and to likewise prescribe by law the powers and duties of those officers. This Court has construed that language as meaning that Article X, § 1 confers no more authority upon the Superintendent than is delineated by statute. *Fortney v. Sch. Dist. of West Salem*, 108 Wis. 2d 167, 182, 321 N.W.2d 225 (1982). In *Thompson* itself, the Court reiterated that the Superintendent's powers are "subject to limitation by legislative act." *Thompson*, 199 Wis. 2d at 699. If the framers had intended Article X, § 1 to give the Superintendent supreme control over all matters related to

public instruction, including the legislative establishment of education policy, they would not have authorized the legislature to limit the Superintendent's authority.

The text of the Constitution indicates that the Superintendent's power of supervision is executive, not legislative, in nature.

2. The constitutional debates.

The second step in interpreting a constitutional provision is to review the constitutional debates. *Polk Cnty.*, 188 Wis. 2d at 674. In harmony with the textual analysis above, the delegates at the constitutional conventions of 1846 and 1848 understood that the Superintendent's powers would be executive, not legislative. Proposals at the two conventions differed as to whether the office of Superintendent should be specifically created by the Constitution or whether the creation of offices related to public instruction should be left entirely to the legislature and as to whether the Superintendent should be appointed by the Governor or independently elected, but the constitutional proposals in both 1846 and 1848 gave the legislature the power to prescribe the Superintendent's powers and duties. *See The Convention of 1846* 538 (Milo M. Quaife ed., 1919); *The Attainment of Statehood* 481 (Milo M. Quaife ed., 1928); *see also Thompson*, 199 Wis. 2d at 685-87.

There simply was no debate at either constitutional convention suggesting that the Superintendent should have any powers other than those delineated by the legislature. There were no statements or arguments about granting the Superintendent any legislative power akin to rulemaking authority. The powers discussed and debated related to the execution of existing laws, rather than the creation of new laws. *The Convention of 1846*, at 569 ("travel over the state, organize the system, and awaken the people to the importance of this subject"); *id.* at 571 ("instituting normal schools for the education of teachers, appointing local superintendents, and visiting every county, and if possible every school-district, to impress upon the minds of the people the importance of the subject"). In 1848, one delegate admitted that because public instruction was in its infancy, the "duties of a superintendent were not of a fixed and well-known kind," but noted that "*all* these questions should be left to the governor and senate, and public opinion would control them in their action upon this as upon all other subjects." *The Attainment of Statehood*, at 561 (emphasis added).

The main concern expressed by the delegates was *not* about the Superintendent's specific powers, but that the legislature might fail to provide direction and financial support to the Superintendent. Delegates advocated for a permanent Superintendent because in other states the uniform system of education was abandoned following

statehood. *The Convention of 1846*, at 569-70 (citing Connecticut as an example). According to the 1846 Convention Chairman Lorenzo Bevans:

> *[I]f we neglect to make it an imperative requisition upon our legislature to give us a system of public schools according to the most approved plan*—to provide for the election of a state officer whose duty it shall be to superintend this first interest of the state—to provide ample funds for accomplishing this great end . . . we shall present to the world the mortifying spectacle of an entire failure in having attempted to erect a political superstructure without a foundation on which to build.

Id. at 573 (emphasis added). A permanent Superintendent with supervisory powers was believed to be necessary to give the educational system "permanency," "uniformity, energy, and efficiency." *Id.* at 569-70, 574.

Other convention debates focused on whether to provide a specific salary, whether the Superintendent should be elected, and whether the officer hired for the position should be from Wisconsin or the East Coast. *Id.*; *see also The Attainment of Statehood*, at 559-63. All agreed, however, that the Superintendent would function according to laws laid down by the legislature, and nobody suggested that the Superintendent would possess some kind of inherent legislative authority or ultimate control over legislative delegations of such authority.

On the contrary, the framers could not have intended to restrict the legislature's ability to place conditions on future delegations of legislative authority to the Superintendent because the modern concept of administrative rulemaking was unknown prior to the late 19th and early 20th centuries. In *Whitman*, the Court noted that the recognition that law could emanate from the exercise of delegated legislative powers by boards, bureaus, and commissions was a fundamental change that only began with the creation of the Interstate Commerce Commission in 1887. *Whitman*, 196 Wis. at 494. According to *Whitman*, administrative agencies exercising delegated legislative power "[w]ere not only unknown but undreamed of at the time the Constitution of the United States was formed as well as at the time most state Constitutions were adopted." *Id.*

While administrative agencies began to develop in the last two decades of the 19th century, the modern process of rulemaking did not take shape until the first half of the 20th century. *See generally* Kenneth K. Luce, *The Wisconsin Idea in Administrative Law*, 34 Marq. L. Rev. 1, 1-4 (1950); Wis. Legis. Council, *Interim Report on Administrative Rulemaking: Supplement to Preliminary Report* (1953-54). It was only in 1943 that Wisconsin adopted an administrative procedure act, and only in 1955 that a law

primarily devoted to rulemaking procedures was enacted. *See* 1943 Wis. Laws ch. 375, § 1; 1955 Wis. Laws ch. 221; Orrin L. Helstad, *New Law on Administrative Rule Making*, 1956 Wis. L. Rev. 407; *see also* Ralph M. Hoyt, *The Wisconsin Administrative Procedure Act*, 1944 Wis. L. Rev. 214.

The content of the debates at the constitutional conventions and the absence of any concept of anything like administrative rulemaking further shows that the "supervision of public instruction" vested in the Superintendent is executive, rather than legislative, in nature and subject to control by the legislature.

3. The first law passed following statehood.

The third and final step in interpreting a constitutional provision is to review the first law passed following statehood. *Polk Cnty.*, 188 Wis. 2d at 674. An act approved on August 16, 1848, was the first law passed by the legislature setting out the duties of the Superintendent. *Thompson*, 199 Wis. 2d at 694. The greater part of that law prescribed many specific duties and powers for the Superintendent that were plainly executive in nature and a

few that were quasi-judicial.[4] The only part of the law arguably conferring a legislative power was a provision directing the Superintendent to "propose suitable forms and regulations for making all reports and conducting all necessary proceedings under this act." 1848 Wis. Laws, at 129. The court of appeals interpreted that portion of the law as establishing that the 1848 legislature understood rulemaking to be part of the Superintendent's supervisory powers. *See Coyne*, 361 Wis. 2d 225, ¶ 24 (P-Ap. 7-8). That interpretation, however, reads far too much into the law.

First, contrary to the court of appeals' suggestion, the fact that the 1848 legislature may have delegated some regulatory power to the Superintendent implies no legislative recognition that the Superintendent's

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[4]Examples of executive duties included "devot[ing] his whole time to the advancement of the cause of education;" visiting and inspecting schools throughout the state; communicating as widely as possible "a knowledge of existing defects and desirable improvements in the administration of the system, and the government and instruction of the schools;" recommending text books; securing uniformity in education throughout the state, as far as practicable; recommending the establishment of school libraries and advising on the selection of library books; collecting important information about the schools throughout the state; "ascertain[ing] the condition of all the school funds in this state with the amount of the school funds due to each township from lands or other sources;" corresponding with friends of education in Wisconsin and other states; furnishing information to school officers and county and town clerks; and reporting annually to the legislature on the subject of education. 1848 Wis. Laws, at 128-29. Quasi-judicial duties included "adjust[ing] and decid[ing] all controversies and disputes arising under the school lands without cost to the parties." *Id.* at 129.

constitutional power of supervision includes such power. A delegation of regulatory power is equally consistent with a legislative understanding that the delegation was needed precisely because the Superintendent's constitutional powers did *not* include that power.

Second, the highlighted statutory language does not relate to regulations that would broadly establish public policy related to education, but rather deals only with forms and procedures related to the internal administration of the Superintendent's office. Therefore, the 1848 statute embodies, at most, some legislative recognition of the Superintendent's power to regulate his own proceedings. Contrary to the court of appeals' suggestions, it does not follow that the 1848 legislature understood the Superintendent to have any broad power to legislatively regulate public education policy.

Finally, and most importantly for present purposes, the court of appeals overlooked the fact that the 1848 statute gave the Superintendent only a power to *propose* regulations. Giving only a power of proposal necessarily implies that someone other than the Superintendent would have the final power over actual *adoption* of regulations. The 1848 legislature's understanding of the Superintendent's powers was thus consistent with the understanding embodied today in the challenged provisions of Act 21: in both instances, the Superintendent can *propose* regulations, but lacks unilateral control over their ultimate *adoption*.

For all of these reasons, the 1848 statute supports the conclusion that the 1848 legislature understood the Superintendent's powers to be executive, and not legislative, in nature.

C. Because the challenged provisions of Act 21 only affect legislative rulemaking power, they do not impinge upon the executive power vested in the Superintendent.

The "supervision of public instruction" vested in the Superintendent by Article X, § 1 is executive in nature. Any rulemaking power possessed by the Superintendent, in contrast, is a delegation of legislative power that is constitutionally vested in the legislature. The challenged provisions of Act 21 impose procedural safeguards on the Superintendent's exercise of that delegated legislative power without affecting the executive power vested in him by the Constitution.

This conclusion is consistent with *Thompson*. In that case, the Court invalidated legislation that took away from the Superintendent much of the executive power of supervision of public instruction vested in him by the Constitution and gave it to other independent executive officials. *See Thompson*, 199 Wis. 2d at 698-99. The challenged provisions of Act 21, by contrast, only affect legislative rulemaking powers delegated to the Superintendent by statutes, rather than by the Constitution. Nothing in *Thompson* precludes the legislature from

controlling the terms under which it delegates rulemaking authority by establishing procedural requirements for rulemaking that apply to all recipients of delegated legislative power, including the Superintendent.

D. This Court has consistently endorsed procedural safeguards on delegations of legislative power. Respondents' position would cast constitutional doubt on the applicability of such safeguards to the Superintendent.

The provisions of Act 21 challenged by the respondents not only do not implicate the executive power vested in the Superintendent, they also impose the kind of procedural safeguards upon the exercise of delegated legislative power that this Court has frequently endorsed.

When legislative power is delegated to non-legislative agencies and officials, "it is incumbent on the legislature, pursuant to its constitutional grant of legislative power, to maintain some legislative accountability over rule-making." *Martinez v. Dep't of Indus., Labor & Human Relations*, 165 Wis. 2d 687, 701, 478 N.W.2d 582 (1992). Accordingly, the legislature is permitted to delegate legislative rulemaking authority only so long as the purpose of the delegating statute is ascertainable and there are procedural safeguards to insure that the recipient of the delegated power acts within that legislative purpose. *Panzer*, 271 Wis. 2d 295, ¶¶ 54-55.

One set of such procedural safeguards is provided by the legislature's power by statute to create and abolish administrative agencies and to fix, circumscribe, and change their powers, duties, and the scope of their authority. *Id.* ¶ 56. While the office of the Superintendent is created by the Constitution, rather than by statute, the legislature has statutorily created the Department of Public Instruction and has enacted many statutes prescribing the powers and duties of that agency and of the Superintendent. *See* Wis. Stat. § 15.37; Wis. Stat. chs. 115-21.

Another set of procedural safeguards is provided by the formal administrative rulemaking procedures set forth in Wis. Stat. ch. 227. *See Panzer*, 271 Wis. 2d 295, ¶ 56; *State (Dep't of Admin.) v. Dep't of Indus., Labor & Human Relations*, 77 Wis. 2d 126, 135, 252 N.W.2d 353 (1977). Those procedures provide, among other things, for special review of proposed rules affecting particular subject areas; review of all proposed rules by legislative council staff; notice periods, public hearings, and opportunities for public comment; legislative review by standing committees and by the Joint Committee for Review of Administrative Rules ("JCRAR"); publication of approved rules; and suspension and review of previously promulgated rules by JCRAR. *See* Wis. Stat. §§ 227.114 to 227.26. These rulemaking procedures "require[] administrative agencies to follow a rational, public process" and "ensure[] that administrative agencies will not issue public policy of general application in

an arbitrary, capricious, or oppressive manner." *Mack v. Wis. Dep't of Health & Family Servs.*, 231 Wis. 2d 644, 649, 605 N.W.2d 651 (Ct. App. 1999) (quotation omitted). This is what the rulemaking procedures of Wis. Stat. ch. 227 are all about: standards and accountability.

The challenged provisions of Act 21 merely provide additional procedural safeguards, similar to those noted above. By requiring gubernatorial approval of all proposed administrative rules, Act 21 affords the Governor an opportunity to review proposals and provide an independent check on any proposal that he finds to be arbitrary, unnecessary, unauthorized, inconsistent with other government programs, or otherwise inappropriate. This Court has recognized that it is constitutionally permissible and proper for the legislature to require that rulemaking power be exercised subject to procedural safeguards that include an independent check on rulemaking discretion. *See Martinez*, 165 Wis. 2d at 699 (upholding JCRAR review under Wis. Stat. § 227.26); *Panzer*, 271 Wis. 2d 295, ¶ 56.

Before Act 21 was enacted, the Superintendent's rulemaking activities were already constrained by many statutory requirements governing rulemaking procedures and imposing legislative oversight of both proposed and existing rules. The respondents have not claimed that the Superintendent is constitutionally exempt from those requirements, or even from *all* of the new requirements created by Act 21. Instead, they attack only the

gubernatorial approval requirements created by Act 21. The respondents' argument, however, is so broad that it would cast constitutional doubt on the applicability of all such procedural safeguards to the Superintendent.

Respondents' central contention is that, under *Thompson*, if the legislature delegates any power involving the supervision of public instruction, including rulemaking power, then the Superintendent must be supreme with respect to that power. *See Coyne*, 361 Wis. 2d 225, ¶ 25 (P-Ap. 008). If that were true, then the Legislature would be powerless to impose *any* restraints on rulemaking by the Superintendent, who would be constitutionally exempt from all the procedural rulemaking requirements in Wis. Stat. ch. 227—including the provisions in Wis. Stat. § 227.19 for legislative oversight of rulemaking. Neither the respondents nor the lower courts have suggested such a sweeping principle.

To the contrary, any such claim of supremacy over the exercise of delegated legislative power is inconsistent with established law. In *Martinez*, this Court rejected a separation-of-powers challenge to Wis. Stat. § 227.26, which provides for JCRAR suspension and review of previously promulgated administrative rules. *See Martinez*, 165 Wis. 2d at 699. The reasoning of *Martinez* likewise ensures the constitutionality of Wis. Stat. § 227.19, which provides for legislative review of proposed rules by JCRAR and by standing committees of the legislature. But if

separation-of-powers principles do not preclude the legislature from directly intervening in rulemaking procedures, then they also do not preclude the legislature from giving the Governor a role in the rulemaking process.

II. Alternatively, to the extent that the challenged provisions of Act 21 affect power shared between the legislature and the Superintendent, those provisions are valid because they do not unduly burden or substantially interfere with the supervision of public instruction.

Rulemaking power is not a power constitutionally vested in the Superintendent and the challenged portions of Act 21 thus do not intrude upon the Superintendent's constitutional authority. Even if rulemaking were a part of the Superintendent's constitutional supervisory power, however, it still would not follow that Act 21 unconstitutionally infringes that power.

The principle of separation of powers is "to maintain the balance between the three branches of government, to preserve their respective independence and integrity, and to prevent concentration of unchecked power in the hands of any one branch." *State v. Washington*, 83 Wis. 2d 808, 825-26, 266 N.W.2d 597 (1978). This Court has repeatedly held, however, that the doctrine does not compel the complete disassociation of the branches. *See, e.g., In re Constitutionality of Section 251.18, Wis. Statutes*, 204 Wis. at 504. The Court acknowledges that "governmental functions and powers are too complex and

interrelated to be neatly compartmentalized." *Panzer*, 271 Wis. 2d 295, ¶ 49. Accordingly, the separation of powers doctrine is not strict and absolute, but rather envisions a system of separate but interdependent parts of government, reciprocally sharing some powers while jealously guarding the autonomy of certain others. *See State ex rel. Friedrich v. Circuit Court for Dane Cnty.*, 192 Wis. 2d 1, 14, 531 N.W.2d 32 (1995) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

Each branch has exclusive core constitutional powers, into which the other branches may not intrude. *See id.* at 13 (citing *State ex rel. Fiedler v. Wis. Senate,* 155 Wis. 2d 94, 100, 454 N.W.2d 770 (1990)). Beyond those core powers, the branches have shared or overlapping authority in many areas:

> There are 'great borderlands of power' . . . in which it is difficult to determine where the functions of one branch end and those of another begin. The doctrine of separation of powers does not demand a strict, complete, absolute, scientific division of functions between the three branches of government. The separation of powers doctrine states the principle of shared, rather than completely separated powers. The doctrine envisions a government of separated branches sharing certain powers.

State v. Holmes, 106 Wis. 2d 31, 43, 315 N.W.2d 703 (1982) (footnotes omitted).

In accordance with these principles, courts "recognize both the independence and interdependence of the three

branches of government." *Panzer*, 271 Wis. 2d 295, ¶ 49. In determining whether a statute unconstitutionally infringes upon the power of a separate branch, a court must first consider whether the subject matter of the challenged statute falls within any exclusive core powers constitutionally granted to the other branch. *See State v. Horn*, 226 Wis. 2d 637, 644-45, 594 N.W.2d 772 (1999). If the power in question is an exclusive one, then any intrusion upon it is invalid. *Id.* at 645. If the statute occupies a zone of power shared between the legislature and another branch, then it will be invalidated only if the party challenging the statute proves beyond a reasonable doubt that it unduly burdens or substantially interferes with the constitutional powers of the other branch. *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 546, 552, 576 N.W.2d 245 (1998).

The statute at issue here occupies a zone of power that, if not exclusively legislative, is shared between the legislature and the Superintendent. While the respondents contend that the "supervision of public instruction" vested in the Superintendent includes the setting of public education policy through administrative rulemaking, it would be completely implausible to suggest that the Superintendent has *exclusive* policymaking power in the education field. The plain language of Article X, § 1 vests the supervision of public instruction not only in the Superintendent, but also in "such other officers as the legislature shall direct," and further expressly authorizes the legislature to prescribe by

law the qualifications, powers, duties, and compensation of both the Superintendent and the "other officers."

It follows that, even if the "supervision of public instruction" includes administrative rulemaking in the field of public education, the legislature nonetheless may prescribe the powers and duties of the Superintendent regarding such rulemaking, direct that some portion of the rulemaking power shall be exercised by other officers, and prescribe the powers and duties of those officers. In accordance with that authority, the legislature has enacted many statutes prescribing the rulemaking powers and duties of the Superintendent.[5] The legislature's undisputed power to enact such statutes makes it clear that power over policymaking in the field of public education is—if not exclusively legislative—shared between the legislature and the Superintendent.

To the extent that administrative rulemaking is a shared power, the challenged provisions of Act 21 can be found unconstitutional as applied to the Superintendent only if the respondents prove beyond a reasonable doubt that those provisions unduly burden or substantially interfere with the "supervision of public instruction" that is constitutionally vested in the Superintendent. "[A]n 'adverse impact' is not, by itself, proof of an undue burden or substantial interference much less proof beyond a reasonable

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[5]*See*, footnote 3, *supra.*

doubt." *Flynn*, 216 Wis. 2d at 553. Even where this Court believes that the legislature has burdened and interfered with another branch in a way that makes it more difficult for the other branch to accomplish its goals, the Court will not invalidate the legislative act unless it can say beyond a reasonable doubt that the burden is undue and the interference is substantial. *Id.* at 554-55.

Furthermore, the undue burden or substantial interference is measured not by the challenged statute's direct impact on its immediate subject matter, but by its impact on the overall constitutional functioning of the other branch.

In *Flynn*, for example, this Court held that separation of powers principles were not violated by a statute that caused the lapse into the state's general revenue fund of several million dollars of program revenues previously appropriated for court information systems. *Id.* at 529-30. The Court found that powers over the funding of the judiciary were shared between the legislative and judicial branches and that the key question, therefore, was whether the challenged statute unduly burdened or substantially interfered with the judiciary. *Id.* at 552.

In resolving that question, the Court recognized that the lapse of funds had caused numerous immediate adverse impacts on the courts. *Id.* at 553-54. In assessing those impacts, however, the Court considered not whether the challenged statute unduly burdened or substantially

interfered with the particular powers of the judiciary that were directly affected, but whether the statute unduly burdened or substantially interfered with the overall ability of the judiciary to carry out its constitutional duty of overseeing the administration of justice. *Id.* at 554-55.

Measured against that standard, the Court determined that, the "needs [of the judiciary] continued to be met, though at a slower pace, and certainly not as sufficiently, economically, efficiently or conveniently as we would have liked." *Id.* at 554. The Court thus concluded that, although the adverse impacts were widespread and significant, they were not unconstitutional: "A burden? Yes. An interference? Yes. But undue or substantial? Not beyond a reasonable doubt." *Id.*

When those principles are applied to this case, it is clear that the Governor's power under Act 21 to disapprove scope statements and administrative rules does not unduly burden or substantially interfere with the Superintendent's overall ability to carry out his constitutional duty of supervising public instruction.

The promulgation of administrative rules is only a small fraction of what the Superintendent does. A review of Wis. Stat. chs. 115 through 121 reveals dozens, if not hundreds, of powers, duties, and activities of the Superintendent other than rulemaking. Moreover, as discussed earlier, administrative rulemaking in the modern sense was undreamed of in 1848 and thus could not have

been part of what the framers understood by the "supervision of public instruction."

Even if this Court were to conclude that the framers intended the Superintendent's constitutional functions to include *some* policymaking component, any such component still would have been miniscule in comparison with the many executive functions of the Superintendent reflected in the debates at the constitutional conventions. In *Flynn*, the adverse impacts on specific court programs and activities caused by the lapse of funding did not unduly burden or substantially interfere with the overall constitutional functioning of the judiciary. Similarly here, any adverse impact on the Superintendent's rulemaking activities alone would not unduly burden or substantially interfere with the overall constitutional functioning of the Superintendent.

Even looking only at rulemaking, the Governor's power to disapprove scope statements and proposed rules has only a partial, limited, and subordinate impact on the Superintendent's activities. Under Act 21, the Governor can prevent the Superintendent from completing the promulgation of a particular rule as proposed, but this does not prevent the Superintendent from modifying the proposal. Nor does disapproval of one proposal mean that a modified proposal would also be disapproved. In addition, the disapproval of one rule would not interfere with the Superintendent's ability to promulgate other rules.

Furthermore, Act 21 gives the Governor no power to propose, draft, or promulgate administrative rules in the field of public education. Wherever other statutes have delegated rulemaking power to the Superintendent, only the Superintendent has the authority to affirmatively determine the scope and content of those rules. The Governor's ability under Act 21 to disapprove a proposed rule might make it more difficult for the Superintendent to establish a particular policy, but the mere possibility of such a limited adverse impact is not enough to prove beyond a reasonable doubt that the Governor's actions would unduly burden or substantially interfere with the Superintendent's ability to supervise public instruction.

The court of appeals was concerned that the challenged provisions of Act 21 give the Governor "substantial power to shape rulemaking with respect to public instruction" by enabling him to "decide that there will be no rule or rule change on a particular subject, irrespective of the judgment of the SPI" or to "use his approval authority to leverage changes to proposed rules, again irrespective of the SPI's judgment." *Coyne*, 361 Wis. 2d 225, ¶¶ 28-29 (P-Ap. 8-9). Such limited power, however, does not unduly burden or substantially interfere with the Superintendent's constitutional functions.

In *J.F. Ahern Co. v. Wis. State Building Comm'n*, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983), *review denied*, 114 Wis. 2d 601, 340 N.W.2d 201 (Table) (1983), the

court of appeals rejected a separation-of-powers challenge to a statute that created a state building commission. The commission had the executive power to grant or withhold approval of state construction contracts but was controlled by members of the legislature. The plaintiffs claimed that this was an impermissible legislative intrusion upon the powers of the executive branch. *Id.* at 105-08.

The court disagreed and upheld the statute, reasoning that it did not violate the separation of powers because the Governor's approval was also required for all construction projects and the legislator members of the commission thus lacked the power to unilaterally execute a construction contract. *Id.* at 107-08. In the court's view, there was "[a] practical requirement of unanimity between the legislative members of the Building Commission, on the one hand, and the governor, on the other" and "[t]hat compulsory unanimity converts the shared power over building construction into a cooperative venture between the two governmental branches." *Id.* at 108. The creation of such a cooperative framework, the court concluded, did not violate the constitutional separation of powers. *Id.*

The present case is analogous to *J.F. Ahern Co.* Here, too, the power in question is a shared one in which constitutionally independent government actors each has the power to prevent an affirmative action from occurring. The Governor alone has no rulemaking power in the field of public education, and the Superintendent cannot promulgate

a rule without the Governor's approval. As in *J.F. Ahern Co.*, the challenged statute here creates a practical requirement of unanimity that makes rulemaking a cooperative venture between the Superintendent and the Governor. Contrary to the fears of the court of appeals, the use of legislative checks and balances to encourage constitutional officers to cooperate constitutes no impermissible usurpation of constitutional powers.

III. This Court's earlier holding in *Thompson* is limited to its own facts and is not applicable here.

The court of appeals accepted respondents' argument that the challenged provisions of Act 21 are unconstitutional under *Thompson*, in which this Court invalidated legislation that would have comprehensively reallocated state governmental powers in the field of public education. Applying *Thompson* to this case, however, is erroneous. *Thompson*'s holding is properly limited to its unusual facts and not applicable to the very different facts at issue here.

In *Thompson,* the Governor argued that the legislation challenged there should be upheld because Article X, § 1 did not restrict the legislature's authority to allocate the power of supervision of public education between the Superintendent and the "other officers." *Thompson*, 199 Wis. 2d at 681. The Court disagreed, holding that Article X, § 1 precludes the legislature from "giv[ing] the former powers of the elected state Superintendent of Public

Instruction to appointed 'other officers' at the state level who are not subordinate to the superintendent." *Id.* at 698.

The court of appeals interpreted the statement in *Thompson* that "[u]nder our holding in the present case, the legislature may not give equal or superior [supervision of public instruction] authority to any 'other officer.'" *Coyne*, 361 Wis. 2d 225, ¶ 25 (P-Ap. 008) (quoting *Thompson*, 199 Wis. 2d at 699), as meaning that "the legislature may not . . . give the SPI a supervisory power relating to education and then fail to maintain the SPI's supremacy with respect to that power." *Id.* The court of appeals concluded that the challenged provisions of Act 21 violate that rule because they "give the Governor substantial power to shape rulemaking with respect to public instruction" and do so "irrespective of the judgment of the SPI." *Id.* ¶¶ 28-29.

That interpretation, however, broadens the holding of *Thompson* far beyond what is justified by the facts of that case. The legislation invalidated in *Thompson* would have completely eliminated the Department of Public Instruction, under the direction and supervision of the Superintendent, and replaced it with a new Department of Education to be headed by a Secretary appointed and serving at the pleasure of the Governor and supervised by a new Education Commission, chaired by the Superintendent, but including eight other commissioners appointed by the Governor or by officers of the legislature. *Id.* at 678-79.

The *Thompson* Court concluded this legislation would have effected a large-scale transfer of power in the field of public education out of the hands of the Superintendent and into the hands of the new Secretary and Commission, whose authority was independent of the Superintendent. *Id.* The broad scope of that legislation provides the necessary context for understanding the *Thompson* Court's conclusions about the constitutional limitation on giving the powers of the Superintendent to non-subordinate officers and giving equal or superior authority to any other officer. *Id.* at 698-99. *Thompson* did *not* hold that whenever the legislature delegates any *particular* power involving the supervision of public education, the Superintendent must be supreme with respect to that particular power.

As interpreted by the respondents, *Thompson* would mean that every single power of state government related to public instruction must be subject to the ultimate control of the Superintendent. That, however, would be logically equivalent to saying that *all* powers related to public education constitutionally belong *exclusively* to the Superintendent. Such a view not only goes far beyond anything actually said in *Thompson*, but also would render *Thompson* inconsistent with well-established principles of shared power under Wisconsin's separation-of-powers doctrine.

Although *Thompson* did not expressly apply the standard separation-of-powers analysis, it is nonetheless

consistent with those principles, as long as it is viewed in relation to its facts—a case challenging legislation that redistributed public education power to such an extent that it unduly burdened and substantially interfered with the overall powers constitutionally vested in the Superintendent. If respondents' interpretation of *Thompson* were correct, *Thompson* would clearly be wrongly decided, not only because it would be inconsistent with separation-of-powers principles, but also because it would be inconsistent with the plain language of Article X, § 1 that gives the legislature the authority to prescribe by law the powers and duties of the Superintendent and other officers. The plain language of Article X, § 1 cannot be reconciled with a view that the Superintendent has the exclusive authority to control every particular power related to the supervision of public instruction. Any contrary interpretation of *Thompson* is constitutionally untenable.

The respondents' interpretation is also inconsistent with the *Thompson* Court's express reaffirmation of the earlier decision in *Fortney*, 108 Wis. 2d at 182, 699-700 n.10. *See Thompson*, 199 Wis. 2d at 699. In *Fortney*, the court had held that "[b]ecause the constitution explicitly authorized the legislature to set the powers and duties of public instruction officers, Article X, section 1 confers no more authority upon those officers than that delineated by statute." *Fortney*, 108 Wis. 2d at 182. *Thompson* approvingly quoted that language and construed it to mean that "the

plain language of Article X, § 1, makes the powers of the SPI and the other officers subject to limitation by legislative act." *Thompson*, 199 Wis. 2d at 699.

Thompson's reaffirmation of *Fortney* is inconsistent with respondents' view that the Superintendent has the exclusive authority to ultimately control every particular power of state government involving the supervision of public instruction. The correct view, consistent with both *Thompson* and *Fortney*, is that the powers of the Superintendent are subject to limitation by legislative act, as long as the legislation does not unduly burden or substantially interfere with the Superintendent's overall ability to carry out his constitutional duty of supervising public instruction.

If *Thompson* is properly interpreted in relation to its facts and in accordance with separation-of-powers principles, then that case is distinguishable from the present case in two important respects.

First, unlike the law invalidated in *Thompson*, Act 21 does not directly address the allocation of the power of supervision of public education at all, but rather creates a generally applicable procedural requirement for all administrative rulemaking by all officials to whom the legislature delegates rulemaking authority. In contrast, the legislation invalidated in *Thompson* was specifically targeted at effecting a substantial reallocation of governmental power in the field of public education. Nothing

in *Thompson* suggests that legislation generally affecting all agency policymaking activities in all fields is invalid as applied to the Superintendent, just because it may incidentally affect that official's policymaking activities.

Second, any impact that Act 21 may have on the Superintendent's policymaking power is miniscule when compared to the diminution of the Superintendent's powers that was effected by the legislation invalidated in *Thompson*. Under that legislation, the new Department of Education, Secretary of Education, and Education Commission would have had the power to initiate, promulgate, and implement public education policies even over the opposition of the Superintendent. In contrast, Act 21 does not give the Governor power to create or implement public education policies, but only gives the power, on a case-by-case basis, to disapprove specific rulemaking proposals by the Superintendent.

Unlike the legislation invalidated in *Thompson*, therefore, Act 21 does not make the Governor or any other official superior to the Superintendent in the field of public education. It does not even make the Governor equal to the Superintendent in the making of education policies, since it leaves the power to initiate and affirmatively draft a proposed administrative rule exclusively in the Superintendent's hands. Act 21 may give the Governor the ability to indirectly *influence* the content of administrative rules through the exercise of his disapproval power, but that

limited power of influence is a far cry from the kind of large-scale transfer of powers that was at issue in *Thompson*.

CONCLUSION

The essential nature of a representative democracy is that the will of the people should govern. Consistent with that principle, the framers of the Wisconsin Constitution provided that the power to legislatively establish public policy is vested in the legislators whom the people elect to represent them in the assembly and the senate. The framers also provided that the executive power of supervision of public instruction is constitutionally vested in an elected Superintendent, but they reserved to the legislature the authority to prescribe the powers and duties of the Superintendent, thereby ensuring the legislature's plenary authority to legislatively establish public education policy.

Under well-established precedent, the legislature can delegate portions of its legislative power to executive officers and agencies, subject to legislatively-imposed procedural safeguards. The challenged provisions of Act 21 are a valid exercise of that legislative power. And, even if rulemaking is viewed as a power shared between the legislature and the Superintendent, they are permissible because they do not unduly burden or substantially interfere with the Superintendent's authority

The lower court decisions upset the balance of constitutional powers established by the framers. This Court should reverse the rulings below and uphold the constitutionality of Act 21 as applied to the Superintendent.

Dated this 12th day of August, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,016 words.

Dated this 12th day of August, 2015.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 12th day of August, 2015.

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