

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**

Reply Brief of Defendants-Appellants-Petitioners

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INTRODUCTION

This case requires the Court to answer a single question: does the Superintendent of Public Instruction hold the *constitutional* power to make rules? If the answer is yes, then Respondents win. If the answer is no, then Petitioners win.

In their briefs, Respondents point the Court in one direction to resolve this question: *Thompson v. Craney*, 199 Wis. 2d 674, 546 N.W.2d 123 (1996). They claim that *Thompson* definitively held that in all things related to public education, including rulemaking, the Superintendent reigns supreme over all other parts of government, including the legislature. *Thompson* made no such holding. Yet if Respondents are correct, and this is what *Thompson* truly means, then that precedent must be overruled: the Wisconsin Constitution does not grant the Superintendent superior power in all realms of public education.

Significantly, Respondents have made numerous concessions throughout their briefs that undermine their position. Coyne concedes that the legislature is “free to add to, subtract from, or alter the Superintendent’s powers,” and that the Superintendent’s constitutional powers are executive powers and not legislative. (Coyne Br. at 15, 24-25.) Evers concedes not only that the legislature *may* regulate rulemaking, but that it *must* regulate rulemaking. (Evers Br. at 8.) If these concessions are true, then the

Superintendent’s rulemaking powers are *not* constitutional powers, but legislatively delegated powers that the legislature may give or take away. (Coyne Br. at 24.) The court of appeals similarly determined that the legislature has the authority to give and take powers from the Superintendent—including rulemaking power. *Coyne v. Walker*, 2015 WI App 21, ¶ 25, 361 Wis.2d 225, 882 N.W.2d 606. But neither Coyne, nor Evers, nor the court of appeals has ever explained how the legislature could possibly have the authority to take away the Superintendent’s rulemaking power if it is a *constitutional* power.

These concessions and admissions make clear that rulemaking is *not* a constitutional power of the Superintendent, but a power that the legislature may give, take, and regulate. The constitution surely does not grant this legislative power of rulemaking to the Superintendent, and neither did *Thompson*. But if it did, then *Thompson* should be reversed and its reasoning abandoned. Either way, the challenged provisions of Act 21 are constitutional.

ARGUMENT

I. If *Thompson* granted the Superintendent with constitutional rulemaking powers, then *Thompson* should be overruled.

Respondents’ briefs—and the court of appeals opinion—rely almost exclusively on the theory that *Thompson* granted the Superintendent with near king-like

powers. Among these powers is the power to make rules regarding education without oversight or interference by any other official, according to Respondents.¹ This theory of “superiority” is essential to Respondents’ success in this case but finds no support in the text of the constitution itself.

Respondents assert that the Superintendent is the “superior officer” in the field of education and that with respect to rulemaking, no one may be “superior to the Superintendent.” (Evers Br. at 21; Coyne Br. at 24.) And the court of appeals crafts a near hagiography of the Superintendent by creating out of thin air something called the “Superiority Test” and then taking nearly four pages of dicta to apply it. *Coyne*, 2015 WI App 21, ¶¶ 25-36.

Based on this, one would think that the “Superiority Test” was established by this Court in *Thompson*. Of course, this Court did no such thing. This Court instead used the word “superior” twice in *Thompson*—not to create a “test,” but to summarize the nature of the Superintendent’s *executive* powers in relation to other *executive* officials. *Thompson*, 199 Wis. at 679, 699. Significantly, *Thompson*

¹ Respondents concede that the legislature itself may oversee rulemaking, but fail to explain how this would work if the Superintendent really does, in fact, have *constitutional* rulemaking powers. (See, e.g., Evers Br. at 20.) If these rulemaking powers are constitutional, then no one, not even the legislature, should be able to interfere with those powers.

does not mention rules or rulemaking, a point ignored by Respondents.

If Respondents are correct, however, and they convince the Court that *Thompson* controls, then *Thompson* should be overruled and its reasoning abandoned.

If *Thompson* really means that the Superintendent is superior in all realms—both executive and rulemaking—then *Thompson* runs contrary to the plain language of the constitution. The constitution, which sets the basic rules and framework of our government, does not use the word “superior” to describe the Superintendent or his powers. The operative word is “supervision,” and the operative phrase is “prescribed by law.” A constitution that says, in effect, that the Superintendent has the *duty*² to oversee education in the State (as dictated by future legislation), is hardly a constitution that grants the Superintendent “superior” powers. What Respondents want, and this Court should reject, is a theory that injects a “necessary and proper”-type clause into Wis. Const. art. X, § 1. (*See Evers Br.* at 17, “It simply would not be possible under current law to supervise

² As explained in Evers’ first brief, the constitution’s framers were concerned about the public-education system failing due to neglect, and so their chief concern was to impose a *duty* upon the Superintendent to keep the system running, not granting unchecked *power*. (*Br.* at 19-20.) It would be completely foreign to the framers to learn that this same provision is now being used to advocate for nearly unchecked rulemaking power for the Superintendent.

a system that educates almost 900,000 children in 2,218 public schools without issuing ‘regulation[s], standard[s], statement[s] of policy, or general order[s] of general application which has the effect of law.’”) But that theory is not a modest exercise of judicial interpretation, but instead an act of constitutional creativity.

In short, if *Thompson* says what Respondents claim, then *Thompson* is wrong and should be overruled.

II. This is a separation-of-powers case.

At its core, this is a separation-of-powers case. Yet Respondents urge this Court to ignore established separation-of-powers principles and focus solely on their simplistic understanding of *Thompson*. Their approach is constitutionally wrong. The claim that a law infringes upon the constitutional power of the Superintendent is a separation-of-powers claim. In fact, in this context, it is impossible to understand article X, § 1 or *Thompson* apart from the doctrine of separation of powers.³

Any interpretation of article X, § 1 necessarily involves the meaning of the power of “supervision of public instruction.” And to understand that power, one must examine the general legislative power vested in the

³ Coyne and Evers allege petitioners have forfeited a separation of powers argument by not having previously raised it. The petition for review expressly raised this issue and Respondents did not allege forfeiture in their response to the petition.

legislature by article IV, § 1, as well as the legislature's specific power under article X, § 1 to prescribe the powers and duties of the Superintendent and other educational officers.

Because the legislation challenged in *Thompson* deprived the Superintendent of executive control over the state's public education system, the Court was not called upon to consider whether the supervision of public instruction is executive or legislative in nature. Nor was the Court called upon to separately analyze the constitutional status of administrative rulemaking powers and how they relate to the executive supervision of public instruction.

In contrast, the Court here must review legislation that affects only rulemaking, without diminishing the Superintendent's control over the executive supervision of public instruction. Unlike in *Thompson*, therefore, the distinction between legislative and executive powers is central here. This is, therefore, a separation-of-powers case.⁴

⁴ Evers also now suggests that this case involves the balance of power between the Superintendent and the Governor, rather than the legislature. (Evers Br. at 4-5.) In a state with a divided executive branch like Wisconsin, however, that is also a separation-of-powers issue. *See, e.g., Brown v. Chiang*, 132 Cal. Rptr. 48, 71 (2011) (discussing relationship between state governor and other constitutional executive officers in terms of separation of powers).

III. Rulemaking is a delegated legislative power, not inherent in the supervision of public instruction.

Respondents argue that rulemaking is part of the supervision of public instruction because the Superintendent must promulgate administrative rules in order to carry out his constitutional function of supervision. (Coyne Br. at 11-12, 17 n. 7; Evers Br. at 1, 10.) They are wrong on two accounts.

First, even if rulemaking is required for the Superintendent to carry out some of his statutory duties, a restriction on his rulemaking power does not intrude on his constitutional power of supervision. The power to supervise is the executive power to oversee the faithful execution of existing laws. Rulemaking, in contrast, is the creation of new laws (called “rules”). The power to make new rules is delegated by the legislature subject to legislatively imposed conditions. It is not an inherent constitutional power hiding somewhere in the penumbras of article X, § 1.

Second, Respondents are wrong to assume that the Superintendent’s supervisory activities necessarily require administrative rulemaking. Under Wis. Stat. § 227.10(1), “[e]ach agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute.” The administration of a statute does not necessarily require additional statements of

general policy or agency interpretations.⁵ A statute complete enough to be executed based on its own language can be administered without need for bureaucratic rulemaking. To hold otherwise would be to concede the inevitability of the administrative state as superior to the democratically elected legislature.

The challenged provisions of Act 21 impose conditions upon the Superintendent's statutorily derived power to create *new* policies through rulemaking. But that does not diminish the Superintendent's constitutionally derived power to be in charge of supervising *existing* policies in the field of public instruction.

The fact that Act 21 regulates only the exercise of legislative power, rather than executive power, also distinguishes this case from *Thompson*. Unlike the law challenged in *Thompson*, Act 21 does not take away executive powers from the Superintendent. Act 21, which regulates a legislative power, does not restrict such executive power and thus is unaffected by *Thompson*.⁶

⁵ Many programs in this state are run without the promulgation of administrative rules. For example, the Department of Justice is statutorily required to operate a crime alert network, Wis. Stat., § 165.785, yet the Department has been able to run this important program without the promulgation of a single rule.

⁶ Evers also asserts that Act 21 is an unconstitutional delegation of legislative power to the Governor. Claims of unlawful delegation are raised by *plaintiffs* in *complaints*—not by *defendants* in a supreme court brief.

IV. The first laws do not prove that rulemaking is part of the Superintendent's constitutional powers.

Respondents argue that the first laws dealing with the powers of the Superintendent enacted after the creation of article X, § 1 in 1848 and after its amendment in 1902 demonstrate that the Superintendent's constitutional power of supervision was understood to include rulemaking. (Coyne Br. at 19-20; Evers Br. at 13-14.) This argument conflicts with their concession that the legislature could take away the Superintendent's rulemaking power altogether and ignores another reasonable inference: that legislation was needed to supplement the Superintendent's constitutional power, not just to reiterate it.

The legislature's statutory delegation of some regulatory power to the Superintendent in 1848 and 1903 does not constitute legislative recognition that the Superintendent's constitutional powers include the power to regulate. To the contrary, the legislature may have conferred rulemaking power on the Superintendent precisely because it understood his constitutional powers not to include rulemaking. Neither Coyne nor Evers has refuted this fundamental (and logical) point.

Further, Respondents concede that the legislature could abrogate rulemaking power altogether. (Coyne Br. at 15, 23.) If this is true, rulemaking simply cannot be a part of the Superintendent's constitutional power of supervision.

Evers also argues that this Court in *Thompson* concluded that the Superintendent's power to propose regulations under the 1848 statute was part of the constitutional supervisory power. (Evers Br. at 4 n. 3, 13-14.) That is not what *Thompson* says. *Thompson* listed the Superintendent's power to propose regulations under the 1848 statute just as an example of the Superintendent's active supervisory role. *Thompson*, at 199 Wis. 2d at 694-95. The Court did not hold that rulemaking is part of the Superintendent's constitutional power.⁷

V. The challenged provisions of Act 21 do not reduce the Superintendent to a merely exhortatory role.

Conjuring up *Thompson*, again, Coyne contends that the challenged provisions of Act 21 would reduce the Superintendent to a merely exhortatory role. (Coyne Br. at 14-15, 17 n. 7.) That is a distorted characterization of Act 21.

The challenged provisions of Act 21 do not prevent the Superintendent from actively exercising an executive power of oversight in the field of public education or restrict him to a role of mere advocacy. All of his activities other than

⁷ Any regulatory power of the Superintendent under the 1903 statute also is not relevant because the portions of article X, § 1 amended in 1902 are not at issue here. The amendment provided that the Superintendent would be elected in non-partisan elections and gave the legislature the power to change the manner of electing or appointing other educational officers. See *Thompson*, 199 Wis. 2d at 681-82.

rulemaking are unaffected: he can still supervise the execution of existing educational laws as prescribed by law. And even with regard to rulemaking, he is not reduced to mere advocacy, but remains the only officer with the power to affirmatively propose and draft administrative rules under his enabling statutes.

If Coyne's characterization of Act 21 were true, then every agency subject to Act 21 would have only an exhortatory role in relation to the statutes that the agency administers. That is clearly not the case.⁸

VI. Act 21 does not unduly burden the constitutional functions of the Superintendent.

Coyne's final argument is that *Thompson* rejected the notion that the Superintendent shares the power to

⁸ Evers also cites a decision by the West Virginia Supreme Court. (Evers Br. at 14-15 (citing *West Virginia Bd. of Ed. v. Hechler*, 376 S.E.2d 839 (1988))). That decision should be given little weight because it has no relevance to how this Court interprets the Wisconsin Constitution and, in any event, is distinguishable in at least two crucial respects. First, the West Virginia Constitution, unlike the Wisconsin Constitution, contains an express separation of powers clause that required the strict separation of the powers of the different branches of government. *Hechler*, at 843. Second, the West Virginia board derived its authority to promulgate administrative rules directly from the state constitution itself. *Id.* at 843 n.6 & 7; 843-44. Here, Respondents concede that Wisconsin's Superintendent promulgates rules pursuant to statutory authorization that the legislature is free to give, withhold, or take away.

supervise public instruction with any other state officer. (Coyne Br. at at 25.) That assertion misses the point.

The question is not whether power over the supervision of public instruction is shared between the Superintendent and other executive officers; it is whether that power is possessed solely by the Superintendent to the exclusion of the Legislature. The answer to that question is clearly no. Article X, § 1 expressly gives the legislature the power to prescribe the powers and duties of the Superintendent and other educational officers. Coyne concedes that, under *Thompson*, the Superintendent exercises powers and duties as prescribed by law and that the legislature can change or diminish the Superintendent's powers and duties, as long as it does not give any other state officer superior powers over public instruction. (Coyne Br. at 15, 25.)

Coyne incorrectly characterizes *Thompson* as holding that the legislature cannot confer upon another state officer *any* power over public education that is superior to the Superintendent's power. (Coyne Br. at 4, 13-16.) In reality, *Thompson* was about a complete marginalization of the Superintendent and a transfer of his constitutional powers to other officers. It did not hold that every time the Legislature delegates a single power related to public instruction, the Superintendent must be supreme with regard to that power. *See Thompson*, 199 Wis. 2d at 698.

CONCLUSION

The framers of the Wisconsin Constitution created a Superintendent of Public Instruction, not an education czar. The Superintendent is an executive branch official with no inherent legislative powers. The Superintendent's constitutional power is the power to oversee the execution of existing laws and does not include the power to make new law. The Superintendent may promulgate rules only under a grant of legislative power subject to legislatively imposed conditions, including those created by Act 21. In holding otherwise, the court of appeals upset the balanced division of powers that the framers created to safeguard liberty and prevent the consolidation of too much power in too few hands. The Court should confirm the clear meaning of the Constitution and reverse the judgment of the court of appeals. And if *Thompson* conflicts with these fundamentals of constitutional law, *Thompson* should be overruled.

Dated this 21st day of September, 2015.

Respectfully submitted,

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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 2,829 words.

Dated this 21st day of September, 2015.

s/Daniel P. Lennington
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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 21st day of September, 2015.

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