AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Nondelegation of Legislative Powers

**Wisconsin Legislature v. Palm, No. 2020AP765-OA (WI 2020)**

*In the spring of 2020, the novel coronavirus, later designated COVID-19, jumped from animals to humans. A global pandemic began in China and quickly swept through much of the rest of the world. COVID-19 had various unusual and significant features, including that humans had no natural immunity to it, many infectious carriers were asymptomatic, and many of those who would become symptomatic were infectious for up to two weeks before their symptoms became apparent. The virus was relatively easy to transmit and was fatal in a relatively high number of cases, particularly among the elderly. There was no immediate vaccine or effective treatment, and tests to detect the virus had to be newly developed, manufactured and distributed. Public health experts recommended that the most effective means of slowing transmission were frequent hand washing, the use of masks that covered the nose and mouth, and maintaining a physical distance of six feet or more between individuals.*

*Governors across the country declared public health emergencies and made use of preexisting statutory authority to slow the spread of infection. Because of prevalence of infectious asymptomatic carriers and limiting testing capacity, the infectious could not be easily identified and quarantined as in traditional epidemics. As a result, many governors took the unprecedented step of issuing wide-ranging “lockdown” orders that imposed generalized restrictions on ordinary life of most of the general public.*

*On March 12, 2020, Wisconsin Governor Tony Evers declared a public health emergency. On March 24, Department of Health Services Secretary-designee Andrea Palm issued Emergency Order 12 which directed all individuals within the state “to stay at home or at their place of residence,” with limited exceptions. On April 16, Palm issued Emergency Order 28 that backed the stay-at-home order with criminal penalties including fine and imprisonment. It also prohibited non-essential travel, closed non-essential businesses, and prohibited private or public gatherings beyond a single household, among other things.*

*The state legislature filed an emergency petition with the state supreme court seeking to have Emergency Order 28 declared invalid as having been issued without the statutorily required rulemaking process and as exceeding Palm’s statutory authority. The case turned on whether the emergency order fell within the definition of a “rule” within Wisconsin’s statutory scheme, which would have necessitated Palm following a specified rulemaking process. Wisconsin defines a “rule” as “a regulation . . . or general order of general application that has the force of law and that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency.” The court’s treatment of the statutory question, however, was shaped by concern for a background constitutional principle that executive branch officials cannot engage in lawmaking. The scope of statutory authority possessed by the secretary of the department of health services must be consistent with the structural requirements of the state’s constitutional scheme, and as a consequence the court interpreted the relevant statutes to bring them in line with constitutional requirements. In a fractured 4-3 decision, the state supreme court held that Emergency Order 28 was invalid.*

Chief Justice [ROGGENSACK](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I215b0bc634f411e9bc5c825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I215b0bc634f411e9bc5c825c4b9add2e).

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We conclude that Order 28 is a "general order of general application." The order regulates all persons in Wisconsin at the time it was issued and it regulates all who will come into Wisconsin in the future. If we were to read the definition of "Rule" as Palm suggests, one person, Palm, an unelected official, could create law applicable to all people during the course of COVID-19 and subject people to imprisonment when they disobeyed her order.

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Rulemaking exists precisely to ensure that kind of controlling, subjective judgment asserted by one unelected official, Palm, is not imposed in Wisconsin. . . .

We recognize that emergency rulemaking procedures contemplate that rules may have to be promulgated in response to extraordinary circumstances. . . .

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In addition, we employ the constitutional-doubt principle. That is, we disfavor statutory interpretations that unnecessarily raise serious constitutional questions about the statute under consideration. *Clark v. Martinez* (2005). Palm points to statutes that she asserts give her broad authority to impose regulation; but it does not follow she can impose regulation without going through a process to give the people faith in the justness of the regulation. However, under Palm's theory, she can "implement all emergency measures necessary to control communicable diseases," even at the expense of fundamental liberties, without rulemaking. That interpretation is constitutionally suspect. We do not construe § 252.02(6) as an "open-ended grant" of police powers to an unconfirmed cabinet secretary. *Industrial Union Department, AFL-CIO v. American Petroleum Institute* (1980).

To explain further, Article I, Section 1 of the Wisconsin Constitution provides that "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers form the consent of the governed." The people consent to the Legislature making laws because they have faith that the procedural hurdles required to pass legislation limit the ability of the Legislature to infringe on their rights. These limits include bicameralism and presentment, quorum requirements, and journal and open door requirements. At times, legislation is enacted that infringes on a person's rights despite these front-end procedures, however, for that we have judicial review.

We have allowed the Legislature to delegate its authority to make law to administrative agencies. But as we stated in *Martinez v. DILHR* (WI 1992), such a delegation is allowed only if there are "adequate standards for conducting the allocated power." Stated otherwise, "[a] delegation of legislative power to a subordinate agency will be upheld if the purpose of the delegating statute is ascertainable and there are procedural safeguards to insure that the board or agency acts within that legislative purpose."

When a grant of legislative power is made, there must be procedural safeguards to prevent the "arbitrary, unreasonable or oppressive conduct of the agency." Procedural safeguards, generally, are those requirements imposed by the Administrative Procedures Act. . . .

Palm cannot point to any procedural safeguards on the power she claims. . . . Rulemaking provides the ascertainable standards that hinder arbitrary or oppressive conduct by an agency. Judicial review does not prevent oppressive conduct from initially occurring.

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[I]n order to constitute criminal conduct proscribed by statute, the conduct must be set out with specificity in the statute to give fair notice. The same specificity is required in a properly promulgated rule before criminal sanctions could follow violations. Both must "meet the standards of definiteness applicable to statutory definitions of criminal offenses."

It has long been the law in Wisconsin that in order for the violation of an administrative agency's directive to constitute a crime, the directive must have been properly promulgated as a rule. *HM Distributors of Milwaukee v. Department of Agriculture* (WI 1972).

Palm asserts that Order 28 is not a rule, yet she also asserts Wis. Stat. §252.25 endows her with the power to create criminal penalties for violations of Order 28. Her argument stands §252.25 on its head. This is so because criminal penalties can arise from a rule violation only when the rule was properly promulgated. . . . Without the promulgation of a rule, no criminal penalties are possible for violations of administrative agency directives.

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[T]he Governor's emergency powers are not challenged by the Legislature, and Palm does not rely on the Governor's emergency powers. Constitutional law has generally permitted the Governor to respond to emergencies without the need for legislative approval. "With no time for ex ante deliberation, and no metric for ex post assessments, the executive's capacities for swift, vigorous, and secretive action are at a premium." But the Governor's emergency powers are premised on the inability to secure legislative approval given the nature of the emergency. For example, if a forest fire breaks out, there is no time for debate. Action is needed. The Governor could declare an emergency and respond accordingly. But in the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely.

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Chief Justice ROGGENSACK, concurring.

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Justice REBECCA GRASSL BRADLEY, with whom Justice KELLY joins, concurring.

Under the Wisconsin Constitution, all governmental power derives "from the consent of the governed" and government officials may act only within the confines of the authority the people give them. The people of Wisconsin never consented to any elected official, much less an unelected cabinet secretary, having the power to create law, execute it, and enforce it. "[E]ver vigilant in averting the accumulation of power by one body——a grave threat to liberty——the people devised a diffusion of governmental powers" among three branches of government. *Gabler v. Crime Victims Rights Bd*. (WI 2017). Whenever any branch of government exceeds the boundaries of authority conferred by the people, it is the duty of the judicial branch to say so.

However well-intentioned, the secretary-designee of the Department of Health Services exceeded her powers by ordering the people of Wisconsin to follow her commands or face imprisonment for noncompliance.2 In issuing her order, she arrogated unto herself the power to make the law and the power to execute it, excluding the people from the lawmaking process altogether. The separation of powers embodied in our constitution does not permit this. Statutory law being subordinate to the constitution, not even the people's representatives in the legislature may consolidate such power in one person. . . .

The people of Wisconsin pronounced liberty to be of primary importance, establishing government principally to protect their freedom. . . . Under the Wisconsin Constitution, government officials, whether elected or appointed, are servants of the citizens, not their masters.

Endowing one person with the sole power to create, execute, and enforce the law contravenes the structural separation of powers established by the people. Through the Wisconsin Constitution, the people confer distinct powers on the legislative, executive, and judicial branches of government. . . . Under the Wisconsin Constitution, the legislature makes the laws; an unelected cabinet secretary serving in the executive branch cannot unilaterally do so.

. . . . Although consolidation of power in one person may be tempting in times of exigency, for purposes of expeditiously producing an efficient and effective response to emergencies like a pandemic, history informs of the perils of the consolidation of power, and not merely through the exhortations of the Founders and philosophers. Regrettably, we have tangible examples of judicial acquiescence to unconstitutional governmental actions considered——at the time——to inure to the benefit of society, but later acknowledged to be vehicles of oppression. This is particularly true in the context of the police power, the source of authority cited by the DHS secretary-designee in this case.

"Historically, when courts contaminate constitutional analysis with then-prevailing notions of what is 'good' for society, the rights of the people otherwise guaranteed by the text of the Constitution may be trampled. Departures from constitutional text have oppressed people under all manner of pernicious pretexts. . . .”

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. . . . When legislatures expound broad policy goals and leave the details to administrative bodies, "[t]he consolidation of power within executive branch agencies 'often leaves Americans at the[ir] mercy' endowing agencies with 'a nearly freestanding coercive power' and '[t]he agencies thereby become rulers of a sort unfamiliar in a republic, and the people must jump at their commands.'"

It is insufficient for the DHS secretary-designee to point to the legislature's statutory delegation of lawmaking power as the source of her authority to dictate how the people must conduct their lives, without considering the constitutional ramifications of such a broad statutory interpretation——namely, the threat to the liberty of the people. "The Founders recognized that maintaining the formal separation of powers was essential to preserving individual liberty. . . .

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In a particularly chilling exchange with this court during oral arguments, the attorney for the state representing the DHS secretary-designee claimed the authoritarian power to authorize the arrest and imprisonment of the people of Wisconsin for engaging in lawful activities proscribed by the DHS secretary-designee in her sole discretion. . . . "If the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce." . . .

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Justice KELLY, with whom Justice REBECCA GRASSL BRADLEY joins, concurring.

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. . . . My purpose in writing separately is to describe why, under our constitutional form of government, the Legislature cannot possibly have given the Secretary the authority she believes she has.

In the Secretary's view, the Legislature gave her plenary power to simply "act" without the need of any further statutory or regulatory policy. Her brief candidly asserts there are no statutory or regulatory limitations on her authority to address communicable diseases. . . .

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The executive's constitutionally-vested authority consists of executing the laws, not creating them: "The executive power shall be vested in a governor." The difference between legislative and executive authority has been described as the difference between the power to prescribe and the power to put something into effect. . . .

On the other hand, we characterize legislative power as “the authority to make laws, but not to enforce them. . . .” It includes "the power to adopt generally applicable rules of conduct governing future actions by private persons——the power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,' or the power to 'prescribe general rules for the government of society.'" *Gundy v. United States* (2019) (Gorsuch, J., dissenting.). These powers must be kept forever separate. . . .

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We must be assiduous in patrolling the borders between the branches. This is not just a practical matter of efficient and effective government. We maintain this separation because it provides structural protection against depredations on our liberties. The Framers of the United States Constitution understood that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, . . . may justly be pronounced the very definition of tyranny.” . . .

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The separation of powers forbids abdication of core power just as much as it protects one branch from encroachment by another. "It is . . . fundamental and undeniable that no one of the three branches of government can effectively delegate any of the powers which peculiarly and intrinsically belong to that branch." . . .

The border between the legislature and the executive is maintained, or at least it once was, under the aegis of the non-delegation doctrine. There are some who say this is a dead letter. . . . If that describes the doctrine's vitality in Wisconsin, it is not because we never recognized it or outright rejected it, but because we allowed it to fall into desuetude. To the extent that has happened, we have been derelict in our duties.

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This principle is a matter of power, not of prudence: the constitution's progenitors did not grant the various branches permission to shuffle their distinct powers amongst themselves. . . . It is for that reason the legislature cannot alienate even a sliver of its core power, even if it consciously intends that end. Not because it would be unwise, or imprudent, but because those who created the legislature gave it no power to do so. . . .

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Adjudicating these constitutional border disputes is not easy. . . . But as Justice Gorsuch observed, there are three principles by which to guide our inquiry.

The first is that "as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details.'" But the filling up must truly comprise details. . . . Second, "once [the legislature] prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding." And third, the legislature "may assign the executive and judicial branches certain non-legislative responsibilities." . . .

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. . . . [O]ur task is to determine whether the Order incorporates, either explicitly or implicitly, policy decisions not already encompassed by current statutes or rules. If it does, and §252.02 allows her to make those policy decisions, then the statute violates the non-delegation doctrine. . . .

Under any rational reading, the Order contains or assumes policy decisions that are staggering both in their reach and in their effect on what we once thought of as inherent rights – rights that, according to our constitution, the government exists to secure. The Secretary insists the Order does not adopt any policies because, by its nature, it is time-delimited and directed at a certain set of temporary facts that (we all hope) won't recur. She says "the power to set public policy," on the other hand, is accomplished by "establishing prospective, generally applicable requirements to govern future conduct." The Order, she claims, hasn't done that.

Although the Secretary's argument seems to accept the conceptual distinction between executive and legislative power, it does not adequately address the totality of what the Order accomplishes. The Order, it is true, contains an executive component. But much more significantly for our analysis today, it also announces some shockingly profound public policy decisions, or assumes they have previously been made. For example, the Order could not function without a public policy decision that the Secretary of the Department of Health Services has the authority to confine people to their homes. That's a policy decision with respect to both the grant of authority itself, as well as the choice of person in which to vest it. So is the public policy decision that the Secretary has the power to close private businesses, or forbid private gatherings, or ban intra-state travel, or dictate personal behavior. The Order also depends on a public policy decision that the Secretary has the authority, all by herself, to criminalize whatever conduct she believes is anathema to controlling communicable diseases.

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But no such public policy decisions have been taken. There are no statutes or rules that confer on the Secretary these sweeping powers. The Secretary not only knows this, she affirmatively asserts that Wis. Stat. §252.02 gave her all the power needed to confer this type of authority on herself: "Under the statute's plain language," the Secretary says, "DHS may give legal force to suitable actions that it then carries out. The law requires no intermediary that DHS must go through . . . ." If §252.02 enables the Department to confer on itself the power to confine people to their homes, close businesses, etc., then it has quite obviously transferred no small amount of the legislature's core authority to the executive branch, thereby enabling the Secretary to make up public policy decisions as she goes along. Without that understanding of the Secretary's authority, the Order could not function. . . .

. . . . The power to confine law-abiding individuals to their homes, commandeer their businesses, forbid private gatherings, ban their intra-state travel, and dictate their personal behavior cannot, in any imaginable universe, be considered a "detail." This comprehensive claim to control virtually every aspect of a person's life is something we normally associate with a prison, not a free society governed by the rule of law.

Further, if Wis. Stat. § 252.02 actually allows this, as the Secretary says, the Framers would recognize the statute as a frustration of our system of government because it allows the legislature to "merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Gundy*. To avoid offending the separation of powers, §252.02 would have to "set forth standards 'sufficiently definite and precise to enable [the Legislature], the courts, and the public to ascertain' whether [the Legislature's] guidance has been followed." The Secretary eschews the need for any guidance. Her power, she says, is simply to "act" with all dispatch. If §252.02 allows this, there is literally no means by which we could ascertain whether the Secretary is following any legislatively determined policy at all. The Secretary's view of the statute is, essentially, that the Legislature charged her with the vague aspiration of controlling communicable diseases, and then left to her the responsibility of making the public policy decisions that she would then execute.

If her authority is that boundless, there is no method by which we can determine what power she might assert next. The Secretary understands the scope of her power under Wis. Stat. §252.02 to be so complete, so comprehensive, that she can do literally anything she believes is necessary to combat COVID-19. . . .

The Order fares no better under the second principle of non-delegation: "[O]nce [the Legislature] prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding." Under this rationale, it could conceivably be appropriate for the Legislature to confer on the Secretary the power to confine people to their homes if she finds that such an action is necessary to control the spread of a communicable disease. But no statute or rule confers on her that authority, so the Order cannot be justified as the exercise of executive authority under this principle.

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If Wis. Stat. §252.02 makes the Order's contents entirely executive, a few strategically written statutes would make the legislature a virtual non-entity. What if the legislature instructed the Department of Justice to "issue orders . . . for the control and suppression of [crime]"? . . . If the executive's authority under each of these hypothetical delegations was as staggeringly broad as the Secretary claims for herself under §252.02, the whole of our lives could be governed exclusively from within the executive branch.

But none of those hypotheticals would be consistent with the separation of powers for the same reason the Order is not. An agency cannot confer on itself the power to dictate the lives of law-abiding individuals as comprehensively as the Order does without reaching beyond the executive branch's authority.

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Justice ANN WALSH BRADLEY, with whom Justice DALLET joins, dissenting.

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Justice DALLET, with whom Justice ANN WALSH BRADLEY joins, dissenting.

. . . . This decision will undoubtedly go down as one of the most blatant examples of judicial activism in this court's history. And it will be Wisconsinites who pay the price.

A majority of this court falls hook, line, and sinker for the Legislature's tactic to rewrite a duly enacted statute through litigation rather than legislation. But legislating a new policy from the bench exceeds the constitutional role of this court. While a majority of this court is clearly uncomfortable with the broad grants of authority the Legislature gave to DHS through Wis. Stat. §252.02 and throughout Wisconsin history,3 the court's role is only to examine and apply the plain statutory language. "It is the duty of the courts to enforce the law as written."

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It is first important to understand Wisconsin's long-standing history of giving a broad grant of power to its public health authority, a history the majority purposefully overlooks. The Wisconsin Legislature was among the first state legislatures to address public health emergencies when it created the State Board of Health in March 1876. . . . The Legislature granted the board unusually broad powers, allowing it to impose statewide quarantines unilaterally in times of public health emergencies, as well as making "rules and regulations . . . necessary for the preservation or improvement of public health . . . ."

In 1904 this court recognized that the Legislature may "rightfully grant to boards of health authority to employ all necessary means to protect the public health" given the need to "act immediately and summarily in cases of . . . contagious and malignant diseases, which are liable to spread and become epidemic, causing destruction of human life." *Lowe v. Conroy* (WI 1904). . . . Similarly, the United States Supreme Court has recognized that it was "surely . . . appropriate," and "not an unusual, nor an unreasonable or arbitrary, requirement," to vest a board of health with the authority to respond to "an epidemic of disease" because it is composed of persons in the affected locality who presumably had "fitness to determine such questions." *Jacobson v. Massachusetts* (1905).

The State Board of Health exercised its broad emergency powers during the Spanish Flu pandemic of 1918. In October 1918, State Health Officer Dr. Cornelius Harper, in consultation with the governor, issued an order closing all public institutions in Wisconsin, including "schools, theaters, moving picture houses, other places of amusement and public gathering for an indefinite period of time." . . .

The broad executive power to take swift measures in response to an outbreak of communicable disease has existed uninterrupted since 1876. The language of ch. 252 expressly confers on DHS, the modern successor to the State Board of Health,6 broad pandemic-response powers. . . .

. . . . Section 252.02(4) plainly grants DHS the power to address COVID-19 through rulemaking *or by issuing orders*. The use of the word "or" distinguishes "orders" from "rules." Whichever alternative DHS chooses, order or rule, it can be made "applicable to the whole" of Wisconsin. The Legislature chose these words and is presumed to say what it means and mean what it says. . . .

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[I]n 1982, at the beginning of the AIDS epidemic,7 the Legislature amended the predecessor to Wis. Stat. §252.02(4) to explicitly include as part of DHS's power the ability "to issue orders" of statewide application. Even though DHS had existing authority to promulgate a "rule" which, again, had always included a "general order . . . of general application," the Legislature chose to give DHS the separate power to issue orders on a statewide basis to control and suppress communicable diseases.

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Emergency Order 28 is authorized by two other subsections of Wis. Stat. §252.02: §§252.02(3) and (6), neither of which require rulemaking under ch. 227. Section §252.02(6) is the broadest grant of authority given by the Legislature to DHS. Subsection 6 reads: "The department may authorize and implement all emergency measures necessary to control communicable diseases." (Emphasis added). The very broad language of §252.02(6) to "authorize and implement all emergency measures necessary" includes the issuance of emergency orders necessary to combat a deadly virus. The Legislature asks the court to read in language that simply is not there. Section 252.02(6) does not contain any limiting language – it does not say that DHS may "authorize and implement all emergency measures necessary except general orders of general application, for which rulemaking is required." We will not read into a statute "words the legislature did not see fit to write." . . .

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This reading of Wis. Stat. § 252.02 is even more illogical because it hamstrings DHS to a time-consuming, lengthy rulemaking scheme inconsistent with the authorization for DHS to act "immediately and summarily" to guard against the introduction of communicable disease as well as to control and suppress it. . . .

. . . . These procedures and timelines [for rulemaking] are wholly inconsistent with the prompt and decisive action necessary to control and suppress a deadly communicable disease like COVID-19.

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. . . . [A] rule applies to future circumstances and is enacted with the purpose of guiding future conduct. Emergency Order 28 is an immediate response to current circumstances and has an end-date of May 26, 2020. It does not serve as guidance for response to any future unique contagious disease, or even to the evolving circumstances surrounding COVID-19, and is therefore by its very nature not a rule.

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Justice HAGEDORN, with whom Justice ANN WALSH BRADLEY and Justice DALLET join, dissenting.

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Some would like to characterize this case as a battle over the constitutional limits on executive power – can an executive branch officer really shut down businesses, limit travel, and forbid public gatherings? These are important questions for sure, but they are not what this case is about. . . .

We are a court of law. We are not here to do freewheeling constitutional theory. We are not here to step in and referee every intractable political stalemate. We are not here to decide every interesting legal question. It is no doubt our duty to say what the law is, but we do so by deciding cases brought by specific parties raising specific arguments and seeking specific relief. In a case of this magnitude, we must be precise, carefully focusing on what amounts to the narrow, rather technical, questions before us. If we abandon that charge and push past the power the people have vested in their judiciary, we are threatening the very constitutional structure and protections we have sworn to uphold.

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[W]hile the federal government is one of limited and enumerated powers, the state government is not. States have what is known as the police power. This is the state's inherent power "to promote the general welfare," which "covers all matters having a reasonable relation to the protection of the public health, safety or welfare." If that sounds incredibly broad and far-reaching, that's because it is. . . .

From the British common law through the Industrial Revolution and up through today, the power to quarantine and take other invasive actions to protect against the spread of infectious diseases has been universally recognized as a legitimate exercise of state police power. . . .

The power of state government is not without limits, however. Every exercise of the police power is subject to the limits set by the people through our constitutions. . . .

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Where the legislature gives broad discretionary authority to the executive——in the enforcement of the criminal law, for example——that power can be immense. To illustrate, the legislature defines crimes, and has created a system for the prosecution of those crimes. But law enforcement has considerable discretion in determining whether to arrest those who break the law and refer them for punishment. All of us who have received a kindly warning from a merciful officer for driving a bit over the speed limit know this firsthand. Even after referral, prosecutors are given vast discretion in choosing whether to file a criminal complaint, and which crimes to charge. In practical effect, some crimes are almost never prosecuted in some jurisdictions.

Thus, under our constitutional design, the scope and size of the executive branch, the areas in which the executive branch is called upon to act, and the discretion with which it is entrusted is set by the legislature through the enactment of laws.

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During its rise in the Progressive Era, this court had some difficulty squaring the emerging administrative state with the structure of the Wisconsin Constitution. But eventually, like the U.S. Supreme Court, it acquiesced. . . .

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[O]ver time, this court has come to describe rulemaking as closer to a legislative power. . . . The logic here is not hard to understand either. As government grew into the modern behemoth it is today, the legislature began to enact statutes that looked more like broad, undefined goals, rather than concrete laws. Doing so left specific policy decisions to the executive branch. . . .

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Relevant for what follows, Wis. Stat. §252.02(4) states in part that DHS "may promulgate and enforce rules or issue orders," both of which may "be made applicable to the whole or any specified part of the state," for purposes of controlling and suppressing any communicable disease. Secretary Palm argues the statutory distinction between "rules" and "orders" indicates that DHS has authority to act on a statewide basis outside of the rulemaking process – that is, DHS can issue orders based on the police power given to the executive through the legislatively set parameters in §252.02. . . .

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I conclude the textual evidence overwhelmingly shows that Order 28 is a "general order" precisely because of its statewide application. Therefore, the legislature's argument that its statewide effect also makes it an order of "general application" is incorrect. An order of "general application" is one that has prospective application beyond the situation at hand. Order 28 does not. . . .

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But Wis. Stat. ch. 102, governing worker compensation claims, is different. Unlike any of the foregoing, that chapter defines both an "order" and a "general order." "'Order' means any decision, rule, regulation, direction, requirement, or standard of the department or the division, or any other determination arrived at or decision made by the department or the division." And a "general order" is "such order as applies generally *throughout the state* *to all* persons, employments, places of employment or public buildings, or *all* persons, employments or places of employment or public buildings of a class under the jurisdiction of the department. All other orders of the department shall be considered special orders." Thus, chapter 102 distinguishes between special orders, those applying to a specific person or party, and general orders, those applying generally to the entire state.

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This is not all. The statutes not only make clear that a general order is one applying statewide, but also that such statewide general orders may or may not need to be promulgated as rules. . . .

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Importantly, however, our statutes also show that just because something is a general order does not make it a rule. While many general orders are rules, not all of them are. They still must meet the other criteria to actually qualify as a rule.

With that in mind, the second requirement for any rule is that it must have "general application." . . .

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Secretary Palm argues, and I agree, that a regulation, standard, statement of policy, or general order is one of "general application" if it applies generally, as opposed to specifically. That is, an application is specific if it applies to a single, particular factual situation. Something with general application applies to multiple, prospective factual situations. A specific application is focused on the present; a general application is focused on the future.

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This reading also makes sense because of what rules are meant to be. Rules are designed to have enduring effect. They are published in official registers. They require public hearings, written input, and a series of complicated bureaucratic checks before being implemented. And while emergency rules are an option, they are still relatively slow and cumbersome. This is all by design. Government orders with limited application to a particular situation and individual circumstances warranting temporary action are not what rulemaking is designed to address.

In some ways, Secretary Palm's interpretation of the statutes may even be constitutionally required. To the extent rulemaking has a justification under our state constitution, it is because it retains the legislature's constitutional prerogative to determine the general policies that will govern the state. But rulemaking itself cannot tread so far as to authorize a legislative intrusion into the core power of the executive to enforce the laws. Our constitution's commitment to the separation of powers means the legislature should not, as a general matter, have a say in the executive branch's day-to-day application and execution of the laws. The legislature gets to make the laws, not second guess the executive branch's judgment in the execution of those laws. If rulemaking is understood as establishing a check on how a law is prospectively understood, that could be justified as retaining the legislature's constitutional prerogative to determine the state's public policy. But if rulemaking morphs into subjecting executive branch enforcement of enacted laws to a legislative veto, that turns our constitutional structure on its very head.

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Under the nondelegation doctrine as traditionally understood, it is usually the statute itself that is the basis for any nondelegation problems, not enforcement efforts. In the recent United States Supreme Court decision where Justice Gorsuch in dissent called for reinvigoration of a more vigorous nondelegation doctrine, the question was whether a *law* could give the executive the discretion to decide to whom it would apply. *Gundy*. Similarly, in early cases challenging the emerging administrative state, the question was whether *the law itself* provided enough detail. . . .

Accordingly, if Wis. Stat. § 252.02 gives too much undefined power to Secretary Palm——and that is the argument being made by the majority and concurrences——the remedy would be that the statute itself should be declared unconstitutional. The problem under a nondelegation theory is not whether an enforcement action is consistent with the law, but whether the underlying law is constitutionally capable of being enforced in the first place. But there's an obvious obstacle with deploying that approach in this case with respect to §252.02. Namely, it would need to be premised on legislative standing to argue that the laws it wrote are unconstitutional. It cannot be that the legislative branch has standing to sue the executive branch on the grounds that the legislature itself violated the constitution when it passed certain laws.

Furthermore, a certain irony inheres in calls to breathe new life into the nondelegation doctrine in this case. If we are to return to a vision of the separation of powers that does not allow delegation from one branch to another, how in the world can we support that proposition and at the same time hold that Secretary Palm is required to submit to rulemaking, a process that is premised, lo and behold, on the delegation of legislative power to the executive branch? If we are going to have a serious discussion about the separation of powers and its relationship to the administrative state, I welcome that conversation. But a decision grounded in "it's good for me but not for thee" does not inspire confidence that we are applying the same law to both parties before us.

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Wisconsin Stat. §252.25 . . . defines criminal penalties for any person who violates a "departmental order under this chapter and relating to the public health." This applies to any DHS order, whether a statewide ban on large public gatherings or closing Green Bay West High School or quarantining someone in Racine. No further course of conduct needs to be articulated as the legislature has plainly stated that violations of DHS orders – which is exactly what Order 28 is – are conduct subject to criminal penalties.

The majority's logic is premised not on the proposition that Order 28 violates Wis. Stat. ch. 252, but rather that the statute authorizing criminal penalties for violation of Order 28, Wis. Stat. §252.25, is unconstitutional. This means all of the public health authority granted to DHS in chapter 252 will be left with no enforcement mechanism at all, contrary to the law as the legislature drafted it.

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It is without doubt that the strictures of the constitution must be diligently defended during this crisis; the judiciary must never cast aside the law in the name of emergency. But just as true, the judiciary must never cast aside our laws or the constitution itself in the name of liberty. The rule of law, and therefore the true liberty of the people, is threatened no less by a tyrannical judiciary than by a tyrannical executive or legislature. Today's decision may or may not be good policy, but it is not grounded in the law.

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