

COMMENT

MAKING “EXPLICIT AUTHORITY” EXPLICIT: DECIPHERING WIS. ACT 21’S PRESCRIPTIONS FOR AGENCY RULEMAKING AUTHORITY

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2011 Wisconsin Act 21 modified the Wisconsin Administrative Procedure Act to introduce legislative and gubernatorial accountability in agency rulemaking, prohibit agencies from promulgating and enforcing rules that are more restrictive than the regulatory standards provided for by the Legislature, and redefine agency rulemaking authority. While most of Act 21’s provisions implement straightforward procedural requirements, two of its provisions work together to create an entirely new regime for agency rulemaking authority in Wisconsin. The first, Wis. Stat. § 227.10(2m), limits rulemaking authority to implement or enforce any regulatory “standard, requirement, or threshold” to regulatory standards already “explicitly required or explicitly permitted by statute.” The second, § 227.11(2)(a), designates several types of statutory clauses that fail to confer such rulemaking authority. Together, these two changes threaten to pull the rug out from under agencies in their attempts to defend the validity of their rules because these changes target the very basis for rulemaking authority upon which agencies had grown most comfortable relying.

Considerable debate as to the true scope of Act 21’s implications for rulemaking authority followed its enactment and remains to this day. Since no precedential Wisconsin court decision addresses Act 21’s prescriptions for rulemaking authority, agencies, legislators, and the regulated community are left to simply guess at its meaning and impact on agencies. This Comment analyzes constitutional principles comprising the administrative law landscape in Wisconsin, Act 21’s legislative history, and the text of the Act to determine that these provisions work together to create an “explicit authority” requirement that will bring the focus of analyzing agency rulemaking authority back to legislative intent—where it should have been the whole time. Ultimately, Act 21’s prescriptions for rulemaking authority align precisely with the constitutional principles that underlie all Wisconsin administrative law because they clarify what a proper legislative delegation of authority looks like. Therefore, although Act 21 brought about dramatic change in the sense that it demands courts undertake a particular analysis of rulemaking authority drastically different than that which they had grown accustomed to applying, it does no more than restate the constitutional principles that should have controlled the whole time.

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INTRODUCTION

The Wisconsin Administrative Code contains 159,253 regulatory restrictions, roughly 12 million words, and would take someone almost 17 weeks to read from front to back.¹ These regulations touch businesses in every industry and individual Wisconsinites in their day-to-day affairs—whether the day entails paying utility bills,² taking the kids to school,³ voting,⁴ hunting,⁵ water skiing,⁶ playing bingo,⁷ or visiting the State Fair.⁸ Administrative agencies are the authors and enforcers of this extensive regulatory scheme,⁹ so they directly and profoundly impact nearly every aspect of Wisconsin life. The extent to which they do so may come as a surprise to the regulated community,

1. A Snapshot of Wisconsin Regulation in 2017, Policy Brief Mercatus Center, George Mason University (Aug. 8, 2017), <https://www.mercatus.org/publications/urban-economics/snapshot-wisconsin-regulation-2017> [<https://perma.cc/TVY5-BGPN>].

2. WIS. ADMIN. CODE PSC § 5.09 (2019).

3. WIS. ADMIN. CODE PI § 7.02 (2019).

4. WIS. ADMIN. CODE EL § 3 (2019).

5. WIS. ADMIN. CODE NR § 10 (2019).

6. WIS. ADMIN. CODE NR § 5.34 (2019).

7. WIS. ADMIN. CODE DOA § 42 (2019).

8. WIS. ADMIN. CODE SFP § 1 (2019).

9. ADMINISTRATIVE RULES PROCEDURES MANUAL, WISCONSIN LEGISLATIVE COUNCIL (2014); *See also* WISCONSIN ADMINISTRATIVE CODE, WISCONSIN ADMIN. REFERENCE BUREAU (2018), <http://legis.wisconsin.gov/LRB/nav/administrative-code/> [<https://perma.cc/3SS6-PPYN>].

considering that these agencies are not directly accountable to those they regulate through election. Instead, those we elect to the Legislature set the broad outlines of the law and direct agencies to carry those laws into execution. This structure often leaves open significant regulatory gaps, making room for a significant degree of agency discretion and interpretation. Accordingly, the Legislature authorizes agencies to fill in these gaps by granting them regulatory authority—an authority which often involves agencies establishing their own regulatory standards through rulemaking and enforcing those standards against individuals through issuing permits.¹⁰ These legislative authorizations are central to the constitutionality of agency action because they form the principal connection between the regulatory scheme and the will of the people.¹¹ Faithfully preserving and giving effect to the meaning of these legislative delegations not only ensures agency action remains consistent with our constitutional structure, but also stands as the strongest barrier between agencies and unfettered discretion.

This aim is complicated, however, by the fact that bodies other than the Legislature must ascertain the meaning of these delegations in order to give them effect. Agencies must consider whether a contemplated action falls within their regulatory authority, and courts must interpret an agency’s regulatory authority when exercising judicial review as to whether an agency action is authorized by the statutes. For these reasons, the Legislature has a strong interest in making known the assumptions about interpretation and agency authority underlying the delegations it makes. This way, agencies remain sufficiently empowered to carry out their legislatively delegated purpose, without incidentally acquiring any power beyond that which the Legislature contemplated in establishing the agency. So, when the Wisconsin Legislature lamented that state agencies were somehow exercising regulatory authority far beyond what it intended to grant them,¹² it

10. See, e.g., WIS. STAT. § 281.35(10) (2017–18) (conferring upon the Department of Natural Resources rulemaking authority to promulgate rules establishing, inter alia, the procedures for reviewing and acting on permit applications).

11. See generally Blake Emerson, *Administrative Answers to the Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2045–49 (2018) (using the nondelegation and major questions doctrines to demonstrate how enabling legislation tethers agency regulation to the will of the people).

12. See *infra* Part I.B. This Comment refers to “legislative intent” to refer to the authority the Legislature contemplates granting to the agency through the statutory language it enacts. This phrase is used for the purpose of distinguishing the Legislature’s understanding of its delegations of regulatory authority from the court’s interpretation of the same. It is not enough to simply refer to the regulatory authority exercised by an agency because this authority has often been shaped by court interpretations and may not comport with the authority that the Legislature thought it was delegating through the statute. This usage is not, however, meant to encompass the

spoke up and clarified, through a piece of legislation, the ways in which it confers regulatory authority upon agencies. This change—2011 Wisconsin Act 21¹³ (“Act 21”)—became law eight years ago and carries the potential to dramatically alter the regulatory authority enjoyed by all state agencies. Yet its practical effect on agency regulatory authority remains a subject of heated debate because Wisconsin courts have yet to apply its new requirement in a precedential case.¹⁴

Act 21 imposes what this Comment refers to as an “explicit authority requirement.” Two statutory changes introduce this requirement to agency regulatory authority.¹⁵ First, the Act confines an agency’s authority to promulgate or enforce rules to those rules that implement a regulatory standard “explicitly required or explicitly permitted by statute.”¹⁶ Second, the Act attempts to prevent agencies from circumventing this new “explicit authority” requirement by simply utilizing broad statutes describing the agency’s general duties or legislative purpose as a blank check for regulatory authority.¹⁷ These

privately held intention of individual legislators or any other intentions the Legislature did not express in the statutory language.

13. January 2011 Special Sess. Assembly Bill 8, 2011 Wis. Act 21 (codified at WIS. STAT. § 227 (2011)).

14. Lower courts have attempted to apply the Act’s requirement as a matter of “first impression,” *e.g.*, Transcript of Oral Decision Hearing at 9–10, *New Chester Dairy v. Wis. Dep’t of Nat. Res.*, Outagamie Cty. Case No. 14-CV-1055 (Nov. 12, 2015) (unpublished decision), but decisions must come from the Wisconsin Court of Appeals or the Wisconsin Supreme Court to hold precedential value. *See Cook v. Cook*, 560 N.W.2d 246, 254–56 (Wis. 1997); *Kuhn v. Allstate Ins. Co.*, 510 N.W.2d 826, 832 (Wis. Ct. App. 1993). In April 2019, the Wisconsin Supreme Court accepted bypass certification under Wis. Stat. § 809.61 of two cases in which Clean Wisconsin challenged DNR decisions—one regarding DNR’s authority to consider environmental impact in issuing high-capacity well permits and the other regarding DNR’s authority to include conditions on water permits issued to concentrated animal feeding operations. *See Clean Wisconsin v. Wis. Dep’t Nat. Res.*, Appeal No. 2016-AP-1688 (Wis. Ct. App. 2019) (*cert. granted*, Jan. 16, 2019); *Clean Wisconsin v. Wis. Dep’t Nat. Res.*, Appeal No. 2016-AP-2502 (Wis. Ct. App. 2019) (*dismissed*, May 9, 2019).

15. For purposes of clarity, this Comment uses “regulatory authority” to refer to an agency’s authority to both promulgate rules and issue permits. But it should be noted that Wis. Stat. § 227.11 applies only to an agency’s “rule-making authority.”

16. WIS. STAT. § 227.10(2m) (2017–18) (“No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter, except as provided in s. 186.118 (2) (c) and (3) (b) 3. The governor, by executive order, may prescribe guidelines to ensure that rules are promulgated in compliance with this subchapter.”).

17. WIS. STAT. § 227.11(2)(a)1.–3. (2017–18).

Rule-making authority is expressly conferred on an agency as follows:

(a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if

two provisions work together to target and discard the pre-Act 21 judiciary’s practice of upholding agency regulatory action where such action was merely impliedly authorized by statute.¹⁸

This Comment argues that Act 21, through these two provisions, succeeds in offering a solution to the pre-Act 21 world’s deviation from legislative intent by providing reviewing courts with tools sufficient to help them discern legislative intent. Act 21’s explicit authority requirement adequately resolves the primary sources of confusion responsible for leading the previous administrative regime away from legislative intent: it explains that any statute conferring regulatory authority will invite the agency to create or enforce a specific regulatory standard, rather than generally describe or introduce the agency’s general subject-matter authority.¹⁹

At first blush, these requirements may not appear to impose a terribly high threshold for regulatory authority—especially in light of the well-established maxim that agencies lack any authority whatsoever until granted such authority by the Legislature.²⁰ But the bar for agency regulatory authority at the time of the Act’s enactment was so low that this new standard threatens to eliminate agency authority in many cases where it was previously thought to exist. Yet even today—eight years after the enactment of Act 21—agencies, regulated parties, and

the rule exceeds the bounds of correct interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency’s rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
2. A statutory provision describing the agency’s general powers or duties does not confer rule-making authority on the agency or augment the agency’s rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

Id.

18. See *infra* Part I.B.

19. § 227.10(2m); § 227.11(2)(a).

20. *Wis. Citizens Concerned for Cranes & Doves v. Wis. Dep’t of Nat. Res.*, 677 N.W.2d 612, 620 (Wis. 2004) (“It is axiomatic that because the legislature creates administrative agencies as part of the executive branch, such agencies have ‘only those powers which are expressly conferred or which are necessarily implied by the statutes under which it operates.’”) (quoting *Kimberly-Clark Corp. v. Pub. Serv. Comm’n of Wis.*, 329 N.W.2d 143, 146 (Wis. 1983)).

interested lawyers are still debating what Act 21's practical implications for agency regulatory authority will be.²¹ Even though the Act imposes a new and unclear requirement for the actions by which agencies routinely regulate the people of Wisconsin, Wisconsin courts have yet to address what kind of change this requirement imposes.²²

This Comment attempts to shed some light on this debate by contextualizing Act 21's textual changes within Wisconsin's administrative law landscape.²³ Act 21 was not created in a vacuum—it entered a colorful landscape of Wisconsin administrative law rich with constitutional principles, judicial doctrines, and agency practices.²⁴ Understood within this context, the Act's practical impact becomes surprisingly vivid and its constitutional significance undeniable. This also reveals that interpretations on both ends of the debate spectrum miss the mark on Act 21's meaning: the Act is neither so impactful as to potentially invalidate the entirety of the administrative scheme, nor is it so insignificant as to leave untouched all agency rules and practices existing at the time of its enactment. Instead, Act 21 impacts those administrative rules and practices that rely on “implicit” authorizations because it announces that legitimate authorizations exist only when they are made explicitly. This Comment draws from the Act's context to conclude that, on its face, “explicit” includes statutory language that affirmatively invites the agency to create or enforce a regulatory standard but it does not include statutory language merely granting the agency authority over a given subject matter.

Whatever the extent of the Act's practical significance, its enactment makes this new explicit authority requirement a core part of the constitutionally required method of agency delegation. Because the Legislature—as the body that holds complete authority to make delegations—explains through Act 21 the way in which it will confer such regulatory authority, Act 21 constitutes an essential component of

21. Compare *Coyne v. Walker*, 879 N.W.2d 520, 525 (Wis. 2016) (holding that Act 21 is unconstitutional as applied to the Superintendent of Public Instruction), with *Koschkee v. Taylor*, 929 N.W.2d 600, 603–04 (Wis. 2019) (holding that Act 21 is constitutional as applied to the Superintendent of Public Instruction, drastically reinterpreting Act 21 less than three years after *Coyne* and for the second time in Act 21's short history).

22. See *Koschkee*, 929 N.W.2d at 603, 609 (limiting the Court's engagement with Act 21 to only a procedural description and a determination of the legislature's ability to use Act 21 to “change a past delegation of rulemaking authority”).

23. For purposes of clarity, this Comment refers to Act 21's two provisions, WIS. STATS. §§ 227.10(2m) and 227.11(2)(a)1.–3., as the Act's “explicit authority requirement.” This requirement will refer to an agency's authority to promulgate rules, as well as to enforce rules through the regulatory permit process, even though that process is not technically “rulemaking.” See § 227.10(2m) (requirement applies “term[s] or condition[s] of a[] license issued by the agency”).

24. See *infra* Parts I.A.2–3.

the Legislature’s delegation to agencies in the first place. Therefore, courts reviewing agency regulatory authority are not free to ignore this explicit authority requirement and must address its effect on their existing method of evaluating agency regulatory authority. Somewhat paradoxically, however, this requirement does not modify any previous legislative standard. Instead, it merely spells out for courts the already-existing, constitutionally mandated analysis for agency authority: that agencies have no authority except that which the Legislature actually confers upon them.²⁵ Even though this standard comes directly from constitutional principles and governs independently of any legislative directive, Act 21 is still meaningful because it specifically demands that courts abandon their previous model for analyzing agency authority and redirects them to the constitutional course.²⁶ By effectively decoding the language of potential legislative authorizations, Act 21 reinforces the constitutional order by operationalizing the principle that it is the Legislature alone—not the judiciary—that confers authority to agencies and that any authority not so conferred remains with the Legislature.

I. ACT 21 IN CONTEXT

This Comment begins by presenting Act 21 in its appropriate context. This context is comprised of the regime of agency authority that preceded Act 21 and the concerns surrounding the enactment of Act 21. Part A. of this section explains the former by providing: first, the background principles of law governing agency authority; and second, the statutory regime for agency rulemaking in place before Act 21. Next, Part B. of this section turns to the important features of the Act’s enactment by addressing the statutory changes it brought and the concerns driving those changes. Ultimately, this Part aims to provide an adequate basis upon which this Comment may then turn to analyze Act 21’s practical impact on Wisconsin administrative law.²⁷

A. Administrative Law Without Act 21

Three sources define the regime of agency rulemaking authority in Wisconsin: the background principles of law established by the Wisconsin Constitution, the Wisconsin Administrative Procedure Act, and judicial doctrines created for analyzing agency rulemaking

25. See *Brown Cty. v. Wis. Dep’t of Health & Soc. Servs.*, 307 N.W.2d 247, 252 (Wis. 1981); *Jocz v. Labor & Indus. Review Comm’n*, 538 N.W.2d 588, 593 (Wis. Ct. App. 1995), *abrogated by Coulee Catholic Sch. v. Labor & Indus. Review Comm’n*, 768 N.W.2d 868 (Wis. 2009).

26. WIS. STAT. § 227.40(4) (2017–18).

27. See *infra* Part II.

authority.²⁸ While Act 21 directly altered only Chapter 227, it required that the judicial doctrines for agency rulemaking authority change as well. The background principles of law established by the Constitution remain unchanged—they govern regardless of the statutory scheme in effect²⁹—but Act 21 highlights some of those principles and thereby reminds reviewing courts what their rulemaking analyses must look like. These background principles lay the foundation upon which the Wisconsin Administrative Procedure Act, found in Chapter 227 of the Wisconsin Statutes, creates a comprehensive statutory scheme to govern administrative law in the state.³⁰ The final layer in this regime consists of doctrines developed by Wisconsin courts as they attempt to analyze agency authority under both the constitutional and statutory provisions.³¹

Under the operation of the Wisconsin Constitution, the pre-Act 21 Chapter 227, and judicial doctrines, the pre-Act 21 world came to accept the notion that agency authority may be merely “implied” by statutes conferring general subject-matter authority. Analyzing how these sources operated to give rise to this notion reveals where responsibility lies, and thereby illuminates how directly Act 21 addresses the problem.

1. BACKGROUND PRINCIPLES OF AGENCY RULEMAKING

Wisconsin’s constitutional order makes legislative grants of authority an indispensable prerequisite for agency action of any kind. Agencies have no authority until they have been granted such authority

28. See generally Kenneth K. Luce, *The Wisconsin Idea in Administrative Law*, 34 MARQ. L. REV. 1 (1950) (noting that the Wisconsin Constitution, the Wisconsin Administrative Procedure Act, and judicial doctrine are all sources of administrative law); Ramon A. Klitzke, *Administrative Decisions Eligible for Judicial Review in Wisconsin*, 61 MARQ. L. REV. 405, 406 (1978) (discussing judicial decision making and doctrine and its impact on Wisconsin administrative law).

29. See *State v. Lambert*, 229 N.W.2d 622, 624–25 (Wis. 1975); see generally WIS. CONST.

30. WIS. STAT. § 227 (2017–18). See, e.g., Ralph M. Hoyt, *The Wisconsin Administrative Procedure Act*, 1944 WIS. L. REV. 214, 214 (discussing the broad reach of the original Wisconsin Administrative Procedure Act and noting that it was almost the first of its kind); *Muench v. Pub. Serv. Comm’n*, 53 N.W.2d 514, 510–11 (Wis. 1952) (confirming Hoyt’s conclusions that “the sole purpose of the legislature in adopting the [Administrative Procedure Act] was to establish a uniform method of review and there was no intent to abolish any existing right of review”).

31. WIS. STAT. § 227.40(4)(a) (2011–12) (“In any proceeding pursuant to this section for judicial review of a rule, the court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated without compliance with statutory rule-making procedures.”).

by the Legislature.³² This conclusion follows from some basic constitutional principles Wisconsin courts have articulated for decades. Wisconsin courts have long held that Wisconsin’s constitutional structure permits the Legislature to delegate policy-making duties to agencies as long as the Legislature sufficiently limits and defines the agency’s sphere of authority.³³ In consideration of “the need for efficient administration of public policy,” the Legislature frequently uses its delegation power to vest agencies with the authority to promulgate rules.³⁴ Exploring these concepts at a deeper level shows that, under constitutional principles alone, an agency cannot obtain rulemaking authority until the Legislature—and the Legislature alone—confers such authority upon it.

Wisconsin administrative agencies—even those specifically contemplated in the Wisconsin Constitution—have no inherent authority in the absence of legislative delegations.³⁵ Like the Federal Constitution, the Wisconsin Constitution grants legislative authority to the Legislature without making any qualifications that may open the door to other parts of government to enjoy some of this power.³⁶ But unlike the Federal Constitution, the Wisconsin Constitution specifically contemplates the existence of administrative agencies in an independent Article entitled “Administrative,” immediately following the articles establishing the other branches of the state government.³⁷ Another article of the Wisconsin Constitution specifically creates one such

32. *Wis. Dep’t of Admin. v. Wis. Dep’t of Indus., Labor & Human Relations*, 252 N.W.2d 353, 357 (Wis. 1977).

33. *See State v. Lambert*, 229 N.W.2d 622, 624–25 (Wis. 1975).

34. WIS. STAT. § 227.19(1)(b) (2017–18) (“The delegation of rule-making authority is intended to eliminate the necessity of establishing every administrative aspect of general public policy by legislation.”).

35. *Wis. Dep’t of Admin.*, 252 N.W.2d at 357; *see also Coyne v. Walker*, 879 N.W.2d 520, 534 (Wis. 2016), *overruled on other grounds by Koschkee v. Taylor*, 929 N.W.2d 600 (Wis. 2019) (stating that two agencies named in the Constitution do not have any inherent rulemaking power and that any rulemaking power that they do have is “clearly a delegation of power from the Legislature”).

36. WIS. CONST. art. IV, § 1 (“The legislative power shall be vested in a senate and assembly.”).

37. *Compare* U.S. CONST. art. I § 1, *with* WIS. CONST. art. VI. This Article presumes the existence of certain constitutional officers—not agencies—outside the three branches of government. WIS. CONST. art. VI (providing for the existence of the Secretary of State, Treasurer, Attorney General, and county officers); *see also* Arlen C. Christenson, *The State Attorney General*, 1970 WIS. L. REV. 298, 300 (noting these “administrative” officers are not within the Executive or the Legislative and that they occupy a unique position in Wisconsin’s constitutional structure). Additionally, the Wisconsin Constitution features a separate article providing for a state superintendent to supervise public instruction, which the Wisconsin Supreme Court has held to be an agency to whom WIS. STAT. § 227 applies. *Coyne*, 879 N.W.2d at 528–29.

administrative “agency,”³⁸ which it vests with authority over education.³⁹ Nevertheless, even this constitutionally created agency’s “very existence . . . is dependent upon the Legislature” and the Legislature may still “grant, withhold, or take away those officers’ powers and duties as it sees fit.”⁴⁰ The only constitutional barrier this places on legislative control over these agencies’ duties and powers is that, should the Legislature decide to grant those powers to anyone, it must do so to the constitutionally created agency.⁴¹ Therefore, even the agencies specifically contemplated by the Wisconsin Constitution have no more inherent power to create policy than agencies whose scope of specified authority is defined by the Legislature.⁴²

Although the Wisconsin Constitution does not vest any department other than the Legislature with the ability to make laws, administrative regulations validly promulgated by an agency have the full force and effect of law just like legislation.⁴³ This occurs when the Legislature chooses to delegate authority to administrative agencies to carry out specific legislative directives through rulemaking and the agency promulgates a rule in accordance with that legislative directive—both substantively and procedurally. The Legislature’s decision to delegate part of its legislative power to agencies does not constitute abrogating its constitutional duty as long as it “sufficiently limit[s] and define[s]” that delegation.⁴⁴ It remains within the sole authority and duty of the Legislature to declare the existence of law and set out the general purposes or policies that body of law shall aim to achieve.⁴⁵ In other words, once the Legislature lays down the “fundamentals of a law,” it may then delegate to agencies the power necessary to carry those general legislative purposes into effect.⁴⁶ So long as the agency is acting within its grant of delegated power, it is “effectuat[ing] the will of the

38. Under the broad definition of that term in Chapter 227. WIS. STAT. § 227.01(1) (2017–18). *Coyne*, 879 N.W.2d at 529 (“The SPI is . . . considered an agency to which WIS. STAT. 227 applies.”).

39. WIS. CONST. art. X (creating a Superintendent of Public Instruction, in the section entitled “Education,” and vesting that officer with supervision of public instruction).

40. *Coyne*, 879 N.W.2d at 536–37.

41. *Id.* at 537.

42. *Id.*

43. *Kranzush v. Badger State Mut. Cas. Co.*, 307 N.W.2d 256, 267–68 (Wis. 1981). Before Act 21, a broad rule approved by an agency had the force of law until the Legislature took action or it was legally challenged. *See* Press Release, Scott Walker, Governor of Wisconsin, Special Session Part 2: Regulatory Reform (Dec. 21, 2010).

44. *State v. Lambert*, 229 N.W.2d 622, 624 (Wis. 1975).

45. *State ex rel. Wis. Inspection Bureau v. Whitman*, 220 N.W. 929, 941 (Wis. 1928).

46. *Id.*

legislature.”⁴⁷ Therefore, while the Legislature may delegate significant legislative power to agencies, that delegation is invalid if it is not clearly circumscribed within specific limits established by the statutes.⁴⁸

Allowing the Legislature to delegate grants of authority to administrative agencies accounts for the reality that the Executive will often need to fill in narrow gaps left open by laws in order to enforce them effectively.⁴⁹ But requiring that the Legislature sufficiently limit and define these delegations also preserves separation-of-powers principles by making sure the Legislature fulfills its duty to make the laws, while cabining the executive’s task to carrying those laws out—though allowing a considerable degree of discretion in that enforcement.⁵⁰ This requirement also makes it more likely that courts will uphold the Legislature’s intentions for agency authority, as clear and definite grants of authority will obviate the need for a searching analysis into a statute’s unstated attempts to delegate.

Finally, this system imposes a check to ensure the Legislature does not abdicate its constitutionally prescribed legislative duty. Otherwise, it may either do so intentionally, through a legislative mandate, or unintentionally, through writing unclear statutes that become interpreted by courts as granting an agency more power than the Legislature intended.⁵¹ While these principles are well settled within the contours of administrative law in the abstract, determining when the Legislature has sufficiently limited and defined its delegation of power to an administrative agency is a complicated analysis because the very purpose of delegating legislative powers to agencies is to take certain

47. *Brown Cty. v. Dep’t of Health & Soc. Servs.*, 307 N.W.2d 247, 250 (Wis. 1981).

48. *See, e.g., A. O. Smith Corp. v. Oglesby*, 323 N.W.2d 143, 144 (Wis. Ct. App. 1982) (“[L]egislature may delegate to an administrative agency the authority to make such rules as are necessary to effectuate the laws it has enacted . . . provided that the purpose of the law is ascertainable and adequate procedural safeguards exist to insure the agency acts within its authority.”) (internal citations omitted); *Mut. Fed. Sav. & Loan Ass’n v. Sav. and Loan Advisory Comm.*, 157 N.W.2d 609, 613 (Wis. 1968) (explaining when the Legislature has laid down fundamentals of a law, it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose).

49. *See, e.g., Whitman*, 220 N.W. at 941 (stating that “if we [the court] are to have any regard for prior decisions or for common sense and the inherent necessity of governmental co-ordination, we cannot hold the power conferred upon the [administrative agency] an unconstitutional delegation of legislative power.”) (internal quotations omitted).

50. *Cf. Schmidt v. Dep’t of Res. Dev.*, 158 N.W.2d 306, 312–13 (Wis. 1968) (discussing the academic community’s high regard for the 1928 Wisconsin Supreme Court’s “legal realism” in acknowledging that administrative agencies participate in law-making when they fill up the details of law).

51. James O. Freedman, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307, 315 (1978).

tasks from the realm of the Legislature's discretion and placing them within that of the agency.⁵²

This constitutional requirement for statutorily prescribed "limits" of an agency's power, however, is completely irrelevant until the Legislature has actually granted power to the agency in the first place. This is the most foundational requirement for an agency to enjoy any authority, because administrative agencies are creatures of the Legislature and remain accountable to it.⁵³ The Legislature has complete authority in the first instance to create and grant power to administrative agencies. And, once it has created and empowered an agency, it retains the power to "withdraw powers which have been granted, prescribe the procedure through which granted powers are to be exercised, and, if necessary, wipe out the agency entirely."⁵⁴ Therefore, each statute addressing the agency action in question is relevant to determining whether the agency has been legislatively authorized to undertake that action.

2. STATUTORY REGIME FOR RULEMAKING BEFORE ACT 21

Since 1943, the Wisconsin Administrative Procedure Act has codified for all administrative agencies the procedural requirements they must follow in promulgating rules and regulations; the method by which agencies conduct contested cases; and judicial review of the agency's determinations.⁵⁵ This Act, codified in Wisconsin Statutes Chapter 227 (and hereinafter referred to as "Chapter 227") creates a comprehensive scheme governing administrative law in the state.⁵⁶ Despite comprehensively governing administrative law in the state, none of Chapter 227's language indicates some approval of implicit regulatory authority.⁵⁷ While Act 21's amendments to Chapter 227 may

52. *See id.* at 312–13.

53. *Brown Cty. v. Dep't of Health & Soc. Servs.*, 307 N.W.2d 247, 250 (Wis. 1981).

54. *Whitman*, 220 N.W. at 942.

55. Hoyt, *supra* note 30, at 214.

56. *Id.*

57. Chapter 227 is comprehensive in the sense that it compiles the requirements governing all state administrative agencies in a single section of the Wisconsin Statutes, whereas such provisions used to be scattered among statutes directed at specific agencies and court decisions. *See id.* But it is not comprehensive in the sense that it may supplant constitutional principles governing administrative law—it is merely a statutory scheme and therefore governs only to the extent that it comports with constitutional requirements. *See, e.g., Coyne v. Walker*, 879 N.W.2d 520, 531 (Wis. 2016) (discussing the two types of constitutional challenges to statutes, specifically in the context of Chapter 227). Therefore, even if the text of the pre-Act-21 Chapter 227 did appear to contribute to creating the implied-authority era, it could not

hold the key to dismantling the implied-authority regime, the previous Chapter 227 does not appear to hold the blame for ushering that in in the first place.

While Act 21 added provisions to Chapter 227 that help clarify when an agency *lacks* regulatory authority, it did not modify the provisions of Chapter 227 setting the standard for when an agency affirmatively *possesses* regulatory authority. Both versions of Chapter 227 set the same mandatory standard as to when an agency must promulgate a rule and the same permissive standard for when an agency may promulgate a rule. First, they both require that agencies promulgate a rule for “each statement of general policy and each interpretation of a statute which [the agency] specifically adopts to govern its enforcement or administration of [the agency’s organic] statute.”⁵⁸ Second, they both permit an agency to promulgate a rule the agency “considers . . . necessary to effectuate the purposes of the statute.”⁵⁹ Thus, once an agency establishes its regulatory authority, the question as to when the agency can or must exercise that authority through rule promulgation remains unchanged with Act 21.

Both the pre- and post- Act 21 versions of Chapter 227 provide the same grounds upon which a court exercising judicial review for declaratory judgment proceedings of an agency rule must invalidate the rule. Reviewing courts must invalidate a rule if 1) the rule “violates constitutional provisions,” 2) the rule “exceeds the [agency’s] statutory authority” or 3) the rule “was promulgated without compliance with statutory rule-making procedures.”⁶⁰ Chapter 227 further establishes various other circumstances that render a rule invalid that persist after Act 21. First, “a rule is not valid if it exceeds the bounds of correct interpretation [of the statute].”⁶¹ Second, an agency may not “promulgate a rule which conflicts with state law.”⁶² These provisions meaningfully limited agency rulemaking authority in the sense that they provided substantive requirements that every rule must satisfy to be valid. Yet, these statutory limitations provided no guidance for the

be fully responsible for the departure from the constitutional principles underlying administrative law.

58. Compare WIS. STAT. § 227.10(1) (2009–10), with WIS. STAT. § 227.10(1) (2015–16).

59. Compare WIS. STAT. § 227.11(1) (2009–10), with WIS. STAT. § 227.11(1) (2015–16). *But see* WIS. STAT. §§ 227.11(2)(a)–(d) (2015–16). While both versions of Chapter 227 provide the same four permissive grants of rulemaking authority, Act 21 further built on §227.11(2)(a) to foreclose the specified statutory provisions from conferring rulemaking authority.

60. Compare WIS. STAT. § 227.40(4)(a) (2009–10), with WIS. STAT. § 227.40(4)(a) (2017–18).

61. WIS. STAT. § 227.11(2)(a) (2009–10).

62. WIS. STAT. § 227.10(2) (2009–10).

majority of agency rules that fall somewhere in between outright contradicting statutes and being expressly contemplated by the Legislature. This version of Chapter 227, therefore, differed from today's Chapter 227, not by any provisions it included, but by those it omitted. Its minimal limitations offered nothing to help courts or agencies determine whether rules were sufficiently authorized by the Legislature, except where those rules were so blatantly unauthorized as to directly contradict a statute.

Additionally, the pre-Act 21 Chapter 227 did not contain any affirmative grants of rulemaking power beyond those that remain post-Act 21. Nor did it appear to set any specific standard for legislative delegations of agency authority that may be analogous to the post-Act 21's standard for "explicit authority." Instead, the old language produces a tone generally consistent with the standard set by Act 21. First, this tone is apparent in the same warning language found post-Act 21, which explains that Chapter 227 itself "does not confer rule-making authority upon or augment the rule-making authority of any agency."⁶³ Additionally, the pre-Act 21 Chapter 227 casts this tone by using the term "expressly conferred" to indicate how statutes grant rulemaking authority.⁶⁴ Specifically, the same section that provides the methods by which "[r]ule-making authority is expressly conferred," featured that same language and specified the same methods by which rulemaking authority may be expressly conferred.⁶⁵ This section differs from today's Chapter 227 in that it did not contain any specific ways rulemaking authority may not be conferred.⁶⁶ The old Chapter 227's reference to rulemaking authority as something "expressly conferred" does not directly establish that as the standard by which rulemaking authority had to be conferred. But this standard was the only one acknowledged by Chapter 227's text and therefore would have been, at the least, consistent with Chapter 227's provisions. Most noticeably absent from the pre-Act 21 Chapter 227's discussion of rulemaking authority is any blessing for—or even acknowledgment of—this "implicit" or "implied" authority that the drafters of Act 21 sought to eliminate with its passage.⁶⁷

63. § 227.11(1).

64. The provision referencing "expressly conferred" rulemaking authority that existed in § 227.11(2)(a)–(d) remained through the enactment of Act 21, although Act 21 added subsections beneath (2)(a), explaining the statutory provisions that fail to "expressly confer" such authority. *See* WIS. STAT. § 227.11(2)(a)1.–3. (2011–12).

65. *Compare* WIS. STAT. § 227.11(1) (2009–10), *with* WIS. STAT. § 227.11(1) (2011–12).

66. *See id.*

67. WIS. STAT. § 227 (2009–10). *See* sources cited *infra* notes 109–19.

3. JURISPRUDENTIAL REGIME FOR RULEMAKING BEFORE ACT 21

While nothing about the pre-Act 21 world’s constitutional requirements or its statutory regime indicates any inconsistencies with Act 21’s notion of how regulatory authority must be conferred, Wisconsin case law—coming from both the Wisconsin Supreme Court and the Wisconsin Court of Appeals—nevertheless arrived at an image of agency rulemaking authority that the Legislature thought it needed to remedy with Act 21.⁶⁸ Instead of requiring an explicit grant of rulemaking authority, Wisconsin courts in this era upheld an agency rule so long as the agency’s authority to promulgate that rule could be “fairly implied” by statute.⁶⁹ Specifically, Wisconsin courts found potential legislative grants of regulatory authority as sufficient whenever 1) the subject-matter of the agency action was one over which the agency had some general jurisdiction and 2) the action did not create or enforce a regulatory standard contradictory to one laid out in the statutes.⁷⁰ These two requirements came to effectively replace the constitutionally mandated, threshold inquiry that the Legislature first grant the agency authority to promulgate the rule in question, before limitations to that authority become relevant.⁷¹

Although the threshold requirement for a valid rule is that some statute empower the agency to promulgate that rule in the first place, Wisconsin courts often passed over that question and instead jumped right to assessing whether the rule in question conflicted with the enabling statute.⁷² Courts gave lip service to this threshold requirement, frequently characterizing an agency’s rulemaking authority as encompassing whatever authority could be “expressly conferred” or “fairly implied” by the agency’s governing statutes.⁷³ In evaluating whether a statute granted such authority, Wisconsin courts employed what they called an “elemental approach.”⁷⁴ As long as the elements of the rule in question matched those contained in the statute, the statute

68. See sources cited *infra* notes 109–19.

69. See *Watkins v. Labor and Indus. Review Comm’n*, 345 N.W.2d 482, 486 (Wis. 1984).

70. See generally *Oneida Cty. v. Converse*, 508 N.W.2d 416 (Wis. 1993).

71. See *infra* Part II.A.

72. Patrick M. Zabrowski, *The Standard of Review of Administrative Rules in Wisconsin*, 1982 WIS. L. REV. 691, 700.

73. *Peterson v. Nat. Res. Bd.*, 288 N.W.2d 845, 848 (Wis. 1980); *Dep’t of Admin. v. Dep’t of Industry, Labor & Human Relations*, 252 N.W.2d 353, 357 (Wis. 1977); *Racine Fire & Police Comm’n v. Stanfield*, 234 N.W.2d 307, 309 (Wis. 1975). The court also referred to this latter kind of authority as “necessarily implied.” *Wisconsin Citizens Concerned for Cranes & Doves v. Wis. Dep’t of Nat. Res.*, 677 N.W.2d 612, 620 (Wis. 2004) (quoting *Kimberly-Clark Corp. v. PSC*, 329 N.W.2d 143, 146 (Wis. 1983)).

74. *Wis. Citizens Concerned for Cranes & Doves*, 677 N.W.2d at 620.

sufficiently authorized the rule.⁷⁵ The statute need not supply every detail of the rule;⁷⁶ nor did the Legislature need to expressly authorize the rule's promulgation.⁷⁷ However, most actions so easily satisfied this standard that it rarely posed an obstacle to establishing a rule's validity.⁷⁸

Reviewing courts often found legislative authorization for agency action in general statutes explaining the agency's subject-matter authority, and only then would they turn to consider the statutes specifically addressing the types of agency action at issue.⁷⁹ But the courts considered these specific statutes only as potential limits on the agency's authority, not as the legislative delegation through which authority may be conferred in the first instance.⁸⁰ Under this analysis, a rule was not valid if it conflicted with either an unambiguous statute or a clear expression of legislative intent.⁸¹ A court would invalidate any rule that was "so out of harmony with the [controlling] statutes" as to exceed the agency's rulemaking authority.⁸² In making this determination, courts purported to construe the statute narrowly and resolve any doubt against the agency.⁸³ This approach allowed courts to determine the extent of the agency's authority as a question of law and therefore gave the court significant power to make the ultimate determination as to whether the agency's action was authorized.⁸⁴

A Wisconsin Court of Appeals decision upholding the Department of Commerce's ("DOC") sprinkler rule illustrates the significance of this first prong.⁸⁵ In that case, the court upheld the DOC rule because a statute sufficiently granted regulatory authority for the rule.⁸⁶ The key statutory language the court relied upon charged the DOC with the general authority to "enforce and administer all laws" that require "public buildings to be safe" and that require "the protection of the life, health, safety, and welfare of . . . the public or tenants in any such

75. *Id.*

76. *Wis. Ass'n of State Prosecutors v. Wisc. Emp't Relations Comm'n*, 907 N.W.2d 425, 436 (Wis. 2018). *See Hoyt*, *supra* note 30, at 217.

77. *Graft v. Dep't of Nat. Res.*, 618 N.W.2d 897, 901, 903 (Wis. 2000).

78. *Zabrowski*, *supra* note 72, at 701.

79. *See, e.g., Capoun Recovable Tr. v. Ansari*, 610 N.W.2d 129, 134–35 (Wis. Ct. App. 2000); *Oneida Cty. v. Converse*, 508 N.W.2d 416, 418–19 (Wis. 1993).

80. *Zabrowski*, *supra* note 72, at 701.

81. *Wis. Citizens Concerned for Cranes & Doves v. Wis. Dep't of Nat. Res.*, 677 N.W.2d 612, 620 (Wis. 2004). *But see Capoun*, 610 N.W.2d at 135.

82. *Vill. of Plain v. Harder*, 68 N.W.2d 47, 50 (Wis. 1955).

83. *Wis. Citizens Concerned for Cranes & Doves*, 677 N.W.2d at 620.

84. *Zabrowski*, *supra* note 72, at 699.

85. *Wis. Builders Ass'n v. Dep't of Commerce*, 762 N.W.2d 845, 850 (Wis. Ct. App. 2008).

86. *Id.*

public building.”⁸⁷ The court found this statute authorized the Department to promulgate a rule requiring sprinklers in multifamily dwelling units without any further analysis.⁸⁸ Turning then to the second inquiry, the court analyzed whether there was any “basis” in the agency’s governing statutes for “limiting the Department’s general authority” to promulgate that sprinkler rule.⁸⁹ The plaintiffs pointed to a statute in that chapter authorizing the Department to require sprinkler systems in multifamily dwellings featuring more than twenty units. They argued that this statute was inconsistent with the rule, which required sprinkler systems in dwellings with fewer than twenty units.⁹⁰ The court rejected this argument because it did not find that this statute removed the Department’s authority to promulgate rules for the protection of public buildings, an authority it presumably possessed already by virtue of its general grant.⁹¹

In a Wisconsin Department of Natural Resources (“DNR”) case, the Wisconsin Court of Appeals similarly upheld agency action as legislatively authorized under statutes containing “a broad, general grant of authority,” despite the existence of two statutes “creat[ing] specific rules” for the action at issue.⁹² In that case, the court relied upon the DNR’s general authority and duty concerning “the waters of the state” as authorizing its formal environmental reviews for well permits, and rejected the argument that the those “general grants of authority . . . are superseded by [the] specific statutes regulating wells.”⁹³ The two general statutes upon which the court relied, Wis. Stat. §§ 281.11 and 281.12, are the first two statutes of the relevant subchapter and are entitled “Statement[s] of policy and purpose,” and “General department powers and duties,” respectively.⁹⁴ The court acknowledged that these statutes “do not mention wells in particular,” but they still “explain, inter alia, that the DNR ‘shall have general supervision and control over the waters of the state’ and ‘shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of [Wis. Stat. ch. 281].’”⁹⁵ The fact that the statutory scheme governing wells was “silen[t]” with regard to DNR’s authority to conduct an environmental review for the

87. *Id.* at 848 (internal citation omitted).

88. *Id.* at 849.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Lake Beulah Mgmt. Dist. v. Wis. Dep’t of Nat. Res.*, 787 N.W.2d 926, 933 (Wis. Ct. App. 2010), *aff’d in part, rev’d in part*, 799 N.W.2d 73 (Wis. 2011).

93. *Lake Beulah Mgmt. Dist.*, 787 N.W.2d at 934.

94. *Id.* at 933–34; WIS. STAT. §§ 281.11 and 281.12 (2007–08).

95. *Lake Beulah Mgmt. Dist.*, 787 N.W.2d at 933–34 (quoting WIS. STAT. § 281.12(1)).

type of well at issue did not “tacitly revok[e] any other authority the DNR might have over other wells, including its general authority to protect the waters of the state.”⁹⁶

In each of these cases, the court released the agency from being bound by the limits of its specific, enabling statutes, and instead found the agency to have plenary power to take any action on its areas of subject-matter authority, so long as the action did not contradict other statutes.⁹⁷ This analysis primarily looks to general statutes, which it treats as granting plenary authority over the subject matter in question, and it only secondarily considers the specific enabling statutes.⁹⁸ Instead of relying on the specific statutes as the place where the agency’s authority is conferred in the first instance, the courts treated those statutes as limits on some pre-existing authority.⁹⁹

Because all agencies have authority over some subject matter, agency actions frequently pass this first assessment easily.¹⁰⁰ And they rarely face any larger obstacles under the second assessment either, unless the rule provided some standard contradictory to a regulatory standard prescribed by the statutes.¹⁰¹ For example, the Wisconsin Supreme Court invalidated a rule promulgated by the DNR that blatantly contradicted the text and express purpose of the statute in question.¹⁰² Although the statute permitted the agency, in general terms, to “promulgate rules deemed necessary to carry out the purposes of th[at] subsection,” the court found that the DNR’s rule allowing for wholesale reconstruction of destroyed boathouses was “completely inconsistent” with the “express provisions” of the governing statutes attempting to phase out boathouses.¹⁰³ The statute specifically prohibited repairs on boathouses when the cost of repairs exceeded fifty percent of a boathouse’s fair market value.¹⁰⁴ However, because the DNR rule allowed for the wholesale reconstruction of boathouses, it effectively permitted repairs on boathouses costing up to one hundred percent of their fair market value.¹⁰⁵ The court discerned that the

96. *Id.* at 935–36.

97. *See* Initial Brief for Co-Appellant at 13–14, *Clean Wis., Inc. v. Wis. Dep’t of Nat. Res.*, No. 18-AP-59 (Wis. Ct. App., May 3, 2018).

98. *See Lake Beulah Mgmt. Dist.*, 787 N.W.2d at 934–36.

99. *Id.* at 935–36.

100. *See Wis. Builders Ass’n v. Dep’t of Commerce*, 762 N.W.2d 845, 848–49 (Wis. Ct. App. 2008); *Lake Beulah Mgmt. Dist.*, 787 N.W.2d at 933–36.

101. *See Oneida Cty. v. Converse*, 508 N.W.2d 416, 419 (Wis. 1993).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* (explaining that the rule was “completely inconsistent” with the statute because it “would allow repairs of up to one hundred percent of fair market value if a boathouse is destroyed by vandalism, fire or wind”).

Legislature’s intent behind the statute was clearly to phase out boathouses, so the DNR rule directly contradicted that goal by allowing for the kind of reconstruction that the statute “plainly prohibited.”¹⁰⁶

Pre-Act 21 Wisconsin courts sometimes found reason to excuse agencies from complying with even this minimal criterion that their rules not contradict statutes.¹⁰⁷ For example, the Wisconsin Court of Appeals declined to consider a party’s challenge that the DNR’s decision to issue an after-the-fact permit conflicted with the statute requiring permits before work began.¹⁰⁸ Specifically, the court said that the principle that “[a]n administrative rule that conflicts with an unambiguous statute exceeds the rule-making authority of the administrative agency” is an “issue [that] is not available when one contests subject matter jurisdiction.”¹⁰⁹ In other words, the court’s determination that the agency had authority to issue after-the-fact permits, as a subject-matter, meant that the rule could not conflict with the statutes.¹¹⁰ The court reasoned that an agency’s subject-matter jurisdiction is established by the Legislature, so an agency’s rule within that jurisdiction could not contradict the statutory grant of authority.¹¹¹ This case demonstrates that, in practice, an agency’s regulatory authority was satisfied so long as the agency action dealt with some subject-matter over which the agency had jurisdiction, regardless of whether the statutes specifically enabled the agency action in question.¹¹²

This case law as a whole reveals that, although the Wisconsin courts purported to construe constitutive statutes narrowly and resolve ambiguities against agencies, the minimal requirements laid out in Chapter 227 left them without any guidelines sufficient to put these principles into operation. Instead, the courts effectively presumed that agency rules were valid whenever one of the agency’s statutes—usually a general one, providing for the agency’s duties or purpose—fairly encompassed the subject matter of the rule in question. This presumption determined an outcome upholding the rule, unless the court concluded that the regulatory standard set out in the rule directly contradicted a standard already provided in the statutes—and sometimes even such a contradiction was not enough.¹¹³

106. *Id.*

107. *See Capoun Revocable Tr. v. Ansari*, 610 N.W.2d 129, 135 (Wis. Ct. App. 2000).

108. *Id.* at 134–35.

109. *Id.* at 135 (quoting *Seider v. Musser*, 585 N.W.2d 885, 887 (Wis. Ct. App. 1998)).

110. *Id.*

111. *Id.*

112. *Id.*

113. *See id.*

B. Act 21 Makes an Entrance

Frustrated with the Wisconsin courts' willingness to find agency authority wherever it could be implied, then-Governor Walker and the Legislature ushered in Act 21 in an attempt to make agencies more accountable to the other branches of government.¹¹⁴ Two features of Act 21's enactment help illuminate its likely effect on the Wisconsin administrative law landscape: its legislative history and its text. Under the Act 21 regime, both prefatory language stating the agency's purpose and statutory provisions describing the agency's general powers or duties necessarily fail to qualify as sufficiently explicit delegations.¹¹⁵ Therefore, agencies must point to some explicit authorization for any regulatory standard they enforce through rules or permits, and these designated types of provisions categorically fall short of establishing that authority in the wake of Act 21.

1. THE DRAFTERS' VISION

Act 21 resulted from a Special Legislative Session in 2011 convened by then-Governor Scott Walker for the purpose of overhauling Wisconsin's regulatory process.¹¹⁶ In ordering the Special Session, Walker noted that "burdensome regulation[s]" had "stifled" "the business climate in Wisconsin . . . for too long."¹¹⁷ The Governor identified one problem as "Wisconsin's unelected agency bureaucrats hav[ing] broad rulemaking authority," and citing the Department of Commerce's sprinkler rule as a "specific example" of that problem.¹¹⁸ He further explained that "instead of basing rules on the specific rule of law approved by the legislature, bureaucrats are empowering themselves to use the department's overall duties provision."¹¹⁹ As a potential legislative solution to this problem, Walker suggested "legislation that states an agency may not create rules more restrictive than the regulatory standards or thresholds provided by the legislatures" and legislation "stating that the department's broad statement of policies

114. Walker, *supra* note 43.

115. WIS. STAT. §§ 227.11(2)(a)1.-2. (2011-12).

116. Walker, *supra* note 43.

117. Wis. Exec. Order No. 1, Gov. Scott Walker, Relating to a Special Session of the Legislature (Jan. 3, 2010), https://docs.legis.wisconsin.gov/code/executive_orders/2011_scott_walker/2011-1.pdf (on file with author).

118. Press Release, Gov. Scott Walker, *Regulatory Reform Info Paper* (Dec. 21, 2011), <https://walker.wi.gov/press-releases/regulatory-reform-info-paper> (on file with author).

119. *Id.*

or general duties or powers provisions do not empower the department to create rules not explicitly authorized in the state statutes.”¹²⁰

The Legislature understood the Governor to be concerned that “the bureaucrats had too much power and the legislative intent was not being met.”¹²¹ Then-Secretary of the Department of Administration called upon other legislators to support the initiative to “restrain[] [agency authority to promulgate rules] to the limits originally granted by the Legislature,” in order to “place an effective check on the creeping scope of agencies’ rule-making authority.”¹²² However, at least one legislator explained that the Legislature “did not craft this bill for Governor Walker” but to “set a course that would bring back some good strong rules that ultimately would protect the legislative body.”¹²³ In legislative discussions, the Legislature apparently agreed with the Governor’s assessment that there was a “problem,” but that the problem was “not partisan.”¹²⁴ Instead, a legislator contemplated that this problem was “something that evolved over years” and possibly the result of the Legislature’s failure to articulate with sufficient clarity the scope and conditions of agency delegations.¹²⁵ That legislator expressed concerns that “too much power was being moved into those that were writing the rules and less power was coming out of th[e] [legislative] chamber.”¹²⁶

The Legislature answered with several provisions to reinstate agency accountability—they augmented the standards for rulemaking authority, imposed additional procedural requirements for rules, and introduced gubernatorial approval into the rulemaking process.¹²⁷ In addressing some of the bill’s “very important” provisions, one legislator first addressed the rulemaking requirement.¹²⁸ He explained that under this change, “the agency’s general powers does not confer rule-making authority. In other words, they can’t use their mission statement in order to write a rule.”¹²⁹

120. *Id.*

121. Wis. Sen. Scott Fitzgerald, Excerpts of Transcript of Proceedings From Wisconsin State Legislature Senate Floor Debate 4 (Feb. 10, 2011).

122. Sec’y Dep’t Admin. Mike Huebsch, Senate Committee on Economic Development and Veterans and Military Affairs, Testimony for January 2011 Special Session Senate Bill 8 (Feb. 1, 2011).

123. Fitzgerald, *supra* note 121, at 8.

124. *Id.* at 3.

125. *Id.*

126. *Id.* at 4.

127. Wis. Rep. Tom Tiffany, Excerpt of Transcript of Proceedings from Wisconsin State Legislature Assembly Floor Debate 3 (Feb. 2, 2011).

128. *Id.*

129. *Id.*

2. THE TEXTUAL CHANGES

The Act's drafters attempted to accomplish their goals for regulatory reform by requiring agencies to comply with additional procedural requirements in the rulemaking process and by specifying the method by which the statutes may confer rulemaking authority.¹³⁰ While these procedural provisions help combat over-regulation by making future rules more difficult to promulgate, Act 21's rulemaking authority requirement stands as an absolute barrier to any rule not "explicitly" authorized by the Legislature.¹³¹ In other words, no matter what procedural hoops the agency might be willing to jump through, there are some rules it is categorically barred from promulgating under this new requirement.¹³² The Act effected this change by creating two new provisions: Wisconsin Statutes sections 227.10(2m) and 227.11(2)(a)(1)–(3).¹³³

This first provision directly addresses an agency's authority to promulgate rules or implement regulatory standards in more subtle ways, such as through licensing. It excludes from every agency's realm of regulatory authority the ability to create or enforce regulatory standards not already contemplated by the statutes. It reads:

No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, *unless that standard, requirement, or threshold is explicitly required or explicitly permitted* by statute or by a rule that has been promulgated in accordance with this subchapter.¹³⁴

The second addition contributing to Act 21's explicit authority requirement is placed under the section entitled: "Extent to which chapter confers rule-making authority."¹³⁵ This modification left all of Wisconsin Statutes § 227.11 intact, simply adding three subprovisions to a subsection already in existence.¹³⁶ Both before and after Act 21,

130. WIS. STAT. § 227.137 (2017–18).

131. Without addressing Act 21's retroactive effect in detail, this Comment assumes that Act 21 is not limited in application to rules yet to be promulgated. However, it should be noted that there is a meaningful debate, beyond the scope of this Comment, as to whether the Act applies only prospectively, affecting only those rules promulgated after its enactment or retroactively. *See* Wis. Op. Att'y Gen., OAG-01-16 (May 10, 2016).

132. WIS. STAT. § 227.10(2m) (2011–12); §§ 221.11(2)(a)1.–3.

133. *Id.*

134. § 227.10(2m) (emphasis added).

135. § 227.11.

136. H.R., Spec. Sess., at §§ 2–3 (Wis. 2011).

this section contained four different ways that rulemaking authority may be “expressly conferred.”¹³⁷ However, Act 21 added three types of provisions that categorially fail to “expressly confer[] or augment[]” an agency’s rulemaking authority.¹³⁸ The list of such provisions that follows features the same types of statutory provisions where pre-Act 21 courts most often succeeded in their quest to find “implicit” agency authority.¹³⁹ The first item targets statutory preambles. It bars “statutory or nonstatutory provision[s] containing a statement or declaration of legislative intent, purpose, findings, or policy” from conferring new—or augmenting existing—rulemaking authority.¹⁴⁰ The second explains that “[a] statutory provision describing the agency’s general powers or duties,” does not confer or augment rulemaking authority beyond that which is explicitly conferred on the agency by the Legislature.¹⁴¹ The third and final paragraph under this list provides that “[a] statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than . . . [that which is] contained in the statutory provision.”¹⁴²

II. ACT 21 IN ACTION

Act 21 addresses the disconnect between agency authority and legislative intent for that authority by targeting and eliminating the specific reasons why this disconnect plagued the pre-Act 21 world. To develop this conclusion, Part II of this Comment will begin by surveying the possible reasons the pre-Act 21 world interpreted regulatory authority so contrary to legislative intent.¹⁴³ Uncovering the sources of confusion will help illuminate whether Act 21 strikes at the heart of those problems. The pre-Act 21 Chapter 227 is the logical place to begin this determination because it is the source that Act 21 directly modified. Chapter 227 failed to provide reviewing courts with sufficient guidance in upholding legislative intent; but it is not necessarily responsible for unmooring agency authority from legislative intent because the reviewing courts still ultimately bore the

137. §§ 227.11(2)(a)–(d).

138. §§ 227.11(2)(a)1.–3.

139. Initial Brief for Co-Appellant at 16, *Clean Wis., Inc. v. Wis. Dep’t of Nat. Res.*, Case No. 18-AP-59 (Wis. Ct. App., May 3, 2018).

140. § 227.11(2)(a)1.

141. § 227.11(2)(a)2.

142. § 227.11(2)(a)3.

143. See Fitzgerald, *supra* note 121.

responsibility to implement legislative intent as expressed in statutes.¹⁴⁴ Specifically, courts most frequently resolved agency authority questions contrary to legislative intent when they found regulatory authority in statutes simply describing the agency's general role or prefacing the agency's actual enabling statutes.¹⁴⁵ Act 21 attempts to redirect the courts by telling them they may no longer infer the existence of regulatory authority from a general statute granting mere subject-matter authority.¹⁴⁶

After concluding that this practice ultimately led to the Legislature's complaints that agency regulatory authority deviated from legislative intent, this Part explains how Act 21 succeeds in resolving the confusion about statutory language. Specifically, the Act's explicit authority requirement explains the meaning behind the specific types of statutes that most often led courts astray from implementing the statute's actual meaning. These provisions do not introduce a wholly new type of regulatory authority—they merely restate constitutional principles that have long inhered Wisconsin administrative law. Nevertheless, these provisions do require that the court abandon its prior analytical framework for addressing agency authority. Placing these provisions properly within their historical and political context reveals how they will likely be incorporated into the complex administrative law landscape in Wisconsin.

Perhaps surprisingly, the Act accomplishes its goal without implementing a radically new theory for regulatory authority, as might have been expected. Instead, Act 21 simply restates and clarifies the constitutional principles that necessarily govern agency rulemaking. Act 21 did not withdraw any power that agencies previously possessed, nor did it change the nature of regulatory authority itself. Instead, it provides the Legislature's own translation of its delegations of regulatory authority so that the courts can no longer mistakenly read into statutes more regulatory authority than the Legislature meant to convey.

A. Where the Pre-Act 21 World Went Wrong

While Chapter 227 is the most intuitive place to begin the search for an explanation for the pre-Act 21 world's tendency of finding

144. *State Pub. Intervenor v. Wis. Dep't of Nat. Res.*, 503 N.W.2d 305, 307–08 (Wis. Ct. App. 1993) (explaining the question of whether an agency exceeded its authority in promulgating a rule is reviewed *de novo* by the reviewing court).

145. *See, e.g., Capoun Revocable Tr. v. Ansari*, 610 N.W.2d 129, 134–35 (Wis. Ct. App. 2000); *Wis. Builders Ass'n v. Dep't of Commerce*, 762 N.W.2d 845, 848–49 (Wis. Ct. App. 2008).

146. §§ 227.11(2)(a)1.–3.

rulemaking authority where the Legislature did not intend to confer such authority, it does not reveal any red flags that led to the implied-authority regime. The principle that agencies have no authority besides that granted to them by the Legislature stems from background principles of Wisconsin administrative law, so Chapter 227 itself is not responsible for the collapse of legislative intent.¹⁴⁷ Even if Chapter 227 offered no guidelines as to when a statute confers rulemaking authority, the reviewing court must still address whether such authority has indeed been granted by the statutes.¹⁴⁸ Chapter 227 certainly has the potential to be a useful tool that the Legislature can provide to make this determination easier for courts to make, but its failure to do so should not affect the threshold constitutional question already in place. Before Act 21, Chapter 227 merely failed to serve as a meaningful tool for helping courts discern legislative intent as expressed in the statutes.¹⁴⁹

The pre-Act 21 Chapter 227 was unhelpful to courts in evaluating regulatory authority because of what it omitted, rather than what it included. For example, if Chapter 227 had used the word “implicit” or otherwise gave some indication that the Legislature may confer authority implicitly, it may have properly bore the blame for agency rulemaking’s departure from legislative intent.¹⁵⁰ But 227 did not even use or otherwise hint at such language.¹⁵¹ Instead, Chapter 227 specifically limited the realm of valid rules to those that neither contradicted statutes nor exceeded the bounds of “correct interpretation.”¹⁵² However, because it did not provide any guidance on how courts may reach the correct interpretation, these limitations were little more than a redundancy of what the court already knew its role to be.¹⁵³

Even under the old 227, courts could have adequately searched for legislative delegations to agencies if they had been guided by the constitutional principle that agencies have only the power that the Legislature delegates to them, without making any assumptions standing in tension with that principle. This way, a court would

147. See discussion *supra* Part I.A.1.

148. Chapter 227 did not mention “implicit” authority but explained that the agency may promulgate rules “necessary to effectuate the purpose of the statute” and did not offer any meaningful limitation on that condition. § 227.11(2)(a).

149. Fitzgerald, *supra* note 121, at 3.

150. § 227.

151. This version of Chapter 227 did not feature the word “implicit” or “implied” but referred to rulemaking authority only as “expressly conferred.” § 227.11(2)(a).

152. *Id.*

153. See generally *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 681 N.W. 110 (Wis. 2004) (explaining Wisconsin courts’ goals and methods in statutory interpretation cases).

remember to address the essential requirement that a statutory provision actually grants power to an agency before it attempted to delineate the bounds of that power. Perhaps by articulating requirements that already inhered the constitutional principles of agency authority, Chapter 227 led courts astray by focusing on solely the minimum requirements of constitutional delegations of agency power.¹⁵⁴ By treating these inherent principles as affirmative limitations imposed by 227, the court made what should have been part of the floor for valid rulemaking authority instead a component of the ceiling, as a legislatively imposed limitation.¹⁵⁵ As a result, the agency's statutory scheme became the court's primary venue for searching for limitations on agency rulemaking authority.¹⁵⁶ In this way, the courts effectively discarded the notion that agency authority must be affirmatively created by the Legislature through statute as long as the minimal requirements in Chapter 227 were satisfied.¹⁵⁷

With Chapter 227 providing no guidance for the courts' search for legislative authorization, courts centered their analysis on the minimal limitations established by the statutes.¹⁵⁸ But these limitations provided no guidance for evaluating the majority of agency rules that do not go so far as to outright contradict a regulatory standard set out by a statute. As a result, courts turned their attention away from the dictates of Chapter 227 and instead tapped into their statutory interpretation techniques to answer questions of agency rulemaking authority.¹⁵⁹ In this endeavor, courts frequently reminded themselves of their constitutional obligation to legislative intent and created rules to fulfill that obligation, such as "strictly constru[ing]" an agency's enabling statute and "resolv[ing] any reasonable doubt pertaining to an agency's implied powers against the agency."¹⁶⁰ Even so, Wisconsin courts confirmed agency authority where the statute in question referred to the

154. See discussion *supra* Part I.A.1.

155. *Cf. Debeck v. Wis. Dep't of Nat. Res.*, 493 N.W.2d 234 (Wis. Ct. App. 1992) (explaining that agency rules conflicting with statutes are invalid).

156. See, e.g., *Wis. Builders Ass'n v. Dep't of Commerce*, 762 N.W.2d 845, 849 (Wis. Ct. App. 2008) (upholding rule imposing more restrictive requirement on sprinkler systems because there was "no basis in the language of . . . [the statute] for limiting the Department's general authority to promulgate rules that require fire protection").

157. *Capoun Revocable Tr. v. Ansari*, 610 N.W.2d 129, 135 (Wis. Ct. App. 2000) (rejecting APA limitation on rules contradicting statutes where party contest subject-matter authority).

158. *Cf. id.*

159. *Coyne v. Walker*, 879 N.W.2d 520, 564 (Wis. 2016) (Roggensack, C.J., dissenting).

160. *Wis. Builders Ass'n v. Dep't of Transp.*, 702 N.W.2d 433, 438 (Wis. Ct. App. 2005) (quoting *Wis. Citizens Concerned for Cranes & Doves*, 677 N.W.2d 612 (2004)); see also *Myers v. Wis. Dep't of Nat. Res.*, 922 N.W.2d 47, 53 (Wis. 2019).

subject matter of the rule as something within the agency’s jurisdiction but did not specifically contemplate an agency rule on the subject at issue.¹⁶¹ While the court, in this analysis, was nominally engaging in the threshold constitutional question—whether a statute constitutes legislative delegation for the agency action—its decision to conflate subject-matter authority with rulemaking authority rendered this important assessment practically meaningless.¹⁶²

The courts incorrectly framed the threshold question as whether the subject matter of the thing regulated was within the agency’s general grant of authority.¹⁶³ In other words, courts would ask whether the object of the rule in question is something that the statutes place within the agency’s realm of concern instead of inquiring whether the agency had authority to promulgate the rule in question in the first place.¹⁶⁴ Because challenges to agency authority tend to arise in contexts where the agency clearly has some general power, this threshold was easy to meet in most cases.

For example, the Court in *Capoun* found that the DNR had some subject-matter authority over after-the-fact permits because the statutes set out the fee the DNR must charge for such permits.¹⁶⁵ On this basis, it inferred that the DNR similarly had implicit authority to make a rule regarding after-the-fact permits.¹⁶⁶ But this analysis completely neglects whether the Legislature actually conferred to the DNR enough discretion over such permits so as to support the DNR’s power to promulgate such rules. It assumes that whenever the Legislature grants some authority over a subject to an agency, it necessarily confers authority on the agency to come up with regulatory standards governing that subject so long as the substantive requirements of that rule do not conflict with the express provisions of a statute.¹⁶⁷ As long as the Legislature adequately established the agency’s subject-matter jurisdiction, the court essentially allowed the agency free reign to regulate anything within that field that it wanted, so long as it did not contradict statutes.¹⁶⁸

Due to the lack of meaningful engagement with the threshold question, the reviewing court was usually quick to move onto the

161. See *Capoun Revocable Tr.*, 610 N.W.2d 129.

162. *Id.* at 133–35.

163. *Cf. id.* at 133–34.

164. *Id.*

165. *Id.* at 134–35.

166. *Id.*

167. *Id.* at 135 (explaining that once the statutes grant subject-matter authority, parties cannot claim that the rule promulgated conflicts with that same statute).

168. *Id.*

second inquiry: whether the rule conflicts with a statute.¹⁶⁹ This inquiry brought the court's attention to whether the statutes prohibit the agency from promulgating the rule in question.¹⁷⁰ Unless the statute expressed a regulatory standard different from that in the rule, rules passed this test easily.¹⁷¹

Because the court would usually find some subject-matter authority effortlessly, its controlling question effectively became whether the agency *exceeded* its statutory authority, rather than whether the agency possessed such authority in the first place.¹⁷² In other words, its purported search for agency statutory authority turned into a presumption of agency authority and a subsequent search for limits upon that authority.¹⁷³ The obvious problem with this approach is that the court was not treating statutes as the sole source of agency power, but as the opposite: a limit on some extra-statutory agency authority.¹⁷⁴ However, this completely inverts the analysis that courts ought to undergo in these cases because agencies do not possess any power whatsoever until a statute confers such power upon them. This approach was improper because it presumed agency rulemaking authority when the statutes expressed no intention to confer such authority.¹⁷⁵

Courts' failure to uphold the requirement of legislative authorization for agency action did not result from a blatant disregard for constitutional principles, but from a mistaken assumption about the Legislature's mode of delegation to agencies.¹⁷⁶ Specifically, courts assumed that a clear conferral of subject-matter authority necessarily carried with it a general rulemaking authority.¹⁷⁷ This way of granting rulemaking authority would not be inherently impermissible, as the Legislature is completely free to delegate a task to an agency implicitly. However, the Legislature retains the right to confer some subject-matter authority without necessarily granting the agency complete discretion to promulgate any rule relating to that subject along with

169. *Debeck v. Wis. Dep't of Nat. Res.*, 493 N.W.2d 234, 237 (Wis. Ct. App. 1992) (explaining that in a conflict between a statute and a rule, the statute controls).

170. *Capoun Revocable Tr.*, 610 N.W.2d at 135.

171. *Compare id.*, with *Oneida Cty. v. Converse*, 508 N.W.2d 416 (Wis. 1993).

172. *Capoun Revocable Tr.*, 610 N.W.2d at 135.

173. *See, e.g., id.* at 134 (explaining that the court looks for limits in agency's authorizing statute to determine whether it had authority to promulgate the rule in question).

174. *See id.* at 134–35.

175. *See id.* at 134.

176. *Id.*

177. *Id.*

it.¹⁷⁸ Without a legislative expression—through either the authorizing statute, Chapter 227, or somewhere else in the statutes—that general grants of authority over a subject matter carry with them a general rulemaking authority over the same, courts had no reason to make such an assumption.¹⁷⁹ In so doing, courts effectively conferred a power to the agency that the Legislature has not so conferred. The Legislature could choose to confer authority in this way as long as its delegation is sufficiently limited to the purpose of carrying out the policies already established by the Legislature.¹⁸⁰ When these requirements are met, nothing prevents the Legislature from fulfilling this obligation through a statute “necessarily implying” rulemaking authority through the statutes.¹⁸¹ But because the Legislature gave no indication that it intended to do so, the courts erred in presuming a substantive conferral of rulemaking authority in general statutes merely establishing an agency’s subject-matter authority.¹⁸²

The court’s failure is also not necessarily attributable to its lack of concern or active disregard of legislative intent.¹⁸³ Instead, the court frequently showed its dedication to the bedrock principles of administrative law in its oft-repeated recitation of constitutional principles and even in the analytical framework it employed.¹⁸⁴ Despite this apparent concern for constitutional principles, however, the judge-made rules crafted in pursuit thereof were insufficiently tethered to legislative direction and thereby failed to adequately implement those principles.¹⁸⁵ This problem arises from the court’s willingness to find agency regulatory authority where the statutes only “fairly implied”

178. See, e.g., WIS. STAT. § 30.28(2m)(b) (2017–18) (discussing the statute cited in *Capoun* as establishing DNR’s subject-matter authority over after-the-fact permits, although the statute merely required DNR to charge a specific fee for such applications).

179. See generally *Capoun Revocable Tr*, 610 N.W.2d 129; WIS. STAT. § 30.28(2m)(b).

180. *State v. Lambert*, 229 N.W.2d 622, 624 (Wis. 1975).

181. For a discussion on the argument that legislatures may implicitly confer lesser powers to agencies through expressly conferring greater regulatory powers, see Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2034–42 (2009).

182. See *id.*

183. *Id.* at 2041.

184. See, e.g., *Wis. Citizens Concerned for Cranes & Doves*, 677 N.W.2d 612, 620 (Wis. 2004) (stating that “[i]t is axiomatic that because the Legislature creates administrative agencies as part of the executive branch, such agencies have only those powers” that the Legislature has delegated to them).

185. *Id.*

such authority because it turned the court into the granter of regulatory authority when that role belonged exclusively to the Legislature.¹⁸⁶

The implicit authority approach also raises questions as to whether the court violated its own rule to resolve doubts against agency authority because it appeared to employ a presumption in favor of agency rulemaking authority, triggered whenever the object of the rule was within the agency's subject-matter authority.¹⁸⁷ While this approach may seem logical enough, the clearest indicator that it fails is that it paints all legislative delegations with a broad brush. Legislative delegations require a highly nuanced approach because, with each delegation, the Legislature can delegate precisely as much or as little agency authority as it desires. There is no general rule that whenever the Legislature charges an agency with some duty, that duty necessarily carries a rulemaking power—or any other powers, for that matter—along with it.¹⁸⁸ It is further evident that such a straightforward and blanket approach cannot provide meaningful answers to all legislative delegations because they span such a wide range of subject matters. It is hard to imagine that this—or any—generic framework could determine the rules that are justified under a subject-matter authority over state pollution discharge system just as meaningfully as it would determine the rules justified under a subject-matter authority over state correctional institutions.¹⁸⁹ Specifically, the court was not necessarily incorrect to say that statutes may sometimes imply agency rulemaking authority—if statutes could imply nothing to agencies, the Legislature would likely be doing the agency's work itself—but the way it framed the question of what a statute implied led it drastically off constitutional course.¹⁹⁰

B. How Act 21 Attempts to Propose a Solution

Pre-Act 21 interpretations of agency rulemaking authority raised constitutional and practical concerns, each of which played a role in establishing the need for regulatory reform like Act 21.¹⁹¹ Hallmarks of the pre-Act 21 world include agency attempts to push the limits of

186. See *Maple Leaf Farms, Inc. v. State Dep't of Nat. Res.*, 633 N.W.2d 720, 725 (Wis. Ct. App. 2001) (quoting *Oneida Cty. v. Converse*, 508 N.W.2d 416, 418 (Wis. 1993)).

187. See *supra* Part I.A.3.

188. But see *Coyne v. Walker*, 879 N.W.2d 520, 532–33 (Wis. 2016) (holding that superintendent had to have authority to promulgate rules).

189. Compare WIS. STAT. § 281 (DNR's authorizing statute), with WIS. STAT. § 301.02 (Dep't of Corrections' authorizing statute).

190. See *Wis. Citizens Concerned for Cranes & Doves*, 677 N.W.2d at 620 (stating that a “statute need not supply every detail of the rule”).

191. See *supra* Part I.B.

rulemaking authority¹⁹² and the ultimate disregard of the Legislature’s intentions as a result of these realities.¹⁹³ This composite picture of the pre-Act 21 world provides a useful reference for evaluating the extent to which Act 21 sufficiently targets those problems.¹⁹⁴ This context is further helpful because Act 21 will not operate in a vacuum; it is a dynamic law that alters the balance of Wisconsin’s comprehensive Administrative Procedure Act and may play a role in forming the scope of every agency’s discretion.¹⁹⁵ Therefore, Act 21’s historical and political context can help reveal how it will be incorporated into the Wisconsin regulatory landscape and whether it ultimately accomplishes what it set out to achieve.

Ultimately, the Legislature passed Act 21 to unequivocally express that any agency authority must be traced to an explicit, enabling grant of such authority—implied or general powers would no longer be sufficient to confer rulemaking authority.¹⁹⁶ Its consequences for general or descriptive statutes are straightforward—preambles, statements of legislative intent, and the like, will not confer rulemaking authority.¹⁹⁷ However, “explicit” does not necessarily mean that every valid rule must have been specifically contemplated by the Legislature or that every grant of rulemaking authority must begin with some magic words. This section explores the kind of “explicit” authority Act 21 requires going forward and why it may not be quite as detrimental to agency rulemaking authority as some of its biggest proponents may have expected.

Act 21 proposed a solution to excessive regulation and to agency action unmoored from authorizing statutes by clearly articulating a principle already rooted in administrative law: that agencies have no

192. Specifically, the Wisconsin Supreme Court became a national spectacle for the significant amount of discretion it approved for the DNR by broadly construing grants of administrative authority. *See id.*; *see also* Melissa Kwaterski Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees, and Political Power in Wisconsin*, 27 *ECOLOGY L. Q.* 135, 140 (2000).

193. *See generally* Transcript, Jan. 2011 Special Session Assembly Floor Debate on AB 8 (Feb. 2, 2011).

194. It is worth noting that this Comment does not assume the legislative intent behind Act 21 as revealed by extrinsic sources will—or should—shape how the Act is applied by courts. *Cf. State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 681 N.W.2d 110, 123 (Wis. 2004). For an excellent discussion of this seminal case for Wisconsin courts’ approach to statutory interpretation and its effect on statutory interpretation in practice, *see* Daniel R. Suhr, *Interpreting Wisconsin Statutes*, 100 *MARQ. L. REV.* 969 (2017).

195. *See, e.g.*, Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 *ADMIN. L. REV.* 429, 450 (1999) (explaining that an agency’s ability to make rules “decrease[s] the need for monitoring behavior” and leaves “little discretion” to the agency).

196. Tiffany, *supra* note 127.

197. WIS. STAT. § 227.11(2)(a) (2009–10).

authority beyond that which the Legislature grants.¹⁹⁸ The pre-Act 21 world demonstrated that when the Legislature fails to give these constitutional principles any enforcement mechanism, courts may quickly cast them to the wayside.¹⁹⁹ By imposing specific explanations as to where agencies have rulemaking authority in Act 21, the Legislature simply spelled out the ways by which it intentionally confers such authority. Because the Legislature is the exclusive granter of agency power, these provisions carry more significance than artificial limitations on agency power enacted through legislation; instead, they translate the very language the Legislature uses when it makes delegations of rulemaking authority. Therefore, these requirements become baked into any rulemaking analysis and any organic statute because they simply explain the Legislature’s means of conveying rulemaking authority.²⁰⁰

1. NO MORE IMPLICIT AUTHORITY

Despite the drafters’ clear aims to remove “implicit” from the agency rulemaking authority vocabulary, the precise reach of Act 21’s text in application remains subject to considerable debate.²⁰¹ After all, the Legislature enacts the statute itself—not its intent for that statute—into law.²⁰² The most basic debate about the requirement revolves around what “explicit” really means.²⁰³ At a deeper level, though, parties seek the answer to this question in order to uncover just one aspect of what everyone is really wondering: Act 21’s practical effect on the current Wisconsin Administrative Code, agencies’ ability to act, and the regulated community.²⁰⁴

198. Wis. Exec. Order No. 1, Gov. Scott Walker, Relating to a Special Session of the Legislature (Jan. 3, 2011) (citing “burdensome regulation” as a reason for calling the Special Session of the Legislature that resulted in Act 21); *Wis. Builders Ass’n v. Wis. Dep’t of Transp.*, 702 N.W.2d 433, 438 (Wis. Ct. App. 2005).

199. See *supra* Part I.A.

200. For a more thorough discussion of the various procedural requirements agencies must comply with in the rulemaking process at Act 21’s enactment and beyond, see Jodi E. Jensen, *Regulatory Reform: Moving Policymaking from State Agencies to the Legislature*, 2018 WIS. LAW. 24, 25–26 (2018).

201. Compare WIS. STAT. § 227.11(2) (2009–10), with WIS. STAT. §227.11(2) (2017–18).

202. *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 681 N.W.2d 110, 124 (Wis. 2004).

203. See Initial Brief for Co-Appellant at 14, *Clean Wis., Inc. v. Wis. Dep’t of Nat. Res.*, No. 16-CV-2817 (Wis. Ct. App. 2018).

204. See, e.g., Opening Brief for Respondent-Appellant at 2, *Clean Wis. v. Wis. Dep’t of Nat. Res.*, Nos. 16-AP-1688 & 16-AP-2502 (Wis. Ct. of App., May 16, 2018); Brief for Petitioner-Respondents, *Clean Wis. v. Dep’t of Nat. Res.*, Nos. 16-AP-1688 & 16-AP-2502 (Wis. Ct. App., June 25, 2018).

One side of the debate advocates that Act 21 reflects the Legislature’s “deliberate decision to shift policy-making decisions away from state agencies and [back] to the Legislature,” notwithstanding whatever “far-reaching consequences” accompany this shift.²⁰⁵ This side includes the Walker Administration and the Wisconsin Department of Justice while under the leadership of Brad Schimel.²⁰⁶ Drawing from a literal interpretation of the word “explicit,” this group argues that “Act 21 discarded the court-devised presumption against implied delegations and replaced it with a flat prohibition.”²⁰⁷ In other words, after Act 21, any statute that does not confer a rulemaking power “expressly and specifically,” necessarily fails to confer the power at all, “even if the power is ‘naturally or necessarily involved in,’ or a legal consequence of a general grant of authority.”²⁰⁸ The argument continues, then, that the three kinds of statutes that necessarily fail to confer explicit rulemaking authority—identified in Act 21’s addition of § 227.11(2)(a)1.–3.—may no longer be used “as a wildcard to assert regulatory authority when explicit authority does not exist.”²⁰⁹ Overall, members of this camp emphasize that “explicit” necessarily requires a specific, direct, and unequivocal invitation for an agency to promulgate rules.²¹⁰

On the other end of the debate are those who conclude that Act 21 leaves the foundations of rulemaking authority in place and simply imposes new limits on agency rulemaking authority going forward.²¹¹ This group argues that Act 21 does not “go so far” as to “modif[y] decades of precedent holding that agencies have implied authority.”²¹² They also argue that “[n]othing in Act 21 rescinds a legislative grant of general authority” or otherwise “implicitly revokes the explicit and broad authority” that agencies held prior to Act 21.²¹³

205. Opening Brief for Respondent-Appellant at 2, *Clean Wis.*, No. 16-AP-1688 & 16-AP-2502 (citing Wis. Op. Atty. Gen., OAG-04-17 (Dec. 8, 2017)).

206. See Wis. Op. Atty. Gen., OAG-04-17 (Dec. 8, 2017); Walker, *supra* note 118.

207. Opening Brief for Respondent-Appellant at 23, *Clean Wis.*, No. 16-AP-1688 & 16-AP-2502.

208. *Id.* at 24 (quoting 7 OXFORD ENGLISH DICTIONARY 724–25 (2d ed. 1989)).

209. Nonparty Brief at 11, *Tetra Tech EC, Inc. v. Wis. Dep’t of Revenue*, No. 2015-AP-2019 (July 11, 2017).

210. See, e.g., Opening Brief for Respondent-Appellant, *Clean Wis.*, Nos. 16-AP-1688 & 16-AP-2502.

211. See generally Brief for the Petitioner-Respondents, *Clean Wis. v. Dep’t of Nat. Res.*, Nos. 16-AP-1688 & 16-AP-2502 (Wis. Ct. App., June 25, 2018).

212. Brief for Petitioner-Respondents at 27, *Clean Wis.*, Nos. 16-AP-1688 & 16-AP-2502.

213. *Id.* at 28–29.

Another argument that Act 21's changes will have little practical significance is that § 227.11(2)(a) did not change the nature of rulemaking authority, but that it simply carved out specific, discrete exceptions to rulemaking conferrals.²¹⁴ The general default principle for rulemaking authority remains unaltered, so perhaps the provisions laid out in the list that follows²¹⁵—the types of provisions that no longer may confer rulemaking authority—simply carve out isolated exceptions to that general rule. This would mean that Act 21's § 227.11(2)(a) lacks any significance for the majority of rulemaking analyses, which take place outside those exceptions.²¹⁶ From a policy perspective, this group argues that the other side's conception of Act 21 as “implicitly revok[ing] such agency rules, or render[ing] entire statutory provisions inert,” would leave significant “uncertainty for agencies, the regulated community, and interested parties.”²¹⁷

Both of these perspectives, however, miss the mark because they rest on the assumption that Act 21 is simply an additional statutory command to be considered in the agency rulemaking analysis. Although Act 21 is undoubtedly a statutory pronouncement, the explicit authority requirement is embedded in the constitutional principles for legislative delegations and therefore deserves the analysis accorded to constitutional, rather than mere statutory, dictates. The view proclaiming a powerful Act 21, capable of reaching into the very heart of agency rulemaking authority, understands the explicit authority requirement as the “exact limit on agency's general authority” that courts “found lacking” in pre-Act 21 cases.²¹⁸ Similarly, those arguing that Act 21 has no bearing on agency authority already established in previous court determinations suggest that the proper question is whether Act 21's provisions are “so radical as to limit” previously existing and legitimate agency authority.²¹⁹

However, Act 21's explicit authority requirement does not impose any new mandates with which agencies or courts must comply. Instead, Act 21's explicit authority requirement resembles a guideline to help courts, agencies, and the regulated community, understand when the Legislature uses its plenary legislative power to grant rulemaking authority upon an agency. Act 21 does not, on its own, grant or

214. See generally Brief for Petitioner-Respondents, *Clean Wis.*, Nos. 16-AP-1688 & 16-AP-2502.

215. WIS. STAT. §§ 227.11(2)(a)1.-3. (2017-18).

216. *Id.*; see generally Brief for Petitioner-Respondents, *Clean Wis.*, Nos. 16-AP-1688 & 16-AP-2502.

217. Brief for Petitioner-Respondents at 29-30, *Clean Wis.*, Nos. 16-AP-1688 & 16-AP-2502.

218. Wis. Op. Att'y Gen., *supra* note 206, at 8.

219. *Clean Wis v. Wis. Dep't of Nat. Res.*, at 10, Nos. 12-CV-2817-24 (Oct. 11, 2017).

withhold any regulatory authority; it simply is the Legislature explaining when it has made such a grant.²²⁰ The Legislature always retains the ability to create or “wipe out” an agency as well as to empower it or rescind its authority, but the Legislature did not directly exercise those abilities in enacting Act 21.²²¹ Rather, the Legislature clarified when other statutes fairly express legislative intent to confer rulemaking authority: when they do so explicitly.

As a guideline for discerning when rulemaking authority is conferred in the statutes, Act 21’s requirement does not change the nature of rulemaking authority itself or the constitutional relationship between agencies and the Legislature or the executive. The Act reinforces the bedrock principle that agencies have only that authority granted to them by the Legislature by targeting the statutory confusion that previously led courts to find authority beyond what the Legislature had conferred.²²² Regardless of the courts’, agencies’ or anyone else’s prior understanding of what types of statutes confer rulemaking authority, the Legislature always has been the exclusive grantor of agency authority.²²³ Therefore, the fact that other parties misunderstood exactly how much authority an agency had does not affect the threshold question as to whether the Legislature actually conferred upon the agency that authority.²²⁴ Act 21 does not reach back into those previous court decisions and withdraw from the agency any power it legally had; it just explains to courts and agencies that prior determinations that the agency had such authority is incorrect.

Further, the explicit authority requirement cannot artificially limit any authority the agency would otherwise rightfully enjoy because it constitutes one of the very terms by which the Legislature grants such authority. Rather, this requirement goes to the very heart of the grant itself and controls on the same level as the “empowering” terms found in agencies statutes. Because the Legislature’s exclusive lawmaking authority to delegate goes hand-in-hand with its duty to sufficiently limit and define those delegations, pronouncements like Act 21 permeate every grant of agency authority—no matter how long-established that agency or its authority may be. When the Legislature expresses an across-the-board explanation of agency delegations through legislation like Act 21, it is simply clarifying what those grants of authority actually mean. Instead of changing the extent to which

220. See WIS. STAT. §§ 227.11(2)(a)1.–3. (2017–18).

221. Cf. *State ex rel. Wis. Inspection Bureau v. Whitman*, 220 N.W. 929, 942 (Wis. 1928).

222. E.g., *Wis. Builders Ass’n v. Wis. Dep’t of Transps.*, 702 N.W.2d 433, 438 (Wis. Ct. App. 2005).

223. *Id.*

224. Zabrowski, *supra* note 72, at 700.

authority is conferred, it simply explains for other parties the way to interpret those conferrals.

Although the requirement is more of a guideline for ascertaining legislative intent than it is a legislative directive requiring agency conformance, it still requires courts to take a different analytical path when evaluating rulemaking authority. The threshold constitutional question remains the same: does the statute authorize the agency to promulgate the rule in question?²²⁵ However, Act 21 forecloses the court's old approach as an adequate means to answer this question. Courts previously answered this question with ease by looking to prefatory or otherwise-descriptive statutes containing broad references to certain subject matters over which the agency had authority.²²⁶ As long as the subject matter of the regulation—such as, for example, sprinkler systems in public buildings—matched the subject matter described somewhere in the agency's statutes, the court found the rule sufficiently authorized by the statutes.²²⁷ Act 21 directly responded to this problem by rejecting the court's notion that general or descriptive statutes could ever confer rulemaking authority. Under this direction, the fact that an agency is the exclusive supervisor of some subject matter does not subsume within it the authority to promulgate any rule it wishes over that subject matter. In this way, Act 21 makes clear for the courts that the Legislature does not forfeit any part of its legislative authority when it decides to place specific subjects within an agency's ambit of authority or it uses the statutes to describe its general directives and vision for the agency. This safeguards the Legislature's reservation of all authority not explicitly granted by explaining that the mere existence of agency authority over a subject does not necessarily bring with it an inherent rulemaking power.²²⁸

Act 21's specific requirements appear to intentionally foreclose the courts' prior practice of approving implied agency authority.²²⁹ It directly rejected the courts' practice of finding rulemaking authority in specific statutes by articulating that 1) statutes not "explicitly permitt[ing] or explicitly authoriz[ing]" a regulatory standard do not authorize an agency to promulgate its own standard²³⁰ and 2) neither

225. See *supra* note 64 and accompanying text.

226. See generally *Wis. Builders Ass'n v. Wis. Dep't of Commerce*, 762 N.W.2d 845 (Wis. Ct. App. 2008).

227. See *id.*

228. *Id.*

229. WIS. STAT. §§ 227.11(2)(a) 1.–3. (2017–18) addresses three types of statutes that do not confer rulemaking authority upon an agency beyond that explicitly conferred by the Legislature; WIS. STAT. § 227.10(2m) prohibits agencies from enforcing regulations that are not "explicitly required or explicitly permitted." See also Ronald Sklansky, *Changing the Rules on Rulemaking*, 84 WIS. LAW. 10, 15 (2011).

230. § 227.10(2m).

statutory preambles nor statutes describing agency’s general duties will confer rulemaking authority upon an agency.²³¹

While Act 21 makes these terms of agency rulemaking authority clear, its application to actual statutes remains complicated. One possible effect is that this change “discard[s] the court-devised presumption against implied delegations” in exchange for a “flat prohibition.”²³² Under this theory, the only statutes that clearly convey rulemaking authority must expressly and directly state that a particular agency has authority to promulgate rules on a certain area, by using “magic words” such as “agency ‘x’ has rulemaking authority to enforce [subject matter, y].”²³³ While such an explicit grant may have things subsumed within it, the way in which rulemaking authority is conferred must be unequivocal and precise.²³⁴ On the other hand, this “explicit” requirement may have left the court’s previous determinations on rulemaking authority in place while simply carving out exceptions precluding rulemaking authority going forward.²³⁵ People in this camp are inclined to argue that Act 21 does not apply retroactively to existing rules and statutes, especially ones the court has already adjudicated.²³⁶ Somewhere between these highly opposed views, however, it could also be the case that all statutes are indeed required to explicitly grant authority to agencies, but that they may meet this requirement without containing these “magic words” that make rulemaking authority unequivocal.²³⁷

Interpreting statutes begins with the plain meaning of the statute’s words and Act 21 is no exception.²³⁸ As DNR informed the Wisconsin Court of Appeals, “explicit” is defined as “[d]istinctly expressing all that is meant; leaving nothing merely implied or suggested; express.”²³⁹ This definition highlights the basic fact that the Legislature chose to use the antonym of the word that largely controlled the court’s prior

231. § 227.11(2)(a).

232. Opening Brief for Respondent-Appellant, at 23, *Clean Wis.*, Nos. 16-AP-1688 & 16-AP-2502 (Wis. Ct. App. May 16, 2018).

233. “Magic words” phrase used to explain this approach to Act 21 borrowed from Daniel Suhr. Interview with Daniel Suhr, Director of Policy for Gov. Scott Walker (Dec. 3, 2018).

234. *See generally* Wis. Exec. Order No. 50 at II.1.c, Governor Scott Walker, Relating to Guidelines for the Promulgation of Administrative Rules (Jan. 3, 2011).

235. Brief for Petitioner-Respondents, at 26, *Clean Wisconsin v. Wis. Dep’t of Nat. Res.*, Nos. 16-AP-1688 & 16-AP-2502 (Wis. Ct. App., June 25, 2018).

236. *Id.*

237. Interview with Daniel Suhr, *supra* note 233.

238. *State ex rel. Kalal v. Cir. Ct. of Dane Cty.*, 681 N.W.2d 110, 124 (Wis. 2004).

239. Reply Brief for Respondent, at 1, *Clean Wisconsin v. Wis. Dep’t of Nat. Res.*, Nos. 16-AP-1688 & 16-AP-2502 (Wis. Ct. App., July 10, 2018) (quoting 5 OXFORD ENGLISH DICTIONARY 572 (2d ed. 1989)).

jurisprudence on rulemaking authority: “implicit.”²⁴⁰ Including the word, “explicit,” then, foreclosed that entire side of the court’s previous disjunctive standard from the realm of possible agency rulemaking authority. In other words, Act 21 “directe[ed] courts to change course on the required levels of specificity for legislative delegation” by rejecting “well-worn principles of express and necessarily implied authority” as “insufficient to constrain the expanding administrative state.”²⁴¹

2. BUT—EXPLICIT AUTHORITY FOUND IN AN UNEXPECTED PLACE?

Although Act 21 foreclosed the possibility that agency rulemaking authority may be implicitly granted, it still leaves open an avenue that could be responsible for conveying large swaths of rulemaking authority to agencies. Act 21 left in place Chapter 227’s main general grant allowing an agency to promulgate rules interpreting statutes it enforces or administers when “the agency considers it necessary to effectuate the purpose of the statute.”²⁴² It is likely surprising to many that this provision remains in the post-Act 21 Chapter 227, although the provision is now followed by three separate conditions where explicit authority is *not* conferred.²⁴³ The fact that Act 21 did not alter Chapter 227’s general grant of authority, however, suggests that Act 21 does not limit potential grants of rulemaking authority to those statutes that expressly and unequivocally invite an agency to make a rule, by using “magic words” such as “may regulate” or “may promulgate rules to . . .”²⁴⁴ If a statute must now use these “magic words” before conferring any rulemaking authority, the current Chapter 227’s grant of authority for an agency to promulgate rules it “considers . . . necessary” would be moot.²⁴⁵

Executive Order 50, issued by the Walker Administration, supports this reading of Act 21’s requirements.²⁴⁶ This Order alerted

240. Initial Brief for Co-Appellant at 16, *Clean Wis. v. Wis. Dep’t of Nat. Res.*, Nos. 16-AP-1688 & 16-AP-2502 (Wis. Ct. App., May 3, 2018) (citing Transcript of Jan. 2011 Special Session Assembly Floor Debate on AB 8 (May 17, 2011)).

241. *Id.* at 1.

242. WIS. STAT. § 227.11(1) (2009–10).

243. *Id.*

244. Interview with Daniel Suhr, *supra* note 233.

245. WIS. STAT. §§ 227.11(2)(a) 1.–3. (2017–18); *see also State ex rel. Kalal v. Cir. Ct. of Dane Cty.*, 681 N.W.2d 110, 124 (Wis. 2004) (“[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole in relation to the language of surrounding . . . statutes.”).

246. Wis. Exec. Order No. 1, Governor Scott Walker, Relating to a Special Session of the Legislature (Jan. 3, 2011) (citing “burdensome regulation” as a reason for calling the Special Session of the Legislature that resulted in Act 21) (on file with Wisconsin Legislative Reference Bureau).

courts and agencies that the administration would be taking Act 21’s requirements seriously and accordingly clarified the status of rulemaking authority in the wake of Act 21.²⁴⁷ Specifically, the Order explained that, “in the absence of an explicit grant of rulemaking authority, an agency may promulgate a rule if (i.) [t]he agency considers it necessary to effectuate the purpose of the statute; and (ii.) [t]he agency has a general grant of rulemaking authority to administer or enforce the [statute].”²⁴⁸ According to this formulation, it is clear that an explicit grant of rulemaking authority within the authorizing statute is not a necessary condition to any rulemaking authority whatsoever under Act 21. Rather, rules falling under this category appear to be explicitly authorized by Wis. Stat. § 227.11(2)(a) itself. Therefore, agencies retain the power they had before Act 21 to promulgate rules “necessary to effectuate the purposes of the statute,” as long as that power did not come from a statutory provision identified as not conferring rulemaking authority in § 227.11(2)(a).²⁴⁹ Although this may not be the “explicit” standard that many were hoping for in the wake of Act 21, this provision would be surplusage if an agency’s individual authorizing statutes were the only kind capable of granting rulemaking authority.

This grant of authority, found in Chapter 227 itself, will likely assuage concerns held by the pro-agency-authority camp because it seems to ensure at least a minimal amount of agency rulemaking authority going forward. Under this allowance, agencies may not be able to defend rules enforcing a specific regulatory standard not set out by the statutes, but they do have a more malleable framework for rulemaking authority than would be possible under a strict interpretation of Act 21’s explicit authority requirement. Therefore, this provision may hold the key to ensuring agency authority is not cabined to such a degree that agencies cannot perform their essential executive function. It protects agencies’ ability to promulgate any rule necessary to carry out the statutes they administer. While it is unclear whether this provision alone will be sufficient to save the parts of the current Wisconsin Administrative Code that may otherwise be in danger, it at least affords agencies some opportunity to defend their rulemaking authority in the absence of an explicit grant of rulemaking authority within the agency’s enabling statute itself.

247. Katie Ignatowski, Chief Legal Counsel for Governor Walker, Address at the Wisconsin Manufacturers & Commerce Policy Day (Aug. 16, 2018) (notes on file with author).

248. Exec. Order No. 50 at II.C., Governor Scott Walker, Relating to Guidelines for the Promulgation of Administrative Rules (Jan. 3, 2011).

249. WIS. STAT. § 227.11(2)(a) (2017–18).

CONCLUSION

Through its two key additions to Chapter 227, Act 21 brings legislative intent front and center in the discussion of agency rulemaking authority in Wisconsin. It demands a new analytical framework for courts in analyzing agency rulemaking authority going forward by pointedly rejecting the courts' presumption that statutes may imply rulemaking authority through a grant of subject-matter jurisdiction. While the standard set by the Act's "explicit authority" may not be quite as demanding as many expected—or perhaps, as the drafters consciously intended—the requirement certainly differs meaningfully from the previous standard used by reviewing courts. The Act reroutes courts in their assessments of rulemaking authority going forward but manages to avoid seriously threatening any foundational premises upon which the Wisconsin administrative scheme rests. Although Wisconsin courts have yet to offer a precedential opinion determining the interpretation and scope of Act 21's explicit authority requirement, it is nevertheless evident that the Act reminds the court where the Constitution demands the rulemaking authority standard should have been the whole time.