



# State Democracy Research Initiative

UNIVERSITY OF WISCONSIN LAW SCHOOL

## Explainer: Wisconsin Supreme Court Set to Consider Fate of “Mini Legislature”

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In recent decades, the Wisconsin Legislature has increasingly empowered legislative committees, rather than its full membership, to wield control over state agencies and programs. This practice, which makes the state a national outlier, has [drawn scrutiny](#) recently from the Wisconsin Supreme Court.

The court will soon consider another challenge to a legislative committee’s power in [Wisconsin State Legislature v. Wisconsin Department of Public Instruction](#). Oral argument is set for April 3. This case raises slightly different legal issues than the others the court has recently considered, but it likewise has significant implications for the separation of powers under the Wisconsin constitution, as well as concrete consequences for education funding.

This case revolves around control of \$50 million allocated for a newly created childhood literacy program in Wisconsin’s schools. Instead of directly appropriating the funds to the agency responsible for the program, as is typical, the legislature directed them to a little-known “supplemental appropriation” account controlled by its Joint Committee on Finance (JCF) that is seemingly meant for emergencies. This arrangement gives JCF significant influence over the executive branch’s efforts to implement the literacy program.

Following disagreements over how the \$50 million should be spent, Governor Evers vetoed part of another bill related to the literacy program. In response, JCF then [largely refused](#) to release funds to the Department of Public Instruction (DPI), which is responsible for the literacy program, providing DPI [with just \\$327,400](#) of the \$50 million so far. The legislature then [sued the governor](#) over the veto, while the [governor and DPI countersued](#), seeking release of the funds. A [trial court ruled](#) against both the legislature’s challenge to the veto and DPI’s claims for the funds, essentially leaving things unchanged. Both parties appealed to the Wisconsin Court of Appeals, but before that court could issue a decision, the Wisconsin Supreme Court [agreed to take the appeal directly](#).

The court’s ruling in *Legislature v. DPI* could have implications well beyond determining control of the \$50 million for the literacy program. It may settle the constitutionality of the legislature’s increasing practice of funneling funds for state agencies and programs into the JCF’s

supplemental appropriation account, including more than \$230 million in the last budget. This practice has given a small group of legislators growing power over how the executive branch implements programs and spends funds, including whether money is released at all. [DPI argues](#) that this effectively creates a “mini legislature,” operating “outside the normal channels of the budget making process” that typically requires the full legislature’s participation—an argument that the trial court judge [indicated he was](#) “sympathetic” to. According to DPI, this violates the separation of powers by allowing the legislative branch to exercise the executive branch’s core responsibility to spend public funds to implement state programs. The legislature argues, in contrast, that its committees can share in the responsibility of spending public funds.

As alluded to earlier, this case is part of a recent string of court conflicts involving legislative committees. Last summer, the [court struck down](#) JCF’s authority to block the Department of Natural Resources from spending already-appropriated funds for environmental conservation as a violation of the state constitution’s separation of powers. The consequences of that decision are still unfolding; the same committee [has more than a hundred](#) similarly structured approval or “legislative veto” powers over executive branch actions, and the court also recently heard [oral arguments in a challenge](#) to another legislative committee’s power to veto administrative rules. Whatever the outcome, this is proving to be a significant year for the court’s separation of powers jurisprudence, and for attention to the state’s unusual legislative committee powers.

This Explainer examines the latest legal battle between Wisconsin’s legislative and executive branches, focusing on the legislature’s unusual approach to funding the childhood literacy program, the legal challenge it faces, and how it compares to other states—where legislative committees typically lack discretionary control over public funds. It also briefly discusses the legislature’s challenge to the governor’s veto power.

## **Background: The Joint Committee on Finance’s Supplemental Appropriation Account**

At the heart of the dispute is the Wisconsin Legislature’s increasing use of JCF’s supplemental appropriation account to pay for state programs. A brief overview of the supplemental appropriation account—and its origins as a reserve fund for emergencies—provides background for the case.

Statutes establishing mechanisms for emergency government funding in Wisconsin date back to at least the early twentieth century. As early as 1915, the executive branch had the power to access funds to respond to funding shortfalls. The governor, secretary of state, and state treasurer could collectively approve “emergency appropriations to meet operating expenses of any state institution, department, board, commission, or other body for which sufficient money

has not been appropriated to properly carry on the ordinary regular work.”<sup>1</sup> To make an emergency appropriation, the three officials had to certify that “such moneys are needed to carry on the ordinary regular work of the [executive branch entity] for which the moneys are to be used and that no other appropriation is available for that purpose.”<sup>2</sup> The legislative branch was not directly involved.

In 1925, the scope of the “emergency appropriation” power was narrowed to “meet unforeseen emergencies and contingencies as a result of damage or disaster to works, buildings, or other property owned by the state, or as a result of epidemic of disease menacing the life and health of the people, or as a result of the lack of sufficient appropriations for state institutions with which to supply the necessary food, clothing, and necessary medical care.”<sup>3</sup>

In 1931, the emergency appropriation authority was transferred to a newly created “Emergency Board,” a hybrid executive-legislative entity composed of the governor, who served as chair, and the chairs of the senate finance and assembly committees. The scope of the authority was also modified to authorize the Board, as it “may deem advisable,” to “supplement appropriations which shall prove insufficient because of unforeseen emergencies, or to supplement appropriations which shall prove insufficient to accomplish the purposes for which made.”<sup>4</sup>

In 1949, the statute governing the Emergency Board’s power was amended to require the Board to hold a public hearing and make three specific factual findings in writing before supplementing an appropriation: (1) an emergency existed; (2) no other funds were available; and (3) the purposes for which a supplemental appropriation is requested had been authorized or directed the requested by the legislature.<sup>5</sup>

In 1975, the supplemental appropriation power was transferred to JCF, where it remains today.<sup>6</sup> Similar to the Emergency Board’s prior power, state law [currently authorizes](#) JCF to “supplement ... the appropriations of any department, board, commission or agency, which is insufficient because of unforeseen emergencies or insufficient to accomplish the purpose for which made.”<sup>7</sup> Further, JCF can release the funds only if it finds that (1) an emergency exists, (2) no other funds

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<sup>1</sup> 1915 Wis. Laws. ch. 609, § 24a (creating a new § 172a); see *also* 1917 Wis. Laws. ch. 14, § 117 (renumbering § 172a to § 20.74).

<sup>2</sup> 1915 Wis. Laws. ch. 609, § 24a.

<sup>3</sup> 1925 Wis. Laws ch. 443.

<sup>4</sup> 1931 Wis. Laws ch. 67, §§ 142-143 (renumbering tit. 3, § 20.74 to tit. 3, § 14.72); see *also* 1933 Wis. Laws ch. 406, § 1 (amending tit. 3, § 14.72 to clarify when the legislative members of the emergency board can collect a per diem).

<sup>5</sup> 1949 Wis. Act ch. 181, § 2.

<sup>6</sup> 1975 Wis. Act. 39, § 8 (amending tit. 3, § 13.101).

<sup>7</sup> Wis. Stat. § 13.101(3)(a).

are available, and (3) the legislature has authorized or directed the expenditure. The findings are no longer required to be made in writing, however.

Since 1975, the statutory framework has largely remained the same<sup>8</sup>—but the legislature’s use of the account has grown. Rather than treating the account as an emergency reserve, the legislature has used it as a mechanism for funding planned state programs and agencies. According to the brief filed by the Wisconsin Attorney General’s office, which represents DPI in the lawsuit, [this shift began](#) in 1989 with a modest allocation of \$3.6 million for anticipated expenses and grew to about \$100 million by the late 1990s. The figure peaked in the 2023–2025 budget with more than \$230 million [allocated to the account](#) for specific programs and agencies, including the disputed \$50 million for the childhood literacy program, nearly \$32 million to the University of Wisconsin system for workforce development, and \$20 million to the Wisconsin Technical College System for oral healthcare workforce initiatives.

## The Legal Claims Concerning the Supplemental Appropriation Account

DPI’s lawsuit argues that the funding arrangement for the literacy program violates statutory and constitutional principles and that the \$50 million should be released to DPI.

A major point of contention is whether the supplemental appropriation account can be used only for “unforeseen emergencies” and not for planned expenses, like the literacy program. DPI takes this narrower view of the account, but the legislature argues that the account can be used whenever prior appropriations are “insufficient” for their intended purpose. DPI disputes this interpretation, pointing out that the law still requires JCF to determine that an “emergency exists” before releasing funds. The legislature, however, maintains that there is a legal distinction between an “unforeseen emergency” and an “emergency.” The trial court did not address this issue in detail in the course of rejecting DPI’s efforts to gain control of the \$50 million, but it did note that the governor approved the bill appropriating the money to the supplemental appropriation account.

Another key part of the dispute is DPI’s argument that granting a legislative committee discretionary control over public funds violates the Wisconsin Constitution. Typically, state programs, like the childhood literacy program, are created and funded through legislation passed by both legislative chambers and signed into law by the governor. The programs are then implemented by executive branch officials, like the governor or department heads. While the legislature can set rules in its legislation for how funds should be spent, once funds are appropriated, the legislature’s role in the funding process typically ends, leaving implementation

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<sup>8</sup> Since 1975, the statute was amended once, in 1981, to make relatively minor changes. See 191 Wis. Act 20, § 3h, 3i.

to the executive branch. DPI argues that the funding arrangement for the literacy program undermines this constitutional framework in two ways.

First, DPI claims that the arrangement violates a constitutional provision requiring that appropriations be made through duly enacted legislation, [which states](#): “[n]o money shall be paid out of the treasury except in pursuance of an appropriation by law.” DPI argues that when JCF “supplements” an appropriation, it effectively makes a new appropriation through a committee vote, bypassing the Constitution’s lawmaking procedures. The legislature counters that JCF is not appropriating new money but merely spending funds appropriated to it.

Accepting the legislature’s response for the sake of argument, DPI next argues that granting a legislative committee the discretion to spend funds to implement a state program would violate the Wisconsin Constitution’s separation of powers. DPI maintains that the power to spend appropriated funds lies with the executive branch, which the constitution tasks with “faithfully execut[ing]” laws passed by the legislature. Allowing a legislative committee to spend these funds, DPI claims, usurps this “core” executive responsibility, violating the separation of powers. The legislature, however, counters that it can share the responsibility of spending public funds so long as it does so in accordance with defined procedures and safeguards. The trial court sided with the legislature on this point.

Notably, the Wisconsin Supreme Court’s decision from last summer striking down a legislative committee’s power to block the Department of Natural Resources from spending already appropriated funds, [Evers v. Marklein](#), provides some support for DPI’s argument, but does not definitively resolve it. *Marklein* dealt with a slightly different funding arrangement. There, the legislature had appropriated funds to an executive agency to implement a state program, but a legislative committee had the power to block the agency from spending the funds. In *Legislature v. DPI*, in contrast, the legislature purported to appropriate funds to a legislative committee, leaving the executive agency without the money intended to fund the program. The trial court said this was a critical distinction. The Wisconsin Supreme Court could decide that it agrees with the trial court, or it could conclude that both arrangements violate the separation of powers.

A final issue concerns the appropriate remedy if the funding mechanism is deemed unlawful. DPI contends it should receive the funds. The legislature, however, contends that if the funding mechanism is unlawful, the funds should remain in the JCF’s supplemental appropriation account until the end of the 2023-2025 biennium, at which point the funds would automatically revert to the general fund.

## Other States' Approaches to Emergency and Contingency Funding

The challenge to JCF's supplemental appropriation account raises the question of how other states handle similar situations. Most states allow executive branch officials to access emergency or contingency funds when needed, but even under the Wisconsin Legislature's own characterization of JCF's power, Wisconsin stands out by appropriating funds to a legislative committee and granting the committee direct control over the funds—an uncommon arrangement.

A review of other states' codified laws describing their respective budgeting processes suggests that most follow one of two conventional approaches to emergency and contingency funding. First, some states allocate the power to the executive branch. In these states, the legislature either authorizes the executive branch in advance to use designated emergency funds, or permits the executive to reallocate existing funds to address unforeseen circumstances.<sup>9</sup> Second, in some states the legislature does not provide advanced authorization for emergencies or contingencies, and instead passes new legislation to appropriate funds for otherwise unplanned expenses.<sup>10</sup> (A small group of states have mechanisms involving committees consisting of executive *and* legislative branch officials.<sup>11</sup>) While some states impose additional restraints<sup>12</sup> or involve legislative committees in a non-binding advisory role,<sup>13</sup> none grant legislative committees discretionary spending power over emergency or contingency funds.

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<sup>9</sup> See, e.g., Ala. Code § 41-4-94; Ariz. Rev. Stat. § 35-192; Cal. Gov't Code § 8690.6; Fla. Stat. § 216.231; Ga. Code § 45-12-77; Idaho Code § 46-1005A; 30 Ill. Comp. Stat. § 105/23; Ind. Code § 4-12-1-15; Ky. Rev. Stat. § 48.630; Me. Rev. Stat. tit. 37-B, § 824; Md. Code, State Fin. & Proc. § 7-209; Minn. Stat. § 3.30; Miss. Code § 33-15-307; Mont. Stat. § 17-7-311; Neb. Stat. §§ 84-166, 84-612; Nev. Rev. Stat. § 353.264; N.C. Stat. §§ 143C-4-4, 143C-6-4; Okla. Stat. tit. 62, § 139.47; Tenn. Code § 9-4-511; Tex. Gov't Code §§ 401.061-.065; Utah Code § 63J-1-217; Wash. Rev. Code § 43.88.250; W. Va. Code § 11B-2-20 (only if a budget shortfall occurs before November 1 in a calendar year); Wyo. Stat. § 9-2-1014.2.

<sup>10</sup> See, e.g., Alaska Stat. § 37.07.100; Colo. Rev. Stat. 2-3-208; Conn. Gen. Stat. § 2-33c; Del. Code tit. 29, § 6533(c); Haw. Rev. Stat. § 328L-3; Iowa Code § 8.55; La. Stat. § 39:461.1; Mass. Gen. Laws ch. 29, § 2H; Mo. Const. Art. 4, § 27(a); 72 Pa. Stat. § 1703-A; 35 R.I. Gen. Laws §§ 35-3-8, 35-3-20, 35-3-20.2; Va. Code Ann. § 2.2-1819; W. Va. Code § 11B-2-20 (only if a budget shortfall occurs after November 1 in a calendar year).

<sup>11</sup> See, e.g., Ariz. Rev. Stat. § 35-192(F)(2); Ind. Code § 12-8-1.5-11; Kan. Stat. § 75-3713; La. Stat. Ann. § 39:461.1; Ohio Rev. Code §§ 127.14, 127.19; Okla. St. T. 62 § 139.48 (for emergencies not covered by Okla. Stat. tit. 62, § 139.47); Vt. Stat. Ann. tit. 32, § 133, 131, 706.

<sup>12</sup> See, e.g., Utah Stat. § 63J-1-217(4)(c) (authorizing the governor to make emergency expenditures but prohibiting such expenditures for "any activity or function rejected directly or indirectly by the Legislature.").

<sup>13</sup> See, e.g., Ky. Rev. Stat. § 48.630 (requiring the executive branch to notify a legislative committee before allotting an unbudgeted appropriation); Minn. Stat. § 3.30 (requiring the executive branch to seek non-binding advice from a legislative committee to transfer amounts in excess of \$10,000 from a general

A handful of states grant legislative committees more than an advisory role in emergency and contingency funding, but none go as far as Wisconsin. The most comparable mechanism appears to be Oregon's "Emergency Board," a legislative committee that has control over an emergency fund and the power to appropriate funds to the executive branch during emergencies.<sup>14</sup> However, key distinctions separate Oregon's Emergency Board from Wisconsin's Joint Committee on Finance. For one, the Oregon Constitution explicitly authorizes the Emergency Board's powers,<sup>15</sup> eliminating any concern that the arrangement violates the state constitution. The Wisconsin Constitution, meanwhile, contains no comparable provision. Further, Oregon's Emergency Board's powers are active only when the state legislature is out of session and, therefore, unable to respond quickly to emergencies.<sup>16</sup> Wisconsin law has no comparable limit, allowing JCF to make supplemental appropriations even when the legislature is in session and could quickly meet to consider an emergency.

Beyond Oregon, nine other states have emergency or contingency funding mechanisms that grant legislative committees more than a mere advisory role.<sup>17</sup> Yet, unlike in Wisconsin—at least under the Wisconsin Legislature's characterization—none of these other arrangements appropriate funds directly to the committee and then grant the committee discretionary control over spending. Instead, their power is more confined to approving or denying requests from executive branch officers to spend funds for emergencies or contingencies based on whether circumstances were met.

Moreover, these other legislative committees often operate under additional constraints that are absent in Wisconsin. For example, their approval authority may be limited to executive branch requests to transfer funds from other agencies to address the shortfall,<sup>18</sup> restricted to much more

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contingent fund); Miss. Code § 33-15-307(5) (requiring the executive branch to notify certain legislators of a determination to requisition public money from one fund to a disaster-related fund); N.C. Stat. § 143C-4-4 (requiring the executive branch to report the use of funds from a contingency and emergency fund to a legislative committee within 30 days); Utah Code § 63J-1-217(4)(b) (requiring the executive branch to notify the legislative branch when the governor allocates from an emergency appropriations account); Wyo. Stat. § 9-2-1014.2 (requiring the governor to provide advance notice to a legislative committee before reducing agency expenditures or transferring agency funds).

<sup>14</sup> See Or. Rev. Stat. §§ 291.322-291.334.

<sup>15</sup> Or. Const. Art. 3, § 3.

<sup>16</sup> Or. Const. Art. 3, § 3(1).

<sup>17</sup> See Ark. Code § 19-5-1263; Mich. Comp. Laws § 18.1393, Nev. Stat. §§ 353.263, 353.266, 353.268, 353.269; N.H. Stat. §§ 4:18, 9:13-d; N.J. Stat. § 52:9H-19; N.M. Stat. § 6-3-25; N.Y. State Fin. Law § 53(8); N.D. Cent. Code §§ 54-16-04, 54-16-09; S.D. Codified Laws §§ 4-8A-8, 4-8A-9, 4-8A-10.

<sup>18</sup> See, e.g., Mich. Comp. Laws § 18.1393; N.M. Stat. § 6-3-25; N.M. Stat. § 6-3-25(8).

narrowly defined emergencies,<sup>19</sup> or applicable only when the full legislature is out of session<sup>20</sup>—a scenario that does not arise in Wisconsin. While adopting these design features might not completely resolve the constitutional issues raised by DPI’s lawsuit, they underscore how uniquely broad JCF’s powers are in the budget process compared to legislative committees in the rest of the country.

Finally, while no state currently appears to use a supplemental appropriation mechanism quite like Wisconsin’s, at least one has in the past—and the arrangement was declared unconstitutional. In 1976, the Kansas Supreme Court struck down a law that authorized a legislative committee to appropriate and distribute money from a special fund to executive agencies for expenses arising from “circumstances which could not reasonably have been foreseen when the legislature was in session.”<sup>21</sup> The court condemned this setup as a “little legislature,” finding that its “vague standard” gave the committee an “unrestricted grant of power” to appropriate and authorize expenditures of state funds in violation of the state constitution.<sup>22</sup> While this is the most similar funding arrangement to Wisconsin’s that a state court has considered, courts in other states have notably—and almost universally—[struck down legislative attempts](#) to give committees spending powers or vetoes over executive branch decisions, often relying on legal theories similar to those advanced by DPI.

## The Legal Claim Concerning the Governor’s Partial Veto

Although this Explainer focuses on the funding dispute, the legislature’s challenge to the governor’s partial veto of one of the bills that created the literacy program also raises an important constitutional question that warrants discussion.

The Wisconsin Constitution generally authorizes the governor to either fully approve or fully reject bills passed by the legislature. However, it also grants the governor the power to veto *parts* of “appropriation bills,” subject to certain limits.<sup>23</sup> Citing this authority, the governor vetoed parts of a bill that authorized and required DPI to pay for the literacy program. Specifically, the governor removed a reference to reimbursing charter schools for their expenses in connection

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<sup>19</sup> See, e.g., N.H. Rev. Stat. Ann. § 9:13-d (“In determining whether a civil emergency exists, the governor shall consider whether there is such imminent peril to the public health, safety and welfare of the inhabitants of this state so as to require immediate action to remedy the situation.”); N.J. Stat. § 52:9H-19 (“As used in this section, ‘emergency’ means any condition or occurrence which requires an immediate response in the protection of the life, safety or well-being of the citizens of this State, or any of them, or in the protection or restoration of property, public or private, endangered, damaged, or destroyed as a result, actual or potential, of such condition or occurrence.”).

<sup>20</sup> See, e.g., Nev. Rev. Stat. § 353.268; S.D. Codified Laws § 4-8A-3.

<sup>21</sup> *Kansas ex rel. Schneider v. Bennett*, 547 P.2d 786, 798-99 (Kan. 1976).

<sup>22</sup> *Id.* at 799.

<sup>23</sup> Wis. Const. art. V, § 10(1)(b).

with the program, consolidated multiple spending authorizations into one, and eliminated a provision that would have repealed DPI's spending authority in 2028.

The legislature argues that the bill does not qualify as an "appropriation bill" because it did not allocate any money, meaning the governor's partial veto power should not apply. In response, the governor contends that an "appropriation bill" should be understood more broadly to include both bills that allocate money and those that authorize the executive branch to spend money already set aside. The trial court sided with the governor on this issue.

Adding a layer of complexity, the Wisconsin Supreme Court is currently considering another challenge to the governor's partial veto power in [LeMieux v. Evers](#). The outcome of *LeMieux* could shape the resolution of the legislature's claim in this case.

## Conclusion

The Wisconsin Supreme Court's decision in *Legislature v. DPI* will likely shape the extent of the legislature's control over state programs and agencies after the lawmaking process concludes. If the court sides with DPI, the legislature will likely have to stick with creating and funding state programs through the ordinary lawmaking process, allowing the executive branch to implement them. However, if the court upholds the legislature's approach, lawmakers will likely continue to steer funds for state programs and agencies through JCF's supplemental appropriation account, giving the committee's membership significant discretion to shape the implementation of state laws.

