



# State Democracy Research Initiative

UNIVERSITY OF WISCONSIN LAW SCHOOL

## Explainer: The Proposed Constitutional Amendments on Federal Funding Appearing on Wisconsin's August Primary Ballot

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In August, Wisconsin voters will see two [proposed state constitutional amendments](#) on their ballots, both aimed at increasing the legislature's role in allocating federal funds received by the state. The amendments [stemmed from legislators' desire to be more involved](#) with the funding distribution process for [billions of dollars](#) in federal COVID-19 pandemic relief funding. That process gave [broad discretion to Democratic Governor Tony Evers](#) in determining how to spend more than \$4 billion, subject to various federal requirements.

The proposed amendments represent the Republican-controlled legislature's [most recent effort](#) to exert more legislative control over the federal funding process. In 2021, the [legislature passed a bill](#) that would have given the legislature's Joint Committee on Finance the power to oversee and block pandemic-related federal funding decisions, but [Governor Evers vetoed it](#). The proposed amendments go further than the 2021 legislation, applying to a broader range of federal funding while also raising questions about their full scope and ultimate impact. Proponents argue that the legislature's involvement in the process will enhance transparency and provide greater accountability by involving more elected representatives in the process, while opponents argue that it will tie up federal funds in bureaucracy and partisan wrangling.

Under the Wisconsin Constitution, proposed amendments do not require the governor's approval to go to the voters or take effect. Instead, legislators must pass the proposals by majority vote in two successive legislative sessions, which they have already done. The proposals then go to the state's voters for ratification or rejection, also by majority vote. For these two proposed amendments, voters will weigh in on August 13.

This explainer describes each proposed amendment, lays out the main arguments being made for and against the proposals, and provides some broader national context. The explainer takes up the two amendment questions in reverse order for ease of explanation.

## Question Two: “Allocation of Federal Moneys.”

*Question voters will see on their ballots: “Allocation of federal moneys. Shall Section 35 (2) of Article IV of the Constitution be created to prohibit the governor from allocating any federal moneys the governor accepts on behalf of the state without the approval of the Legislature by joint resolution or as provided by legislative rule?”*

*Text of the amendment: “The governor may not allocate any federal moneys the governor accepts on behalf of the state without the approval of the legislature by joint resolution or as provided by legislative rule.”*

### **Intended Impacts**

At its most basic level, this amendment would give the legislature a say in future spending decisions involving federal funding similar to the pandemic-related relief.

Wisconsin receives billions of dollars every year in federal aid, [much of which is allocated to agencies](#) in the state budget bill or via another bill passed by the legislature and sent to the governor for signing or veto. However, when the state receives federal funding that falls outside of these budgeted-for amounts, the governor typically has broad discretion under a [state statute](#) to accept the funds and determine how to allocate them. This was the case with billions of dollars the state received in 2021 under the American Rescue Plan Act (ARPA). (For more details about the existing federal funding process, see the [Wisconsin Policy Forum’s explainer here](#).)

If Question 2 passes, the governor likely would not be able to allocate similar funding in the future without approval from the legislature, either via a joint resolution passed by the senate and assembly or via a different method that would be determined by the legislature.

### **Unknowns**

Constitutional amendments often contain less detail than statutes and consequently leave many open questions. The key questions raised by Question 2 are (1) what types of federal funding will require legislative approval and (2) what that legislative approval process will look like.

On the first question, unlike the 2021 legislation, this amendment is not limited to pandemic-related funding and likely would not retroactively affect that funding. Instead, it likely applies to any future federal funds “the governor accepts on behalf of the state” and then needs to “allocat[e].” This would likely include any undesignated funding the governor accepts—i.e., funding that the federal government has not directly designated for a specific program or project. (This [would not include](#) University of Wisconsin funding, which typically [goes directly to the Board of Regents rather than to the governor](#).) Even with the large influx of pandemic-related funding, [undesignated funding controlled by the governor only makes up a small fraction of federal funds](#) the state receives each year. The vast majority of federal funding is instead designated to specific programs, and the legislature already plays a role in that process. However,

it is unclear if this amendment could impact federal funding processes more broadly, and it may fall to the Wisconsin Supreme Court to determine the exact bounds of what federal funding is covered. Disputes over the meaning of prior Wisconsin constitutional amendments have routinely ended up in court, and, if passed, these amendments would presumably generate such litigation as well.

The second question, on approval process, is one that the legislature would primarily answer. The amendment provides that approval is either “by joint resolution or as provided by legislative rule.” A joint resolution requires majority approval in both the senate and assembly to pass. Each body would therefore need to vote on all covered federal funding decisions, although lawmakers could possibly do so [in sweeping resolutions](#) that apply to all funding received during the biennium. It is less clear what the alternative approval mechanism—action by “legislative rule”—would look like. One option, proposed in a prior version of the amendment, might be to give a joint legislative committee, like the [Joint Committee on Finance](#), control over federal funding decisions. The legislature could also implement some type of passive review process that would not require direct legislative approval of every spending decision. These are just some of the possibilities, and it will fall to the legislature to decide on a process if the amendment is approved.

## Question One: “Delegation of Appropriation Power.”

*Question voters will see on their ballots: “Delegation of appropriation power. Shall Section 35 (1) of Article IV of the Constitution be created to provide that the Legislature may not delegate its sole power to determine how moneys shall be appropriated?”*

*Text of the amendment: “The legislature may not delegate its sole power to determine how moneys shall be appropriated.”*

### **Intended Impacts**

The amendment’s lead Senate author, former Sen. Dale Kooyenga (R-Brookfield), [has said that he](#) advanced this amendment to restrain the legislature from abdicating its responsibility to determine how federal funds are spent. Under his original proposal, the amendment would have provided that “The legislature may not delegate its sole power to determine how federal moneys shall be expended.”

The amendment was later revised to the current version, however, changing “expended” to “appropriated” and eliminating “federal.” [Legislative Reference Bureau counsel explained](#) that, under the original proposal’s use of “expended,” it was “not clear how involved the legislature would have to be in state agencies’ day-to-day expenditure of federal funds to avoid a delegation of legislative authority.” The change “clarifie[d] that the legislature may not delegate its authority to determine how moneys are appropriated, rather than expended.” The second change, from “federal moneys” to simply “moneys,” was designed “to avoid any potential implication that the

constitutional amendment would mean that the legislature could delegate the authority to determine how moneys other than federal moneys are to be appropriated.”

In light of the original proposal and subsequent changes, it appears that the intended goal is to prevent the legislature from designating the governor, administrative agencies, or any other entity to make decisions about how to allocate federal funds. Under this view, the two proposed amendments are read together to support the same goal, with Question 1 providing additional assurance that the legislature will remain in control of spending decisions of certain federal funds.

## Unknowns

There are widespread uncertainties about what this amendment would ultimately accomplish if passed by the voters in August.

The first question is what would constitute a “delegation” of the legislature’s power (and what falls within the legislature’s “sole power” to begin with). Although determinations of how to appropriate state funds “[fall squarely within the legislative power](#),” federal funds are somewhat more complicated because the federal government, rather than the state legislature, initially sets funding amounts and purposes. The Arizona Supreme Court, for example, [has held that](#) “[i]t is within the power of the legislature to make appropriations relating to state funds, but funds from a purely federal source are not subject to the appropriative power of the legislature.” Specifically addressing ARPA funds, the New Mexico Supreme Court [held that](#) specifically designated federal funds “do not require legislative appropriation and allow the executive branch to simply execute the law by adhering to a federally preestablished purpose” but that “federal funds provided with a broad or discretionary purpose such that they can be put to a variety of uses must be appropriated by the Legislature.” It also is not clear how much oversight the legislature would need to retain over decisions on allocating federal funds to avoid violating this amendment.

The second question is whether this amendment would affect the state’s existing appropriation process for state, rather than federal, funds. Under the [Wisconsin Constitution](#), “No money shall be paid out of the treasury except in pursuance of an appropriation by law.” This means that the legislature must pass an appropriation bill, which then [goes to the governor for his approval or veto](#) (i.e., bicameralism and presentment). The governor also has the power under the constitution to partially veto appropriation bills. The exact extent of that power is a [subject of current litigation](#), and it [has been a powerful tool for prior governors](#). As noted above, the change from “federal moneys” to “moneys” in this amendment [was aimed at](#) avoiding a negative implication that the legislature *can* delegate its appropriation power over state funds. Given that purpose, this amendment presumably should not impact how state funds are appropriated. However, it is possible that future litigants would invoke the amendment’s broad language to challenge aspects of the state appropriation process in court.

As noted in the discussion of Question 2 above, if this amendment passes, it may fall to the Wisconsin Supreme Court to flesh out its exact meaning and scope.

## Arguments For and Against

Proponents of these amendments [have argued that the legislature should have been involved](#) in deciding how billions of dollars in pandemic-related relief was spent. Under this unprecedented funding, the governor had broad discretion to determine how more than \$4 billion was spent without legislative involvement. Amendment supporters argue that giving the governor the sole decision-making power for this type of funding concentrates too much power in a single branch. By increasing legislative involvement, they argue, funding decisions will be more transparent and better represent voters' wishes.

Opponents of the measure meanwhile [have argued](#) that inserting the legislature into the federal funding distribution process will tie up funding in bureaucracy and partisan wrangling, lead to slower emergency responses, and potentially cause the state to lose out on some federal funding entirely. They note that the legislature is a large body and does not meet on regular basis year-round, so it may struggle to respond quickly to emergencies and unexpected funding. For example, the legislature was [not in session](#) during most of the early months of the pandemic and [only passed one pandemic response bill](#) in 2020. Opponents also [point to the various unknowns](#) about what the funding process will look like and what funds will be covered as reasons to vote against the amendment.

## The National Picture

Wisconsin is not alone in this debate over legislative versus executive power. The unprecedented amount of federal funding related to the COVID-19 pandemic [raised tensions](#) between legislatures and governors over spending decisions and authority. Although "[governors in most states](#) were given fairly wide discretion in how to spend the coronavirus relief funds," some legislatures have sought to exert more control over allocating the later fiscal recovery funding from the American Rescue Plan Act (ARPA). According to a 2021 [Ballotpedia survey](#), 34 states had joint legislative and executive authority over ARPA funds; eight (including Wisconsin) had executive authority; and six had legislative authority (with the other two unknown). Wisconsin is therefore in the minority when it comes to ARPA funds. At the same time, however, Wisconsin is currently [one of 40 states](#) where the executive branch can generally spend unanticipated federal funds without legislative approval, according to the National Association of State Budget Officers. Some states that increased legislative involvement in ARPA funds [did so via ARPA-specific statutes](#) rather than by altering federal funding practices more broadly. In others, the broad, undesignated nature of the ARPA funding required legislative involvement under [existing statutory procedures](#) or constitutional requirements, [as the New Mexico Supreme Court held](#). It does not appear that any other states have responded to these recent federal funding controversies by amending their constitutions, so Wisconsin would be unique in making constitutional-level changes to address these matters. And because the proposed amendments are broadly worded and are not limited to ARPA funds, they would place Wisconsin in the minority

of states to impose a general requirement of legislative approval before the state can use unanticipated federal funds.

## Conclusion

In sum, these two proposed constitutional amendments raise important questions about the balance of power between the state's executive and legislative branches when it comes to deciding how federal funding is allocated. The amendments would give the legislature a say in how to spend future unanticipated and undesignated federal funding, like the billions of dollars that came into the state from ARPA. Beyond that type of funding, which spurred the introduction of these amendments, it remains to be seen exactly what federal funding would be covered and how significantly legislative approval would impact the funding allocation process.

Wisconsin voters will have the opportunity to weigh in [on August 13](#). A majority of "Yes" votes would enshrine in the Wisconsin Constitution a prohibition on the governor allocating federal funds without legislative approval and a prohibition on the legislature delegating its power to determine how moneys are appropriated. Any future changes to these provisions would require a new constitutional amendment to pass in two successive legislative sessions and then garner a majority of votes from Wisconsin voters. A majority of "No" votes would leave the Wisconsin Constitution unchanged.