

# Wisconsin Institute for Law and Liberty: State Supreme Court ends administrative agency deference, protecting separation of powers

Posted on Tuesday, Jun 26, 2018

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*WILL Amicus Brief Argued Court Deference to Agencies Is Unconstitutional*

June 26, 2018 – Milwaukee, WI – The Wisconsin Supreme Court decision in Tetra Tech, Inc. v. Wisconsin Department of Revenue ends deference to agency conclusions of law in the state of Wisconsin. WILL filed an amicus curiae brief with the Court arguing court deference to agency interpretations of state statutes is unconstitutional. The brief said, in part, “Collapsing the making of policy into its administration places that decision in the hands of an interested party and is inconsistent with the “auxiliary precautions” that underlie the separation of powers adopted by the framers of Wisconsin’s Constitution.”

WILL President and General Counsel Rick Esenberg said in response to the Court’s decision:

“Today’s decision limits the prerogatives of administrators and brings us a little closer to the system of government our founders envisioned. Basic American civics and the separation of powers require that each branch of government stay in its lane. Deferring to the legal conclusions of administrative agencies combined the executive and judicial powers in the hands of bureaucrats. The Court was correct to end it, as we argued in our amicus brief.”

Wisconsin courts for decades have chosen to defer to the interpretations of state statutes offered by administrative agencies, even when those agencies are enforcing those statutes against private citizens. They have often done so even when the agency interpretation was less reasonable than alternative readings of the law. Although several of the Justices chose to avoid the constitutional issue and rule as a matter of judicial policy, the bottom line is that the Court acted today to ensure that the judicial power – including the power to have the final say on what a statute means – resides exclusively in the courts, not the executive branch.

Today's decision is part of a broader reevaluation of agency deference occurring in both state and federal courts. For example, Mississippi's high court recently ended agency deference. Federal courts are also beginning to grapple with the question. This judicial reevaluation of agency authority is independent of, but consistent with, a more general re-examination of the administrative state, including legislative initiatives such as the REINS Act in Wisconsin. Both the federal and Wisconsin constitutions recognize that freedom is preserved not only by the delineation of individual rights but by structural limits on the power of government. The separation of powers – in which each branch “checks” and “balances” the others – is an important part of the way in which these limits act as, in James Madison's words, “an auxiliary precaution” against the abuse of government power.