

Constitutional Highlights

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Wisconsin Constitution Article IV, Section 8 LEGISLATIVE RULES OF PROCEEDINGS

Each house may determine the rules of its own proceedings....

History and purpose of the section

The power of each house of the legislature to determine its own rules of proceedings is a key feature of the separation of powers doctrine. At its most fundamental level, the doctrine requires the division of governmental power among the legislative, executive, and judicial branches of government. This is done to combat tyranny and better ensure liberty. The separation of powers doctrine is “implicit in the division of governmental powers among the judicial, legislative and executive branches.” *State ex rel Friedrich v. Dane County Circuit Court*, 192 Wis. 2d 1, 13 (1995). While the different branches of government may share overlapping powers in public policy areas or constitutional domains, there is still within each “a core zone of exclusive authority into which the other branches may not intrude.” *In Matter of Complaint Against Grady*, 118 Wis. 2d 762, 776 (1984). Part of the legislature’s core zone of exclusive authority is the power to determine its rules of proceedings.

Legislative rules of proceedings can be found in the federal constitution and in almost every state constitution. In this regard, the Wisconsin Constitution is unexceptional. This legislative power is an expansive power and its scope is not limited to legislative autonomy on matters relating merely, say, to the passage of legislation. According to *Mason’s Legislative Manual*, ch. 1, sec. 3.4, the power “extends to determination of propriety and effect of any action taken by the body in the exercise of any power...” Rules of proceedings are much more than simply rules governing parliamentary debate.

In fact, one court claimed that the “words in which the grant of power...to adopt rules of procedure is couched are about as broad and comprehensive as the English language contains...” *Witherspoon v. State ex rel. West*, 103 So. 134, 138 (Miss. 1925). Read broadly, rules of proceedings are coterminous with virtually all legislative action. Read in a more limited fashion, rules of proceedings include rules that

govern the internal workings of the legislature; statutes that relate solely to the internal organization of the legislature; rules that apply to the legislature itself rather than to members of the body; internal rules that govern acts that occur in the regular course of the legislative process; and internal operating procedures. *Des Moines Register & Tribune Co. v. Dwyer*, 542 N.W.2d 491, 498 (Iowa 1996).

How courts interpret the section

The power of the legislature to determine its rules of proceedings protects the legislature from the executive and judicial branches; in this way, the legislature is not hindered by the other branches of government in its internal organization, affairs, and actions. In the United States, the general rule is that once a legislative matter has been identified as a rule of proceeding the courts may not require compliance with the rule, punish noncompliance with the rule, or void any action taken in dereliction of the rule. Wisconsin has followed the general rule for more than a century. As the court concluded in *McDonald v. State*, 80 Wis. 407, 411-412 (1891), “We think no court has ever declared an act of the legislature void for noncompliance with the rules of procedure made by itself, or the respective branches thereof, and which it or they may change or suspend at will. If there are any such adjudications, we decline to follow them.” Also, see *State v. P. Lorillard Co.*, 181 Wis. 347, 372 (1923); *State ex rel Hunsicker v. Board of Regents*, 209 Wis. 83, 86 (1932); and *Outagamie County v. Smith*, 38 Wis. 2d 24, 41 (1968).

Rules of proceedings are found in legislative rules; custom, usage, and unwritten practices of each house of the legislature; general parliamentary law; and even in the statutes. In *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358 (1983), the court held that the legislature need not comply with statutes that required the referral of bills to legislative committees. Rules of proceedings assume various forms, but the effect is the same—they cannot be enforced by the courts. As the court put it: “If the legislature fails to follow self-adopted procedural rules in enacting legislation, and such rules are not mandated by the constitution, courts will not intervene to declare the legislation invalid.” *Id.* at 365. The legislature is free to follow or not to follow its own rules of proceedings. In the enactment of legislation, it is subject only to the Wisconsin and federal constitutions, not to the Wisconsin statutes. Also, see *Outagamie County v. Smith*, at 39-40.

Stitt is the strongest Wisconsin case to date on the enforceability of legislative rules of proceedings and the limited role of the court in this constitutional area. In *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662 (1976), in contrast, a pre-*Stitt* case dealing with the applicability of Wisconsin’s open meetings law to gatherings of members of the Joint Committee on Finance, the court distinguished between legislative rules of proceedings and the statutes, arguing that the statutes must be followed even if they govern the lawmaking process. *Id.* at 697. *Stitt* seems to be at odds with *Conta*. If a legislative rule of proceeding is contained in the statutes, the court has no power over its enforcement. This is the important lesson of *Stitt*. Interestingly, since *Stitt*, four state supreme courts have ruled on this issue and three—New Hampshire, Alaska, and Florida—have held that the legislature’s power to determine its rules of proceedings does not require compliance with open meetings statutes. *Hughes v. Speaker of the N.H. House of Representatives*,

876 A.2d 736 (N.H. 2005); *Aboud v. League of Women Voters of Alaska*, 743 P.2d 333 (Alaska 1987); *Moffit v. Willis*, 459 So.2d 1018 (Fla. 1984).

Rules of proceedings cases are relatively rare in Wisconsin jurisprudence. Two recent decisions, however, may have implications for future judicial interpretation of legislative rules of proceedings. In *Custodian of Records v. State*, 272 Wis. 2d 208 (2004), the court considered whether a subpoena to a legislative service agency for certain electronic data could be enforced; at issue was whether the statute governing the legislative service agency was a rule of proceeding. Although the court quashed the subpoena on other grounds, it held that compliance with the subpoena would not affect the legislature's power to determine its rules of proceedings, concluding that the "subpoena is not attempting to change the way in which the legislature functions, but rather attempting to gather information to investigate the commission of a crime." *Id.* at 227.

In *State v. Chvala*, 279 Wis. 2d 216 (2005), the court affirmed without legal analysis a court of appeals decision that held that documents governing the legislature's internal operations could be used to help determine whether a legislator had engaged in criminal conduct. The documents were employment manuals for legislative staff and guidelines for incumbent senators. Chvala argued that only the legislature, and not the courts, could punish violations of rules of proceedings. The court of appeals claimed that it was not enforcing "legislative rules governing the enactment of legislation. Rather, the court is being asked to enforce a penal statute that relates to the duties of a legislator and are relevant insofar as it gives affected persons notice of those duties." *Id.*, 271 Wis. 2d 115, 149 (2004). In other words, under *Chvala*, legislative rules of proceedings cannot be enforced by the courts, but their violation can be used for the purposes of criminal prosecution for violations of laws that are not legislative rules of proceedings.

Custodian of Records shows that the court, at least at this juncture, is not prepared to expand its understanding of the scope of legislative rules of proceedings to include all legislative affairs and actions. While neither *Chvala* nor *Custodian of Records* departs from, or in any way limits, prior decisions dealing with rules of proceedings, both appear to retreat from the bold vision of legislative power and autonomy proclaimed well over a century ago in *McDonald* and most recently articulated in *Stitt*, at least in spirit.

Strategies for reconciling legislation with the section

If legislation is desired to govern the internal workings, operations, or organization of the legislature, the best legal advice is to draft the proposal as an amendment to the assembly rules, the senate rules, or the joint rules. By amending the legislature's internal rules, and not incorporating the proposal into the statutes, a legislator can be more certain that the legislature—not the courts—will have sole authority over the changes contained in the proposal. While *Stitt* acknowledges that the legislature is constrained only by the constitution in determining its rules of proceedings, there is a danger in incorporating rules of proceedings into the statutes. The court may not know that the legislature intends a certain statute to be a

rule of proceeding and so must make the determination itself. If rules of proceedings are incorporated into the legislative rules, however, the court is at least put on notice that the legislature intends that an amendment to its internal workings, operations, or organization is a rule of proceeding.

Moreover, if a legislator requests that a rule of proceeding be drafted as statutory law then the governor must be involved, either in signing the legislation or in requiring legislative action in overriding the governor's veto if he or she vetoes the legislation. If a subsequent legislature should choose to change the rule, then the governor, again, must be involved. To be sure, a future legislature can always choose to ignore a statutory rule of proceeding, as *Stitt* acknowledges, or adopt or follow a different rule of proceeding in its own internal rules, but this may create some confusion.

In the end, the legislature should be the sole determiner and enforcer of its rules of proceedings. How the legislature conducts its internal operations and affairs and how it organizes itself should be matters reserved entirely to itself, subject only to the constitution. This is best accomplished by situating its rules of proceedings in the assembly rules, the senate rules, or the joint rules.

Prepared by Richard Champagne, Senior Legislative Attorney



**One East Main Street
Madison, WI 53701-2037
(608) 266-3561
www.legis.wisconsin.gov/lrb**