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William Sternberg

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DELEGATION OF LEGISLATIVE AUTHORITY

ONE of the most firmly established principles of our constitutional law is that legislative power cannot be delegated.[1] Some writers [2] have traced the origin of this principle to the ancient maxim, *delegata potestas non potest delegari;* others have educed it from our system of separated powers. Thus Cooley [3] says:

"Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made."

So also Burdick,[4] after referring to the general principle, declares:

"This results from the clear declarations in our constitutions, both federal and state, that all legislative power shall vest in the law-making bodies which are thereby created."

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1 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed.) 224; 3 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES (2nd. ed.) 1636; Cheadle, *Delegation of Legislative Functions,* 27 YALE L. JOUR. 892.

2 Duff and Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law,* 14 CORN. L. QUAR. 168; Note, 20 MICH. L. REV. 652.

3 COOLEY, *op. cit. supra* note 1.

4 BURDICK, LAW OF THE AMERICAN CONSTITUTION §60.

Still others [5] rather confusingly refer to both the Latin maxim and the doctrine of separated powers as indicating the origin of the general principle. It has been argued that the strict separation of powers was not contemplated by the framers of the constitution [6] and that it is merely a practical device, not indispensable to liberty.[7] But whether we ascribe the origin of the general principle against the delegation of legislative authority to the Latin maxim or to the doctrine of separated powers, it is now too firmly rooted in our jurisprudence to be questioned.

The cases that have come before the United States Supreme Court involving statutes whose constitutionality has been questioned on the ground that they delegated legislative authority are too numerous for discussion here. It is a remarkable and significant fact that in nearly all of these cases, where a federal statute was involved, the objection was overruled and the statute sustained. In only four instances,[8] according to the decisions of the Supreme Court, did Congress attempt to delegate any of its legislative power. It was no doubt this fact that led most writers on the subject to the erroneous conclusion that the Supreme Court would sustain the National Industrial Recovery Act.[9] One of the principal grounds of the decision in the epochal *Schechter* case [10] was that by Section 3 of the National Industrial Recovery Act, Congress had unconstitutionally delegated legislative power to the President. The constitutionality of many other statutes of the New Deal depends on the same principle. Thus the Agricultural Adjustment Act [11] gives the Sec-

5 Carpenter, *Constitutionality of the National Industrial Recovery Act and the Agricultural Adjustment Act*, 7 So. Cal. L. Rev. 125; Ray and Wienke, *Hot Oil on Uncharted Seas of Delegated Powers*, 29 Ill. L. Rev. 1021, 1027.

6 Cheadle, *op. cit. supra* note 1, at 895.

7 Pound, *Spurious Interpretation*, 7 Col. L. Rev. 379, 384.

8 Notes 10, 40 and 41, *infra*.

9 Ray and Wienke, *op. cit. supra* note 5, at 1025.

10 Schechter v. United States, 55 Sup. Ct. 837 (1935).

11 7 U. S. C. A. § § 601 *et seq.*

retary of Ariculture the power to tax processors and shippers of agricultural goods to raise a fund for the reward of farmers who agree to reduce their acreage in certain crops. The Emergency Railroad Transportation Act [12] creates the office of *Coordinator* and empowers him to make rules and regulations that are in the public interest and tend to promote the expressed purposes of the Act. The 1934 Amendment [13] of the Tariff Act of 1930 gives the President authority to change existing tariff rates whenever he finds that the present rate is an undue burden in detriment to the general policy of the Act. So there are similar delegations of what may be called legislative power in the Securities Act,[14] the Tobacco Control Act,[15] and the Cotton Control Act.[16]

The fact that all this legislation involves the delegation of large discretionary powers to administrative officials lends great interest and vital importance to the question whether Congress in enacting these statutes has merely delegated a "rule-making power," [17] as distinguished technically from legislative power. Of course, any person who makes a rule which the state will enforce, does in fact make a law, but Professor Maurer's expression is a convenient term used to designate the power which Congress may constitutionally delegate.

An examination of a few of the leading and illustrative cases will disclose that the general principle against the delegation of legislative power has undergone "a considerable metamorphosis" [18] and that the Supreme Court in its rarely broken record of sustaining federal statutes has evolved two theories as a means of rationalizing its decisions.

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12 49 U. S. C. A. § § 250-267.
13 Act of June 12, 1934, 48 STAT. 943.
14 15 U. S. C. A. §§ 77a *et seq.*
15 7 U. S. C. A. §§ 751 *et seq.*
16 7 U. S. C. A. §§ 701 *et seq.*
17 Maurer, *Emergency Laws*, 23 GEO. L. JOUR. 671, 684.
18 Note, 37 HARV. L. REV. 1118, 1119.

JUDGE RANNEY'S RULE

The first of these theories is Judge Ranney's Rule, which distinguishes between the delegation of power to make the law and the conferring of authority to decide whether and when the law shall be enforced. In language not very remarkable for its lucidity, but which has often been quoted in textbooks and in the opinions of our highest courts, including the Supreme Court of the United States,[19] Judge Ranney of the Supreme Court of Ohio, in an early case [20] said:

> "The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done; to the latter no objection can be made."

It will be found, however, that the authority thus conferred is not an absolute one, leaving it entirely to the executive official to determine whether the law shall be enforced. The cases to which this theory is applicable are rather cases in which Congress has made the enforcement of the law depend upon the happening of a certain contingency and has given some one else authority to determine when that contingency has happened. Hence, the statutes to which Judge Ranney's theory is applicable are properly described as contingent legislation.

This is well illustrated in the first case [21] in which the question of delegating legislative power was raised. By Act of March 1, 1809, Congress had forbidden all commercial intercourse with Great Britain or France, because of certain edicts which those countries had issued in violation of our neutrality. This Act expired with the session of Congress on May 1, 1810, on which day, however, Congress passed

19 Foster, *The Delegation of Legislative Power to Administrative Officers*, 7 ILL. L. REV. 397, 402.

20 C. W. & Z. R. R. Co. v. Comm'rs Clinton Co., 1 Ohio St. 77, 88 (1852).

21 The Brig Aurora, 7 Cranch 382 (1813).

another Act providing that in case either Great Britain or France should revoke the obnoxious edicts and that fact be declared by presidential proclamation, then the previous non-intercourse Act should be revived against the other nation, unless the other nation also revoked her edict. On November 2, 1810, the President proclaimed that France had revoked her edicts, but since Great Britain refused to revoke hers, the nonintercourse Act of 1809 was revived against her. It was held that in thus giving the President authority to revive a previous statute by his proclamation, there was no unconstitutional delegation of legislative power.

It will be observed that in this case, the specified contingency was readily ascertainable by objective criteria. This was not so in two other leading cases dealing with *tariff* regulations. One of these [22] involved the McKinley Tariff of 1890. This Act provided for the free importation of sugar, molasses, coffee, tea and hides. By Section 3, it was further provided if the government of any country producing and exporting these articles should impose duties on the products of the United States that are reciprocally unequal and unreasonable, then the President should have the power to suspend the other provisions of the Act which permit the free importation of these articles. In sustaining Section 3, Justice Harlan, speaking for the Court, said:

"It does not, in any real sense, invest the President with the power of legislation. . . . Congress itself [determined the policy of suspension and the duties to be levied] . . . . the President . . . had no discretion in the premises except in respect to the duration of the suspension . . . he was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect." (The Court then quotes Judge Ranney's Rule.)

A writer [23] comments on the reasoning of the Court which "operated to force the case into coincidence with the facts of

22 Field v. Clark, 143 U. S. 649 (1891).
23 Comment, 31 MICH. L. REV. 786, 791.

The Brig Aurora" and characterizes it as an "unnecessary bit of legerdemain," by which the Court, however, "attained a commendable result."

The other *tariff* case [24] involved the flexible provisions of the Fordney-McCumber Act of 1922. According to this Statute, whenever the duties imposed on imports from other countries do not equalize the difference in the cost of production in the United States and in the competing country, then the President shall have authority to change the tariff schedule so as to effect such equalization. Pursuant to this authority the President raised the tariff on barium dioxide imported from Germany. The plaintiff paid the duty at the increased rate and then sought to recover the excess on the ground the Statute had unconstitutionally delegated legislative power. The Statute was again sustained.

It is interesting to notice the expansion and liberalization of the criterion as compared with the previous case involving the McKinley Act. Under that Act, the only discretion which the President had was to decide whether the rates previously fixed by Congress should go into effect; in the Act of 1922 he is authorized to make changes in the previously fixed rates. In both cases, however, the authority is to be exercised upon the happening of a specified contingency.

In these three cases, the authority to determine whether the contingency had happened was given to the President. But Congress has at times also given such authority to other officials. The three *bridge* cases [25] involved Section 18 of the Act of March 3, 1899, by which the Secretary of War was authorized to make changes in bridges over the navigable waterways of the United States whenever he finds that the bridge erected or contemplated is an unreasonable obstruction to navigation. Said the Court, in sustaining this Statute:

24 Hampton, Jr. & Co. v. United States, 276 U. S. 394 (1928).

25 Union Bridge Co. v. United States, 204 U. S. 364 (1906); Monongahela Bridge Co. v. United States, 216 U. S. 177 (1909); Hannibal Bridge Co. v. United States, 221 U. S. 194 (1911).

"A denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or state of things upon which the enforcement of its enactment depends would be to stop the wheels of government and bring about confusion, if not paralysis, in the conduct of the public business."

PRIMARY STANDARD THEORY

The cases discussed thus far come within the theoretical range of Judge Ranney's Rule; but in cases where the legislation is not contingent and that rule, therefore, inapplicable, the Court has sustained the statute by resorting to what may be called the "primary standard theory." In these cases, the administrative body does not merely decide whether the specified contingency has happened. It makes rules and regulations and can compel obedience by all persons to whom they are applicable. The making of such a rule is, of course, in a certain sense a law-making function, but where the statute which confers the authority to make the rule also prescribes some primary standard to which the regulations of the administrative body must conform, then there is no violation of the principle against the delegation of legislative power. The difficulty in the application of this theory lies in determining the sufficiency of the primary standard. The standards which have been held sufficient are of a great variety and some of them exceedingly indefinite.

The first of the leading cases [26] applying this theory involved Section 2 of the Act of March 2, 1897, the so-called "Federal Tea Inspection Act," which authorized the Secretary of the Treasury to make rules and regulations for determining the quality of tea to be imported into the United States and to exclude any tea that does not satisfy those requirements. Under this Statute, eight packages of tea were rejected as of inferior quality. Counsel for the importer contended that the Statute was unconstitutional and relied on a

26 Buttfield v. Stranahan, 192 U. S. 470 (1903).

strong line of state cases [27] condemning delegations of power apparently less extensive than that of the Federal Statute. But Justice White, speaking for the Court, said:

"The claim that the Statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of opinion that the Statute, when properly construed . . . expresses the purpose to exclude the lowest grades of tea. . . . This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the Statute."

A much broader scope for administrative regulation was recognized in the *Grimaud* case,[28] which dealt with the Forest Reserve Act of 1897 authorizing the Secretary of the Interior to make rules for the protection and preservation of the public forests and provided that a violation of the rules made by him should be punishable as a misdemeanor. In 1905, this authority was transferred to the Secretary of Agriculture who accordingly promulgated *inter alia* Rule 45 forbidding the grazing of sheep on the Sierra Forest Reserve. For the violation of this rule, the defendant was indicted. The case had a very checkered career, including a change in the personnel of the Supreme Court,[29] but in the final decision the Court was unanimous in upholding the Statute. Justice Lamar, writing the opinion, said:

"When Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment. . . . That 'Congress cannot delegate legislative power [to the President] is a principle universally as vital to the integrity and maintenance of the system of government ordained by the Constitution.' . . . But the authority to make administrative rules is not a delegation of

27 For a concise statement of these cases, see Cousens, *The Delegation of Federal Legislative Power to Executive Officials*, 33 MICH. L. REV. 512, 518.

28 United States v. Grimaud, 220 U. S. 506 (1910).

29 Foster, *op. cit. supra* note 19, at 403; Ray and Wienke, *op. cit. supra* note 5, at 1026.

legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense."

During the twenty years following the *Grimaud* decision, there were many cases before the Court involving the question now under discussion. The most important of these were cases arising under statutes which delegate authority to the Interstate Commerce Commission. Included in this authority is the rate-making power. The Supreme Court has repeatedly declared that this is a legislative function.[30] Indeed the author of the standard text on constitutional law regards that proposition as so well-settled that "citation of authority is scarcely necessary." [31] Yet by the Hepburn Act of June 29, 1906, Congress gave the Interstate Commerce Commission authority to fix the rates that interstate railways might charge. And the Court, says Willoughby,[32] found no difficulty in sustaining this delegation of authority. Another writer [33] declares that the right to delegate this authority is "universally recognized."

This general attitude of the Court is strikingly illustrated in the *Intermountain Rate Cases*,[34] involving the Mann-Elkins Act of June 18, 1910, which made it unlawful for any carrier to charge a higher rate for a short haul than for a long haul, but gave authority to the Commission to suspend the prohibition and permit the higher rate for the short haul. The only primary standard contained in the Statute was gathered by implication from other sections of the Act, directing the attention of the Commission to the elimination

30 The Minnesota Rate Cases, 230 U. S. 352 (1913); Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 305, 307, 318 (1913).

31 3 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES (8th ed.) 1641.

32 2 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES (8th ed.) 809.

33 Foster, *op. cit. supra* note 19, at 401.

34 234 U. S. 476 (1913).

of "undue" and "unreasonable" discrimination. One writer [35] finds it "difficult to regard this as more than a fatherly admonition to legislate wisely." Counsel in the case cited an "interesting chain of state decisions" which are succinctly stated by Professor Cousens in an extensive note.[36] The Court, however, in the instant case sustained the Statute.

Although the prestige of the Interstate Commerce Commission, acquired through many years of successful regulation, was an important factor in the rate cases, the major consideration influencing the Court was undoubtedly the necessity of the delegation. In the complexity of our modern civilization, it is impossible for every legislator to know all the facts and theories necessary for a proper solution of the multifarious problems that lie within the field of congressional legislation. Moreover, the mechanical unwieldiness of a large legislative body renders it inadequate to the needs of the situation when immediate action is desirable. In line with this reasoning is the statement of Justice White:[37]

"Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the Statute. To deny the power of Congress to delegate such a duty would amount to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted."

So also Chief Justice Taft,[38] in speaking of the assistance which Congress may seek from the other branches of the government, said:

"The extent and character of that assistance must be fixed according to the common sense and the inherent necessities of the governmental coordination."

It has been frequently said [39] that the first case in which a federal statute was ever declared unconstitutional on the

35 Note, 37 HARV. L. REV. 1118, 1120.

36 Cousens, *op. cit. supra* note 27, at 528.

37 In Buttfield v. Stranahan, *op. cit. supra* note 26.

38 In Hampton, Jr. & Co. v. United States, *op. cit. supra* note 24, at 406.

39 Note, 2 U. OF CHI. L. REV. 632; 48 HARV. L. REV. 799; Carpenter, *op. cit. supra* note 5, at 126; 83 U. OF PA. L. REV. 527; Handler, *The National In-*

ground that it delegated legislative power was the *Hot Oil Case* [40] decided in 1935. But this is not so. On two previous occasions did Congress attempt an unconstitutional delegation. By the Act of October 6, 1917, Congress purported to amend the Judicial Code by providing that in certain cases of maritime jurisdiction the state law shall govern. A similar amendment to the Judicial Code was made by the Act of June 10, 1922. The Supreme Court held, in both cases,[41] that in making these amendments Congress had unconstitutionally attempted to delegate its maritime jurisdiction to the state legislatures. The Statute involved in these two cases, however, did not deal with any general economic situation and, therefore, the decisions in those cases cannot serve as a precedent in determining how much of the New Deal legislation is obnoxious to the general principle against the delegation of legislative power.

This was the state of the authorities when the depression came, followed in 1933 by a veritable flood of New Deal legislation. The *Hot Oil Cases* involved Section 9 (c) of the National Industrial Recovery Act, which authorized the President to prohibit the transportation of hot oil in interstate commerce, that is, oil produced or withdrawn from storage in excess of the amount permitted by state law. Pursuant to the authority thus conferred, the President issued his order July 11, 1933. The petitioners, who were producers of oil in Texas, sought to enjoin the federal authorities from enforcing this regulation. The Court searched the whole Statute diligently for some congressional expression that might be taken as a primary standard, but could find none. The lone dissenter, Cardozo, found such a standard in the "declaration of policy" contained in the first section, but the

dustrial Recovery Act, 19 AM. BAR ASS'N JOUR. 440, 446; Editorial, 47 HARV. L. REV. 85, 95; Cousens, *op. cit. supra* note 27; 23 GEO. L. JOUR. 321.

40 Panama Refining Co. v. Ryan, 55 Sup. Ct. 241 (1935).

41 Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 (1920); Washington v. Dawson & Co., 264 U. S. 219 (1924).

Court said this general outline contains nothing as to the circumstances or conditions in which the transportation of petroleum should or should not be prohibited.

The effect of the case is a decided check on the increasing tendency to centralization of authority and the gradual weakening of the constitutional safeguard which lies in the separation of powers. The decision did not declare any new principle or indicate any substantial change of judicial attitude, but it foreshadowed the decision in the *Schechter* case [42] which, with one fell swoop, obliterated over 500 "Codes of Fair Competition."

This is the situation of the authorities as they stand today. The nation now awaits with profound interest the final decision in the cases which involve other New Deal legislation and which are now on their way to the Supreme Court.

William Sternberg.

Creighton University, School of Law.

42 *Op. cit. supra* note 10.