

THE DELEGATION OF LEGISLATIVE FUNCTIONS

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As the interests of our people become more diversified and their industries grow more complex and assume greater proportions and variety of form, the demands upon the government necessarily increase. But add to the remarkable growth in scope and variety of interests possessed by our people to-day as compared with the situation even half a century ago, the increased tendency toward co-ordination and co-operation, not only in private but as between public and private business as well—the passing of the doctrines of *laissez faire* and unrestricted freedom of the individual as axioms of economics and political and legal theory—and we add enormously to the public burden. This is particularly true in matters of legislation; there all these considerations apply directly. In order to legislate intelligently and in detail, the members of Congress individually must know more things and know them more accurately and intimately than is humanly possible. The result has been that Congress has increasingly delegated to others the duty of doing things which in the inception of the government it might well have done itself.

How far may Congress or the state legislature under a state constitution modeled after the federal pattern go in this respect? How far may they delegate to others duties in the laying down of new rules intended to be obligatory upon all who come within their scope? For whenever a new rule of this type has been laid down an act essentially legislative in character has been done.¹

In the decisions of the courts upon the question of the delegation of legislative functions three things are almost invariably done: First, there is unanimous agreement that legislative powers cannot be delegated by Congress or by the legislature; second, although the judges rely upon the *dicta* of other courts and scarcely analyze the terms used, the delegation is usually permitted; and third, there seems to be a

¹Field, J., in dissent, *Sinking Fund Cases* (1879) 99 U. S. 700, 761, 25 L. Ed. 496, 516:

“The distinction between a judicial and a legislative Act is well defined. The one determines what the law is, and what the rights of the parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases under it.”

Cf. Taylor v. Place (1856) 4 R. I. 324; *Smith v. Strother* (1885) 68 Cal. 194, 8 Pac. 852.

“Essentially, the promulgation of administrative orders or ordinances is legislative in character.” 2 Willoughby, *Constitution*, sec. 742.

growing tendency in the decisions to give prominence to the supposed "necessity" of the case, even while admitting—unnecessarily, perhaps—that this delegation appears contrary to the letter if not to the spirit of the Constitution.²

Such a situation is unsatisfactory. The Constitution must be upheld and even great apparent necessity should not lead to shifts and evasions. On the other hand, we should not follow the vague reasoning of many of the courts nor be content with their faulty analysis nor be misled by the ambiguity and confusion of their terminology.³

It is interesting to note how often in the development of Anglo-American law the courts have reached a conclusion quite in accordance with the duty then resting upon them of balancing the interests involved; yet when the court is pressed to formulate the grounds of the decision a reason is given which is applicable neither logically nor historically.⁴ When later judges decide new phases of the same question they are apt to be led astray by a too literal application of the supposed reason offered for the former decision. This tendency seems inevitable in a system where busy judges, harassed by the pressure of many cases, must formulate the law to such an extent as they do with us.⁵

Our Constitution was framed with the idea that the first principles of government required a separation of legislative, executive and judicial powers. The framers feared tyranny, and the theories of Montesquieu were accepted by them and by the courts as the final word of political wisdom.⁶ Does this doctrine of the separation of the powers of government stand in the way of attempted delegations by the legislature of legislative functions? In answer it might be said that the theory of the separation of powers as applied by the framers of the

² *Railroad Commission v. Central of Ga. Ry.* (1909) 170 Fed. 225, 238, 95 C. C. A. 130; *State v. Public Service Commission* (1917, Mo.) 194 S. W. 287. But for a somewhat different connotation given to adverbs similar to "essentially" as qualifying "legislative," see *infra*, cases cited in notes 92 to 95, and pp. 920, 921.

³ See criticism of analysis on such questions by Edmund M. Parker, *Executive Judgments and Executive Legislation* (1907) 20 HARV. L. REV. 116. For a discussion of the extent to which misuse of terms leads to confusion in thought, see Prof. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE LAW JOURNAL, 16, 29. Compare terms used in cases cited in notes 92-96 *post*.

⁴ See articles by Prof. Jeremiah Smith on *Surviving Fictions* (1917-18) 27 YALE LAW JOURNAL, 147, 153, n. 41, 317. Professor Smith quotes Justice Holmes as saying "that judges know which way to decide a good deal sooner than they know how to give the reason why."

⁵ Prof. John C. Gray, *The Nature and Sources of the Law* (1909) 215-231, 465-512, 545-550, 628-636.

⁶ "The theory was accepted not . . . as a scientific theory but as a legal rule." Prof. Frank J. Goodnow, *Principles of the Administrative Law of the U. S.* (1905) 31.

government did not forbid transference of power from the legislative body to another branch of the government on the ground that it would be a *mixing of functions*. Historically there had never been a government in which legislative, executive and judicial functions—or at least two of them—were not united in the same branch; and when Montesquieu wrote and when the Constitution of the United States was framed, there was no government in existence which did not actually mingle even the *powers* themselves and combine them in one person or body or vest branches of the government with a combination of two of them. Montesquieu had in mind a political theory which at that time was nowhere realized in fact.⁷ The framers of the Constitution gave some slight thought to theory in the separation of powers, but more to matters of political expediency, and the reported debates of the Convention show that the members consciously mixed powers and functions which in their nature were legislative, judicial and executive,⁸

⁷“From these facts [in regard to the British Constitution], by which Montesquieu was guided, it may be clearly inferred, that in saying, ‘there can be no liberty, where the legislative and executive powers are united in the same person, or body of magistrates;’ or, ‘if the power of judging, be not separated from the legislative and executive powers,’ he did not mean that those departments ought to have no *partial agency* in, or no *control* over the acts of each other. His meaning, as his words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.” James Madison, *Federalist*, No. 47.

⁸“That no separation of powers, based upon the nature of the different governmental powers, was ever intended to be inserted in our organic law, would convincingly appear from a most cursory perusal of the debates in the constitutional conventions . . . Familiar with the theory of Montesquieu, but unfamiliar with any supposed possibility of classifying powers according to their intrinsic nature, they vested legislative power, meaning thereby only the power of enacting general laws for the entire government, in the legislature; judicial power, meaning thereby only the power of determining and protecting the rights of persons under the constitution and constitutional laws, in the courts; and executive power, meaning thereby the power of seeing that the laws are faithfully executed, in the executive department. Next they considered . . . other important powers which they thought their government in the course of its existence would probably be called upon to exercise. They did not enter into a philosophical discussion as to whether such a power was legislative, executive or judicial in its nature, but deliberated in which one or more of the departments already established by them the given power could with greatest propriety and safety be vested. Certain governmental powers . . . they vested in a governmental agency specially created for the purpose, and which did not form part of either of the three great departments.

“Powers which would require promptitude, activity, decision, or unity of plan, if of sufficient importance, they vested in the executive. For instance, for such reason, they made the President . . . commander-in-chief of the army and navy. . . . They vested the pardoning power in the executive. . . . They did not waste time in discussing whether the power of receiving ambassadors could be considered executive, legislative, or judicial; . . . they vested the power in the President. . . . They vested the treaty-making power in the executive, . . . subjected . . . to the deliberative assent of two-thirds of the Senate

“The general clause, vesting legislative power in the legislature, vests therein only the power of enacting general laws for the entire government. Besides this, the constitutions specially vest many other powers in the legislature, such as the power of impeachment”

William Bondy, *Separation of Governmental Powers* (1896) 5 *Columbia Studies in Hist. Econ. & Public Law*, No. 2, p. 74 et seq.

and as freely defended the mixing on the ground that the greatest security results from a partial participation of each branch of the government in the powers of the other branches.⁹ The separation as judged by the nature of the powers was not intended to be complete, and in practice such a complete separation would be inadvisable if not impossible.¹⁰ The effect of a separation of the powers of government by the Constitution would, therefore, seem rather to be that no power definitely assigned to any branch could be considered as belonging to or delegable to any other; but as to every function not so assigned, it might well have been considered as delegable at the will of the legislative branch.¹¹

A second reason sometimes suggested for the non-delegability of legislative functions¹² is that each department of the government being itself a delegate could not, therefore, delegate. This idea finds expression in the maxim *delegatus non potest delegare*,¹³ and it is entitled to some respect as a broad assertion of principle if rightly limited and understood. As an exact and universal statement, it is

⁹ *Federalist*, Nos. 47, 48, 50, 51.

¹⁰ "The separation is not, and, from the nature of things cannot be total." *Beall v. Beall* (1850) 8 Ga. 210. Cf. *Paddell v. City of N. Y.* (1908) 211 U. S. 446, 29 Sup. Ct. 139, 53 L. Ed. 275; *State v. Crosby* (1904) 92 Minn. 176, 99 N. W. 636:

"The marked tendency of legislation in recent years, not only in this state, but in other states, has been, to a large degree, to break away from the theory of three separate and independent departments of government . . ."

Cf. *Minneapolis, St. P. etc. Ry. v. Railroad Commission* (1908) 136 Wisc. 146, 116 N. W. 905, 17 L. R. A. N. S. 821.

"No one will assert at present that the separation of powers . . . is essential to liberty. . . . It is a practical device existing for practical ends . . . the division of labor . . . a mere specialization." Dean Roscoe Pound, *Spurious Interpretation* (1907) 7 COLUMBIA L. REV. 379, 384.

¹¹ "Whenever a power is not distinctly either legislative, executive or judicial, and is not by the constitution confided to a designated department of the government, the mode of its exercise . . . must necessarily be under the control of the legislature." Bondy, *op. cit.* 80.

But note that the courts have applied the doctrine of the separation of powers as limiting the kind of functions which may be delegated to any branch of the government, limiting such delegation to functions not inconsistent with the nature of the principal duties of that department. While according to that view courts do not possess all functions judicial in nature, still they should refuse to accept and should be denied functions not judicial in nature unless given directly by the constitution. *Western Union v. Myatt* (1899) 98 Fed. 335; Bondy, *op. cit.* 83; *Appeal of Norwalk St. Ry. Co.* (1897) 69 Conn. 576, 38 Atl. 708; *Village of Fairview v. Giffee* (1905) 73 Ohio St. 183.

"The principle of the separation of powers does not prevent the legislative delegation . . . of a considerable ordinance-making power." Willoughby, *Constitution*, sec. 742.

¹² *State v. Public Serv. Com.* (1917) 194 S. W. 287.

¹³ See the very sarcastic note by Bentham on this maxim: *Principles of Morals and Legislation* (Oxford ed. 1879) 13, n., 1 *Works*, 6, n.

false. Many delegates cannot further delegate the duty intrusted to them because it is to be personally exercised by the delegate himself. This is true of the judicial acts of a judge: he may be selected to try the case before him because of his personal and professional qualifications, and he cannot pass that duty to another. Many delegates cannot further delegate their functions because they are agents or mandataries for the purpose of doing a special act—such as sitting as a judge. With the legislature it is different. Of course the legislature should not delegate the function that is intrusted to its immediate personal care, but by the very nature of its being a delegating or duty-assigning body, it can delegate to others the power both to do acts it could not itself do, and also the power to do acts which it might well have done itself.¹⁴ Therefore the legislative branch being inherently a duty-assigning branch may, in the teeth of the maxim, assign such duties and functions to others as it is not, for some other reason, prohibited from assigning or they from receiving, even though itself a body of delegated and even limited powers;¹⁵ without such ability the power would be barren and incomplete.¹⁶

The true limitation on the power of Congress or of a legislature to delegate functions must be found in the fact that the function attempted to be delegated has been intrusted by the Constitution to one of the departments of government, there to be personally exercised; as applied to legislative duties, these functions are intrusted to the personal care of the legislative body.¹⁷ This is the familiar doctrine of mandate as applied to governmental affairs.¹⁸ The limits of this

¹⁴ "Congress may certainly delegate to others powers which the legislature may rightfully exercise itself." *Wayman v. Southard* (1825) Wheat. 1, 42, 6 L. Ed. 253, 262. See Bondy, *op. cit.* ch. viii.

¹⁵ "Whatever inherent jurisdiction a magistrate had in right of his office, he could transfer by mandate to another proper person. That is to say, a magistrate could delegate his inherent jurisdiction, but could not sub-delegate his delegated jurisdiction." Brinton Coxe, *Judicial Power and Unconstitutional Legislation* (Phila. 1893) ch. xi, div. C, p. 121.

¹⁶ But note the *contra* view of John A. Fairlie, *National Administration of the U. S.* (N. Y. 1905) 23:

"United States judges have held, . . . that Congress may delegate the power to make rules and regulations, and, . . . that this does not constitute a delegation of legislative power. These views would seem to be logically inconsistent with each other. . . . For Congress possesses only legislative power, and it would seem that any delegation of power by Congress must be a delegation of legislative power."

¹⁷ "The assumed incapacity to delegate is implied, as a necessary result, from the fact that, in our system of government, the power to make the laws is lodged in our senate and general assembly; that a consequent obligation rests upon them to exercise the function with which they are intrusted." *Paul v. Gloucester* (1888) 50 N. J. L. 585, 593, 15 Atl. 272, 276.

¹⁸ The doctrine of mandate as applied to governmental duties was known in America at the time of the framing of the Constitution through the writings of Vattel and others. See Varnum's Pamphlet on *Trevett v. Weeden* (1786, R. I.) 24, 25, 26; *Vanhorn v. Dorrance* (1795) 2 Dall. 308; *Federalist*, No. 78; *Marbury v. Madison* (1803) 1 Cranch, 137, 175 *et seq.*; *Luther v. Borden* (1849) 7 How. 1, 66.

doctrine would seem to be that no department could avoid the personal exercise of any function lodged with it by the Constitution unless it appeared by the terms or circumstances of the delegation that the function was to be exercised either by that body or by some other at its discretion. The exception does not apply to the judicial branch; even though a given function were assigned to it contingently, it could not delegate it because the judiciary is not a duty-assigning branch of the government. The exception does apply with full force to the legislative department which by the very nature of its being must assign functions to others.

The problem in relation to the delegation of legislative duties by Congress or the legislature is this: What is it that the Constitution requires of it as a personal duty? Second, how far have the courts already established a rule binding upon us by their precedents? So far as the Constitution originally left Congress free and so far as the courts have not specifically foreclosed the question, the free power of delegation undoubtedly exists.

Consider first the mandate given by the Constitution to Congress. It is found in article I, section I of the Constitution of the United States and provides:

“All legislative powers herein granted, shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”

If we construe those words standing alone they would be consistent with a very broad power of delegation of *functions* and *duties* legislative in their nature. For it must be conceded that the vesting of a power over a certain field does not of itself imply a duty to do personally every act necessary to be done under that power. To assert this would place a limit on the free exercise—and perhaps the most efficacious exercise—of that power. Webster's New International Dictionary gives, among other definitions for power:

“The possession of sway or controlling influence over others; control; authority; command; influence; ascendancy, whether personal, social, or political.”

Paraphrasing the above section and using any one of the suggested equivalents in place of the word power, it could scarcely be contended that this section standing alone forbids the delegation of legislative functions or duties as such, so long as Congress retains the control or authority over such acts; and indeed, in this sense, Congress cannot delegate its legislative *power* because that power, being conferred by the superior might of the Constitution, would remain in Congress subject to be resumed at will by that body in spite of any attempts it might make to delegate it.

As previously suggested, the question is: How far has the Con-

stitution intended this power over legislation to be personally effectuated by Congress; how far is that body, in furtherance of the exercise of the *power*, required to lay down *in detail* new rules for the future; in other words, how far is it required to do every *act* and perform every *function* legislative in *nature* which is necessary to make effective the power itself? Obviously the two things are not the same: the conferring of power or control or authority does not of itself imply a duty personally to perform the detailed act. In fact, as suggested above, if the exercise of the legislative power does entail the personal performance by Congress of all the minutiae of legislation in all cases, Congress is pitifully hampered in the carrying out of the very power supposed to be conferred by the Constitution. This idea, in one form or another, has been repeatedly expressed by our courts and text-writers.¹⁹

What, then, does the legislative *power* mean? Broadly speaking, there are but two functions of government: 1. The choosing and adopting of policies. 2. The carrying out of these policies through the making and enforcing of detailed rules. But this broad division probably does not correspond with the facts of any government known to history. The first is, functionally considered, "law-creative" or legislative. Yet it does not correspond with our division of functions under the Constitution because it would include the policy-initiating, diplomatic, and treaty-making powers of the President.²⁰ But the power over this function—the power of ultimately choosing the policy to be adopted—is the heart and the essence of legislative power; and this is the legislative *power* given to Congress over those subjects committed to its care, and is the essence of legislative power generally.

The second function is administrative; it includes the principal activities of the executive aside from his political functions, and also

¹⁹ "As civilization becomes more complex . . . the government . . . must abandon the system of unconditional commands and resort to conditional commands which vest in the administrative officers large powers of a discretionary character." Prof. Frank J. Goodnow, *Principles of the Administrative Law of the U. S.* (1905) 324.

"Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officers the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted." *Buttfield v. Stranahan* (1904) 192 U. S. 470, 496.

" . . . Unless the Legislature could pass an act outlining the governing principles in somewhat general terms, and leave the railroad commission to fill in the details, the power of the Legislature on the subject would be practically useless and impossible of execution." Lumpkin, J., in *Southern Ry. v. Melton* (1909) 133 Ga. 277, 65 S. E. 665, 668. Cf. *Georgia R. R. v. Smith* (1883) 70 Ga. 694.

²⁰ Compare Locke's suggested division into legislative, executive and federative. His idea of federative combines the war powers and all relations with foreign states, which we to a large extent have combined in the executive branch under the power of the President. *Civil Government*, ch. 12.

the judicial activities.²¹ This administrative field includes all acts legislative in nature beyond the adoption of the broad policy, so that in this sense the legislature too performs essentially administrative functions when it works out details in the application of the policy.

Thus, the legislative power, while concerning itself with new rules for the future, has as its true and proper subject-matter the broad policy which it declares. All details in the application of the policy may be delegated, though these details may involve the exercise of discretion and a choice between policies subordinate to the broad policy of the legislature. Therefore, if article 1, section 1 stood alone as an expression of the duty of Congress, that body need only indicate the policy to be pursued, and it will have exercised the power conferred upon it. The further legislative acts of laying down in detail the rule to be followed might well be done by Congress, or at its option, delegated to any person or body whose possible activities are not expressly or impliedly circumscribed by the Constitution. For instance, these legislative functions and duties could not be conferred upon the courts provided for in the Constitution, but they might well be conferred upon some part of the executive branch because historically the executive has always had some legislative duties to perform and the Constitution puts upon him the duty of participating in certain legislative matters. The executive is more interested than any other branch of the government in the form, the machinery and the details of the law, because these matters have a bearing upon its practical and efficient execution. Especially may the legislative power be vested in other functionaries or boards anomalous in character, brought into being to give expertness and length to the legislative arm in the application of its policies through detailed rules. Such bodies would not be prohibited from exercising their duties and functions through any implied inhibition growing out of the doctrine of the separation of powers.²² This construction is strengthened by consideration of the provisions of article 1, section 8, paragraph 18 of the Constitution and the construction placed thereon by the Supreme Court of the United States.²³ That paragraph provides :

²¹ For even though judges do "legislate," as is often asserted, they presumably operate only within the broad policy of the law as previously existing or as declared by the legislative arm of the government and as recognized by the court. Cf. note 5, *supra*.

[See John E. Young, *The Law as an Expression of Community Ideals and the Lawmaking Functions of Courts* (1917) 27 YALE LAW JOURNAL, 1.—Ed.]

²² *People v. Provines* (1868) 34 Calif. 520. Cf. A. A. Berle, Jr., *The Expansion of American Administrative Law* (1917) 30 HARV. L. REV. 430, 441.

²³ Chief Justice White, speaking of the above clause and the interpretation put thereon by Chief Justice Marshall, says :

"That provision . . . gave legislative power to adopt every appropriate means to give effect to the powers expressly given. In terms it was pointed out that

"The Congress shall have the power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

Thorough investigations by Congress through its committees, and the working out of minute details of laws are administrative functions which Congress has heretofore largely assumed,—and not improperly so long as it can effectively handle them. But Congress can as properly delegate these functions, retaining to itself only the control and direction of policies. In fact this becomes the duty of Congress whenever it finds that these functions can be more efficiently performed by some other person or body. In such case under the provisions of article 1, section 8, paragraph 18, it becomes the duty of Congress to delegate the making of detailed rules to an expert board or to an individual having the necessary skill and information. In doing this Congress is "making laws which shall be necessary and proper for carrying into effect the foregoing powers." And this is the true point of connection between "necessity" and the power to delegate legislative functions.²⁴

We should further note the bearing of other parts of article 1 of the federal Constitution on the power of Congress. Section 4, paragraph 2 requires Congress to meet each year; section 5, paragraph 4 forbids either house deserting the other in the performance of its duties. Under section 7, paragraph 1, revenue bills must originate in the House, and the clear implication is that in completed form they must be passed by Congress itself. Paragraph 2 of the same section further limits the acts that may become laws. All these provisions indicate

this broad authority was not stereotyped as of any particular time, but endured, thus furnishing a perpetual and living sanction to the legislative authority within the limits of a just discretion, enabling it to take into consideration the changing wants and demands of society and to adopt provisions appropriate to meet every situation which it was deemed required to be provided for. In fact, the rulings . . . were all summed up in the following passage, which ever since has been one of the principal tests by which to determine the scope of the implied power of congress over subjects committed to its legislative authority: "We admit, as all must admit, that the powers of government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *First National Bank v. Fellows* (1917) 244 U. S. 416, 419, 61 L. Ed. 1233, 1237.

²⁴ See cases note 19, *supra*; also *State v. Atlantic Coast Line Ry.* (1911) 56 Fla. 617, 47 So. 969, 32 L. R. A. N. S. 639; *State v. Public Serv. Com.* (1917, Mo.) 194 S. W. 287; *U. S. v. Grimaud* (1911) 220 U. S. 506, 55 L. Ed. 563; *State v. Briggs* (1904) 45 Ore. 366, 77 Pac. 750. In all the above cases necessity is spoken of as a justification for delegations—the necessity of resorting to some delegation to legislate effectively.

that Congress must give its personal attention to its work, and they make it clear that Congress may never by a "*lex regia*"²⁵ turn over bodily to another the entire power of legislation. Congress must promulgate its policies as laws; in the case of revenue laws they must be worked out in detail, but in all other cases it is the *power* that Congress must personally execute. No legislation, therefore, can take place without the direction of Congress; and the laying down of directions by that body meeting in its legislative halls constitutes the exercise of the legislative power intrusted to it. All this is in no wise inconsistent with the views indicated, and this legislative *power* may still be exercised with relation to section 8, paragraph 18, of article 1. Congress may not delegate the choosing of policies nor the duty of formally enacting the policy into law, but it may formulate that policy as broadly and with as much or as little detail as it sees proper and it may delegate the duty of working out the details and the application of the policy to the situation it was intended to meet. The rule, therefore,—so far as there may be said to be a rule against the delegation of legislative powers—is not a prohibition against delegations of legislative functions or of the duty to do acts legislative in their nature after Congress has laid down the broad rule; but it is a prohibition of the attempted subdelegation of the very power itself or the duty of meeting in annual session and declaring the national will in some form of enactment in the general laws. As to when the necessity for delegation exists, the decision rests with the legislative body—a discretion not to be disturbed by the courts except in clear cases of abuse.²⁶ The very fact of the separation of powers should make courts more careful in this respect.

The cases upon the question of the delegation of legislative functions and powers are numerous, but as expressed by the courts themselves:

"The line has not been exactly drawn, which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given those who are to act under such general provision to fill up the details."²⁷

²⁵ *Inst. lib. 1, tit. 2, par. 6; Gaii. inst. I. 5, Dig. lib. 1, tit. 4, l. 4.*

²⁶ "When we recur to the fact that the power of eminent domain has been delegated to railroad and other corporations without challenge; that the important power of taxation and all the powers of local government have, for more than three generations, been delegated in our state, we are admonished not to be too confident in asserting where the precise limitation is upon the competency of the legislature to delegate powers of government.

"We must be careful, therefore, how, in the absence of express injunction or clear implication, we strip a co-ordinate branch of the state government of the right to give expression to its will, in the form of law, within its own department." *Paul v. Gloucester* (1888) 50 N. J. 585, 594, 15 Atl. 272, 276.

See notes 99 and 100, *infra*.

²⁷ *In re Griner* (1863) 16 Wisc. 423, 437.

"Touching the question of the delegation of legislative powers, the almost infinite variety of detail and circumstance and of the laws intended to meet them have led to an almost equal variety of judicial decision and utterance which, taken in the abstract, cannot be harmonized."²⁸

Thus, while there has been an inclination toward a liberal and favorable construction of such statutes, there is at the same time a tendency to attempt to put the decision upon some easily conceded ground such as the power to make a complete act effective upon the happening of a contingency,²⁹ or upon the ascertainment of a fact by the chief executive, as in the case of *The Aurora v. United States*.³⁰ This has been done even in cases where some warping of the true situation may have been necessary in order to make applicable the principle thus stated.³¹

It has been phrased:

"Although the legislature cannot delegate its powers to make a law yet it can delegate a power to determine some fact or state of things upon which the law may depend."³²

Dicta also arise from cases where a certain class of things is prohibited generally under a proper exercise of the police power, and some officer or board is empowered to determine when cases do or do not fall within the general prohibition.³³ With such situations it is not intended to deal in this article. We are here interested in those decisions which concede the power to delegate a rule-making or ordinance-making function to executive officers or administrative boards, and with that class of acts which have been ambiguously described by the courts as administrative acts of a legislative nature.³⁴

A challenge to the whole theory attempted to be set forth herein has been sounded in a series of cases of which *Dowling v. Lancashire Ins. Co.*³⁵ is typical. It was there held that the legislature might not constitutionally empower the commissioner of insurance to

²⁸ *State v. Public Serv. Com.* (1917, Wash.) 162 Pac. 523, 526.

²⁹ *Hudspeth v. Swayze* (1914) 85 N. J. L. 592, 89 Atl. 780; *State v. Parker* (1854) 26 Vt. 357.

³⁰ (1813) 7 Cranch, 382, 3 L. Ed. 378.

³¹ Note the minority opinion in *Field v. Clark* (1892) 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294.

³² *Field v. Clark*, 143 U. S. 649; *Locke's Appeal* (1873) 72 Pa. St. 491.

³³ *Union Bridge Co. v. U. S.* (1907) 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; *Monongahela Bridge Co. v. U. S.* (1909) 216 U. S. 177, 30 Sup. Ct. 356, 54 L. Ed. 435.

³⁴ *State v. Atlantic Coast Line Ry.* (1911) 56 Fla. 617; *Chicago & N. W. Ry. v. Dey* (1888) 35 Fed. 866. As showing the uncertain meaning of "administrative" as applied to legislative functions, see note 96, and p. 921, *post*.

³⁵ (1896) 92 Wisc. 63, 65 N. W. 738, 31 L. R. A. 112.

"prepare, approve and adopt a printed form in blank of a contract or policy of fire insurance together with such provisions, agreements or conditions as may be endorsed thereon or added thereto, and form a part of such contract or policy; and such form shall, as near as the same can be made applicable, conform to the type and form of the New York standard fire insurance policy" on the ground that the act "fails to provide definitely and clearly what the standard policy should contain, so that it could be put in use . . . without the determination of the insurance commissioner in respect to matters involving the exercise of a legislative discretion that could not be delegated."

The court held that the act was incomplete and uncertain until the commissioner acted. As

"a discretion was reposed in the commissioner as to the form of the policy which embodied the substance of the contract, and which was to have the sanction and the force of law," that "the effect, clearly, was to transfer to him bodily the legislative power of the state on that subject." Continuing, the court says: "Within the limits prescribed, he was to prepare just such a policy or contract as, in his judgment and discretion, would meet the legal exigencies of the case, and no one could certainly predict what the result of his action might be. It was not to be published, as laws are required to be, or to be approved by the governor. It was to be filed in the office of the insurance commissioner, instead of being deposited in the office of the secretary of state, and its use was to be enforced by the penal sanction of the act. He was not required by the act to perform any mere administrative or executive duty, or to determine any matter of fact for the purpose of executing or carrying the act into effect. The result of all the cases on this subject is that a law must be complete, in all its terms and provisions, when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors or other appointee or delegate of the legislature, so that, in form and substance, it is a law, in all its details, in praesenti, but which may be left to take effect in futuro, if necessary, upon the ascertainment of any prescribed fact or event."⁸⁶

For this decision the court cites and relies largely upon *Field v. Clark* and the cases therein cited. That case, it should be remembered, sustained, so far as our question is concerned, the section of the Tariff Act of 1890 which provided that:

"Whenever, and so often as the President shall be satisfied that the government of any country producing sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States,

⁸⁶ Cf. the following cases in accord, dealing with powers conferred on boards of health: *Anderson v. Manchester Fire Assurance Co.* (1895) 59 Minn. 182, 63 N. W. 241; *O'Neil v. American Fire Ins. Co.* (1895) 166 Pa. St. 72, 30 Atl. 943; *State v. Burdge* (1897) 95 Wisc. 390, 37 L. R. A. 157, 62 Am. St. Rep. 123, 70 N. W. 347. In the case last cited the competency of such legislation as a proper exercise of the police power seems to have been the real question in the mind of the court.

which, in view of the free introduction of such sugar, molasses . . . into the United States, he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, . . . the free introduction of such sugar . . ., the production of such country, for such time as he shall deem just, and in such case and during such suspension duties shall be levied . . . as follows:"

Detailed provisions as to such suspension duties follow. The court in *Field v. Clark* later says:

"That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

After holding that, as interpreted by the court, this was not a delegation of legislative power to the President, the court proceeds:

"The true distinction' as *Judge Ranney* speaking for the Supreme Court of Ohio has well said, '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 valid objection can be made.' *Cincinnati W. & Z. Ry. Co. v. Clinton County Comrs.* 1 Ohio St. 88. In *Moers v. Reading*, 21 Pa. 202, the language of the court was: 'Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.' So, in *Locke's App.*, 72 Pa. 491: 'To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the Legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet fully developed, or to things future and impossible to know . . . The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation.'"

That these statements are not inconsistent with the decision of the Wisconsin court may be conceded. It must be remembered, however, that the decision in *Field v. Clark* was in favor of the validity of the provision in question; that the above statements were not necessary to the decision of the case before the United States Supreme Court, and that the situation immediately presented to Justice Harlan was one which as interpreted by him³⁷ did not involve a question of real delegation. On this point he says:

³⁷ Note that Justice Lamar, Chief Justice Fuller concurring, wrote a dissenting opinion in which, disregarding the form of the enactment, they contended that

"He [the President] had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress."

It would seem, therefore, that the majority opinion in *Field v. Clark* is not intended to apply directly to a case of real delegation of discretion, and as to such a situation it was *dictum*.

The questions presented by *Dowling v. Lancashire Insurance Co.* are:

1. Must a statute contain within itself all the detailed regulations which it contemplates, or may authority to make such detailed regulations be delegated?
2. May a discretion or choice as to means or method be included in this authority?
3. May such an act be sustained if it permits or requires the adoption of a policy or of standards by the delegate depending upon his discretion and judgment?

Of course such regulations are not statutes; a statute is a formal enactment of the legislature. But our question goes to the substance, not to the form or name of the enactment, and our inquiry is whether, and how far, a commission or an executive officer may lay down rules binding upon the public under the general authority of a statute.

We shall first inquire how far a delegate may be intrusted with the power of supplying the detailed regulations contemplated by a statute and in accordance with its policy.

In *Atlantic Express Co. v. Wilmington & Weldon R. R.*,³⁸ the act brought in question denounces excessive charges, unjust discriminations and preferences as unlawful, and invests the commission with authority to "make such just and reasonable rules and regulations as may be necessary for preventing the same." The court says, quoting with approval from *Georgia R. R. v. Smith*.³⁹

"The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed is apparent and great; and this we understand to be the distinction

the discretion lodged in the President here to determine when duties were "reciprocally unequal and unreasonable" and to base such an order upon that determination, was the very essence of legislative duty. They distinguished the case of *The Brig Aurora*, 7 Cranch, 388, on the ground that in the latter case the act of Congress provided for all the contingencies. It should be noted, however, that if the interpretation of the minority is accepted, the duty of the President though legislative in nature is still to be exercised in subordination to the policy of Congress as declared in the act, and so falls within our main thesis.

³⁸ (1892) 111 N. C. 463, 16 S. E. 393, 32 Am. St. Rep. 805, 18 L. R. A. 393.

³⁹ (1883) 70 Ga. 694.

recognized strikingly by all the courts as the true rule in determining whether or not, in such cases, a legislative power is granted."

In *Blue v. Beach*,⁴⁰ the state board of health was by statute empowered to adopt

"rules and by-laws, subject to the provisions of this act and in harmony with other statutes in relation to the public health, to prevent outbreaks and the spread of contagious and infectious diseases."

Under this act, rule 11 of the board was promulgated. It provided:

"In all cases where an exposure to smallpox is threatened, it shall be the duty of the board of health, within whose jurisdiction such exposure shall have occurred, or danger of such an epidemic ensuing, to compel a vaccination or revaccination of all exposed persons."

Under article 4, section 1 of the constitution of the state, "All legislative authority" is lodged in the general assembly, and it is claimed that by virtue of that section of the state constitution the power to make such a rule may not be delegated to the board of health. The court sustained the delegation, saying:⁴¹

"While it is true that the character or nature of such boards is administrative only, . . . the power to make reasonable rules, by-laws, and regulations is generally recognized by the authorities . . . When these boards duly adopt rules or by-laws by virtue of legislative authority, such rules and by-laws, within the respective jurisdictions, have the force and effect of a law of the legislature."

In *State v. Atlantic Coast Line Ry.* this language is used:⁴²

"Where a valid statute, complete in itself, enacts the general outlines of a governmental scheme, or policy, or purpose, and confers upon officials charged with the duty of assisting in administering the law authority to make . . . rules and regulations, . . . such authority is not an unconstitutional delegation of legislative power. . . . A statute may be complete when the subject, the manner, and the extent of its operation are stated in it."

In *Cook v. Burnquist* the court says:⁴³

"The Legislature of the state, in passing a law, may include in that law many administrative details, as well as the main vital provisions of the law, or it may pass a law covering a matter broadly and in gen-

⁴⁰ (1900) 155 Ind. 121, 56 N. E. 89, 50 L. R. A. 64, 84 Am. St. Rep. 195.

⁴¹ It is interesting to note that some of the cases chiefly relied on as sustaining *Dowling v. Lancashire Fire Ins. Co.* as authority for the proposition that the legislative act must be complete in detail and that no discretion can be lodged in the delegate, are in the case of *Blue v. Beach* cited for the opposite result, to wit, *Locke's Appeal*, 72 Pa. St. 491, and *Field v. Clark*, 143 U. S. 649.

⁴² (1911) 56 Fla. 617, 47 So. 969, 3 L. R. A. N. S. 639.

⁴³ (1917) 242 Fed. 321, 329.

eral, leaving the administrative details to a board, or to certain designated persons; but the administrative details of any particular matter included in a statute still retain their character of administrative details, and the Legislature may pass an act permitting the carrying out of a change of these administrative details to a public board or to an individual, even after they have been enacted into the statute."⁴⁴

In *Chicago & N. W. Ry. v. Dey* Justice Brewer remarked that⁴⁵

"the line of demarkation between legislative and administrative functions is not always easily discerned. The one runs into the other. The law books are full of statutes unquestionably valid, in which the legislature has been content to simply establish rules and principles, leaving execution and details to other officers."

That a statute may be general and that the details necessary to its policy and purpose may be supplied by a board or an individual, seems too well settled for further question.

The second question is whether a discretion may be granted to the mandatarly as to means, method, or subject-matter. It would clearly appear from the decisions that, within the purpose and policy of the statute, a discretion—broad or narrow as the legislature shall deem expedient—may be vested in the delegate.⁴⁶ Further consideration of

⁴⁴ In the more recent case of *Red "C" Oil Mfg. Co. v. Board of Agriculture* (1911) 222 U. S. 380, 56 L. Ed. 240, the delegation was upheld:

"The legislative requirement was that the illuminating oils . . . should be safe, pure, and afford a satisfactory light, and it was left to the Board of Agriculture to determine what oils would measure up to these standards."

"A direct exercise by the legislature of the police power is in accordance with immemorial governmental usage. But the subject matter may be such that only a general scheme or policy can with advantage be laid down . . . and the working out in detail of the policy indicated may be left to the discretion of the administrative or executive officials." McGhee, *Due Process of Law*, 366 and cases cited.

⁴⁵ (1888) 35 Fed. 866, 874.

⁴⁶ *Red "C" Oil Mfg. Co. v. Board*, 222 U. S. 380, *supra*, note 43; *Buttfield v. Stranahan*, 192 U. S. 470; *Blue v. Beach*, 155 Ind. 121.

In *St. Louis, Iron Mt. & So. Ry. v. Taylor* (1908) 210 U. S. 281, 287, 52 L. Ed. 1061, 1064, delegation by Congress of the duty to fix the standard height of draw-bars for freight cars, was held constitutional.

State v. Briggs (1904) 45 Ore. 366, 77 Pac. 750:

"It is sometimes said in opinions and in law books that, where a statute undertakes to regulate the licensing of callings, trades, or professions, the extent of the qualifications required of the licensee must be determined by the judgment of the Legislature; but this does not mean that the Legislature must necessarily provide in the act itself the exact qualifications required. It may delegate that power to a board or commission created and authorized by it, which, in the exercise of the authority vested in it, acts on behalf of the state; its conclusions and judgments, so long as exercised within the limits of the law, being the acts of the state, and binding as such."

In *State v. Normand* (1913) 76 N. H. 541, 85 Atl. 899, 901, Ann. Cas. 1913 E, 966, the court says: "The statute is complete in itself. It in effect declares that bread unnecessarily exposed to flies and dirt is a public menace and provides a penalty for the infringement . . . of the act. . . . The state board of health

this question may be included under our treatment of the third inquiry: May a discretion thus granted be so broad as to permit the adoption of a policy by the delegate?

There are many *dicta* to the effect that no power to choose policies may be given to the delegate. But such statements usually accompany a decision sustaining the delegation complained of but insisting that it is not a real delegation of legislative functions or powers. To get clear light, one must ignore phrases and terms and look at the results attained.

In 1910, the fourth section of the Interstate Commerce Act was amended so that⁴⁷

“upon application to the Interstate Commerce Commission such carrier may in special cases, after investigation, be authorized by the commission to charge less for longer than for shorter distances.”

The effect of the act was to take from the carrier the right to determine in the first instance whether conditions were “substantially similar,” and the right to determine in advance upon the modification of a given rate where it conflicted with the general provisions of the long and short-haul clause. The power to make such orders was vested in the commission. In order to standardize its rulings under this act, the Interstate Commerce Commission had divided the territory under its jurisdiction into zones, thus framing a general policy under which its special rules should be made. It was contended that this gave the commission too broad a legislative power. The court denied the contention,⁴⁸ but it sustained the statute and the action of the commission upon the rather unsatisfactory ground that since the carrier had formerly been permitted to fix a rate for itself which depended for its validity on a consideration of whether circumstances were substantially similar, that had been equally a delegation of legislative power; and the carriers contending for that power—which would revert to them if the statute in question were unconstitutional or inoperative—were in no position to complain of the commission’s exercise of the same power and of its classification by zones, similar to those which the railways had formerly used by agreement; if one was an illegal delegation, it followed that the other was also illegal. But it is submitted that a railroad company does not legislate in making a rate for its private business and for determining primarily its private profit. Its act binds only itself and those individuals who enter into relations with it; it has no power to bind other railroads. The public interest

is charged with the enforcement of the law, and for that purpose it is authorized ‘to make all necessary rules and regulations.’ . . . When the board of health made the rule requiring loaves of bread to be wrapped in paper they were not legislating.”

⁴⁷ Act of June 18, 1910, 36 Stat. at L. 548.

⁴⁸ *Intermountain Rate Cases* (1914) 234 U. S. 476, 58 L. Ed. 1408.

and the duty of the carrier as a public utility are merely limitations on the private power of the railroad to make its own rates absolute. Legislation is the making of rules binding generally on others, not rules for the conduct of one's own business. The effect of the court's decision is, therefore, to acquiesce in the delegation to the commission of a broad discretion, with no standards prescribed other than the general purposes expressed in the act, and to acquiesce in the assumption by the commission of a duty to formulate a general policy to guide its action in the making of future rules and regulations.

Two remarkable acts of the type under discussion are the general acts authorizing a reorganization of the customs service by the President.⁴⁹ By the Act of August 24, 1912, Congress made the following provision:

"The President is authorized to reorganize the customs service and cause estimates to be submitted therefor on account of the fiscal year nineteen hundred and fourteen bringing the total cost of said service for said fiscal year within a sum not exceeding \$10,150,000.00 . . . ; in making such reorganization and reduction in expenses he is authorized to abolish or consolidate collection districts, ports, and subports of entry and delivery, to discontinue needless offices and employments, to reduce excessive rates of compensation below amounts fixed by law or Executive order, and to do all such other and further things that in his judgment may be necessary to make such organization effective and within the limit of cost herein fixed; such reorganization shall be communicated to Congress at its next regular session and shall constitute . . . until otherwise provided by Congress the permanent organization of the customs service."

The act of August 1, 1914, provides:

Sec. 1. "The President is authorized from time to time, as the exigencies of the service may require, to rearrange, by consolidation or otherwise, the several customs-collection districts and to discontinue ports of entry by abolishing the same or establishing others in their stead: *Provided*, That the whole number of customs-collection districts, ports of entry, or either of them, shall at no time be made to exceed those now established and authorized except as the same may hereafter be provided by law: *Provided further*, That, hereafter, the collector of customs of each customs-collection district shall be officially designated by the number of the district for which he is appointed and not by the name of the port where the headquarters are situated and the President is authorized from time to time to change the location of the headquarters in any customs-collection district as the needs of the service may require: *And provided further*, That the President shall, at the beginning of each regular session, submit to Congress a statements of all acts, if any, done hereunder and the reason therefor."

These acts were brought about by the almost intolerable condition of customs districts in the United States, a condition that had from

⁴⁹ Act of Aug. 24, 1912, 37 Stat. at L. 434, and Act of Aug. 1, 1914, 38 Stat. at L. 623.

year to year been pressed upon the attention of Congress without result. The system of districts was substantially the same as that formulated in 1799; many of the 126 districts had become unnecessary, while newer parts of the country were not served at all.⁵⁰ The system was wasteful and extravagant, but detailed congressional action was apparently impossible because of the complexity of the public interests involved and the many conflicting local interests.

By virtue of the first act, President Taft promulgated and transmitted to Congress on March 3, 1913, his plan of reorganization,⁵¹ making in the state of Maine, for instance, two districts instead of fourteen, and establishing forty-nine districts for the entire territory covered in place of the one hundred and twenty-six previously maintained. It will be of interest to note that among other changes in policy and detail put into effect by this plan, a protest fee of \$1.00 was established for each appeal in order to discourage useless and frivolous litigation.

It is true that under these statutes there is no unlimited discretion in the President; but he has some discretion, and it is contemplated that he shall adopt his own policy for the general purposes named in the act—to reduce expense and increase efficiency. But his acts thereunder are legislative in nature, and his authority is derived from the delegation of power to him by Congress.

Another instance of the authority to perform legislative functions so broad as to imply a duty in the delegate to establish a policy will be found in the provisions for a government for the Philippine Islands. The Act of March 2, 1901, provides that

"All military, civil and judicial powers necessary to govern the Philippine Islands . . . shall, until otherwise provided by Congress, be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants of said Islands in the free enjoyment of their liberty, property and religion."⁵²

By the Act of May 11, 1908:

"That the President is hereby authorized in his discretion to create by Executive order, and name, a new executive department in the Philippine government, and to embrace therein such existing bureaus as he may designate in his order; and in his appointment of any commission member he shall specify in his message to the Senate the department if any, of which the appointee shall be the secretary."⁵³

⁵⁰ See *U. S. Finance Report* (1906) 34; also testimony of Jas. F. Curtis, Assistant Secretary of the Treasury, before the Committee on Expenditures of Treasury Department, Aug. 16-17, 1911, esp. *Report*, p. 4.

⁵¹ Executive order of March 3, 1913. See also executive orders of President Wilson under the act of Aug. 1, 1914, dated Nov. 21, 1914, and May 15, 1917.

⁵² 31 Stat. at L. 910.

⁵³ Ch. 164, s. 2, 35 Stat. at L. 125.

It is true that under the Constitution⁵⁴

“The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.”

This provision is an authority to legislate, although on the face of it, it is no more an authority to delegate legislative power to the co-ordinate executive branch of the government than are the provisions of article 1 already referred to. The question was raised as to the first of the above statutes in *Dorr v. United States*,⁵⁵ but the Supreme Court only said in answer to the objection that “The right of Congress to authorize a temporary government is not open to question at this day . . .” Of course the power of Congress to legislate for a territory cannot be denied, nor its power to delegate powers of local self-government to a locality or a territory. It is true, also, that the executive authority may do some things in the control and organization of new territory that falls into its hands; but none of these considerations touches the present question: Can Congress *give* to the President by *delegation* legislative power over the territories which he would not otherwise have? If so, it is additional evidence of our recognition of the power of Congress to delegate legislative functions, and it is broader than the *dicta* of the early cases.

A recognized power to delegate legislative functions, even to the extent of allowing the delegate to adopt a policy—or rather, as we hope may appear, requiring the delegate to adopt a policy—will be found in the cases dealing with the delegation of the rate-making powers. In *Munn v. Illinois*⁵⁶ the Court went so far as to declare that a legislative rate was a matter of policy to be controlled at the polls rather than in the courts. This sweeping result is not now deemed to follow the legislative exercise of the rate-making function but it is concededly a legislative function—a rule for the future binding upon all to whom it applies.⁵⁷ May this function be delegated by the legislature to a commission? In *Interstate Commerce Com. v. Cincinnati etc. Ry.* Justice Brewer said:⁵⁸

“There were three obvious and dissimilar courses open for consideration. Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty.”

⁵⁴ Article IV, sec. 3, par. 2.

⁵⁵ (1904) 195 U. S. 153, 49 L. Ed. 128.

⁵⁶ (1876) 94 U. S. 113.

⁵⁷ *Atlantic Coast Line R. R. v. North Car. Corp. Com.* (1907) 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933 and notes; *Interstate Commerce Com. v. Cincinnati etc. Ry.* (1897) 167 U. S. 479, 42 L. Ed. 243.

⁵⁸ 167 U. S. 479, 494.

In *Louisville & Nashville Ry. v. Garrett* it is said:⁵⁹

"It has frequently been pointed out that prescribing rates for the future is an act legislative, and not judicial, in kind. . . . It pertains, broadly speaking, to the legislative power. The legislature may act directly, or, in the absence of constitutional restriction, it may commit the authority to fix rates to a subordinate body."

The Supreme Court has said:⁶⁰

"The function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated."

Chief Justice White, in *Atlantic Coast Line R. R. v. North Car. Corp. Com.* says:⁶¹

"The elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their operation are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine."

In *State v. Public Serv. Com.* the court says:⁶²

"It is also settled beyond doubt or cavil that this power of prescribing maximum rates for common carriers, which, as we have seen, Legislatures possess pursuant to an untrammelled grant of powers to pass laws, may be delegated to a public service commission. To this rule, unless inhibited by express constitutional provision, there is not a reputable exception. . . . He reads the cases in vain who does not concede the authority of the Legislature, absent an express constitutional provision which forbids, to delegate to an administrative body the power to fix rates for the carriage of freight and passengers."

By the provisions of the Missouri constitution⁶³

"The legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled the General Assembly of the state of Missouri." And⁶⁴ "The General Assembly . . . shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties."

⁵⁹ (1913) 231 U. S. 298, 305, 58 L. Ed. 229, 239.

⁶⁰ *Knoxville v. Knoxville Water Co.* (1908) 212 U. S. 1, 8, 53 L. Ed. 371, quoted in *San Joaquin Light & P. Corp. v. R. R. Com.* (1917) 165 Pac. 16, 17.

⁶¹ 206 U. S. 1, 19.

⁶² (1917, Mo.) 194 S. W. 287, 291, 289, 292, 295.

⁶³ Art. 4, sec. 1, Constitution of 1875.

⁶⁴ Art. 12, sec. 14.

Under these constitutional provisions the legislature had provided that⁶⁵

“Whenever the Commission shall be of the opinion . . . that the maximum rates . . . are insufficient to yield reasonable compensation for the service rendered,⁶⁶ . . . the Commission shall . . . determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute. . . .”

The court held that in spite of the direct mandate given by article 12, section 14 of the Missouri constitution to the legislature, the latter body had properly delegated this function, although the exercise of the sub-delegated power by the commission involved the setting aside by the commission of a previously established legislative rate,⁶⁷ and that the power of delegation to a commission was the same whether such provisions were in the constitution or not, and that “it is not a forbidden delegation of legislative power to clothe a public service commission with the power of establishing reasonable rates, maximum or minimum.”⁶⁸

It is true that, while sustaining the rate-making function bestowed on a commission by statute, courts have attempted to show that this function is not legislative but rather judicial in nature. This tendency

⁶⁵ Laws of 1913, sec. 47, p. 583.

⁶⁶ Notice the qualification on the jurisdiction of the commission: it must first find that the maximum rate is insufficient to yield reasonable compensation. This makes it necessary for the commission to find that fact as a prerequisite to jurisdiction to act as a legislative body. Cf. *Chicago, M. & St. P. Ry. v. Minnesota* (1890) 134 U. S. 418. But it is believed that this fact being found, the power exercised is as purely legislative as though the statute were unqualified. See Illinois Act of May 2, 1873, sec. 8, which without qualification commanded the commission to “make for each railroad . . . a schedule of reasonable rates.” This statute was upheld in *Chicago, B. & Q. R. R. v. Jones* (1894) 149 Ill. 361, 376, 37 N. E. 247.

⁶⁷ The Missouri court points out, however, that the state legislature is not dependent upon art. 12, sec. 14 for its power over rates.

“Since . . . the Legislature of this state had and exercised the power to establish reasonable maximum rates of carriage for freight and passengers, long before section 14 of article 12 was ever written into our Constitution, the latter section of the Constitution was merely the expression of a theretofore existing constitutional power . . . and so the cases which come from states having no express provision as to the legislative authority over railroads, and which hold constitutional the delegation of this power, are just as cogent, binding and persuasive as cases from Illinois, West Virginia, Alabama, Washington, and Georgia, which have constitutional provisions similar to our own.”

⁶⁸ For decisions in other states under similar provisions see *Chicago, B. & Q. R. R. v. Jones*, 149 Ill. 361, 376. Also *State v. Baltimore & O. R. R.* (1915) 76 W. Va. 399, 75 S. E. 714, 717, where under similar constitutional provisions the commission was authorized to “change any intrastate rate, charge or toll which is unjust or unreasonable, and may prescribe such rate, charge or toll as would be just and reasonable. . . .” This was held to be not unconstitutional as

is more likely to appear where the statute conferring the legislative duty couples with it as a prerequisite the duty of first ascertaining whether the rates previously in effect are unreasonable, and makes that finding a condition precedent to the exercise of the legislative function of establishing new rates. Here the commission has two functions to perform: one judicial in nature, in determining the jurisdictional fact of pre-existing unreasonable rates; the other legislative, in the establishment of the new rates; but the tendency has been to consider the two functions as one. Thus the Wisconsin court in *Minneapolis, St. P. etc. Ry. v. Railroad Com.*⁶⁹ speaks of the power of the legislature to delegate to the commission the power of making rates under chapter 362, section 14, of the laws of 1905, providing in substance that whenever the commission shall find any existing rate unreasonable or unjustly discriminatory, it shall fix a reasonable rate to be followed in the future.

The court says:

"This law establishes, and thenceforth assumes, the existence of rates . . . discoverable by investigation, but undisclosed, which are exactly reasonable and just. It commits to the Railroad Commission the duty to ascertain and disclose that particular rate. . . . The law intends that there is only one rate . . . that is reasonable and just. When the order of the commission is set aside by the court, it is because this reasonable and just rate . . . has not yet been correctly ascertained. When the order of the commission has been rescinded or changed by the commission because of changed conditions, it is because there is a new reasonable rate to be ascertained and disclosed, applicable to such new conditions and fixed by force of law immediately when the new conditions come into existence. But the theory and mandate of the law is that this point always exists under any combination of conditions and is always discoverable, although not always discovered. Until it is discovered and made known the former rates and service prevail. . . . If it were conceded that the commission had power or discretion to fix one of several rates, either of which would be just and reasonable, it would be hard to say that this was not a

delegating legislative power expressly conferred on the legislature by the constitution.

See also *State v. Railroad Com.* (1909) 52 Wash. 33, 100 Pac. 184, sustaining a Washington statute under similar circumstances.

Art. 4, sec. 2, par. 1 of the Georgia constitution provided that:

"The power and authority of . . . requiring reasonable and just rates of freight and passenger tariffs, are hereby conferred upon the General Assembly, whose duty it shall be to pass laws, from time to time, to regulate freight and passenger tariffs." Under this provision the legislature provided that the commission should "make reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business in this state on the railroads thereof." Code 1882, par. 719, p. 159.

The court in *Georgia R. R. v. Smith* (1883) 70 Ga. 694, 698, sustained the delegation because of the "utter impossibility of preparing by the legislature just and proper schedules for the various railroads." See also *Railroad Com. v. Central of Ga. Ry.* (1909) 170 Fed. 225, 238, construing the Alabama constitution.

⁶⁹ (1908) 136 Wisc. 146, 116 N. W. 905, 911, 912, 17 L. R. A. N. S. 821.

delegation of pure legislative power to the commission. But the theory of this law is to delegate to the commission the power to ascertain facts and to make mere administrative regulations."

Note the statement of the court that the delegation in question is permissible only if one concedes that a reasonable rate is a fixed point to be found by the commission as a fact previously existing, and that if the latter had "power or discretion to fix one of several rates, either of which would be just and reasonable, it would be hard to say that this was not a delegation of pure legislative power."

Yet it is submitted that what may be a reasonable rate is not a fixed point. The court admits this for practical purposes, for it proceeds to say:

"In reviewing the order of the Railroad Commission the inquiry is not whether the rate . . . fixed by the commission is just and reasonable, but whether the order of the commission is unreasonable or unlawful. . . . The court is not investigating for the purpose of establishing a fixed point. Whether or not the order is within the field of reasonableness, or outside its boundaries, is the question for the court. . . . The order, being found by the court to be such that reasonable men might well differ with respect to its correctness, cannot be said to be unreasonable."

Of course what the court had in mind in the last quotation is the relation of the functions of the court and the commission, and the court treats it as somewhat like the relation of court and jury. But it should be recognized that a reasonable rate is not, even in theory, a fixed point, but is any point in that portion of a scale of possible rates between the point of unreasonable cost to the public on the one hand and of confiscation of the property of the utility on the other; and that even the location of this portion of the entire scale will vary according to the basis taken for valuation and proper return.⁷⁰ That the duty of fixing the rate implies a broad discretion and a duty to establish a

⁷⁰ "The thing of real importance in a rate case is not the fair value of the property alone or the fair rate of return alone, but the product of the two." *Report*, p. 146, of committee on plans for ascertaining the fair value of railroad property submitted to 23d Annual Convention, National Association of Railroad Commissioners.

"What is the test by which the reasonableness of rates is determined? This is not yet fully settled. Indeed, it is doubtful whether any single rule can be laid down, applicable to all the cases." Judge Brewer in *Ames v. Union Pac. R. R.* (1894) 64 Fed. 165, 177.

"Little progress has been made toward a definition of 'fair value for rate purposes.' Some authorities state that the term is not subject to definition, if by definition is meant the laying down of a standard or rule or formula by which fair value can be determined. Each case must be considered on its own merits." Whitten, *Valuation of Public Service Corporations* (1914) Supp. 817.

Fair value "is a determination of what, under all the facts and circumstances of the case is a just and equitable amount on which the return allowed to the corporation is to be computed." *Minnesota Rate Cases* (1913) 230 U. S. 352.

policy is well brought out in the case of *re Portland Railway, Light & Power Co.*⁷¹

"In the consideration of any case . . . this commission will be governed by considerations of public policy, bearing in mind the constant need for the investment of new capital in order that the public may be properly served . . . the effect upon investors of a given action in rate regulation is not confined to the particular class of utility in which it is exercised."

And it seems well settled that whether rates are fixed by a commission or by the legislature directly, the courts will use the same consideration in dealing with them. They will not declare them confiscatory unless there is a clear case. Thus in *Louisville & N. R. R. v. Garrett*, Justice Hughes says:⁷²

"The rate-making power necessarily implies a range of legislative discretion; and, so long as the legislative action is within the proper sphere, the courts are not entitled to interpose and upon their own investigation of traffic conditions and transportation problems to substitute their judgment with respect to the reasonableness of rates for that of the legislature or of the railroad commission exercising its delegated power."

Another court puts it thus:⁷³

"The vital question to both shipper and carrier being that the rates shall be reasonable, and not by what body they shall be put in force."

In *Bluefield v. Bluefield Water Co.*:⁷⁴

"The valuation of the property of a public service corporation for rate making purposes and the fixing of rates for tolls and charges for the services to be rendered are purely legislative acts and are not the subject of judicial inquiry, except in so far and in so far only as may be necessary to determine whether such rates are void on constitutional or other grounds."⁷⁵

We must conclude that the making of rates, whether by the legislature or by a commission, is a legislative function, that it is delegable to the commission, that it involves the exercise of a broad discretion and the adoption of a policy by the commission, and that no standards need be set for the commission other than the implied standard that the rates shall be not confiscatory on the utility nor oppressive to the public. Even as to these bounds no definite point can be fixed and the

⁷¹(P. S. C. Ore.) P. U. R. 1918 B, 266, 275.

⁷²(1913) 231 U. S. 298, 313, 58 L. Ed. 229, 242.

⁷³*State v. Atlantic Coast Line R. R.* (1908) 56 Fla. 617, 47 So. 969, 32 L. R. A. N. S. 639.

⁷⁴94 S. E. 121, 122, P. U. R. 1918 B, 25.

⁷⁵*Cf. Chicago & N. W. Ry. v. Dey* (1888) 35 Fed. 866; *Des Moines Gas Co. v. Des Moines* (1915) 238 U. S. 153, 59 L. Ed. 1244.

decision rests with the rate-making body subject to be set aside when the power granted is not exercised within the terms of the grant, or when the result is clearly confiscatory or is a clear invasion of the right of the public to a rate that is not oppressive.⁷⁶

Another class of cases in which the courts have apparently attempted to explain away clear delegations of legislative functions and to attribute the result attained to other grounds is in those instances where commissions are authorized to prescribe in advance demurrage and other charges. Some courts have seemed to imply that since this is fixing an element of civil damage for cases that may arise, it is like jury action and hence is not legislative. In *State v. Public Service Com.* the court says:⁷⁷

"There is the same distinction between prescribing such compensation and fixing a penalty in its nature purely punitive as there is between the fixing of reasonable rates and the prescribing of such penalties. Both the fixing of reasonable rates and the fixing of reasonable demurrage for the failure to furnish cars in their nature involve the determination of the question of reasonable compensation."

The inference apparently intended to be conveyed in this and similar cases is that the act of designating a reasonable compensation is not legislative but it is akin rather to a judicial determination or a finding of fact by a jury. But this is not true: the distinction between a legislative and a judicial act is not that in the latter a remedy is applied while in the former it is rather a penalty; the true distinction lies in the fact that in legislation there is created a new general rule for future cases binding upon all to whom the rule applies, while in judicial acts the thing done is to ascertain the actual past damage in connection with a case before the tribunal. By this test, the fixing of damages or of rates of demurrage in advance is a legislative act; it is no less so when done by a commission than when done by a legislature. It would seem, therefore, that in spite of the *dicta* in the case last quoted, it makes no difference whether the delegation is of the authority to make a general rule inflicting penalties, or is intended to cover future cases for compensatory damages; the act required in either case is legislative, and if there is any distinction it should be sought on other grounds.

In the case of *Ex parte Kollock* the court says:⁷⁸

"We agree that the courts of the United States, in determining what constitutes an offense against the United States, must resort to the statutes of the United States, enacted in pursuance of the Constitution."

⁷⁶ Beale & Wyman, *Railroad Rate Regulation*, sec. 442, 445.

⁷⁷ (1917) 162 Pac. 523, 526. Cf. *Chippewa & F. Improvement Co. v. Railroad Com.* (1916) 159 N. W. 739; *Southern Ry. v. Melton* (1909) 133 Ga. 277, 65 S. E. 665.

⁷⁸ (1897) 165 U. S. 526, 533, 41 L. Ed. 813, 815.

In *United States v. Maid* the court puts it thus:⁷⁹

"A department regulation may have the force of law in a civil suit to determine property rights, . . . and yet be ineffectual as the basis of a criminal prosecution. . . .

"The obvious ground of said distinction is that to make an act a criminal offense is essentially an exercise of legislative power, which cannot be delegated, while the prescribing . . . of a rule, without penal sanctions, to carry into effect what congress has enacted, although such rule may be as efficacious and binding as though it were a public law, is not a legislative, but ministerial, function."

It is submitted that any "function" which can create a "rule binding as though it were a public law" for all future cases as they arise is legislative and that it is not ministerial in any proper sense of that term. Departmental regulations for the conservation of the national domain⁸⁰ or for the protection of dairy interests against unlabeled oleomargarine⁸¹ are regulations calling for a wide discretion to be exercised by the delegate. In *United States v. Eaton* this language is used:⁸²

"It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue . . . could be considered as a thing 'required by law' . . . in such manner as to become a criminal offence under § 18 of the act. . . . If Congress intended to make it an offence, . . . it would have done so distinctly."⁸³

Reading between the lines, the real ground of distinction between cases where the commission attempts under delegated authority to impose a penalty and those in which it fixes a rule of damages for the future, would appear to be that the determination of the policy being the essential of the legislative act, the courts will look to the authorizing act of Congress or the legislature for that policy; and that while the intention to standardize damages might readily be assumed,⁸⁴ yet the court will not *presume* the intended policy of allowing the commission or delegate to inflict a penalty or create a new crime in any case; therefore the authority to do that must at least be clearly expressed in the statute. But if so expressed, it may authorize the making of rules by administrative agencies which when made will be binding as law and their violation a crime. In other words, the inflicting of penalties and the creating of crimes is so much a matter of policy as to be what

⁷⁹ (1902) 116 Fed. 650, 652.

⁸⁰ *Grimaud v. U. S.* (1911) 220 U. S. 506.

⁸¹ *Ex parte Kollock*, 165 U. S. 526.

⁸² (1892) 144 U. S. 677, 688, 12 Sup. Ct. 764, 36 L. Ed. 591.

⁸³ *Cf. U. S. v. Bailey* (1835) 9 Peters, 238, 9 L. Ed. 113; and *Oceanic Steam Nav. Co. v. Stranahan* (1909) 214 U. S. 320, 29 Sup. Ct. 671, 53 L. Ed. 1013.

⁸⁴ *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 320, *supra*, n. 82.

is sometimes called an "essentially legislative" or "purely legislative act."⁸⁵ But it is believed that even the above cases are not necessarily binding as precedents for the proposition that commissions may under no circumstances be allowed to fix penalties or name offences if definitely authorized by statute to do so: the cases cited go rather on the theory that such authority will not be presumed. On the other hand the cases seem to indicate so strong a tendency on the part of the courts jealously to watch delegations of policy-forming functions by the legislature when they conflict with "individual or property rights," that this result is doubtful. One reason is that such delegations of power are unnecessary. Few cases can be conceived in which the delegation of such functions was necessary; but if the necessity ever becomes apparent it is not doubted that the power will be conceded to exist unless the question has been definitely closed by precedent.

In this connection attention may be called to a class of cases arising under state constitutions which reserve no legislative power in the people. The legislature in such cases may attempt to refer back some legislative act to the people for their ratification, making a favorable popular vote the condition precedent to the operation of the act.

There are two groups of cases upon this point, one declaring such reference unwarranted as a delegation of legislative power to the majority,⁸⁶ and the other allowing it as the mere naming of a condition precedent upon which the law will become effective—an external act or happening which the legislature itself makes the condition of the law's operation.⁸⁷

On principle, if the mandate to the legislature requires it to declare the policies of the state, the legislature should not shirk its duty by attempting to throw back upon the public the responsibility for the policy.⁸⁸ It was ingeniously suggested by Justice Redfield in *State v. Parker*.⁸⁹

"And in regard to those great moral, social, and economic reforms, can it be doubted that the question of the preparation of the public mind to sustain them, firmly and quietly, lies at the foundation of all hopeful legislation on the subject? And is this not precisely what American legislatures both state and national have always, in effect, although not in form, been accustomed to do?"

⁸⁵ See *post*, notes 92 to 94.

⁸⁶ *In re Municipal Suffrage to Women* (1894) 160 Mass. 386, 36 N. E. 488, 23 L. R. A. 113; Cooley, *Constitutional Limitations* (7th ed.) 168 *et seq.*; *People v. Kennedy* (1913) 207 N. Y. 533, 101 N. E. 442.

⁸⁷ *Hudspeth v. Swayze* (1914) 85 N. L. J. 592, 89 Atl. 780; *State v. Parker* (1854) 26 Vt. 357. See also *Smith v. Janesville* (1870) 26 Wisc. 291.

⁸⁸ Cf. dissenting opinion of Justice Holmes in *In re Municipal Suffrage*, 160 Mass. 386, 36 N. E. 488, 491, with Cooley, *Constitutional Limitations* (7th ed.) 168 *et seq.*—note 86, *supra*.

⁸⁹ 26 Vt. 357, 364.

It may be true that laws should be only those which the popular mind is ready to receive and that the enforcement of laws depends upon their appeal to the sentiment of the people at large; but this consideration should be addressed toward an amendment to the constitution if it is believed that the will of the people can be found only by a referendum. It should not be permitted to override a mandate expressed or strongly implied in the constitution requiring the legislature to take personal responsibility for all state policies formulated into statutes.

It may be objected that the line should be more sharply drawn, that we should either forbid all delegation of legislative functions, or else go to the other extreme and forbid nothing less than the surrender of the final and ultimate power itself. But it is believed that such a line need not be drawn and that the duty of Congress and of the legislatures will in this respect always be relative to the subject, to the emergency, and to the public needs—more, probably, in the future than in the past; more in war times than in times of peace. The question is what is reasonably necessary in view of what the times demand and of the end to be accomplished.⁹⁰ The result may be that legislation for every-day purposes will increasingly be by rules and regulations, and that statutes will be limited to a position of mere policy-directing instruments. Statutes may bear a relation to the rules and regulations of the future somewhat analogous to that which constitutions have heretofore borne to statutes. It is true that such methods will be earlier used in cases where expertness and special knowledge are needed, or where the subject-matter is vastly complicated; but, within the limits indicated, it remains a potential means of practical legislation for broader fields.

Something might be said at this point on the use of terms by the courts in the classes of cases under consideration. It would appear that the courts classify these cases in which power is delegated *after* the court has decided to sustain or reject it, and the terms applied therefore become a sort of *ex post facto* justification or prohibition, according as the thing is deemed necessary or not. The fact that so many classes of permitted delegations of a power legislative in its nature have occurred shows the existence of a power to make such delegation which is gradually recognized as the necessity becomes apparent. The term "ministerial" has been used⁹¹ to describe an act really discretionary in nature, but so used as to disguise the true nature of the permitted act. The terms "strictly and essentially" or "strictly

⁹⁰ See Professor Frankfurter, *Constitutional Opinions of Justice Holmes* (1916) 29 HARV. L. REV. 683, 686-688.

⁹¹ *Douglas Park Jockey Club v. Talbott* (1917) 191 S. W. 474; *U. S. v. Maid* (1902) 116 Fed. 650.

and exclusively legislative acts;"⁹² "purely legislative power;"⁹³ or "purely legislative duties;"⁹⁴ or "legislation in the broad sense"⁹⁵— have all been used in the sense of the legislative policy control as distinguished from subordinate acts of a legislative character, or ultimate legislative discretion as contrasted with the act which declares the new rule. We also have the much-abused term "administrative powers and duties," which as applied to functions of a legislature nature seems to mean only "those legislative functions and powers which may be delegated." For the purposes of our discussion, the expression is a question-begging term more or less elastic in content.⁹⁶

Let us disregard the terms used and consider the thing done. Several propositions must then be conceded: No rule against the delegation of legislative powers by the legislature or by Congress⁹⁷ within the scope of the subjects committed to it, prevents the delegation upon the executive department or upon specially created boards or commissions through general statutes of the power and duty to perform functions legislative in their nature. This delegated power may be so broad as to require the use of a broad discretion and to necessitate the adoption of policies by the delegate. While the power may be exercised only within the limits designated by the legislature, yet it is for the legislature to say how broad the limits shall be, and in this determination they are guided by their honest judgment as to the most efficient means of serving the public. The courts should not review the discretion of the legislature in this respect, but should interfere only in plain cases of an attempted abdication of the function of choosing policies, or because of arbitrary interference with matters of private right.⁹⁸ In construing the rules laid down by a subordinate functionary under this power, the courts should treat their acts as valid if within the lines of the authority committed to them and not clearly

⁹² Lumpkin, J., in *Southern Ry. v. Melton*, 65 S. E. 665.

⁹³ *Interstate Commerce Com. v. Goodrich Trans. Co.* (1912) 224 U. S. 194, 214, 56 L. Ed. 729, 737.

⁹⁴ *State v. Crosby*, 92 Minn. 176, 99 N. W. 636, quoted in *Alexander v. McInnis* (1915) 129 Minn. 165, 167, 151 N. W. 899, 901.

⁹⁵ *Cook v. Burnquist* (1917) 242 Fed. 321, 329.

⁹⁶ *State v. Atlantic Coast Line Ry.* (1911) 56 Fla. 617, *supra*, note 34.

⁹⁷ While Congress has only granted legislative powers and there is not the same presumption in favor of its power as is indulged in the case of a state legislature, yet it is believed that the power of Congress to delegate, within the field of legislation committed to it, must be unquestioned in view of the provisions of the federal Constitution quoted *supra*, and the construction placed upon them by the courts. See cases mentioned in notes 14, 19, 23, 46, 48, 55, 58 *supra*.

⁹⁸ "The Constitution should be interpreted so as not to render impotent or inoperative, but to preserve and make effective, the sovereign power of the state. . . . If the details of the general legislative purpose, within definite limitations, as expressed in a complete law, cannot be committed to administra-

against some constitutional inhibition. Of the wisdom or expediency of the subordinate policy contained in these rules the court should not judge.⁹⁹

Judicial reference has been made to the general tendency:¹⁰⁰

"The marked tendency of legislation in recent years, not only in this state, but in other states, has been, to a large degree, to break away from the theory of three separate and independent departments of government, by imposing upon other departments duties and powers of a legislative character, which the courts have been inclined to sustain."

And in *Cook v. Burnquist*:¹⁰¹

"The tendency, not only in Congress, but in state Legislatures, is more and more to commit to administrative boards, or to individuals, or to some other branch of the government, administrative details."

Indeed the whole tendency of the cases has been toward a general readjustment of the relations of courts and legislatures; toward a greater inclination to concede to the latter freer lines as to policies; and toward noninterference on the part of the courts whenever political ideas are the moving considerations.¹⁰² Perhaps we are realizing more clearly that governmental problems, even under our written con-

tive officers, the sovereign power and duty to regulate would be impotent." *State v. Atlantic Coast Line Ry.* (1908) 56 Fla. 617, 47 So. 969, 32 L. R. A. N. S. 639, 659.

"As a general proposition, whatever laws or regulations are necessary to protect the public health and secure public comfort is a legislative question, and appropriate measures intended and calculated to accomplish these ends are not subject to judicial review. But nevertheless such measures or means must bear some relation to the end in view." *Blue v. Beach* (1900) 155 Ind. 121, 56 N. E. 89, 93.

For a case where the court tries to settle the question of the power to delegate by substituting its own judgment as to policy for that of the legislature, see *Schaeslein v. Cabaniss* (1902) 135 Cal. 466, 67 Pac. 755. The court quotes the following from *Yick Wo v. Hopkins* (1886) 118 U. S. 356:

"The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

⁹⁹ "The appropriate questions for the court would be whether the commission acted within the authority duly conferred by the legislature, and also, so far as the amount of compensation permitted by the prescribed rates is concerned, whether the commission went beyond the domain of the state's legislative power and violated the constitutional rights of property by imposing confiscatory requirements." *Louisville & N. R. R. v. Garrett* (1913) 231 U. S. 298, 313, 58 L. Ed. 229, 243.

¹⁰⁰ *State v. Crosby*, 92 Minn. 176, 99 N. W. 636, 637. See note 26, *supra*, and 6 A. & E. Ency. Law (2d ed.) 1022.

¹⁰¹ 242 Fed. 321, 325.

¹⁰² That the federal courts have in the past unconsciously tended to decide questions of power in reference to departures in legislation, upon political rather than on purely legal considerations, see Professor Freund, *Principles of Legislation* (1916) 10 Am. Pol. Sci. Rev. 1, 14.

stitutions, must be settled as questions of policy and expediency before they are finally laid to rest. The settled theory of our fathers that this shall be a government of laws and not of men cannot well be applied as a limitation upon the processes of the lawmaking and policy-declaring branch of the government in the same way that it can be applied to functions judicial in nature.

Our present inquiry is not what policy the legislature should adopt in the matter of delegation. That is a problem for political wisdom to determine, and it will always be largely affected by contemporaneous social and political views. The time will probably come when the legislature will go too far; the time has surely been when it did not go far enough. We are here concerned only with the question of power. It may be urged that it is wrong to agitate these problems anew solely in the light of present conditions and of political ideals which often greatly vary from those of our ancestors. But it is equally inadvisable to settle these problems by *dicta* of the past which in their turn were based upon theories now somewhat outworn and outgrown.

Perhaps we have grown too rapidly and are now at that stage in the development of a world nation where the sane and conservative views of our fathers have too little weight. But these are matters of political judgment, and if our times are wrong, the wrong will be righted later. The chief thing to remember is that our Constitution is capable of adaptation to new ideals as well as to new conditions, and that to realize this is to pay it the highest possible tribute. We must enter upon our new undertakings with full sense of the fallibility of all things human, and with a proper reverence for the wisdom of the past.