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Constitutional Law—Arkansas's Nondelegation Doctrine: The Arkansas Supreme Court Defines a Limit on the Delegation of Legislative Authority to a Private Party. *Leathers v. Gulf Rice Arkansas, Inc.*, 338 Ark. 425, 994 S.W.2d 481 (1999).

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CONSTITUTIONAL LAW—ARKANSAS'S NONDELEGATION DOCTRINE: THE ARKANSAS SUPREME COURT DEFINES A LIMIT ON THE DELEGATION OF LEGISLATIVE AUTHORITY TO A PRIVATE PARTY. *Leathers v. Gulf Rice Arkansas, Inc.*, 338 Ark. 425, 994 S.W.2d 481 (1999).

I. INTRODUCTION

In *Leathers v. Gulf Rice Arkansas, Inc.*,¹ the Arkansas Supreme Court held that the General Assembly could not delegate to a private group of people (rice producers) the authority to impose an assessment on another private group of people (rice buyers).² Previous caselaw recognized the constitutionality of conditioning the effectiveness of an assessment on a favorable referendum by those who had to pay the assessment;³ however, the court found imposing an assessment through a referendum that did not involve all those affected to be an unconstitutional delegation of legislative authority.⁴

This note examines the facts surrounding the creation of the Arkansas Rice Research and Promotion Board and the effect of Act 344 of 1995 on assessments to support the work of the Board. Next, this note discusses the evolution of the nondelegation doctrine at the federal level and in Arkansas. After discussing the reasoning of the court in the *Gulf Rice* opinion, this note concludes with a discussion of the significance of the court's decision in terms of the limits the decision sets on legislative delegation, its impact on drafting future legislation, and some remaining unanswered questions.

II. FACTS

Act 725 of 1985 ("Act 725") created the Arkansas Rice Research and Promotion Board ("Board") with nine producer members.⁵ Act 725 also assessed the producers \$0.03 per bushel on all rice grown within the state.⁶ The Act required the producers to approve the assessment by a three-fifths vote before imposition.⁷ Even though the assessment was mandatory, any producer could apply for and receive a refund from the

1. 338 Ark. 425, 994 S.W.2d 481 (1999).

2. *See id.* at 433-34, 994 S.W.2d at 486.

3. *See id.* at 433, 994 S.W.2d at 484-85.

4. *See id.* at 433-34, 994 S.W.2d at 486.

5. *See id.* at 428, 994 S.W.2d at 482. Act 725 was codified, in part, at Arkansas Code Annotated section 2-20-507 (Michie Repl. 1996). *See id.* at 428, 994 S.W.2d at 482.

6. *See id.* at 425, 994 S.W.2d at 482.

7. *See Gulf Rice*, 338 Ark. at 425, 994 S.W.2d at 482.

Department of Finance and Administration ("DFA").⁸ The first buyers of Arkansas rice collected and remitted the assessment funds to the DFA.⁹ The DFA then deposited the assessments collected into a special fund with the State Treasurer until allocated for research and extension projects through the University of Arkansas and market development projects through the United States of America Rice Council.¹⁰

Act 344 of 1995 ("Act 344") authorized the Board to refer an alternative assessment to the rice producers of the state.¹¹ By this referendum, the rice producers could authorize assessments of \$0.0135 per bushel against rice buyers and up to \$0.0150 per bushel against rice producers.¹² Act 344 did not allow rice buyers to vote in the referendum, and neither rice buyers nor producers could obtain refunds.¹³ In February 1996, by a vote of 4,271 to 1,649, the rice producers adopted the alternate assessment imposing a \$0.0135 per bushel assessment on rice buyers.¹⁴

Gulf Rice Arkansas, Inc. and Gulf Pacific Rice Co. (collectively referred to as "Gulf Rice") subsequently brought suit against Tim Leathers, State Commissioner of Revenues, and the individual directors of the Board (collectively referred to as the "Board") in Pulaski County Chancery Court.¹⁵ Riceland Foods, Inc., Producers Rice Mill, Inc., and Riviana Foods, Inc. (collectively referred to as "Riceland") intervened

8. See *id.*, 994 S.W.2d at 482. Arkansas Code Annotated section 2-20-509 authorized the refund. See ARK. CODE ANN. § 2-20-509 (Michie Repl. 1996).

9. See Appellant's Brief at ix, *Leathers v. Gulf Rice Ark., Inc.*, 338 Ark. 425, 994 S.W.2d 481 (1999) (No. 98-737). The term "first buyer" is a descriptive term referring to buyers of Arkansas rice at the first point of sale, as opposed to subsequent purchasers. See ARK. CODE ANN. § 2-20-511(a) (Michie Repl. 1996).

10. See Appellant's Brief at ix, *Gulf Rice* (No. 98-737).

11. See *Gulf Rice*, 338 Ark. at 425, 994 S.W.2d at 482. Act 344 of 1995 is codified at Arkansas Code Annotated section 2-20-511. See *Gulf Rice* at 428, 994 S.W.2d at 482.

12. See *id.* at 428, 994 S.W.2d at 482. When Act 344 was codified, the decimal place was incorrectly moved two places to the right while specifying the assessments. See *id.* n.1, 994 S.W.2d at 482 n.1. Arkansas Code Annotated section 2-20-511 provides for assessments of \$1.35 per bushel for rice buyers and up to \$1.50 per bushel for producers instead of \$0.0135 for buyers and up to \$0.0150 per bushel for producers. See *id.* n.1, 994 S.W.2d at 482 n.1.

13. See *id.*, 994 S.W.2d at 482-83. Act 344 allowed no refund notwithstanding section 2-20-509. See ARK. CODE ANN. § 2-20-511(b)(2) (Michie Repl. 1996).

14. See *Gulf Rice*, 338 Ark. at 428, 994 S.W.2d at 483. The Pulaski County Chancery Court's decree described the effect of the referendum as the producers voting to reduce their assessment from \$0.03 to \$0.0115 per bushel and, at the same time, imposing on the first-point-of-sale buyers a new assessment of \$0.0135 per bushel. See Appellant's Brief at Addendum 4, *Gulf Rice* (No. 98-737).

15. See *Gulf Rice*, 338 Ark. at 425, 994 S.W.2d at 482.

on behalf of the Board.¹⁶ Gulf Rice alleged that Act 344 was an unconstitutional delegation of legislative taxing power in violation of Article II, Section 23 and Article XVI, Section 13 of the Arkansas Constitution.¹⁷ The chancery court granted Gulf Rice's motion for summary judgment, finding Act 344 to be an unlawful delegation of legislative authority.¹⁸ The Board and Riceland appealed to the Arkansas Supreme Court.¹⁹

III. BACKGROUND

The nondelegation doctrine is the judicial interpretation of what authority a legislative body can delegate to another branch of government, administrative agencies, or non-governmental entities.²⁰ While similar at both state and federal levels, the nondelegation doctrine followed different paths in the federal courts and Arkansas courts.

A. The Federal Nondelegation Doctrine

1. *Roots of the Nondelegation Doctrine: Nature of the Power Delegated*

In its earliest form, the nondelegation doctrine was the judicial principle that Congress may not delegate its constitutional law-making powers to another entity.²¹ Chief Justice Rehnquist traced the

16. *See id.* at 427, 994 S.W.2d at 482.

17. *See id.*, 994 S.W.2d at 482. Article II, Section 23 provides that "[t]he General Assembly may delegate the taxing power . . . to the State's subordinate political and municipal corporations to the extent of providing for their existence, maintenance and well being, but no further." ARK. CONST. of 1874, art. II, § 23. Article XVI, Section 13 provides that "[a]ny citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever." *Id.* at art. XVI, § 13.

18. *See Gulf Rice*, 338 Ark. at 427, 994 S.W.2d at 482. At trial, the Board argued that the assessment was not unconstitutional because it was a "fee" assessed pursuant to the state's police powers, rather than a "tax." *See* Appellant's Brief at 95-99, *Gulf Rice* (No. 98-737). The chancery court concluded that the legislature unlawfully delegated its authority regardless of whether the assessment was considered a "tax" or a "fee." *See id.* at Addendum 5.

19. *See Gulf Rice*, 388 Ark. at 427, 994 S.W.2d at 482.

20. *See generally* 16A AM. JUR. 2D *Constitutional Law* §§ 288-312 (1998) (discussing the delegation of legislative powers). *American Jurisprudence* presents background material and case summaries on the different types of delegation.

21. *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 478-79 (1989). *See also* Todd E. Pettys, *The Intended Relationship between Administrative Regulations and Section 1983's "Laws"*, 67

philosophical basis of the nondelegation doctrine back to the writings of John Locke in 1690.²² Prior to the twentieth century, the courts looked to the nature of the power that was being delegated to see if it was essentially legislative or law-making in nature.²³

While still looking to the law-making nature of the act, in 1892, the United States Supreme Court in *Field v. Clark*²⁴ foreshadowed the more modern nondelegation principle.²⁵ The legislation authorized the President to impose tariffs in retaliation for tariffs imposed by any foreign country on certain United States goods.²⁶ The Court held that the delegation was constitutional because Congress had defined the nature of the goods and tariffs and the President was only asked to determine if a fact (the imposition of tariffs) had occurred.²⁷

GEO. WASH. L. REV. 51, 86 (1998). One commentator defined the current nondelegation principle in a circular manner to emphasize the wide latitude granted to Congress. "Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them." Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1239 (1994). The United States Constitution provides a basis for the nondelegation doctrine in Article I, Section 1: "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." See U.S. CONST. art. I, § 1.

22. See *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 672-73 (1980) (Rehnquist, J., concurring). To support his position, Justice Rehnquist quoted Locke:

The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.

Id.

23. See *Pettys*, *supra* note 21, at 87. In the early nineteenth century the Court upheld the delegation of legislative authority to the President to revive a trade statute because Congress had fully expressed its will. See *id.* at 88 (summarizing *Cargo of the Brig Aurora v. United States*, 11 U.S. 382 (1813)).

24. 143 U.S. 649 (1892).

25. See *id.* at 694.

26. See *Pettys*, *supra* note 21, at 89.

27. See *Field*, 143 U.S. at 694 ("[T]he 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 . . .") (quoting *Locke's Appeal*, 72 Pa. 491, 498 (1873)).

2. *Evolution of the Nondelegation Doctrine: Extent of Legislative Power Delegated*

With the expansion of administrative agencies and delegations of authority to them, the nondelegation doctrine began to shift.²⁸ Early in this century, two cases established principles that have influenced judicial decisions into this decade: *United States v. Grimaud*²⁹ and *J. W. Hampton, Jr. & Co. v. United States*.³⁰ In *Grimaud*, the Supreme Court held that Congress could outline the legislative scheme and allow the agency to fill in the details by providing the specific means and methods to implement the legislative scheme.³¹ In *Hampton*, the Court established the "intelligible principle" test, which stated that delegation of authority to an agency was permissible so long as the statute set out an intelligible principle to which the regulations were to conform.³² In the time between the Court's decisions in *Grimaud* and *Hampton*, one commentator insists, over criticism, that the Court held at least three legislative acts to be unconstitutional delegations of authority.³³

The intelligible principle test of the nondelegation doctrine has been described as having only one good year.³⁴ In 1935, the Court struck down two sections of the National Recovery Act as delegating legislative authority without an intelligible principle.³⁵ Over the next

28. See Pettys, *supra* note 21, at 89. See also Farina, *supra* note 21, at 483.

29. 220 U.S. 506 (1911).

30. 276 U.S. 394 (1928).

31. See *Grimaud*, 220 U.S. at 517. The Court relied on a suggestion by Chief Justice Marshall made in dicta that "[a] general provision may be made, and power given to those who are to act under such general provisions to fill up the details." *Id.* (citing *Wayman v. Southard*, 23 U.S. 1, 42-43 (1825)).

32. See *Hampton*, 276 U.S. at 409 ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

33. See David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 736 (1999). Schoenbrod asserted that three cases were reversed on grounds of unconstitutional delegation. See *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924) (prohibiting the delegation of authority to the states to apply state worker compensation laws in admiralty cases); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921) (finding a statute that criminalized charging unreasonable prices for necessities to be an unconstitutional delegation of legislative authority to the judiciary, and also finding the statute unconstitutionally vague); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) (prohibiting the delegation authority to federal courts to apply state worker compensation laws in admiralty cases).

34. See *Nondelegation: The D.C. Circuit Resurrects Lazarus (Maybe)*, JUD./LEGIS. WATCH REP., July 1999, at 1.

35. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935) (declaring section 3 of the National Industrial Recovery Act unconstitutional for

half century, the Court did not hold any other legislation to be unconstitutional for delegating legislative authority to another branch of the federal government.³⁶ In 1974, Justice Marshall declared that the nondelegation doctrine was all but dead.³⁷ The courts have allowed very broad applications of the intelligible principle test, ranging from public convenience, interest, and necessity³⁸ to fair and equitable prices, just and reasonable rates, excessive profits, and compelling public interest.³⁹ The Court has approved the involvement of non-governmental parties when a law was implemented after a favorable referendum vote by the group intimately affected.⁴⁰

3. *Modern Nondelegation Doctrine: Interpretation of the Power Delegated*

In 1980, Justice Rehnquist expressed interest in resurrecting the nondelegation doctrine in *Industrial Union Department v. American Petroleum Institute*.⁴¹ Even though Justice Rehnquist argued in a concurring opinion that Congress had impermissibly delegated its authority, the Court held that the delegation was proper, but that the Secretary of Labor had overstepped his authority in exercising that power.⁴² The Court has been hesitant to restrict broad delegation of authority because the size and complexity of the federal government

delegating legislative power without adequate standards). See also *Panama Ref. v. Ryan*, 293 U.S. 388, 430 (1935) (declaring section 9(c) of the National Industrial Recovery Act unconstitutional for delegating legislative power without an intelligible principle).

36. See Lawson, *supra* note 21, at 1240.

37. See *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345, 352-53 (1974). In his concurring opinion, Justice Marshall stated: "The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930s, has been virtually abandoned by the Court . . ." *Id.* (Marshall, J., concurring).

38. See William A. Niskanen, *Legislative Implications of Reasserting Congressional Authority over Regulations*, 20 *CARDOZO L. REV.* 939, 940 (1999).

39. See *Nondelegation*, *supra* note 34, at 1.

40. See *United States v. Rock Royal Co-Op*, 307 U.S. 533, 578 (1939). See also *Currin v. Wallace*, 306 U.S. 1, 17 (1939).

41. 448 U.S. 607 (1980).

42. See Peter H. Aranson, et al., *A Theory of Legislative Delegation*, 68 *CORNELL L. REV.* 1, 15 (1982). The Court's plurality opinion referenced *A.L.A. Schechter Poultry* and *Panama Refining* in interpreting the Occupational Safety and Health Act as requiring a threshold level of risk before the Occupational Safety and Health Administration could regulate the benzene industry, rather than finding an unconstitutional delegation of authority. See *American Petroleum*, 448 U.S. at 646.

precludes Congress from micro-managing the agencies.⁴³ Shortly after *American Petroleum*, the Court ruled in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,⁴⁴ that agencies, not the courts, should resolve ambiguities in statutory language and that courts should give deference to the agency's interpretation.⁴⁵

Recently, in *American Trucking Ass'n v. United States EPA*,⁴⁶ the D.C. Circuit drew significant media attention by its use of nondelegation language.⁴⁷ However, the ruling was actually consistent with *American Petroleum* because it was the EPA's interpretation of the statute that the court found objectionable, not the statute itself.⁴⁸ In 1998, the nondelegation doctrine was argued before the Court in *Clinton v. City of*

43. See Lawson, *supra* note 21, at 1241. In 1989 the Court explained that "[o]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). See also Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZ L. REV. 807, 821 n.80 (1999).

44. 467 U.S. 837 (1984).

45. See *id.* at 843-45. See also Damien J. Marshall, *The Application of Chevron Deference in Regulatory Preemption Cases*, 87 GEO. L.J. 263, 263 (1998). One commentator described the *Chevron* decision as follows: "Congress may give agencies primary responsibility not only for making policy within the limits of their organic statutes, but also for defining those limits whenever the text and surrounding legislative materials are ambiguous." Farina, *supra* note 21, at 487-88. In 1991, the D.C. Circuit reaffirmed "the Court's current general practice of applying the nondelegation doctrine mainly in the form of 'giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.'" *UAW v. OSHA*, 938 F.2d 1310, 1316 (D.C. Cir. 1991), *approved on reh'g*, 37 F.2d 665 (D.C. Cir. 1994). The court remanded the issue to allow the agency to explain how its approach conforms to a constitutional interpretation of the act. See *id.* at 1322.

46. 175 F.3d 1027 (D.C. Cir. 1999) (per curiam).

47. See Steve France, *Lost in the Ozone: Scuttling of New Clean Air Act Provisions Revives Anti-New Deal Doctrine*, A.B.A. J., July 1999, at 26, 26 (1999); *New from the Circuits*, ADMIN. & REG. L. NEWS Summer, 1999, at 6.

48. See *American Trucking*, 175 F.3d at 1033.

[W]e find that the construction of the Clean Air Act on which EPA relied in promulgating the [National Ambient Air Quality Standards] at issue here effects an unconstitutional delegation of legislative power. We remand the cases for EPA to develop a construction of the act that satisfies this constitutional requirement.

Id. (citations omitted). Later, the court explained its decision in language similar to that in *American Petroleum*:

Where (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own.

Id. at 1038.

*New York*⁴⁹ as justification for holding the Line Item Veto Act⁵⁰ unconstitutional.⁵¹ However, the Court found the line item veto to be unconstitutional on other grounds and did not rule on the nondelegation issue.⁵²

B. The Nondelegation Doctrine in Arkansas

While federal caselaw has persuasive value, the state's constitution controls the constitutionality of the delegation of legislative authority within that state, not the United States Constitution.⁵³ As a result, the permissible delegation of state legislative authority is determined by each state's judicial interpretation of its constitution and legislative acts.

1. *The Nature of Power Delegated to Arkansas Agencies*

Arkansas has over 300 boards and commissions, the members of which are appointed by the Governor.⁵⁴ The General Assembly delegates to each board or commission the powers necessary to carry out their duties and responsibilities.⁵⁵

The General Assembly is not limited to delegating legislative powers, but may also delegate executive and judicial powers.⁵⁶ For

49. 524 U.S. 417 (1998).

50. 2 U.S.C. §§ 691 *et seq.*

51. *See id.* at 447-48 ("We have been favored with extensive debate about the scope of Congress' power to delegate law-making authority, [however, it] does not really bear on the narrow issue that is dispositive of these cases."). *Id.* *See generally* Bernard W. Bell, *Dead Again: The Nondelegation Doctrine, the Rules/Standards Dilemma and the Line Item Veto*, 44 VILL. L. REV. 189 (1999) (discussing the nondelegation doctrine in relation to the line item veto).

52. *See Clinton*, 524 U.S. at 448 ("[B]ecause we conclude that the Act's cancellation provisions violate Article I, § 7, of the Constitution, we find it unnecessary to consider the District Court's alternative holding that the Act 'impermissibly disrupts the balance of powers among the three branches of government.'"). *Id.*

53. *See Sandstrom v. California Horse Racing Bd.*, 189 P.2d 17, 23 (Cal. 1948), *cert. denied*, 335 U.S. 814 (1948) ("The Constitution of the United States has no voice in determining whether power conferred on a board or commission set up by a state statute involves an unlawful delegation of legislative power."). Author's note: While nondelegation issues may incorporate delegations between branches of government, this note will focus on delegations to agencies, boards, and commissions in Arkansas.

54. *See Suzanne Antley, Judicial Review of Non-Court Decisions: A Constitutionally Based Examination of Arkansas' Review System*, 49 ARK. L. REV. 425, 426 & n.1 (1996).

55. *See id.* at 427.

56. States' delegation doctrines have been grouped into three categories as follows: strict standards and safeguards states, in which powers must be specifically defined in legislation; loose standards and safeguards states, in which the legislature need only provide a general scheme; and procedural safeguards states that rely on notice,

example, the Public Service Commission may exercise both the legislative powers of promulgating rules and regulations and the judicial power of conducting hearings at the request of a regulated industry.⁵⁷ The Arkansas Supreme Court characterized the Arkansas Highway Commission as simply an "agency of government" because it promulgates rules and regulations (legislative power), enforces them (executive power), and can conduct hearings (judicial power).⁵⁸

The mixing of legislative, executive, and judicial powers led the court to declare that the delegation of powers of agencies in Arkansas should not be evaluated in terms of the branch of government they emulate, but in terms of the powers granted and withheld by the legislature.⁵⁹ When considering the constitutionality of the power delegated, the court has looked to whether the agency was acting in an executive, legislative, or judicial manner.⁶⁰ The court examines whether the agency was promulgating a rule or administering an existing rule.⁶¹

2. *Procedural Standards*

The Arkansas Administrative Procedure Act⁶² ("AAPA") appears to provide a basis for examining nondelegation issues under any of the three general theories employed at different times at the federal level as follows: the nature of the power, the extent of the power, or the interpretation of the power.⁶³ However, nothing in the AAPA can repeal

hearings, and judicial review to restrict the agency's power. See Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 579-80 (1994). Greco determined that Arkansas and Utah did not fit into any of the three categories. See *id.* at 579 n.66. Relying on *Arkansas Motor Carriers Ass'n v. Pritchett*, 303 Ark. 620, 798 S.W.2d 918 (1990), Greco concluded that agencies in Arkansas were neither legislative nor executive in nature but could have a mixture of powers as delegated by the legislature.

57. See Antley, *supra* note 54, at 431.

58. See *Arkansas Motor Carriers*, 303 Ark. at 624-25, 798 S.W.2d at 920.

59. See *id.* at 624-25, 798 S.W.2d at 920.

60. See Antley, *supra* note 54, at 437-39.

61. See Antley, *supra* note 54, at 437 n.52 ("The crucial test for determining what is legislative and what is administrative is whether the ordinance is one making a new law, or one executing a law already in existence.") (quoting *Scroggins v. Kerr*, 217 Ark. 137, 143, 228 S.W.2d 995, 998 (1950)).

62. This act is codified at Arkansas Code Annotated sections 25-15-201 to 25-15-214.

63. See ARK. CODE ANN. § 25-15-212 (Michie Supp. 1999). Subsection (h) of section 25-15-212 provides six bases for judicial review of agency decisions that are: "(1) [i]n violation of constitutional or statutory provisions; (2) [i]n excess of the agency's statutory authority; (3) [m]ade upon unlawful procedure; (4) [a]ffected by other error or law; (5) [n]ot supported by substantial evidence of record; or (6)

authority specifically delegated to an agency.⁶⁴ The AAPA exempts the following commissions: the Arkansas Public Service Commission, the State Highway Commission, the State Highway and Transportation Department, the Commission on Pollution Control and Ecology, the Contractors Licensing Board, the State Department of Health, the Arkansas Workers' Compensation Commission, the Employment Security Department, and the Department of Veterans' Affairs.⁶⁵ The General Assembly exempted these agencies because the enabling acts for these agencies provided adequate administrative procedures.⁶⁶

Arkansas courts also provide varying levels and scopes of review for the decisions of agencies excepted from the AAPA.⁶⁷ Generally, the courts apply the same level and scope of review to all decisions rendered by an agency, regardless of whether the decision is legislative, executive, or judicial in nature.⁶⁸

3. *Delegation of Power to Regulatory Agencies*

The General Assembly cannot delegate powers that are strictly law-making in nature.⁶⁹ However, the General Assembly may establish boards and commissions and delegate to them both the power to determine the facts under which a law may take effect as well as the power to determine the details needed to implement general legislative

[a]rbitrary, capricious, or characterized by abuse of discretion." ARK. CODE ANN. § 25-15-212(h) (Michie Supp. 1999). Author's note: Viewed in terms of the three phases of nondelegation at the federal level, reasons one and three would fall under the nature of the power delegated, while reasons two and four would fall under the extent of the power delegated. In addition, reasons five and six would fall under the interpretation of the power delegated.

64. See ARK. CODE ANN. § 25-15-202(1)(C) (Michie Supp. 1999). This section states: "Nothing in this subchapter shall be construed to repeal delegations of authority as provided by law . . ." *Id.*

65. See Antley, *supra* note 53, at 445-46.

66. See *id.* at 446. The Arkansas Code states as follows: "The word 'agency' shall not include the Arkansas Public Service Commission, the Arkansas Pollution Control and Ecology Commission, the Workers' Compensation Commission, and the Employment Security Department, it being determined by the General Assembly that the existing laws governing those agencies provide adequate administrative procedures for those agencies . . ." ARK. CODE ANN. § 25-15-202(1)(B) (Michie Supp. 1999).

67. See Antley, *supra* note 53, at 449.

68. See *id.* at 449.

69. See *Thompson v. Trice*, 145 Ark. 143, 146-47, 223 S.W. 367, 368 (1920) (holding that "[t]he Legislature cannot delegate to another its power to enact laws, but may make the enforcement or execution of the law dependent upon a condition or contingency"). *Id.*

provisions.⁷⁰ The court has also found that an agency's specifically delegated power includes additional implied powers necessary to carry out the General Assembly's mandate.⁷¹ If the general guidelines and standards are vague because they lack sufficient detail, the delegation of legislative authority may be unconstitutional.⁷² Arkansas courts have generally upheld legislation that becomes effective only after a favorable vote by those affected by the legislation.⁷³

4. *Delegation of Power to Licensing Boards*

Arkansas courts have upheld legislative delegation of discretionary power to a licensing board if the delegated power is accompanied by legislatively established guidelines.⁷⁴ The guidelines must provide standards for the licensing authority to follow.⁷⁵ If the statute bestows absolute, unregulated, or undefined discretion to an agency, it is unlawfully delegated power.⁷⁶

5. *Delegation of Taxing Authority*

Arkansas treats taxing authority differently than other delegations because Article II, Section 23 of the Arkansas Constitution prohibits the delegation of taxing powers by the legislature to entities other than subordinate governmental entities.⁷⁷ The legislature may delegate

70. See *Venhaus v. State ex rel. Lofton*, 285 Ark. 23, 27-28, 684 S.W.2d 252, 255 (1985); *McArthur v. Smallwood*, 225 Ark. 328, 331, 281 S.W.2d 428, 431 (1955).

71. See *Hickenbottom v. McCain*, 207 Ark. 485, 491-92, 181 S.W.2d 226, 229 (1944), *cert. denied*, 323 U.S. 777 (1944) (noting that when legislative power is delegated, the delegation implicitly confers the power to do that which is deemed necessary to carry out the delegated legislative power).

72. See *Crowly v. Thornbrough*, 226 Ark. 768, 774, 294 S.W.2d 62, 66 (1956) (holding that a statute that authorized the United States Secretary of Labor to determine minimum wages based on similar projects in the area was unconstitutional because it failed to establish a standard or formula for the wage scale).

73. See *Swanberg v. Tart*, 300 Ark. 304, 311, 778 S.W.2d 931, 934 (1989) (upholding a voter referendum on Sunday horse racing in Hot Springs).

74. See *McQuay v. Arkansas State Bd. of Architects*, 337 Ark. 339, 344, 989 S.W.2d 499, 501 (1999). See also *Patton v. Ragland*, 282 Ark. 231, 234, 668 S.W.2d 3, 5 (1984).

75. See *McQuay*, 337 Ark. at 339, 989 S.W.2d at 501. See also *Arkansas State Bd. of Pharmacy v. Hall*, 243 Ark. 741, 745-46, 421 S.W.2d 888, 890 (1967).

76. See *McQuay*, 337 Ark. at 339, 989 S.W.2d at 501. See also *Alcoholic Beverage Control Div. v. R.C. Edwards Distrib. Co.*, 284 Ark. 336, 339-40, 681 S.W.2d 356, 358-59 (1984).

77. See ARK. CONST. of 1874, art. II, § 23. This section states "the General Assembly may delegate the taxing power, with the necessary restriction, to the State's

taxing authority to subordinate political and municipal corporations.⁷⁸ Taxing privileges may not be allocated to local improvement districts, such as sewer or road improvement districts.⁷⁹

Any delegation related to taxes should be specific in its details.⁸⁰ If a statute fails to specify a particular method for computing the tax but leaves the computation up to the discretion of a court, the legislature has improperly delegated power to the judiciary.⁸¹ Yet when the statute provides a complete plan, the legislation can require that the tax will not become effective until after a favorable vote in a referendum by those who will pay the tax.⁸²

IV. REASONING OF THE COURT

In *Leathers v. Gulf Rice Arkansas, Inc.*,⁸³ the Arkansas Supreme Court held that the General Assembly cannot authorize private rice producers to impose an assessment on private rice buyers through a referendum in which only rice producers vote without providing safeguards such as notice, hearing, or review before the assessment is imposed on rice buyers.⁸⁴ The court affirmed the chancery court's summary judgment in favor of Gulf Rice, holding that Act 344 unconstitutionally delegated legislative authority.⁸⁵ The majority opinion focused on the denial of due process,⁸⁶ while the dissent argued that Gulf Rice had not met its

subordinate political and municipal corporations to the extent of providing for their existence, maintenance and well being, but no further." *Id.*

78. *See* Waldrop v. Kansas City S. Ry. Co., 131 Ark. 453, 459-60, 199 S.W. 369, 371 (1917). *See also* Keel v. Board of Directors, 59 Ark. 513, 528-29, 27 S.W. 590, 592 (1894); City of Little Rock v. Prather, 46 Ark. 471, 477 (1885).

79. *See* Whaley v. Northern Rd. Improvement Dist., 152 Ark. 573, 576-77, 240 S.W. 1, 2 (1922).

80. *See* Holloway, Inc. v. Pine Ridge Addition Residential Property Owners, 332 Ark. 450, 455, 966 S.W.2d 241, 244 (1998).

81. *See id.*, 966 S.W.2d at 244 (holding that "the absence of language . . . directing the chancery court to use a particular method for computing the tax levy bestows upon the judiciary a nondelegable power of the legislature in violation of the separation of powers provisions of the Arkansas Constitution").

82. *See* Boyd v. Weiss, 333 Ark. 684, 689, 971 S.W.2d 237, 240 (1998). The statute supplied a detailed scheme of what the tax status would be if the people of Texarkana approved it. *See id.*, 971 S.W.2d at 240.

83. 338 Ark. 425, 994 S.W.2d 481 (1999).

84. *See id.* at 433-34, 994 S.W.2d at 486.

85. *See id.* at 434, 994 S.W.2d at 486. Justice Glaze wrote the majority opinion. *See id.* at 427, 994 S.W.2d at 482. Justice Brown wrote the dissenting opinion in which Special Associate Justices Sanders and Davis joined. *See id.* at 434, 994 S.W.2d at 486. Justices Corbin and Thornton did not participate. *See id.*, 994 S.W.2d at 486.

86. *See id.* at 433-34, 994 S.W.2d at 486.

burden of proving Act 344 unconstitutional, and therefore, the case should have been remanded to chancery court for further development of the due process issue.⁸⁷

A. Majority Opinion

The pivotal issue in *Gulf Rice* was that Act 344 denied rice buyers due process.⁸⁸ The assessment was imposed upon the buyers by a referendum in which only the rice producers voted.⁸⁹ Thus, Act 344 did not give the buyers notice, a hearing and opportunity to be heard, or the benefit of a review.⁹⁰

Justice Glaze found the arguments of the Board and Riceland to be unpersuasive. The Board argued that Act 344 must be presumed constitutional⁹¹ and that the delegation of decision-making authority in Act 344 fell within the limits set out by the United States Supreme Court⁹² in *Currin v. Wallace*⁹³ and *United States v. Rock Royal Co-Op*.⁹⁴ The constitutional test in *Rock Royal* considered whether the enactment stated the purpose and the standards sufficiently so that those affected by the enactment could understand them.⁹⁵ According to the *Gulf Rice* court's interpretation of *Rock Royal*, Congress need only specify standards as reasonably practicable.⁹⁶ While acknowledging that legislation may delegate details that are impractical for Congress to administer, the *Gulf Rice* court interpreted the constitutional test in *Currin* as whether a congressional act tries to abdicate or delegate an essential constitutional

87. See *id.* at 434, 994 S.W.2d at 486 (Brown, J., dissenting).

88. See *id.* at 433-34, 994 S.W.2d at 486. The court used the term "due process" without designating whether the due process violation was substantive, procedural, or both. See *id.*, 994 S.W.2d at 486. Counsel for Gulf Rice claimed a procedural due process violation. See *id.* at 436, 994 S.W.2d at 487. In its brief, Gulf Rice argued that the due process violation was the result of a lack of fairness in the producer-only referendum that imposed an assessment on non-voting rice buyers. See Appellee's Brief at 28, 32-33 & n.3, *Leathers v. Gulf Rice Ark., Inc.*, 338 Ark. 425, 994 S.W.2d 481 (1999) (No. 98-737).

89. See *Gulf Rice*, 338 Ark. at 428, 994 S.W.2d at 482-83.

90. See *id.* at 433, 994 S.W.2d at 486.

91. See *id.* at 429, 994 S.W.2d at 483.

92. See *id.*, 994 S.W.2d at 483.

93. 306 U.S. 1 (1939).

94. 307 U.S. 533 (1939).

95. See *Gulf Rice*, 338 Ark. at 429, 994 S.W.2d at 483. See also *Rock Royal*, 307 U.S. at 574.

96. See *Gulf Rice*, 338 Ark. at 429, 994 S.W.2d at 483 (citing *Rock Royal*, 307 U.S. at 574).

legislative function to another body.⁹⁷ The Board argued that Act 344 did not delegate authority but merely established a referendum as a condition precedent to the assessment becoming effective.⁹⁸ The court did not agree, finding that Act 344 instead authorized rice producers to shift the existing assessment from them to rice buyers.⁹⁹

Gulf Rice argued that the rice buyers had been denied due process because the assessment was levied on them without the opportunity to vote or have a hearing or a review.¹⁰⁰ Gulf Rice cited *Carter v. Carter Coal Co.*¹⁰¹ to support the contention that the most obnoxious form of unlawful delegation is a delegation that empowers a private majority to regulate the affairs of an unwilling minority.¹⁰² The court rejected the Board's attempt to distinguish *Carter* on grounds that the Board was delegated the power to call the referendum.¹⁰³ The Board argued that Act 344 was constitutional because the General Assembly delegated the power to call the referendum to the Board, a legislatively created agency, rather than directly to the rice producers.¹⁰⁴ According to the court, the real issue was not who was empowered to call a referendum but that the rice buyers were not permitted to vote in the referendum.¹⁰⁵ The court further noted that even if it were relevant, the Board included only rice producers.¹⁰⁶

While recognizing that the General Assembly had the power to pass a law and specify a referendum as a condition precedent to the law becoming effective, the court stated that the Board weakened its case by citing authority in which those most directly affected by the law were allowed to vote in the referendum.¹⁰⁷ By contrast, the referendum authorized by Act 344 failed to provide a vote to those most affected by the assessment, the rice buyers.¹⁰⁸

The majority then turned to the treatise *State and Federal Administrative Law* to explain that many states have voided attempts to delegate authority to private entities because of concerns that private parties

97. See *id.*, 994 S.W.2d at 483. See also *Currin*, 306 U.S. at 15.

98. See *Gulf Rice*, 338 Ark. at 429, 994 S.W.2d at 483.

99. See *id.* at 429-30, 994 S.W.2d at 483.

100. See *id.* at 430, 994 S.W.2d at 483.

101. 298 U.S. 238 (1936).

102. See *Gulf Rice*, 338 Ark. at 430, 994 S.W.2d at 484.

103. See *id.*, 994 S.W.2d at 484.

104. See *id.*, 994 S.W.2d at 484.

105. See *id.*, 994 S.W.2d at 484.

106. See *id.*, 994 S.W.2d at 484.

107. See *id.* at 431, 994 S.W.2d at 484.

108. See *Gulf Rice*, 338 Ark. at 431, 994 S.W.2d at 484.

would put personal gain ahead of public welfare.¹⁰⁹ However, such delegation would not be constitutionally suspect if the private entity's actions were subject to an impartial administrative body.¹¹⁰ The court noted that not only did Act 344 deny rice buyers a vote, but it also provided no administrative safeguards or standards to measure the Board's referendum call.¹¹¹

The court distinguished the current case from *Rock Royal*, in which only milk producers were permitted to vote to effectuate legislation affecting milk handlers.¹¹² In *Rock Royal*, the milk handlers were afforded notice, an opportunity for a hearing, a review by the Secretary of Agriculture, and were provided a list of factors to be considered in evaluating the decision.¹¹³

The Board also cited *Currin* to support the constitutionality of legislative delegation.¹¹⁴ However, in *Currin*, those most intimately affected by the Tobacco Inspection Act were given the power to determine whether it applied to them.¹¹⁵ Finally, the court described as disingenuous the Board's argument that because the General Assembly had the power to impose the assessment, the procedure for effectuating it was unimportant.¹¹⁶ The court noted that the Board cited no supporting authority and that the argument ignored the due process issue.¹¹⁷

The court concluded that Act 344 forced an assessment on rice buyers without establishing any standards to be considered prior to imposing the assessment.¹¹⁸ Further, the assessment was imposed without notice, opportunity to be heard, or review.¹¹⁹ The court found Act 344 especially offensive because it authorized one group of private persons (rice producers) to impose an assessment on another unwilling group of private persons (rice buyers).¹²⁰ Accordingly, the court upheld

109. *See id.* at 432, 994 S.W.2d at 485 (citing ARTHUR E. BONFIELD & MICHAEL ASIMOW, STATE AND FEDERAL ADMINISTRATIVE LAW § 7.3, at 460 (1989)).

110. *See id.*, 994 S.W.2d at 485 (citing ARTHUR E. BONFIELD & MICHAEL ASIMOW, STATE AND FEDERAL ADMINISTRATIVE LAW § 7.3, at 460 (1989)).

111. *See id.*, 994 S.W.2d at 485.

112. *See id.*, 994 S.W.2d at 485.

113. *See id.* at 433, 994 S.W.2d at 485.

114. *See Gulf Rice*, 338 Ark. at 433, 994 S.W.2d at 485. *See also Currin*, 306 U.S. at 15.

115. *See id.* at 433, 994 S.W.2d at 485. The Tobacco Inspection Act provided that the regulations would not be imposed on tobacco growers unless first approved by a two-thirds vote of the growers. *See Currin*, 306 U.S. at 15.

116. *See Gulf Rice*, 338 Ark. at 433, 994 S.W.2d at 485.

117. *See id.*, 994 S.W.2d at 486.

118. *See id.*, 994 S.W.2d at 486.

119. *See id.*, 994 S.W.2d at 486.

120. *See id.*, 994 S.W.2d at 486.

the chancery court's decree that Act 344 was an unconstitutional delegation of legislative authority.¹²¹

B. Dissenting Opinion

In his dissenting opinion Justice Brown noted that *Gulf Rice* was a case of national significance decided without the issues being thoroughly argued and briefed before the chancery court.¹²² Because the case presented a new issue not only for Arkansas but also for the nation, the due process issue should have been fully argued at the chancery court before reaching the Arkansas Supreme Court, according to Justice Brown.¹²³

The thrust of the dissent was that *Gulf Rice* failed to meet its burden of proving a clear incompatibility between Act 344 and the Arkansas Constitution.¹²⁴ The dissent asserted that *Gulf Rice* did not sufficiently develop its due process argument before the chancery court.¹²⁵ The dissent faulted the majority for improperly relying on the due process argument even though neither the complaint, the motion for summary judgment, the chancery court's letter ruling, nor the chancery court's decree granting summary judgment specifically raised the issue of due process.¹²⁶ *Gulf Rice* only briefed violation of due process on appeal.¹²⁷ Therefore, the dissent would have reversed and remanded the case to the chancery court to allow both sides to develop and argue the issue of due process.¹²⁸

The dissent next noted that the majority overlooked the completeness of the plan developed by Act 344.¹²⁹ The court had previously held legislation constitutional which provided a complete plan and held that a referendum was merely a condition precedent to enabling the plan.¹³⁰ The dissent concluded by listing a number of unanswered questions

121. *See id.* at 434, 994 S.W.2d at 486. In a footnote, the court commented that, as in chancery court, it was unnecessary to address the issue of whether the assessment was a valid fee or an invalid tax. *See id.* n.3, 994 S.W.2d at 486 n.3.

122. *See Gulf Rice*, 338 Ark. at 435, 994 S.W.2d at 487 (Brown, J., dissenting).

123. *See id.*, 994 S.W.2d at 487 (Brown, J., dissenting).

124. *See id.* at 434, 994 S.W.2d at 486 (Brown, J., dissenting).

125. *See id.*, 994 S.W.2d at 486 (Brown, J., dissenting).

126. *See id.* at 434-35, 994 S.W.2d at 486 (Brown, J., dissenting).

127. *See id.* at 435, 994 S.W.2d at 487 (Brown, J., dissenting).

128. *See Gulf Rice*, 338 Ark. at 435, 994 S.W.2d at 486-87 (Brown, J., dissenting).

129. *See id.* at 435-36, 994 S.W.2d at 487 (Brown, J., dissenting).

130. *See id.* at 436, 994 S.W.2d at 487 (Brown, J., dissenting) (citing *Boyd v. Weiss*, 333 Ark. 684, 971 S.W.2d 237 (1998) and *Swanberg v. Tart*, 300 Ark. 304, 778 S.W.2d 931 (1989)).

supporting its assertion that the majority's opinion was not justified¹³¹ because *Gulf Rice* did not meet its burden of proof.¹³²

V. SIGNIFICANCE

The significance of the *Gulf Rice* decision lies in three areas. First, *Gulf Rice* establishes a limit to the General Assembly's power to delegate authority. Second, the decision provides guidelines for drafting future legislation. Third, some questions in *Gulf Rice* remain unanswered.

A. Establishing a Limit on the Delegation of Legislative Authority

In *Gulf Rice*, the Arkansas Supreme Court established a limit to the General Assembly's power to delegate its law-making authority to boards or commissions. By declaring Act 344 unconstitutional, the court prohibited the legislature from delegating power to one group of private individuals to levy an assessment on another group of private individuals.¹³³

The significance of the court's ruling can best be understood by recapping where Act 344 went beyond constitutional limitations. First, by establishing a referendum allowing only rice producers to vote on an assessment that applied to both producers and rice buyers, the legislature delegated its power to levy assessments to those private individuals voting in the referendum.¹³⁴ Second, the rice buyers were not protected by normal procedural safeguards.¹³⁵ The AAPA or the specific enabling legislation usually provides procedural safeguards to the decisions of Arkansas boards and commissions.¹³⁶ However, Act 344 bypassed the procedural safeguards by not providing for notice, an opportunity to be heard, or a review to a responsible agency.¹³⁷

The narrowness of the court's decision in *Gulf Rice* is evident from the types of delegation the court left intact. The court did not overrule *Swanberg v. Tart*,¹³⁸ the Hot Springs Sunday racing referendum case, or

131. See *id.*, 994 S.W.2d at 487 (Brown, J., dissenting).

132. See *id.* at 437, 994 S.W.2d at 488 (Brown, J., dissenting).

133. See *id.* at 434, 994 S.W.2d at 486.

134. See *Gulf Rice*, 338 Ark. 433-34, 994 S.W.2d at 486.

135. See *id.* at 433, 994 S.W.2d at 485.

136. See Antley, *supra* note 54, at 445-46.

137. See *Gulf Rice*, 338 Ark. at 433, 994 S.W.2d at 486.

138. 300 Ark. 304, 778 S.W.2d 931 (1989).

Boyd v. Weiss,¹³⁹ the Texarkana tax referendum case. In *Swanberg and Boyd*, the legislation provided the details for a complete plan that was to be implemented only after a favorable vote by those most intimately affected by the legislation. Also, the court did not reverse *McQuay v. Arkansas State Board of Architects*,¹⁴⁰ the Board of Architects licensing case, or *Arkansas State Board of Pharmacy v. Hall*,¹⁴¹ the Board of Pharmacy licensing case. The AAPA provides procedural safeguards to those affected by professional licensing requirements. The *Gulf Rice* decision did not reverse any previous Arkansas Supreme Court ruling. Thus, *Gulf Rice* should be viewed not as a change of the court's previous interpretations of the nondelegation doctrine, but as a narrow decision establishing a limit to the General Assembly's power to delegate authority to boards and commissions.

B. Providing Guidelines for Future Legislation

The *Gulf Rice* decision appears to provide two guidelines for the drafting of future legislation for Arkansas boards and commissions. First, if the legislation contains the details for a complete plan to be implemented only after a referendum, the voters in the referendum must include all those intimately affected by the legislation. Second, if a board is to be given the discretion to levy an assessment, those affected by the assessment must be protected by procedural safeguards through the AAPA or through a board's enabling legislation.

C. Questions Left Unanswered

The court left several questions unanswered that could affect the drafting of future legislation delegating power to Arkansas boards and commissions.¹⁴² The primary question affecting future legislation is

139. 333 Ark. 684, 971 S.W.2d 237 (1998).

140. 337 Ark. 339, 989 S.W.2d 499 (1999).

141. 243 Ark. 741, 421 S.W.2d 888 (1967).

142. In his dissent, Justice Brown identified eight issues that he asserted were left unanswered:

[W]hat brand of due process is being endorsed [in this case][?]. . . . Where is the caselaw to support this theory of procedural due process? Is the due-process claim a separate basis for relief or is it an integral part of *Gulf Rice*'s unlawful delegation claim? If due process is the basis for voiding Act 344, should the Rice Board not have the opportunity to argue that there is a legitimate government interest or rational basis at stake here? Does rice promotion benefit first buyers of rice who resell their rice to the same extent as it benefits rice producers? [Do first buyers] pass the assessment cost back

whether an act can require a referendum when those most intimately affected cannot be readily identified. Buyers of Arkansas rice come from different states and countries and may vary from season to season. The question, therefore, is whether an act should even attempt to require a referendum before implementation if potential voters do not represent an easily identifiable group.

The majority left other questions unanswered because they chose not to address them or held that the answers were not necessary to the decision. At the trial court and on appeal, the parties argued whether the assessment was a valid fee or an illegal tax.¹⁴³ Because both the chancery court and the Arkansas Supreme Court found Act 344 to be an unconstitutional delegation of legislative power, it was unnecessary to address the question.¹⁴⁴ The answer to the question could become an issue if future legislation avoided a referendum and simply set an assessment.

The final question unanswered was what type of due process was violated, substantive or procedural due process. The majority simply referred to a due process violation.¹⁴⁵ The majority's emphasis on the denial of the buyer's right to vote in the referendum would seem to be substantive due process reminiscent of *Carter Coal*. However, the majority's emphasis on notice, hearing, and review would indicate a procedural due process violation. The dissent noted that Gulf Rice's counsel claimed a procedural due process violation at oral argument.¹⁴⁶ If the violation was only procedural, future legislation might pass constitutional muster by providing the safeguards of notice, hearing, and review. However, the court's emphasis on the impropriety of delegating to a private group the power to impose an assessment on another private group would indicate that the court intended to implicate both types of due process.

The chancery court and Arkansas Supreme Court decisions have already impacted legislation. The Eighty-Second General Assembly amended the enabling legislation for the Arkansas Rice Research and

to rice producers by reducing the price paid for the rice? . . . [T]o what extent are the producers also first buyers[?] . . . Can first buyers, who are global in scope, be identified for referendum purposes?

Gulf Rice, 338 Ark. at 436-37, 994 S.W.2d at 487 (Brown, J., dissenting) (internal citations omitted).

143. See *id.* at 434 n.3, 994 S.W.2d at 486 n.3.

144. See *id.*, 994 S.W.2d at 486 n.3.

145. See *id.* at 433-34, 994 S.W.2d at 486.

146. See *id.* at 436, 994 S.W.2d at 487 (Brown, J., dissenting).

Promotion Board in Act 16 of 1999 ("Act 16").¹⁴⁷ Act 16 repealed Arkansas Code Annotated section 2-20-506, which provided for a referendum in each county.¹⁴⁸ Act 16 amended Arkansas Code Annotated section 2-20-507 to repeal the provisions authorizing the producer referendum.¹⁴⁹ Act 16 provides an assessment of \$0.0135 per bushel on the first buyers and \$0.0135 per bushel on rice producers.¹⁵⁰ Act 16 repealed the refund provision¹⁵¹ and amended the use of funds provision to add that the funds could be used to defray costs of referenda that the Board may refer to producers or purchasers of rice.¹⁵²

The limitation on delegation of legislative authority established by the *Gulf Rice* court restricted the power of the General Assembly to authorize a private group of people (rice producers) to impose an assessment on another private group of people (rice buyers).¹⁵³ The court did not limit the legislature's authority to condition the effectiveness of an assessment on a favorable referendum by those who had to pay the assessment;¹⁵⁴ however, the court found an assessment through a referendum that did not involve all those affected to be an unconstitutional delegation of legislative authority.¹⁵⁵

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147. Act of Feb. 4, 1999, No. 16 (codified at ARK. CODE ANN. §§ 2-20-501 to -510 (Michie Supp. 1999)).

148. See ARK. CODE ANN. § 2-20-506 (Michie Supp. 1999).

149. See *id.* § 2-20-507.

150. See *id.*

151. See *id.* § 2-20-509.

152. See *id.* § 2-20-510.

153. See *Gulf Rice*, 338 Ark. at 433-34, 994 S.W.2d at 486.

154. See *id.* at 433, 994 S.W.2d at 484-85.

155. See *id.* at 433-34, 994 S.W.2d at 486.

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