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CONSTITUTIONAL LAW—SEPARATION OF POWERS—LEGISLATIVE RIGHT TO DELEGATE INITIATIVE POWER TO PUBLIC—The act creating the Maryland Milk Commission¹ provided: "The Commission, when requested by a substantial proportion of the producers and/or consumers and/or distributors in any marketing area, shall have power" to do a number of things pertaining to sanitary and trade conditions within the milk industry. Plaintiffs sought to enjoin the Commission from utilizing any power derived from such an act upon the ground that it contained an unconstitutional delegation of legislative power. *Held*, an invalid attempt to delegate legislative authority. The legislature, when acting in its law-making capacity, exercised a power conferred upon it by the people which may not be redelegated. *Maryland Co-operative Milk Producers, Inc. v. Miller*, (Md. 1936) 182 A. 432.

The doctrine of separation of powers requires that each of the departments of government shall itself exercise the powers belonging to it.² Consequently, the law-making function may not be delegated, or "redelegated," but must be exercised solely by the legislature.³ Law-making comprises both enunciating a rule and investing it with the force of law. An attempt to delegate either element of the process is invalid.⁴ Laws contingent upon popular approval by ballot before becoming effective have been held to involve such invalid delegation.⁵ This result has been criticized with much force as illogical and motivated by a judicial horror of "pure" democracy,⁶ since other acts whose effective dates are conditioned upon uncertain contingences have been generally upheld.⁷ In the instant case, although the result would seem fortunate⁸ since the groups to whom the

¹ Md. Laws (1935), c. 310, § 3.

² Cf. MADISON, *THE FEDERALIST*, xlvi (1788).

³ *Rice v. Foster*, 4 Harr. (4 Del.) 479 at 485-492 (1847); *Field v. Clark*, 143 U. S. 649 at 692, 12 S. Ct. 495 (1892). The latter case is of particular interest. Both the majority, per Justice Harlan, and the minority, per Justice Lamar, are in perfect accord on the proposition that the power of Congress cannot be delegated. They diverge in the determination of whether legislative power had been delegated in the particular instance. Cf. I COOLEY, *CONSTITUTIONAL LIMITATIONS*, 8th ed., 224 (1927); Duff and Whiteside, "Delegata Potestas Non Potest Delegari; A Maxim of American Constitutional Law," 14 CORN. L. Q. 168 at 173 ff. (1929). See also *Cincinnati, W. & Z. R. R. v. Commissioners*, 1 Ohio St. 77 at 88 (1852); *Hampton, Jr., & Co. v. United States*, 276 U. S. 394, 48 S. Ct. 348 (1928), for discussions of the range of application of this principle.

⁴ *Barto v. Himrod*, 8 N. Y. 483 at 488 (1853); *Santo v. State*, 2 Iowa 164 (1855); *Wright v. Cunningham*, 115 Tenn. 445 at 468-469, 91 S. W. 293 (1905).

⁵ *Opinions of the Justices*, 160 Mass. 586, 36 N. E. 488 (1894). The remarkable dissent of Holmes wherein he identifies the political theory underlying this doctrine with Hobbes' concept of the complete surrender of authority to the sovereign is particularly valuable. *Barto v. Himrod*, 8 N. Y. 483 (1853); 76 A. L. R. 1053 (1932); 23 L. R. A. 113 (1894). *Contra*: *State v. Parker*, 26 Vt. 357 (1854); *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 125 N. W. 961 (1910); *Hudspeth v. Swayze*, 85 N. J. L. 592, 89 A. 780 (1914). The Supreme Court of Michigan split evenly upon the question in *People v. Collins*, 3 Mich. 343 (1854).

⁶ Duff and Whiteside, "Delegata Potestas non Protest Delegari; A Maxim of American Constitutional Law," 14 CORN. L. Q. 168 (1929).

⁷ I COOLEY, *CONSTITUTIONAL LIMITATIONS*, 8th ed., 227 (1927).

⁸ Although it passes it by in reaching its decision, the court remarks the curious

initiative power to invoke the act was given were indefinite in the extreme,⁹ it could have been based upon the fact that a sufficiently definitive standard and mechanism for the exercise of the delegated legislative power had not been provided rather than upon the broad principle that delegation of authority to the people to determine if and when the provisions of a particular act shall become operative is per se invalid.¹⁰

F. K. B.

dilemma the statute creates. The only requests upon which the Commission may act are those from groups within a particular "marketing area" which is to be defined by the Commission; but since the Commission is powerless to act until petitioned by such a group it is unable to set up "marketing areas" from which such complaints may be received.

⁹ In the language of the court, the attempted delegation is "under an inexplicit phrase, to an uncertain group. . . ."

¹⁰ A somewhat analogous case is *Winters v. Hughes*, 3 Utah 443 (1861), in which a statute providing for a special term of court in any district upon the petition of 100 voters was held an illegal delegation of legislative power in view of the requirement that the time and place of terms of court be determined by law.