

MAINE STATE LEGISLATURE

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STATE OF MAINE
OFFICE OF POLICY AND LEGAL ANALYSIS
ROOM 101/107
STATE HOUSE STATION 13
AUGUSTA, MAINE 04333
TEL.: (207) 289-1670

JULIE S. JONES
JOHN B. KNOX
EDWARD POTTER
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LEGAL SUMMARY

An Outline On
DELEGATION OF
LEGISLATIVE AUTHORITY

Author: Julie S. Jones
Legal Analyst

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DELEGATION OF LEGISLATIVE AUTHORITY

I. Background

A. Maine Constitution.

1. Article III, §1.

Section 1. The powers of this government shall be divided into three distinct departments, the legislative, executive and judicial.

2. Article III, §2.

Section 2. No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted.

3. Article IV, Part 3, § 1.

....The Legislature, with the exceptions herein stated, shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States.

B. Political theory. It must be remembered that the constitutional framework surrounding the issue of delegation of legislative powers originates at the creation of the American republic when a primary concern of the liberal political thinkers, such as the framers of our Constitution, was avoiding the possibility of abuse of power. These concerns resulted in the institutionalization of the thought of several 17th and 18th century political philosophers.

1. Separation of powers. Dividing the powers of government among separate and equal branches would provide limits on the abuse of authority by any one of the branches. (Montesquieu)

2. Special agency. The legislature has been entrusted by the People with the power to make laws because of its special fitness as the elected representatives of the People. "The power of the Legislature being derived from the People by a positive voluntary Grant conveyed, which being only to make Laws, and not to make Legislators, the

Legislature can have no power to transfer their Authority of making laws, and place it in other hands." J. Locke, Two Treatises of Government.

Therefore, the guiding principle for intuiting a delegation problem is the extent to which the statutory grant of discretion permits unchecked abuse of power.

II. Federal delegation

A. Early cases. Although the principle of nondelegation of legislative power was frequently cited affirmatively in early cases, no legislative delegation was found unconstitutional until 1935. Various justifications for delegation were identified:

1. Congress could make legislation effective when the President determined a "named contingency". Field v. Clark, 143 U.S. 649 (1892).
2. Congress could give discretion to executive agencies if it set "standards" to limit the scope of discretion. Buttfield v. Stranahan, 192 U.S. 470 (1904).
3. Congress could give the authority to "fill up the details." United States v. Grimaud, 220 U.S. 506 (1911).
4. Congress need only provide "an intelligible principle" to which an executive agency must conform. J. W. Hampton, Jr. v. United States, 276 U.S. 394 (1928).

B. Sick chickens. In three cases in 1935 and 1936, the Supreme Court finally invalidated several provisions of New Deal legislation relating to the regulation of industry.

1. Grant of "unlimited discretion" to the President to prohibit the transportation of petroleum in violation of state law. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).
2. Grant of discretionary authority to President to give legal effect to industry codes to promote "fair competition." A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
3. Grant of discretionary authority to private industry group to give legal effect to industry codes. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

- C. "Modern times." Since 1936, no statute has been voided by the U.S. Supreme Court as an unconstitutional delegation of legislative authority to an executive agency. The issue of delegation has been raised but generally avoided by statutory interpretation.
- D. One house legislative veto. The U.S. Constitution prohibits a one house veto of executive agency actions. The Supreme Court recognized the guiding principle of the framers of the Constitution as the need for checks upon the arbitrary exercise of authority. A one house veto is without the checks required in the enactment and presentment clauses of the Constitution and therefore unchecked. I.N.S. v. Chadha, 103 S. Ct. 2764 (1983).

III. State delegation

As a general rule, state courts have clung more firmly to the principle of nondelegation of legislative authority. Delegation questions are most frequently confronted in the following situations:

- A. Agency discretionary authority -- standards v. unbounded discretion. Over time, courts have tended to become more lenient in interpreting the amount of agency discretion a statute may authorize. Compare:
 1. 1972 -- Small v. Board of Registration and Examining in Optometry, 293 A.2d 786 (Me. 1972). State law authorized the Board to "make such rules and regulations, not inconsistent with law, as may be necessary to govern the practice of optometry, but no rule or requirement shall be made that is unreasonable or that contravenes any provision of this chapter." The Board promulgated rules unrelated to statutory requirements. Small was disciplined for violating the rules.

The Law Court cited the principle that "... the legislative authority must declare the policy or purpose of the law and, as a general rule, must also fix the legal principles which are to control in given cases by setting up standards or guides to indicate the extent, and prescribe the limits, of the administrative agency." (Emphasis added.) "It may be safely said that a statute which gives unlimited regulatory power to a commission, board or agency with no prescribed restraints nor criterion nor guide to its action offends the Constitution as a delegation of legislative power." (Emphasis added.)

2. 1977 -- State v. Boynton, 379 A.2d 994 (Me. 1977). State law authorized municipalities to adopt ordinances regulating shellfish digging. The law provided the subjects that might be addressed by the local ordinance but did not limit the way in which the municipality could address those subjects. Court defined the purpose of the nondelegation doctrine as protection against "arbitrary or discriminatory action." It found that "There are areas of necessary legislative undertakings...where it may not be feasible to supply precise standards without frustrating the purposes of the particular legislation." In such cases, the Court determined that the presence of adequate procedural safeguards to protect against abuse of discretion compensates for a lack of specific standards. The Court identified standards in the general statutory definition of "conservation" and safeguards in that the ordinance had to be approved by the Commissioner of Marine Resources and be voted upon by the municipality's legislative body.
3. 1981 -- Lewis v. Dept. of Human Services, 433 A.2d 743 (Me. 1981). Law required Department of Human Services to adopt regulations relating to plumbing and subsurface sewage disposal systems. No specific standards were provided. State Plumbing Code was challenged on delegation grounds. Court held that it will look at total legislative scheme and feasibility of prescribing standards in determining the adequacy of the legislation. In doing so, it found sufficient standards in general language relating to protection of health and public welfare.
4. 1981 -- Superintending School Committee of the City of Bangor v. Bangor Education Association, 433 A.2d 383 (Me. 1981). Binding arbitration law lacks standards for determinations of issues submitted to arbitrators. Court infers implicit minimal injunction of the statute that the arbitrators act reasonably and fairly. The basic constitutional requirement is sufficient standards -- specific or generalized, explicit or implicit. Where standards might destroy the flexibility desired by the policy behind the law, protection against uncontrolled discretionary power may be accomplished by adequate procedural safeguards. Interestingly, the Court, in a footnote, identifies the requirement of adequate standards and safeguards in the delegation of authority as deriving from the due process clause?

5. Variation on a theme. Occasionally, a case will identify the role of agencies in filling in the details of a statute by regulation or interpretation as an administrative (i.e. executive) function rather than delegated legislative authority, thereby avoiding the delegation question. This is the exception rather than the rule, however.

B. Incorporating future federal law. Popular belief maintains that it would be a violation of the nondelegation doctrine for the Legislature to incorporate into State law future changes in federal (or other state) law. For example: " 'Ghldhf' shall have the same meaning as in the Federal Ghldhf Management Act of 1923, and all subsequent amendments thereto." This belief is based upon a 1922 case which has not been overturned. However, compare:

1. State v. Intoxicating Liquors, 117 A. 588 (Me. 1922). Legislation that purports to incorporate by reference future enactments of Congress "constitutes an unlawful delegation of legislative power, and an abdication by the representatives of the people of their power, privilege and duty to enact laws." The challenged provision prohibited the sale of intoxicating beverages as defined by "federal enactment, or by decision of the supreme court of United States, now or hereafter declared"

2. Opinion of the Justices, 460 A.2d 1341 (Me. 1982). Use of the Consumer Price Index to adjust income tax rates, exemptions and standard deductions is not an unconstitutional delegation because the CPI is part of a formula adopted by the voters. As a part of that formula, the CPI is determined by objective economic criteria and is widely used to adjust other things. The Court did not address the fact that the federal government could and, indeed, has changed the method of determining the CPI since the State indexing measure was adopted.

3. Reciprocity. There is a question about the constitutionality of making Maine law contingent upon the law of another state. There is no pertinent Maine case. Other states are split.

C. Events of independent significance. The Legislature may tie the effectiveness of legislation to events of independent significance.

1. Lucas v. Maine Commission of Pharmacy, 472 A.2d 904 (Me. 1984). Court upheld State licensing provisions for pharmacists that require graduation

from school accredited by American Council on Pharmaceutical Education (ACOPE). The Court recognized the general theory that a fact or event that has a significance independent of a legislative act may be incorporated by reference into a statute without running afoul of the nondelegation doctrine. ACOPE accreditation is done for many purposes unrelated to Maine law.

2. Boston Milk Producers v. Halperin, 446 A.2d 33 (Me. 1982). Legislature may not permit a tax to be contingent upon the vote of the persons who will be subject to it. The Court's discussion centered on the fact that this case involved a tax, which is generally subject to stricter requirements than other areas of delegation. See paragraph D below.

D. Taxes. "The Legislature shall never, in any manner, suspend or surrender the power of taxation." Me. Constitution, Article 9, Section 9.

1. See Boston Milk Producers, above.
2. Blair v. State Tax Assessor, 485 A.2d 957 (Me. 1984). Plaintiff maintained that exemption from taxation of State retirement benefits was part of contractual right to such benefits and could not be repealed by the Legislature. Court held that, even if that were true, Legislature may not enact a statute which would contract away the power to tax on a permanent basis.
3. See Brewer Brick Co. v. Brewer, 62 Me. 62 (1873). Decided before the adoption of Article 9, Section 9, this case held (and continues to be followed) that only the Legislature may determine what classes of property may be exempt from the property tax. It may not delegate that authority to a municipality. (But this gets complicated. See also Me. Constitution Article 9, Section 8.)

E. Delegation to a subunit of the Legislature. There are no pertinent Maine cases on this subject. It seems fair to assume that the Law Court would follow the reasoning of the U.S. Supreme Court in the Chadha case (see above) that the Legislature may not delegate Legislative functions to a subunit of itself. The theory behind this policy is that Legislative enactments must be subject to the protections guaranteed in the Constitution in the requirements of enactment by both Houses and presentment to the Governor for signing or veto. There could be no effective challenge to the actions of a subunit of the

Legislature; therefore, there would be no checks on the exercise of discretion. Situations in which these theories would be relevant include:

1. Assigning authority to one House or a Committee to veto agency rules
2. Assigning authority to a Committee or Legislative staff to approve executive agency monetary transfers between sessions.
3. Delegating authority to the Legislative Council to make law-making decisions.

NOTE: It is initially necessary to determine whether the authority being delegated is the power to make law. The Legislature possesses other powers which it may delegate to a subunit without fear of violating the Constitution. For example:

1. Legislative employee relations;
2. Advisory functions (Committee review of legislation, studies, county delegation review of county budgets, etc.)
3. Administrative functions may be delegated to the Legislative Council without requiring full law-making procedures.

F. Functions specifically required of the Legislature.

The Constitution provides certain other specific functions that must be performed by the Legislature. These, generally may not be delegated.

- A. The Legislature may not delegate to Governor the power to establish a public office. The Constitution provides that that authority rests solely in the Legislature. State v. Butler, 105 Me. 91 (1909).
- B. The Constitution provides that the duty to reapportion rests with the Legislature and may not be delegated. Opinion of the Justices, 148 Me. 404, 94 A.2d 816 (1953).

* * *

WARNING! This particular topic is a black hole which leads deceptively to situations where members of one branch of government are given authority to exercise powers ordinarily reserved to another branch. This is part of a larger, but related, issue of separation of powers. Venture here at your own peril.

* * *

- G. Prosecutorial discretion. State v. Pickering, 462 A.2d 1151 (Me. 1983). Prosecutorial discretion in deciding whether to prosecute for a civil or criminal violation of operating under the influence is not an unconstitutional delegation of legislative authority. (However, see dissent of Justice Nichols to the contrary.)

- H. Zoning. Lounging around at the edge of "delegation law" are a series of cases relating to municipal zoning ordinances. This is not particularly important to Legislative work. It is mentioned here so that no one will be misled if presented with some of the precedents in this area.

The Law Court, without explicitly making a distinction, holds provisions of municipal zoning ordinances, especially those relating to the granting of special exceptions, to a much higher requirement with regard to standards than is generally true of other types of delegations. See Cope v. Brunswick, 464 A.2d 223 (Me. 1983). Despite rather specific standards, the Law Court has also concluded that such ordinances need to specify the weight that a Planning Board must assign to the enumerated factors. Chandler v. Pittsfield, 496 A.2d 1058 (Me. 1985). In fact there appear to be no cases upholding standards which permit some discretion on the part of Board members, and it is unclear whether any standards could be devised which would pass constitutional muster (editorial comment).

DELEGATION OF LEGISLATIVE AUTHORITY

QUESTIONS TO ASK WHEN DRAFTING

1. Is the power being given to some entity other than the Legislature?
2. Is the power reserved by the Constitution "exclusively" to the Legislature?
 - A. Things to watch out for:
 1. establishment of an office
 2. apportionment
 3. establishing a tax
 4. appropriating money
 5. internal organization
 6. making "law"
3. If the statute grants authority to an executive agency to amplify the statute:
 - A. Does it set "sufficient standards?"

The court will probably go a long way to find standards for you if you omit them, but it is really better to put them into the law if you can. It avoids mistakes of administrative interpretation as well as constitutional challenges, and every once in a while the Law Court gets finicky and refuses to do it for you.
 - B. If standards are not feasible, does the statute provide adequate procedural safeguards?
3. Does the statute delegate legislative power to a subunit of itself?
 - A. If so, is it "law-making" power or administrative functions?
4. Does the statute incorporate future changes in federal or other law?

(Don't do it unless you are willing to risk unconstitutionality.)

5. Does the statute make effectiveness of the law or a portion of it contingent on the action of a private group?
 - A. Is the action of the private group (1) an act of independent significance or (2) directed toward implementation of the law?

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