

Constitutional Highlights

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THE DELEGATION DOCTRINE

The power to declare whether or not there shall be a law, to determine the general policy to be achieved by the law, and to fix the limits within which the law shall operate is vested by our constitution in the legislature and may not be delegated.

History and purposes of the delegation doctrine

Strictly speaking, the legislature may not delegate its law-making function to a nonlegislative entity, such as an administrative agency, because of the separation of powers doctrine. That doctrine, which inheres in the Wisconsin Constitution, dictates that the legislative, executive, and judicial branches may not encroach upon each other and that legislative power is vested solely in the senate and assembly (article IV, section 1, Wisconsin Constitution).

All states whose constitutions contain a separation of powers doctrine have adopted some version of the delegation doctrine, which permits the legislature to delegate the administration of the law, as opposed to the determination of what the law should be, to nonlegislative entities, such as administrative agencies. Thus, the delegation doctrine allows the legislature to focus on the “fundamentals” of a law and leaves to agencies the task of “filling in the gaps” by promulgating rules to administer the law. *State ex. rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472, 505-06 (1928). Courts generally uphold statutes that liberally grant rule-making discretion because of the demands that modern economic and governmental conditions place on administrative agencies. In Wisconsin, as long as the purpose of the legislation is ascertainable and procedural safeguards exist to ensure that the agency acts within the legislative purposes, a law will pass constitutional muster under the delegation doctrine. *Watchmaking Examining Board v. Husar*, 49 Wis. 2d 526, 536 (1971). Conversely, the delegation doctrine prohibits the legislature from abandoning its responsibility to make the law by delegating that power to any other entity, such as an administrative agency, a court, or a private association.

How courts interpret the delegation doctrine

Adequate standards

If legislation does not provide adequate standards for the agency charged with the task of filling in the legislative gaps, a court will probably invalidate the legislation. For example, the Wisconsin Court of Appeals invalidated a statute that allowed the Department of Transportation complete discretion in determining the length of driving license suspensions. The court found the statute lacked any ascertainable standards to guide the department in determining the length of the suspensions, thereby impermissibly delegating the power to make law to the department. *Best v. State of Wisconsin*, 99 Wis. 2d 495 (Ct. App. 1980). Other states with a similar "standards" requirement have invalidated statutes that allowed agencies to promulgate rules concerning such things as liquor-licensing regulations and electronic video systems without providing any standards for the content of those rules.

Delegation of power to determine what is in the public's interest

A statute that delegates to the power to determine what is in the public's interest is constitutionally vulnerable on delegation grounds, as evidenced by decisions of the Wisconsin Supreme Court. In one decision, the court struck down a statute that delegated to circuit courts the authority to determine when it was in the interest of the public to establish a metropolitan sewerage district. *In re City of Fond du Lac*, 42 Wis. 2d 323 (1969). Similarly, the court invalidated a statute that delegated to the circuit courts the duty of determining if a particular annexation was in the public interest. In both cases, the court was troubled because the statutes gave a nonlegislative entity the power to determine policy by deciding what constituted the public's interest. Although there are no reported cases in Wisconsin concerning the delegation of the public interest determination to an administrative agency, other state courts have struck down such statutes on delegation grounds, regardless of whether the statute delegated the power to a court or an agency. The common thread among all these cases is that the legislature may not abdicate its responsibility by allowing other entities to make public policy determinations.

Delegation by incorporation of external material

A statute that incorporates an existing federal statute or regulation by reference and that empowers an administrative agency to rely upon that federal law in making factual determinations is permissible under the delegation doctrine because the legislature, by relying upon an existing, fixed law, has not abdicated its responsibility to make the law.

Thus, the Wisconsin Supreme Court has upheld a statute that defined the term "drug" by reference to the official United States Pharmacopoeia, even though the statute empowered an administrative agency to make the actual determination as to which substance was a drug. *State v. Wakeen*, 263 Wis. 401 (1953). A problem may arise, however, if a statute incorporates, or is interpreted by a court to incorporate, *future* changes to that law. So, for example, a statute that requires drugs to be regulated by any future federal drug law would probably be invalidated because the legislature would effectively be delegating its law-

making function to the federal government.

Delegation to nongovernmental agencies

A similar kind of delegation problem to the “incorporation” problem can arise if a statute delegates to private persons or trade or industry associations the power to promulgate substantive regulations or standards, such as water quality standards or licensing standards, that are properly the province of the legislature. Although the Wisconsin Supreme Court has not addressed the issue of delegation of legislative power to nongovernmental agencies, the supreme courts of other states have generally invalidated such delegations. The crux of the problem lies in giving nonlegislative persons the power to create new legal standards.

Delegation of the power to define or establish punishment for crimes

Courts almost invariably strike down statutes that delegate to a nonlegislative entity or person the power to define or establish the punishment for a crime. In some cases, the statute being challenged on delegation grounds does not contain an ascertainable standard of guilt, thereby effectively and impermissibly delegating to courts the legislative power to define statutory offenses. In other cases, the statute impermissibly delegates legislative power to prosecutors. For example, in *State v. Cissell*, 127 Wis. 2d 205 (1985), the Wisconsin Supreme Court reviewed a challenge to the enactment of two criminal statutes concerning felony abandonment that were identical except for the penalty. Although the statutes were upheld in a 4-3 decision, Justice Abrahamson, writing for the three dissenting justices, concluded that the enactment of the statutes violated the delegation doctrine:

It is axiomatic that the state prosecute people for crimes under statutes enacted by the legislature. . . . By establishing more than one maximum penalty for the identical crime the legislature has effectively failed to fix a penalty for the crime. . . . The legislature has abdicated its responsibility to set a penalty by allowing the prosecutor to determine the maximum penalty for the crime through selecting the statute under which to charge. *Id.* at 228.

Strategies for reconciling legislation with the delegation doctrine

Provide clear standards

To avoid a delegation problem, it is best to provide clear and adequate standards for the agency that is charged with administering the legislation so that no major substantive gaps exist for the agency to “fill in.” In addition to avoiding the constitutional problem, this approach to crafting legislation has the practical effect of enabling the agency to carry out more effectively the requester’s intent.

Use existing standards for incorporation

If a requester wishes to rely upon the federal government or a private association to fill in the gaps of the

legislation, it is best to incorporate existing standards promulgated by the federal government or private association and to refer to them by date and official name so that no question arises about whether the legislature intended to incorporate future changes to those standards. A statute deemed to incorporate future changes would likely be invalidated, as would a statute that delegates to the federal government or private persons the power to make new law by promulgating regulations or standards.

Public interest determinations

It is generally best to avoid delegating to any entity the power to determine what constitutes the public interest because courts uniformly hold that only the legislature may make this kind of policy determination by enacting legislation.



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