RATE REGULATION AS AFFECTED BY THE DISTRIBUTION OF GOVERNMENTAL POWERS IN THE CONSTITOTION

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Introductory.

In this article an effort will be made to show that, within their respective jurisdictions and within constitutional bounds, both Congress and the state legislatures may limit the charges for railroad transportation, either specifically or by definite general rules; and that if the legislative department of government establishes such rules it may empower a commission to name specific rates in accordance therewith; but that, on the other hand, such rules may be established only by the legislative department, and until they are so established no commission may constitutionally ordain specific rates. We shall, furthermore, consider the question whether the statutes which empower commissions to name specific rates do establish definite principles of which the commissions are simply called upon to state the specific applications or whether by those statutes the attempt is made to entrust to the commissions a discretion which is so broad as to be unconstitutional.

As the rules of constitutional law which are involved have been frequently misunderstood even by the courts which have endeavored to apply them, it will be necessary to examine at some length those rules and the more important cases which have arisen under them.

General Rule as to Distribution of Powers.

The United States and the several states have by their respective constitutions made partial[1] distributions of the powers of those governments among three departments of government. In so doing they have by implication, and at times by express words, declared that an organ possessing the characteristics of one department shall not exercise powers which have been entrusted only to another department.[2] It is this restraint which we shall consider in the present article.

Obviously, the distributive clauses of the federal Constitution relate only to the federal government,[3] and the dis-

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[1] See page 4, *infra*.

[2] Cooley, Constitutional Limitations, 7th ed., 126; Cooley, Constitutional Law, 3d ed., 46; Black, Constitutional Law, 2d ed., pp. 78-84; Bondy, The Separation of Governmental Powers, (Columbia University Studies) 19-22; 6 A. & E. Enc. of L., 2d ed., 1006, 1009; 8 Cyc. 807, 828, 844, 858; *State* v. *Johnson*, (1900) 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662; *Western U. T. Co.* v. *Myatt*, (1899) 98 Fed. 335; *Shephard* v. *City of Wheeling*, (1887) 30 W. Va. 479, 4 S. E. 635. Compare 6 A. & E. Enc. of L., 2d ed., 1007; *State* v. *Bates*, (1905) 96 Minn. 110, 116, 104 N. W. 709, 712; *Sawyer* v. *Dooley*, (1893) 21 Nev. 390, 32 Pac. 437; and authorities cited in note 6, *infra*; and see *Atlantic E. Co.* v. *Wilmington & W. R. Co.*, (1892) 111 N. C. 463, 16 S. E. 393, 18 L. R. A. 393. Professor Dunning, in 19 Pol. Sci. Quar. 487, claims that Aristotle did not express the views concerning the distribution of governmental powers which later writers have attributed to him.—The statement in the text is obviously true as to those constitutions which contain express declarations to that effect. As to those which do not contain such declarations, it is clear that one department cannot exercise power which has been entrusted only to another department without the consent of the latter. And the question whether even the consent of the latter can validate the exercise of a power otherwise than as provided in the constitution must be answered by a consideration of the purpose of those who adopted the constitutions when they decided to grant different governmental powers to different organs of government.

[3] The United States Supreme Court said in *Satterlee* v. *Matthewson*, (1829) 2 Pet. 380, 413, "There is nothing in the Constitution of the United States which forbids the legislature of a state to exercise judicial functions." See also *Calder* v. *Bull*, (1798) 3 Dall. 386; *Randall* v. *Kreiger*, (1874) 23 Wall. 137, 147; *Consolidated R. Co.* v. *State*, (1908) 207 U. S. 541, 552, 28 Sup. Ct. 178, 181; *Michigan C. R. Co.* v. *Powers*, (1906) 201 U. S. 245, 294, 26 Sup. Ct. 459, 462, 463; *League* v. *Texas*, (1902) 184 U. S. 156, 161, 22 Sup. Ct. 475, 477;

tributive clauses of the state constitutions relate only to the governments of the respective states. Yet whether we consider the power of an organ of the federal government or the power of an organ of a state government, the problems involved will be the same, for there is a general uniformity among the constitutions, although, of course, there are also variations among the constitutions which may prevent uniform answers to those problems, and even under similar provisions different conclusions may be reached by the authorities of different jurisdictions.[4]

It is true that the actual distribution of powers is not strictly logical; that, for instance, the president or governor exercises power which is legislative in its character when he vetoes legislation, and legislative bodies exercise power of a judicial nature when they try cases of impeachment and power of an administrative nature when they consider appointments to office.[5] But such constitutional exceptions,

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Winchester & S. R. Co. v. *Commonwealth*, (1906) 106 Va. 264, 267, 269, 55 S. E. 692, 693, 694; Bondy, The Separation of Governmental Powers, (Columbia University Studies) 21; *Mobile, J. & K. C. R. Co.* v. *State*, (1908) 210 U. S. 187, 202, 28 Sup. Ct. 650, 655; *Claiborne Co.* v. *Brooks*, (1884) 111 U. S. 400, 410, 4 Sup. Ct. 489, 494. The dates of the cases will be noted, however.

[4] *Trustees* v. *Saratoga G., E. L. & P. Co.*, (1908) 191 N. Y. 123, 83 N. E. 693, 696; *People* v. *Cook*, (1907) 147 Mich. 127, 131, 132, 110 N. W. 514, 516; *State* v. *Kline*, (1907) Ore., 93 Pac. 237, 239; *Winchester & S. R. Co.* v. *Commonwealth*, (1906) 106 Va. 264, 55 S. E. 692; *Wheeler's Appeal*, (1877) 45 Conn. 306; McGehee, Due Process of Law, 71; Goodnow, The Principles of the Administrative Law of the United States, 33, 95; and see remarks of Christiancy, J., in *People* v. *Hurlburt*, (1874) 24 Mich. 44, 63.

[5] On the power of a legislature to appoint its own subordinate officers and to conduct investigations—which are not acts of a legislative nature, and on the power of a court to appoint its own subordinate officers and to exercise analogous powers—which are not acts of a judicial nature, see the discussion in *Board of Comrs.* v. *Gwin*, (1894) 136 Ind. 562, 36 N. E. 237; Goodnow, The Principles of the Administrative Law of the United States, 37, 41, 446-448; Bondy, The Separation of Governmental Powers, (Columbia University Studies) 34, 70, 76, 84, 114, 115, 122, 138; Black, Constitutional Law, 2d ed., p. 76; *In re Janitor of Supreme Court*, (1874) 35 Wis. 410; *In re Chapman*, (1897) 166 U. S. 661, 17 Sup. Ct. 677; *State* v. *Pierre*, (1908) 121 La., 46 So. 574. And see 6 A. & E. Enc. of L., 2d ed., 1007; 21 Harv. L. Rev. 161. Compare

and even exceptions, which appear in some constitutions, which directly affect rate regulation, do not lessen the positiveness of the rule in unexcepted cases.

It is, however, important that we notice that the distribution of powers is not complete, so that while some powers may be exercised only by the legislature, others only by an administrative organ, and still others only by the courts, there are also powers which are not definitely assigned by the constitutions and which may, therefore, be exercised by the legislature itself or be assigned by it to one of the other departments.[6] Moreover, the legislature may grant some self-government to the localities.[7] In so doing it is not

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the authorities cited in note 22, *infra*. The actual decision in *Kilbourn* v. *Thompson*, (1880) 103 U. S. 168, was simply that the federal House of Representatives did not have authority to make the particular investigation there considered.

[6] See Cooley, Constitutional Law, 3d ed., 45, 46; Bondy, The Separation of Governmental Powers, (Columbia University Studies) 79, 80; Stevens, Sources of the Constitution of the United States, 49; *Toncray* v. *Budge*, (1908) Idaho, 95 Pac. 26; *Incorporated Village of Fairview* v. *Giffee*, (1905) 73 Ohio St. 183, 76 N. E. 865; *State* v. *Struble*, (1905) 19 S. D. 646, 104 N. W. 465; *State* v. *Bates*, (1905) 96 Minn. 110, 104 N. W. 709; *Paul* v. *Gloucester County*, (1888) 50 N. J. L. 585, 611, 15 Atl. 272, 284; *Brown v. Turner*, (1874) 70 N. C. 93, 102; 6 A. & E. Enc. of L., 2d ed., 1007; *Ross* v. *Whitman*, (1856) 6 Cal. 361; *Opinion of Justices*, (1885) 138 Mass. 601; page 10, *infra*, and note 66, *infra*. And there are powers which other organs may exercise until forbidden by the legislature: see, *e. g.*, 8 A. & E. Enc. of L., 2d ed., 29, 30; compare note 22, *infra*.

[7] Cooley, Constitutional Limitations, 7th ed., 165, 172, 263, 264; 8 Cyc. 837; 6 A. & E. Enc. of L., 2d ed., 1027, 1024; 28 *id.* 160; Dillon, Municipal Corporations, 4th ed., sec. 308; Goodnow, The Principles of the Administrative Law of the United States, 37; and see Oberholtzer, The Referendum in America, 324, 332, 334; Sutherland, Statutory Construction, 2d ed., p. 170. Compare *Elliott v. City of Detroit*, (1899) 121 Mich. 611, 84 N. W. 820; *In re Municipal Suffrage to Women*, (1894) 160 Mass. 586, 36 N. E. 488, 23 L. R. A. 113; *Bradshaw* v. *Lankford*, (1891) 73 Md. 428, 21 Atl. 66, 11 L. R. A. 582; *Slinger* v. *Henneman*, (1875) 38 Wis. 504; *Burton* v. *Dupree*, (1898) 19 Tex. Civ. App. 275, 46 S. W. 272. Congress may grant local, but only local, powers to the territories: see *Stoutenburgh* v. *Hennick*, (1899) 129 U. S. 141, 9 Sup. Ct. 256; and also *McCornick* v. *Western U. T. Co.*, (1897) 79 Fed. 449, 451; *Ansley* v. *Ainsworth*, (1902) 4 Ind. Ter. 308, 69 S. W. 884. It seems that there would be less "refinement of reasoning" (see *In re Rahrer*, (1891) 140 U. S. 545, 562, 11 Sup. Ct. 865, 869) in sustaining

reassigning power which has been entrusted exclusively to itself, for such limited power has been constantly granted to local authorities from time immemorial, and the general language of the constitutions is interpreted in accordance with this custom, since contemporary history does not furnish any reason for thinking that those who adopted the constitutions intended to abolish the custom. And, of course, the fact that a constitution assigns a given power to one organ of the central government does not of itself oblige the legislature when it bestows a similar power over strictly local matters upon an organ of local government to bestow it upon a similar organ.[5]

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local option and similar laws upon the ground given in the text than in sustaining them upon the ground which is usually given: *Paul* v. *Gloucester County*, (1888) 50 N. J. L. 585, 594, 600, 603, 604, 15 Atl. 272, 276, 279, 280; and see Oberholtzer, The Referendum in America, 208-217, 324; Cooley, Constitutional Limitations, 7th ed., 168, 169. Compare *Field* v. *Clark*, (1892) 143 U. S. 649, 694, 12 Sup. Ct. 495, 505; Sutherland, Statutory Construction, 2d ed., p. 173; Oberholtzer, *op. cit.*, 324, 328; *Evers* v. *Hudson*, (1907) Mont., 92 Pac. 462, 466, 467; *Fouts* v. *Hood River*, (1905) 46 Ore. 492, 81 Pac. 370, 1 L. R. A. N. S. 483; *McGonnell's License*, (1904) 209 Pa. 327, 58 Atl. 615; *Locke's Appeal*, (1873) 72 Pa. St. 491, 508. On the other hand, it is submitted that delegations of power to state boards cannot properly be based upon this exception to the general rule, however defensible they may sometimes be upon another ground. Consider *Brodbine* v. *Revere*, (1903) 182 Mass. 598, 66 N. E. 607; *People* v. *Harper*, (1878) 91 Ill. 357, 370; *Pierce* v. *Doolittle*, (1906) 130 Iowa, 333, 336, 106 N. W. 751, 752, 6 L. R. A. N. S. 143, 145; *Tilley* v. *Savannah, F. & W. R. Co.*, (1881) 5 Fed. 641, 657; 19 Harv. L. Rev. 203; 20 Harv. L. Rev. 147.

[5] *People* v. *Provines*, (1868) 34 Cal. 520, 532; *Eckerson* v. *City of Des Moines*, (1908) Iowa, 115 N. W. 177, 182; *Staude* v. *Board of Election Comrs.*, (1882) 61 Cal. 313, 322; see also *Commonwealth* v. *Collier*, (1905) 213 Pa. 138, 62 Atl. 567; *Muhlenberg Co.* v. *Morehead*, (1898) 20 Ky. L. Rep. 376, 46 S. W. 484; *Pennington* v. *Woolfolk*, (1880) 79 Ky. 13; *Terre Haute* v. *Evansville & T. H. R. Co.*, (1897) 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189; *Fox* v. *McDonald*, (1893) 101 Ala. 51, 69, 13 So. 416, 419; Bondy, The Separation of Governmental Powers, (Columbia University Studies) 179, 183; Goodnow, The Principles of the Administrative Law of the United States, 35-37; and cases there cited. Compare *State* v. *Armstrong*, (1907) Miss., 44 So. 809; *Mayor* v. *Dechert*, (1870) 32 Md. 369; and also *Trustees* v. *Saratoga G., E. L. & P. Co.*, (1908) 191 N. Y. 123, 83 N. E. 693, 696.