AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 7: The Republican Era – Separation of Powers/Nondelegation of Legislative Powers

**Rock v. Carney, 216 Mich. 280 (MI 1921)**

*In 1915, the Michigan state legislature authorized the state board of health “to designate what diseases are dangerous, communicable diseases” and to prescribe “such rules in relation” to dangerous diseases as the board thought necessary. The state board of health subsequently designated gonorrhea and syphilis as dangerous communicable diseases. In 1918, Nina Rock, then eighteen years of age, was approached by a deputy sheriff, and she and her mother agreed to go to the office of the Alma health officer, Thomas Carney, who performed a physical examination and determined that she was afflicted with gonorrhea. She was confined to a nearby hospital, where she also tested positive for syphilis. After being held for treatment for twelve weeks, she was released.*

*After her release, Rock brought in state court a suit against the city health officer and other public officials for monetary damages for detaining her without adequate statutory authority and violating her constitutional rights. The trial judge directed a verdict for Carney. She appealed to the state supreme court, which unanimously reversed the trial court for granting a summary verdict and ordered a new trial with testimony and evidence. The court held that it was not unconstitutional for the legislature to delegate the power to designate dangerous diseases to a board of health and to leave the determination of how best to fight such diseases to health officials. The judges divided, however, over the question of whether Carney had acted within his reasonable scope of authority. Four of the judges thought the courts could examine whether Carney’s decision to quarantine Rock in an institution was reasonably within his scope of discretion. Three of the judges thought the courts could examine whether Carney had a good-faith basis for conducting the initial examination.*

Judge [FELLOWS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I215b0bc634f411e9bc5c825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I215b0bc634f411e9bc5c825c4b9add2e).

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The questions involved in this litigation are of supreme importance, not only to the individuals composing this commonwealth, but also to the numerous boards of health and to the state itself. We approach their consideration with a due regard of their importance. . . . Policies adopted by the legislative and executive branches of the state government are not submitted to this branch for approval as to their wisdom. They stand or fall in this court because valid or invalid under the law, and their wisdom or want of wisdom in no way rests with us. If valid, they must be upheld by this court; if invalid, they must be so declared by this court. If these defendants have transcended their power, they must be held liable, and they may not be excused from liability by the fact that their motives were of the highest. . . .

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Acting pursuant to the authority here conferred, the state board of health designated gonorrhea and syphilis as dangerous communicable diseases. The validity of the provision of the statute . . . is here assailed by plaintiff’s counsel as a delegation of legislative power, and it is claimed that it contravenes sections 1 and 2 of article 4 of the Constitution of the state.

We cannot follow plaintiff’s counsel in this contention. This is not an attempt on the part of the Legislature to delegate to a board or commission the power to make a law, but is the delegation to a board of the power to find a fact, a scientific fact, a medical fact. This distinction was clearly pointed out in *Locke’s Appeal* (PA 1873), where it was said:

“Then, the true distinction, I concede, is this: The 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. To deny this would be to stop the wheels of government.”

It is now too late to insist that the power given to administrative boards, commissions, and officers to determine questions of fact and to make proper administrative rules and regulations is the delegation of legislative or judicial power. Much of recent legislation of this character has been assailed on this ground, and with striking unanimity the courts have rejected the contention. *Kennedy v. State Board of Registration* (MI 1906). . . .

. . . . In *Cedar Creek Township v. Wexford County Supervisors* (MI 1903), Justice Hooker, speaking for the court, said:

“The health board has large discretionary powers, made necessary by the fact that it is an emergency board. When it has reason to fear danger from diseases which are generally recognized as communicable and dangerous to the public health, a court may be justified in taking judicial notice that the disease is within the statute, which in plain terms includes all diseases where there is danger to the public health from a threatened spread of the disease. There may be other diseases which the courts can judicially know not to be within the statute; but there are still others where it cannot be a matter of judicial notice. . . . Within reasonable bounds, at least, the health officer’s conclusion that a disease is communicable, and is a menace to public health, must be conclusive; otherwise the efficiency of health officers and boards would be seriously lessened, for persons would be likely to hesitate about furnishing necessary medicines and other commodities, and rendering services, if it involved the danger of review by another board, with power to disallow claims upon the ground that the disease was not within the statute, or the goods furnished were not necessary.”

The case of *Highland v. Schulte* (MI 1900) is a leading case and has been frequently cited by the courts of other states. In that case the plaintiff occupied the east half of a two-family dwelling. Smallpox existed in the family occupying the west half. Defendants constituting the board of health of Detroit quarantined the entire building, although there was no connecting passages between the homes and plaintiff had not been exposed to the disease. He brought the action to recover his damages occasioned by the quarantine. This court held there was no liability and that defendants were authorized to make the regulations requiring that double houses be quarantined where smallpox breaks out in one of the homes.

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The detention in quarantine of persons infected with communicable diseases has long been recognized by the medical profession and the public at large as one of the most effective measures that may be taken to prevent their spread. Such measures have uniformly been held to be within the police power of the state. The health of the people is of supreme importance to the state, and measures reasonably calculated to promote the public health have with uniformity been sustained. . . . I think the question of whether the person shall be detained in a detention hospital or in their own homes must be left to the honest judgment of the duly constituted authorities. The purpose of the quarantine is isolation, prevention of infection. If this can, in the honest judgment of the health officer, be better secured by detention in a hospital, and the health officer so decides, it is not for the courts to override such decisions and substitute their judgment for that of those skilled in the healing art and intrusted by the law with the determination of the question.

The power to quarantine carries with it in my judgment, as a necessary incident to the exercise of such power, the right to examine one whom the health officer has reasonable grounds to believe is infected with the communicable disease. But the Legislature has not left this subject in doubt. . . .

. . . . I am persuaded that in the absence of fraud or arbitrary action on the part of the examining health officer, his conclusion is final and that this question is foreclosed in this state by the reasoning of the case of *Cedar Creek Township v. Wexford County Supervisors*. . . .

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An examination of the authorities, a consideration of our own statutes, having in mind the rule that they should be liberally construed in order that the aim intended, i. e., the good of the public health should be attained, leads me irresistibly to the conclusion that we should hold: That the state board of health has validly determined that gonorrhea and syphilis are communicable diseases; that the power exists in the boards of health acting through their respective health officers to quarantine persons infected with these diseases either in their homes, or in detention hospitals, such detention to continue so long as the diseases are in their infectious state; and that, subject to what will now be considered, such health officer has the power to make such examination as the nature of the disease requires to determine its presence.

I have said that I thought the health officer had the power to make the examination-when may that power be exercised? Indiscriminately? May he send for every man and woman, every boy and girl of the vicinage, and examine them for these disorders? I think not. . . .

Dr. Carney had the power to make the examination, but he could not exercise such power unless he had reasonable grounds to believe that plaintiff was infected. Such good faith on his part was a necessary prerequisite to the exercise of the power. I am unable to follow the contention of defendant’s counsel that this record establishes such good faith. . . . In the absence of such testimony, I think the trial judge was in error in directing a verdict for defendant Carney. . . .

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*Reversed*.

Judge WIEST, with whom MOORE, BIRD, and STONE join, concurring.

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There is power to protect the public health; it is vested by law in public health boards to be exercised through reasonable rules and regulations duly promulgated. Whether such rules and regulations are lawful and reasonable, considering the true end in view and personal rights guaranteed citizens by the Constitution, constitute judicial questions beyond the power of the Legislature to foreclose.

Arbitrary power, beyond the reach of redress open to an injured citizen, is not vested in boards of health or anywhere else under our system of government. While courts may well be loath to review health regulations, promulgated by an executive board under legislative delegated authority, yet in a proper case the duty exists, and no board by executive action can close the court and succeed in having its officers remain immune from judicial inquiry when a claimed unlawful exercise of authority has been visited upon a citizen and redress is asked.

Courts may be controlled by the determination of an executive board skilled as to what constitutes a dangerous communicable disease and may not attempt to review such classification, but the method adopted or exercised to prevent the spread thereof must bear some true relation to the real danger, and be reasonable, having in mind the end to be attained, and must not transgress the security of the person beyond public necessity.

Measures to prevent the spread of dangerous communicable diseases and to provide for the isolation and segregation of those diseased are practically as old as history. It has been said that, “The history of pestilence is the history of quarantine.”

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The law has not yet conferred upon boards of health the old time custom of the Samnites of examining the conduct of the young people or of holding general inquisition for the discovery of venereal disease. The board of health has no legislative power; it may under delegated power enact rules and regulations for the protection and preservation of the public health, but must steer clear of combining legislative with executive power; in other words, such board cannot give itself power and then execute the power. I have been unable to lay my finger upon any statute authorizing or even sanctioning by inference the procedure here adopted. I recognize the need of full power to stay the spread of epidemic diseases, and I find such power in the statute; but I cannot find there that, by the mere determination that a disease is dangerous and communicable, there follows power at the will of the health officer to refuse isolation in the home by quarantine and placard notice thereof and to commit the diseased person to a hospital. If the law conferred the power exercised by the health officer in this instance, then children with any one of the numerous diseases now declared dangerous and communicable could be taken from their homes and sent to a hospital.

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And right here arises the question of whether the exercise of the power by the defendant officer in refusing this girl right of quarantine in her own home was an unreasonable act and not warranted by menace to the public health, and her confinement in the detention hospital an unlawful restraint of her person.

This presented an issue of fact for the jury, and the trial judge was in error in directing a verdict for defendant. . . .