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Dale D. Goble

University of Idaho, College of Law

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THROUGH THE LOOKING-GLASS AND WHAT THE IDAHO SUPREME COURT FOUND THERE

DALE D. GOBLE*

“When *I* use a word,” Humpty Dumpty said, in a rather scornful tone, “it means just what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”¹

On occasions courts play at Humpty Dumpty’s semantic game. In the Idaho Supreme Court’s recent opinion upholding the legislative veto,² the word is not “glory”—which Humpty Dumpty contemptuously informed Alice meant “a nice knock-down argument”—but “law.”³

I

In 1985, the Board of Health and Welfare adopted septic tank regulations pursuant to a delegation of rulemaking authority from the

* Professor of Law, University of Idaho College of Law. I would like to thank a number of my colleagues for their comments on earlier drafts of this article—but they won’t let me.

1. L. CARROLL, *THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE IN ALICE IN WONDERLAND*, 101, 163 (Norton Critical ed. 1971) [hereinafter L. CARROLL].

2. A “legislative veto” is an assertion of the power by a legislative body to void (“veto”) administrative agency regulations or other actions through the use of procedures other than the enactment of a statute. The process employed in *Mead v. Arnell*, 117 Idaho 660, 791 P.2d 410 (1990), is an example. I.C. § 67-5218 asserts the power to adopt “a concurrent resolution . . . rejecting, amending or modifying” any agency regulation. Since a concurrent resolution is not presented to the governor for his approval or rejection, it does not comply with the constitutional requirements for enacting a statute. The Idaho Constitution requires not only the bicameral adoption of a bill, IDAHO CONST. article 3, § 1, but also presentment to the governor for his concurrence or veto, *id.* article 4, § 10. As the court recognized, “HCR-29 [the concurrent resolution at issue] is not a law.” *Mead*, 117 Idaho at 667, 791 P.2d at 417.

3. See *Mead*, 117 Idaho 660, 791 P.2d 410 (1990).

Idaho Legislature. Four years later, the Idaho Legislature by concurrent resolution declared the regulations to be "null and void and of no force and effect."⁴ By that time, more than 11,000 septic tank permits had been issued. The Board refused to comply with the veto resolution, concluding that it was unconstitutional. One district health department, however, acquiesced in the legislature's directive to reinstate the pre-1985 regulations. The Board responded by petitioning the Idaho Supreme Court for a writ requiring the district to adhere to the vetoed regulations.⁵

The court adopted John Marshall's gambit in *Marbury v. Madison*.⁶ It upheld the constitutionality of the veto on the ground that the legislature could repeal the regulations without enacting a "law" because the regulations themselves were not "law." Nonetheless, the court ordered the district health department to comply with the Board's 1985 regulations because it concluded that the legislature had failed to satisfy the statutory requirements for employing the veto.⁷

4. H.R. Con. Res. 29, 1989 Idaho Sess. Laws 1095.

5. See generally *Mead*, 117 Idaho at 661-62, 791 P.2d at 411-12.

6. 5 U.S. (1 Cranch) 137 (1803). Although Marshall eventually held that the Court lacked jurisdiction over the action, he did so only after deciding that Marbury was entitled to his commission and, therefore, President Thomas Jefferson and Secretary of State James Madison had acted illegally in withholding it. See generally Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1.

7. The court concluded that the statute imposed "threshold requirements that the legislature definitively express that the rule being rejected is contrary to legislative intent." *Mead*, 117 Idaho at 670, 791 P.2d at 420. Since the concurrent resolution did not include such a finding, the court held that it did not satisfy the statutory requirements and was therefore without effect. *Id.* at 671, 791 P.2d at 421.

This aspect of the decision is also perplexing. The legislature either has the constitutional power to void agency regulations or it lacks that power; a statute cannot affect its authority. That is, if the legislature has the constitutional power to veto an agency regulation, that power cannot be circumscribed by a previous legislature. Since a statute does not amend the constitution, no legislature can affect the power of its successors simply by enacting a statute. On the other hand, if the legislature lacks the constitutional power to void agency regulations, the legislature and the governor cannot give the legislature additional powers by enacting a statute. The legislature derives its powers from the constitution and it can neither increase nor decrease those powers by statute—otherwise there would be no constitutional limits on legislative power. Thus, if the legislature has the constitutional power asserted in I.C. § 67-5218 to void agency regulations, compliance with the statutory provisions is not necessary because the resolution is effective in its own right. If the legislature lacks the constitutional power to veto the regulations, a statute cannot confer that power on the legislature and I.C. § 67-5218 and the concurrent resolution are unconstitutional.

II

A central element of the deep constitutional structure of American government is the requirement that a legislature may change the legal rights or obligations of individuals only through a constitutionally prescribed method: enacting a bill with the concurrence of the chief executive or passing it over his objections with a supra-majority. This proposition is so fundamental that precedent for it is almost necessarily inferential since that which is assumed is seldom litigated.⁸ Nonetheless, the caselaw that does exist is suggestive. For example, when the Idaho Legislature attempted by resolution to increase the salaries of state employees⁹ or to relinquish rights in land to private claimants,¹⁰ the Idaho Supreme Court held that the legislature had exceeded its powers and required it to proceed through a bill. Similarly, the court has recognized in a variety of contexts that this constitutionally required method is one of the important checks and balances adopted by the drafters of the state constitution to prevent potential abuse of power by one branch of government.¹¹

In the instant case, the legislature's veto of the regulations changed the legal rights and obligations of individuals. On March 27, 1989, an individual wishing to install a septic tank was required to comply with certain standards or to face legal sanctions. On March 29, an individual seeking to install the same system was required to comply with different standards or to face legal sanctions. The different requirements resulted from the resolution voiding the agency's 1985 regulations and reinstating the 1978 regulations. That resolution sought to change the legal obligations of individuals, subjecting them to sanctions for conduct previously legally permissible—something that the constitution requires to be accomplished by enacting a bill with the concurrence of the governor.

8. The United States Supreme Court struck down the legislative veto in part because the veto "had the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch." *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 952 (1983). This rationale tends to be lost, however, in the Court's otherwise extremely formalistic separation-of-powers analysis.

9. *Griffith v. Van Deusen*, 31 Idaho 136, 169 P. 929 (1917); *Hailey v. Huston*, 25 Idaho 165, 136 P. 212 (1913).

10. *Balderston v. Brady*, 17 Idaho 567, 107 P. 493 (1910).

11. *E.g.*, *Idaho Power Co. v. State*, 104 Idaho 570, 661 P.2d 736 (1983); *Hailey v. Huston*, 25 Idaho 165, 136 P. 212 (1913).

III

Although the Idaho Supreme Court's discussion of the constitutional issue is often jumbled and repetitive, it is ultimately both simple—and entirely semantic.

The court begins with the proposition that “only the legislature has the power to make ‘law.’”¹² The legislature may, however, create administrative agencies and authorize them to promulgate regulations having “the ‘force and effect of law.’”¹³ This distinction—between “law” and things that only have the “force and effect of law”—is the whole of the analysis: the court repeatedly emphasizes that administrative regulations are not “law” because “[o]nly the legislature can make law.”¹⁴

The argument thus resolves itself into a semantic stroll through the looking-glass; since regulations are not “law,” the concurrent resolution vetoing them did not change the “law.” Since the resolution did not change the “law,” the resolution was not itself “law,” and therefore the legislature was not required to comply with the constitutional command that “law” be made through bicameral adoption of bills that are approved by the governor.¹⁵

IV

The court has produced a Jabberwocky opinion: from even a purely semantic perspective, “‘Twas brillig, and the slithy toves/ Did

12. *Mead*, 117 Idaho at 664, 791 P.2d at 414. The court relies upon three provisions of the Idaho Constitution in asserting this threshold proposition: article 2, § 1 provides that the “powers of the government of this state are divided into three distinct departments” and prohibits members of one department from exercising “any powers properly belonging to either of the others”; article 3, § 1 specifies that “[t]he legislative power of the state shall be vested in a senate and house of representatives”; and article 3, § 15 states that “[n]o law shall be passed except by bill.” It is apparent that the constitutional provisions do not necessitate the court’s conclusion, but only the less expansive proposition that the legislature’s method of making law is through a “bill.” Furthermore, the legislature does not act alone in making “law” since the constitution requires that the governor be involved.

13. *Mead*, 117 Idaho at 664, 791 P.2d at 414. The court’s insistence that only the legislature can make “law” and that other governmental entities create things that have only the force and effect of law leads to the question of whether it is now proper to speak of the “common force-and-effect of law” rather than the “common law.” Are torts and contracts no longer law?

14. *Id.* See generally *id.* at 664-66, 791 P.2d at 414-16.

15. “HCR-29 is not a law and need not comply with article 4, § 10 of the Idaho Constitution.” *Id.* at 667, 791 P.2d at 417. See generally *id.* at 667-68, 791 P.2d at 417-18. Bicameral adoption of all bills is required by article 3, § 15 and article 4, § 10; presentment to the governor is mandated by article 4, § 10.

gyre and gimble in the wabe." As Alice said of the original, "Somehow it seems to fill my head with ideas—only I don't know exactly what they are!"¹⁶

A bill adopted by both houses of the legislature and signed by the governor, a judicial decision establishing or rejecting a new common law principle,¹⁷ and a regulation promulgated by an administrative agency—each has the same effect. One may call the various actions "law," "things with the force and effect of law," or "tu-tu,"¹⁸ but whatever term or terms are chosen, their identical effect should be apparent: legal obligations are altered through the formal actions of a governmental entity.

Between October 15, 1985—when the regulation became final—and March 28, 1989—when the senate concurred in the veto resolution and it became final—Idaho residents were obligated to act in certain ways or face legal sanctions. On March 28, 1989, the legislature sought to change those legal obligations. The constitution requires this to be accomplished only by enacting a bill with the concurrence of the governor.¹⁹

V

The court is, of course, correct that administrative regulations "do not rise to the level of statutory law."²⁰ It is also correct that the authority to promulgate regulations is based on "a delegation from the legislature [rather than] a constitutional grant of power to the executive."²¹ But the court's semantic distinction between "law" and something that has the "force and effect of law" but is not itself "law"

16. L. CARROLL, at 116, 118.

17. *E.g.*, *Norwest v. Presbyterian Intercommunity Hospital*, 293 Or. 543, 544-45, 652 P.2d 318, 319-20 (1982).

18. *See* Ross, *Tu-tu*, 70 HARV. L. REV. 812 (1957).

19. A comparison of the language delegating rulemaking authority to the agency and the language of the concurrent resolution demonstrates the practical politics of the legislative veto. The Environmental Protection and Health Act of 1972 authorizes the director "to issue pollution source permits in compliance with standards and procedures established by the board of [health] and welfare." I.C. § 39-115 (1985). The Act itself, however, contains no standards, merely delegating authority to the agency without apparent limits. The concurrent resolution purporting to void the septic tank rules, on the other hand, specifies that the agency is to repromulgate the regulations "taking into account such factors as climate, depth of the water table, where the systems will be installed, monetary hardship and other relevant factors." H.R. Con. Res. 29, 1989 Idaho Sess. Laws 1095. The veto resolution thus sought to amend the delegation of rulemaking authority by providing actual standards for the first time.

20. *Mead*, 117 Idaho at 664, 791 P.2d at 414.

21. *Id.* at 665, 791 P.2d at 415.

obscures the actual differences between legislature and statutes, on the one hand, and agency and regulations, on the other. The fundamental distinction is the difference between a dominant, essentially unlimited power and a subordinate, restricted one.

The Idaho Legislature has all powers it is not prohibited from exercising by the United States or Idaho Constitutions.²² Its decisions are not subject to review or revision by another legislative body. Administrative agencies, on the other hand, lack these attributes. An agency is a creature of statute rather than constitution and thus lacks any inherent power to change legal obligations; an agency may promulgate regulations only when the legislature has authorized it to do so by enacting a statute. Similarly, the agency's authority to regulate is restricted by the scope of the power delegated to it. Finally, the legislature retains the unlimited power to enact a bill amending or repealing the delegated authority. Thus, as a creature of statute, an agency remains subject to the legislature.

Acknowledging this paramount, largely unlimited power says nothing about the method that the legislature must employ to control its creation—and it is precisely because the legislature's power is so unlimited that compliance with the constitutionally mandated method of using that power is so critical.

VI

On the other side of the looking-glass, words can be given any number of meanings; it makes little difference. All that is required is that like Humpty Dumpty the court gives them a bonus when they

22. *E.g.*, *Idaho Power & Light Co. v. Blomquist*, 26 Idaho 222, 241-42, 141 P. 1083, 1088 (1914). This is one reason why the court was properly unmoved by federal separation-of-powers precedents. *See Mead*, 117 Idaho at 667-68, 791 P.2d at 417-18. State governments differ fundamentally from the national government. Most significantly, the national government is a government of enumerated, albeit expansive, powers. Unless affirmatively authorized by the United States Constitution, the national government may not act. State governments, on the other hand, have all powers not affirmatively denied to them. Thus there is no need for a list of the subjects of state legislative power similar to that contained in article 1, § 8 of the national constitution. Similarly, the state judiciary is the repository of all judicial authority—unlike the national judiciary which is empowered to decide only certain cases and controversies. Finally, the national executive power is vested in a unitary office, the President. State executive power, on the other hand, is divided among several independently elected officials: the Governor, Lieutenant Governor, Secretary of State, Attorney General, and Auditor. Such fundamental differences make federal separation-of-powers law an uncertain guide at best. The United States Supreme Court's decision invalidating the legislative veto is thus entitled to a respectful audience rather than automatic acceptance.

come round to collect their pay on Saturday night.²³ On this side of the looking-glass, however, words often affect people at the most mundane level—in establishing standards for the construction of septic tanks, for example.

23. L. CARROLL, at 164.