

1935

CONSTITUTIONAL LAW -VALIDITY OF STATE RECOVERY ACTS ADOPTING FEDERAL CODES

Paul G. Kauper
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Administrative Law Commons](#), [Antitrust and Trade Regulation Commons](#), and the [Constitutional Law Commons](#)

Recommended Citation

Paul G. Kauper, *CONSTITUTIONAL LAW -VALIDITY OF STATE RECOVERY ACTS ADOPTING FEDERAL CODES*, 33 MICH. L. REV. 597 (1935).

Available at: <https://repository.law.umich.edu/mlr/vol33/iss4/5>

This Comment is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

COMMENTS

CONSTITUTIONAL LAW — VALIDITY OF STATE RECOVERY ACTS ADOPTING FEDERAL CODES — Among the interesting problems raised by the enactment of state recovery legislation¹ is the problem growing out of the attempted adoption by the states of the codes of fair competition formulated under the authority of the National Industrial Recovery Act.² The validity of such state legislation may be questioned in light of the familiar doctrine of non-delegability of legislative power — a doctrine that has been written into the constitutions of

¹ For the text of some of the state recovery acts adopted to date see MAYERS, A HANDBOOK OF N.R.A., 2nd ed., 397 *et seq.* (1934), and for digests of some of the state acts adopted to date see 1 U. S. LAW WEEK, index p. 211 (1933), and 1 U. S. LAW WEEK, index p. 911 (1934). The text of the "Model" or "Uniform State Recovery Act," recommended by the National Recovery Administration, is found in 1 U. S. LAW WEEK, index p. 912 (1934). See also Clark, "State Industrial Recovery Acts and State Codes," 20 A. B. A. J. 343 (1934), and the note on state legislation in support of the NIRA in 34 COL. L. REV. 1077 (1934).

² For discussions of the constitutionality of state legislation adopting federal legislation and regulations thereunder, see Fagg, "Incorporating Federal Law into State Legislation," 1 J. AIR L. 199 (1930); Wilson, "The Response of the States to the N.I.R.A.," address digested in 7 WIS. STATE B. A. BULL. 15 at 18-19 (1934); "Dan-

both the federal and state governments by judicial determination.³ Before considering the application of this doctrine to the problem at hand, it will be well to refer to two general types of situations where the doctrine may be applied. A legislature cannot delegate legislative power to another department of the government or to an administrative body; however, it can delegate to an administrative body the function of applying a standard of legislative policy, provided that the legislature defines an adequate standard.⁴ A legislature cannot delegate its power by adopting *prospective* legislation of another state or of the federal government,⁵ but it is conceded that adoption by a state legislature of an *existing* law of another state or of the United States does not violate the doctrine.⁶

Assuming the correctness of the foregoing propositions, the validity of the state recovery acts may now be considered. In general they provide that industries within the state engaged in intrastate transactions shall be subject to codes of fair competition, and they declare that codes of fair competition formulated under the National Industrial Recovery Act shall automatically become the codes governing such intrastate transactions. In short, the federal codes are adopted as state codes. No problem of delegation of legislative power is presented in so far as federal codes for particular industries are already in force at

ger of Invalidity Lurks Behind State Recovery Laws," 1 U. S. LAW WEEK, index p. 315 (1933); note on adoption by states of federal prohibition laws in 20 MICH. L. REV. 652 (1922); note on state legislation adopting federal standards in 23 COL. L. REV. 674 (1923); Report of Committee on Aviation Law, LOS ANGELES B. A. BULL. 342-345 (1929); note on power of states to enable Congress to enact aviation laws for the states in 5 AIR L. REV. 171 (1934); note on state legislation in support of the NIRA in 34 COL. L. REV. 1077 (1934).

³ On the general doctrine of non-delegability of legislative power, see 1 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 224 *et seq.* (1927).

⁴ United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480 (1910); Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co., 191 N. Y. 123, 83 N. E. 693 (1908).

⁵ In State v. Intoxicating Liquors, (Maine 1922) 117 Atl. 588, it was held that a statute attempting to adopt a prospective definition of intoxicating liquors by Congress was invalid as a delegation of legislative power. This decision was followed in State v. Gauthier, 121 Me. 522, 118 Atl. 380 (1922). In In re Opinion of the Justices, 239 Mass. 606, 133 N. E. 453 (1921), in an advisory decision, the opinion was expressed that a state statute adopting the provisions of prospective federal legislation would be unconstitutional. For dictum to the same effect see In re Burke, 190 Cal. 326, 212 Pac. 193 (1923).

⁶ Ex parte Kinney, 53 Cal. App. 792, 200 Pac. 966 (1921); In re Burke, 190 Cal. 326, 212 Pac. 193 (1923); Commonwealth v. Aldermen, 275 Pa. 483, 119 Atl. 551 (1923). In these cases the adoption by the states of the existing national prohibition law was upheld. For dicta to the same effect see State v. Intoxicating Liquors, (Maine 1922) 117 Atl. 588, and In re Opinion of the Justices, 239 Mass. 606, 133 N. E. 453 (1921).

the time of the enactment of the state legislation.⁷ It is the attempted adoption of *prospective* federal codes, i.e., codes promulgated under the national legislation subsequent to the enactment of the state legislation, that presents a problem.

In attempting a solution to this problem it is important to keep in mind that the question whether adoption by a state of prospective federal codes is unconstitutional as an attempted delegation of legislative power to the federal government is only another aspect of the general question whether a grant of authority to administrative officers to formulate codes of fair competition is an attempted delegation of legislative power. It is readily seen that state legislation providing for codes of fair competition for intrastate transactions without purporting to adopt federal codes may be challenged on the ground that it is an attempted delegation of legislative power to administrative officers. Where this issue is raised, the state court must pass on the question whether the legislature has really delegated legislative power to the administrative officers charged with the formulation of state codes or whether it has delegated to such officers the function of applying and administering a legislative standard adequately defined in the act. In case the court decides that the term "fair competition" constitutes a satisfactory standard, it must necessarily hold that there is no delegation of legislative power.

Once a state court has reached a conclusion on the general question whether a law providing for an administrative formulation of codes of fair competition does define an adequate standard, it has necessarily provided itself with an answer to the question whether such a state law is valid when the formulation of such codes is left to federal administrative officers instead of state officers — the situation represented by the state laws which adopt federal codes of fair competition. If the state legislation fails to provide an adequate standard, it is unconstitutional as a delegation of legislative power, whether the administrative determinations thereunder are to be made by state or federal officers.⁸

⁷ See the authorities cited in note 6, *supra*.

⁸ In *People of California v. Capital Cleaners & Dyers*, (Cal. Super. Ct. 1934) 1 U. S. LAW WEEK, index p. 633, it was held that the California Industrial Recovery Act was void in so far as it purported to adopt prospective national codes under the federal legislation. It appears, however, from the digest of the court's opinion that its real objection to the state legislation was not that it adopted the prospective administrative determinations of federal officers but that the state legislation failed to prescribe adequate administrative standards. It must be remembered that if a state adopts federal legislative policies and standards, the adequacy of such standards as a guide to administrative action must be determined by the law of the state.

In *Cline, etc., v. Consumers Cooperative Gas & Oil Co., Inc.*, (N. Y. Sup. Ct., Jefferson County, Sept. 22, 1934) 2 U. S. LAW WEEK, index p. 118, it was held that the operator of a gasoline filling station was not subject to provisions of the Petroleum

But if the state court decides that such a statute does define an adequate standard with respect to prospective administrative determinations thereunder and consequently is not invalid as an attempted delegation of legislative power, it must of necessity reach the conclusion that it is immaterial that the codes are to be formulated by federal instead of state administrative officers.⁹ By hypothesis there is no delegation of legislative power. Consequently, the adoption by states of codes of fair competition formulated under the National Industrial Recovery Act should be held valid, unless indeed a state cannot adopt the prospective administrative determination of federal officers as its own under a statute which defines the same legislative policy and standard as are embodied in the federal statute. In adopting prospective administrative determinations by federal officers, the states in effect are authorizing the federal officers to act as their agents in applying legislative standards adopted in common by the federal and state governments.¹⁰ It does not appear that state constitutions prohibit such a method of co-operation between the federal and state governments when no delegation of legislative power is involved.¹¹ Certainly it is

Code which require retail gasoline dealers to post prices at the place of delivery and prohibits them from charging any price other than that posted. The New York Recovery Act purports to adopt the federal codes of fair competition for intrastate transactions. The court said that the state statute was unconstitutional because it attempted to delegate legislative power to a foreign agency. The "foreign agency" argument was not necessary to the court's decision, however, since it went on to say that a delegation of similar power to the governor of the state, as distinguished from the President of the United States, would likewise have been unconstitutional in the absence of a standard to which the government should be required to conform.

⁹ In the following cases state legislation providing for the adoption of federal codes of fair competition has been upheld as against the contention that it was invalid as an attempted delegation of legislative power to the federal government: *People of State of California v. Economy Cleaners*, (Cal. Super. Ct. 1934) 1 U. S. LAW WEEK, index p. 696; *Ex parte Laswell*, (Cal. App. 1934) 36 Pac. (2d) 678; *Spielman Motor Sales, Inc. v. Dodge*, (D. C. S. D. N. Y. 1934), 2 U. S. LAW WEEK, Oct. 16, 1934, index p. 117; *Re Application of Sabatini*, (N. Y. Sup. Ct., App. Div., 1st Dept. 1935) 2 U. S. LAW WEEK, index p. 425.

¹⁰ Certainly the state should be as free to delegate the administration of its laws to federal administrative authorities as to a private or non-governmental group or organization. There is no doubt that it can do the latter. See the note on delegation of governmental power to private groups in 32 COL. L. REV. 80 (1932).

¹¹ In *Ex parte Laswell*, (Cal. App. 1934) 36 Pac. (2d) 678, where the court held that the state recovery act providing for the adoption of the codes of fair competition promulgated under the National Industrial Recovery Act was not invalid as a delegation of legislative power, Presiding Justice Stephen said (at p. 687):

"The incidental objection that the delegation of code prescription to the President of the United States on the ground that the state of California is a sovereign state and the President is in this sense a foreign official does not greatly impress us. The correlative rights of state and nation are of great importance, but we are a

true that it has been a common practice for the states to adopt federal administrative determinations in fields where the national and state governments have pursued a common policy. A number of states have passed laws adopting either in whole or in part the provisions of the Migratory Bird Treaty Act and the regulations thereunder.¹² Several states in the enactment of narcotic laws have adopted some of the standards prescribed by administrative officers under the Federal Narcotic Laws.¹³ Federal standards prescribed under the Pure Food and Drug Act have been adopted by a number of states.¹⁴ The license and bond requirements governing warehousemen qualifying under the Federal Warehouse Act have been adopted by a considerable group of states.¹⁵ Likewise there has been a widespread adoption by states of federal

nation not an alliance of foreign states, and our President is not a foreign potentate."⁹

¹² According to a communication received from the Bureau of Biological Survey, in reply to the writer's inquiry, fourteen states at present have provisions in their statutes authorizing automatic conformity to the federal regulations fixing open seasons. They are as follows: Alabama, Connecticut, Idaho, Illinois, Maine, Massachusetts, Mississippi, New Mexico, North Carolina, Oklahoma, South Carolina, Virginia, Washington, West Virginia. Several of these states also require automatic conformity to federal regulations on bag limits and possession, and two of them adopt the federal regulations in their entirety. Miss. Code of 1930 (1933 Supp.), sec. 4705-69; 1 Code of Laws of S. C. 1932, sec. 1767. The Mississippi statute cited reads: "The Federal Migratory Bird Treaty Act and Regulations thereunder as presently provided for as amended from time to time and proclaimed by the president are hereby made a part of this act."

See Beard, "Government by Special Consent," 25 AMER. POL. SCI. REV. 61 at 62 (1931).

¹³ The Uniform Narcotic Drug Act which provides for the adoption of some federal standards under the federal narcotic legislation has been adopted by the following states: Florida, Kentucky, Nevada, New Jersey, Rhode Island, South Carolina, and Virginia. The writer is indebted to Mr. H. J. Anslinger, Commissioner of the Bureau of Narcotics, for this information, supplied in response to the writer's inquiry. See also Chamberlain, "Uniformity of Regulatory Laws Through Federal Models," 9 A. B. A. J. 382 at 384 (1923).

¹⁴ According to a communication received from the Federal Food and Drug Administration in response to the writer's inquiry, the laws of the following states provide for the automatic adoption and recognition on the part of the state of all definitions and standards promulgated by the Secretary of Agriculture: Alabama, Arizona, California, Florida, Idaho, Kansas, Maryland, Michigan, Minnesota, Missouri, Mississippi, Nevada, North Carolina, Oklahoma, Utah, Vermont, Virginia, and Washington. According to this same communication, the remainder of the states generally authorize the adoption of rules and regulations and provide that when definitions are adopted they shall be in conformity with those adopted for the enforcement of the federal act, provided they be not contrary to state enactment. The writer is indebted to Mr. W. S. Frisbie, Chief of the Division of Cooperation of the Food and Drug Administration, for the helpful information contained in this communication.

¹⁵ Citations to some of these statutes are found in the note in 23 COL. L. REV. 674 at 675 (1923). See also Chamberlain, "Uniformity of Regulatory Laws Through Federal Models," 9 A. B. A. J. 382 at 383 (1923).

grain standards under the Grain Standards Act¹⁶ and of federal vegetable and fruit-grading standards.¹⁷ Some states in the oil-producing regions have provisions in their conservation statutes adopting and making automatically effective the rules and regulations of the Department of the Interior.¹⁸ A most interesting development has taken place in the field of aviation law: a majority of states require pilots to be licensed and aircraft to be registered in accordance with the federal regulations concerning these matters, and some have adopted in addition the Federal Air Rules.¹⁹ Occupying a separate category but likewise illustrating in a very effective way the principle of adoption by the states of existing federal legislative policies and prospective administrative determinations thereunder are the co-operative efforts of the federal and state governments under the so-called Federal Aid legislation whereby the federal government makes grants-in-aid to the

¹⁶ Citations to some of these statutes are found in the note in 23 *COL. L. REV.* 674 (1923). See also Chamberlain, "Uniformity of Regulatory Laws Through Federal Models," 9 *A. B. A. J.* 382 (1923).

¹⁷ According to a communication received from the Fruit and Vegetable Division of the Bureau of Agricultural Economics in response to the writer's inquiry, the following states have adopted United States standards for one or more fruits or vegetables either by a specific law citing the commodity or commodities, or through authority under a standardization law: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. According to this communication, the states of Florida, Indiana, Louisiana, Montana, Ohio, Oklahoma, and North Dakota have general standardization laws that provide specifically that all the grades established for fruits and vegetables shall be the same as those recommended by the United States Department of Agriculture; the special potato laws of Michigan, Minnesota, and North Dakota specify that the official grades for potatoes in these states shall conform in all respects to the standards established by the United States Department of Agriculture; the Maryland Cantaloupe Law and the Pennsylvania Grape Grading Law also make the United States grades for cantaloups official for these states. The writer is indebted to Mr. R. P. Pailthorp, Specialist in Standardization of the Fruit and Vegetable Division, for the helpful information contained in this communication.

¹⁸ See *ELY, OIL CONSERVATION THROUGH INTERSTATE AGREEMENT* 258 (1933).

¹⁹ See "State Aeronautical Legislation and Abstract of State Laws," *AERONAUTICS BULL.* No. 18, Aug. 1, 1928 (Dept. of Commerce); note in 5 *AIR L. REV.* 171, n. 1 (1934); Beard, "Government by Special Consent," 25 *AMER. POL. SCI. REV.* 61 at 62 (1931); Lee, "State Adoption and Enforcement of Federal Air Navigation Law," 16 *A. B. A. J.* 715 (1930). In 1933 thirty-four states and territories required federal aircraft and airmen licenses for all operations within their borders, eleven required licenses for commercial aircraft operations, and four required either federal or state licenses for all aircraft operations. 4 *AIR COMMERCE BULL.* 508, 535 (1933).

states, provided the states match the federal grants and accept the terms upon which they are offered.²⁰ By means of this device the federal government has induced the states to accept federal policies and standards with respect to such matters as forest fire prevention,²¹ the organization and training of the militia,²² agricultural extension work,²³ the construction and maintenance of improved highways,²⁴ vocational education,²⁵ vocational rehabilitation,²⁶ the organization and maintenance of employment bureaus,²⁷ and, at one time, the treatment of venereal diseases²⁸ and instruction in the hygiene of maternity and infancy.²⁹ In all of these there is an adoption of both existing and prospective federal administrative determinations under existing federal legislation. Though this practice is quite common, as this illustrative material shows, the writer has not found a single decision by a state court of last resort holding that state adoption of prospective federal administrative determinations under existing federal legislation which fixes an adequate administrative determination, is invalid as a delegation of legislative power.³⁰ The acquiescence in the practice

²⁰ An excellent treatment of this subject is found in MACDONALD, *FEDERAL AID* (1928).

²¹ The Weeks Act, 36 Stat. 961, c. 186 (1911), was the earlier act providing for federal aid to the states for forest fire prevention. At the present the work is carried on under the Clarke-McNary Law, 43 Stat. 653, c. 348 (1924). In 1927 thirty-three states were co-operating with the federal government in this work. MACDONALD, *FEDERAL AID* 43 (1928).

²² National Defense Act (1916), 39 Stat. 197. This act, unlike the other federal aid legislation here discussed, does not require the states to match federal funds. See MACDONALD, *FEDERAL AID* 123-155 (1928).

²³ Smith-Lever Law (1914), 38 Stat. 372, c. 79. See MACDONALD, *FEDERAL AID* 52-84 (1928).

²⁴ The Good Roads Act of 1916 (39 Stat. 355, c. 241) was the earlier act providing for federal aid to the states for highway construction and maintenance. At the present time the work is carried on under the Federal Highway Act of 1921, 42 Stat. 212, c. 119. See MACDONALD, *FEDERAL AID* 85 (1928).

²⁵ Smith-Hughes Act of 1917, 39 Stat. 929, c. 114. See MACDONALD, *FEDERAL AID*, c. VII (1928).

²⁶ Fess-Kenyon Act of 1920, 41 Stat. 735, c. 219. See MACDONALD, *FEDERAL AID*, c. VIII (1928).

²⁷ Federal Employment Service Act (1933), 48 Stat. 113, c. 49, sec. 1.

²⁸ The Chamberlain-Kahn Act of 1918, 40 Stat. 886. See Moore, "Four Million Dollars for the Fight Against Venereal Diseases," 5 *SOCIAL HYGIENE* 15 (1919); Seymour, "A Year's Progress in Venereal Disease Control," 5 *SOCIAL HYGIENE* 49 at 57 *et seq.* (1919).

²⁹ Sheppard-Towner Act of 1921, 42 Stat. 224. See MACDONALD, *FEDERAL AID*, c. IX (1928).

³⁰ See notes 8 and 9, *supra*.

In *Watkinson v. Hotel Pennsylvania*, 195 App. Div. 624, 187 N. Y. S. 278

manifested by the general dearth of judicial authority on the question is in itself a persuasive argument in support of its constitutionality. It is fair to conclude, therefore, that the state courts will uphold state legislation adopting federal codes of fair competition, provided they are satisfied that the term "fair competition" defines an adequate standard for the guidance of administrative action.³¹

PAUL G. KAUPER.

(1921), aff'd 231 N. Y. 562, 732 N. E. 889 (1921), it was held that the New York statute accepting the terms of the federal aid grant under the Federal Vocational Rehabilitation legislation and authorizing the Board of Regents of the University to co-operate with the federal legislation was not invalid as a delegation of legislative power. The court pointed out that the statute delegated administrative authority only, and involved no surrender of legislative power to any outside legislative body.

³¹ See note 9, supra.