

Michigan Law Review

Volume 54 | Issue 6

1956

Constitutional Law - Delegation of Legislative Power - Use of State Agency Classification as Basis for Federal Law

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Recommended Citation

James Tobin, *Constitutional Law - Delegation of Legislative Power - Use of State Agency Classification as Basis for Federal Law*, 54 MICH. L. REV. 851 (1956).

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CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER—USE OF STATE AGENCY CLASSIFICATION AS BASIS FOR FEDERAL LAW—Under provisions of the Federal Coal Mine Safety Act¹ a coal mine is classified as gassy within the meaning of the act, and certain precautionary measures are thereby required, when the U. S. Bureau of Mines finds that the mine atmosphere fails to meet tests set forth in the act or when the mine is found to be a "gassy or gaseous mine pursuant to and in accordance with the laws of the State in which it is located."² One of appellant's coal mines was classified as gassy by the West Virginia Department of Mines. When appellant failed to comply with precautionary measures required by the federal act, an inspector of the U. S. Bureau of Mines ordered the mine to be closed. On appeal, *held*, the use of the state classification does not constitute an unconstitutional delegation of power by Congress to a state agency. Congress has merely accepted state action as a condition upon which its exercise of power is to become effective. *Gauley Mountain Coal Co. v. Director*, (4th Cir. 1955) 224 F. (2d) 887.

It is a traditional principle of constitutional law that Congress may not delegate its legislative function to other instrumentalities or confer federal powers upon agencies outside the government.³ It has long been established, however, that Congress is free to pass laws conditioned on facts yet to be ascertained.⁴ That every law is, in a sense, conditioned upon extrinsic facts which are essential to the application of the act is obvious, but the liberal use of the conditional act theory by the courts has expanded the confines of the term until its validity as a tool of analysis is seriously open to question.⁵ Thus, in the principal case, the state is given a position of substantial importance under the act. It can lay down standards as to what constitutes a dangerous mine, inspect in order to determine which mines should be classified as dangerous under the state's standards, and review such classifications in its own courts. Calling these steps a condition of application of the federal act may be technically accurate, but the propriety of conferring these powers upon the state is left unexplained. In bypassing this question, however, the court in the principal case was following a long line of respectable authority. The conditional prohibition

ered as an attempt to discharge the officer rather than to abolish the office, thus infringing upon plaintiff's civil service status. See *Matter of Folkes v. Hushion*, 283 N.Y. 536, 29 N.E. (2d) 76 (1940); *People ex rel. Fulton v. O'Ryan*, 71 Colo. 69, 204 P. 86 (1922); 172 A.L.R. 1366 (1948).

¹ 66 Stat. L. 692 (1952), 30 U.S.C. (1952) §473 (d).

² 66 Stat. L. 703 (1952), 30 U.S.C. (1952) §478 (b).

³ *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241 (1935); *Dahlberg v. Pittsburgh & L.E.R. Co.*, (3d Cir. 1943) 138 F. (2d) 121. See Mermin, "'Cooperative Federalism' Again: State and Municipal Legislation Penalizing Violation of Existing and Future Federal Requirements," 57 YALE L.J. 1 (1947); Jacoby, "Delegation of Powers and Judicial Review: A Study In Cooperative Law," 36 COL. L. REV. 871 (1936); 79 L. Ed. 479 (1935). For a criticism of the historical validity of the principle, see Duff, "Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law," 14 CORN. L.Q. 168 (1929).

⁴ *Brig Aurora v. United States*, 7 Cranch (11 U.S.) 382 (1813).

⁵ See Mermin, "'Cooperative Federalism' Again," 57 YALE L.J. 1 at 9 (1947).

acts of the 1930's depended on state laws to give them substance or guidance.⁶ State law enforcement and adjudications exert a pronounced influence on the disposal of federal lands,⁷ federal bankruptcy claims,⁸ and federal tax enforcement.⁹ Under federal deportation legislation state criminal convictions serve as the justification and basis for deportation of aliens,¹⁰ and federally owned areas adopt the criminal law of the state in which they are located.¹¹ State legislation providing for discriminatory taxation of insurance companies engaged in interstate commerce was upheld by the Supreme Court on the grounds that Congress had specifically sanctioned the regulation and taxation of insurance companies by the states.¹² State courts have, from the beginning, assumed jurisdiction to try federal law.¹³ The statute in the principal case does not seem to fit smoothly within any of the types of legislation discussed above. Since the conditional prohibition cases arose in the area of interstate transportation, where the states themselves are constitutionally powerless without express federal aid, the necessity doctrine, openly applied in cases of intra-governmental delegations,¹⁴ would seem to sustain these cases. The dependency

⁶ E.g., 49 Stat. L. 494 (1935), prohibiting the transportation of convict-made goods into any state in violation of the laws of that state. *Kentucky Whip and Collar Co. v. Illinois Central R. Co.*, 299 U.S. 334, 57 S.Ct. 277 (1937). See, generally, KALLENBACH, *FEDERAL COOPERATION WITH THE STATES UNDER THE COMMERCE CLAUSE* 249-341 (1942).

⁷ See *Butte City Water Co. v. Baker*, 196 U.S. 119, 25 S.Ct. 211 (1905), where regulations by the state legislatures affecting the use and sale of federal lands were upheld as minor in nature and embodied in local custom.

⁸ See *Hanover National Bank v. Moyses*, 186 U.S. 181, 22 S.Ct. 857 (1902).

⁹ See *Phillips v. Commissioner*, 283 U.S. 589, 51 S.Ct. 608 (1931).

¹⁰ 66 Stat. L. 204 (1952), 8 U.S.C. (1952) §1251. While there have been no decisions on the validity of the delegation under the 1952 act, similar provisions have existed uncontested since 1917.

¹¹ All of the legislation discussed above depends on state action both prior to and after the enactment of the federal law. In *Franklin v. United States*, 216 U.S. 559, 30 S.Ct. 434 (1910), the Court defended the use of state criminal law in federal areas on the theory of adoption of existing state law—a mere incorporation by reference. The statute was periodically amended to incorporate the latest state laws until 1948 when the revision was reworded so as to depend upon legislation *in futuro*. 18 U.S.C. (1952) §13. Apparently Congress felt that the constitutionality of such a provision was no longer subject to serious question under the philosophy of the present Court.

¹² *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 66 S.Ct. 1142 (1946), where the Court avoided the delegation argument on the grounds that the statute was merely an example of the power of Congress to "consent" rather than the use of the power to legislate.

¹³ See 24 ORE. L. REV. 148 (1945). In addition, federal power has been given to state agents and private persons. State officers have frequently been empowered to carry out federal functions, although their agency status under the federal law has been said to be separate from their role as state officers. See Mermin, "Cooperative Federalism' Again," 57 YALE L.J. 1 at 13, n. 42 (1947). Referendums in the field of commerce have been upheld on the ground that the law as passed was complete, subject only to the condition of acceptance by the tradesmen involved. *Curran v. Wallace*, 306 U.S. 1, 59 S.Ct. 379 (1939). In the *Housing and Rental Act of 1949*, 63 Stat. L. 26, 50 U.S.C. Appx. (1952) §1893, state governors and local authorities were given the power to remove their areas from federal rent control. The district court held this to be an invalid delegation of authority in *Woods v. Shoreline Cooperative Apartments*, (D.C. Ill. 1949) 84 F. Supp. 660, but the Supreme Court reversed. 338 U.S. 897, 70 S.Ct. 243 (1949).

¹⁴ "A constitutional power implies the power of delegation of authority under it sufficient to effect its purposes. . . ." *Lichter v. United States*, 334 U.S. 742 at 778, 68 S.Ct.

of our dual system of government on state common law and general criminal jurisdiction serves as a logical explanation for the use of state action in land, tax, bankruptcy, and deportation legislation and also for the adoption of state law in federal areas within the states. However, since the act in question in the principal case contains a complete system of classification and review of its own, the need to employ state classification would seem less imperative. The consent doctrine offers no help here since the government takes an active regulatory role rather than a position of passive acquiescence. Nor are those cases in point which confer an agency status upon state officers, since state action in the principal case is taken in reference to state authority and law. Contrary to the usual case where state courts have taken jurisdiction under federal laws, the main elements of judicial review under this statute will be guided entirely by state standards. Opportunities for federal review of the state agency's classification of a mine as gassy, with its all-important impact on the federal law, are almost eliminated.¹⁵ While the same weaknesses exist in such legislation as the deportation statute,¹⁶ the situation there made them unavoidable from a practical standpoint. The act in question would seem, then, to go beyond any of the decided cases, but the difference is primarily one of degree. In the main, the arguments are of a policy nature in an area—commerce—where the Supreme Court has shown a steady retreat from policy-making decisions.¹⁷ Whether or not the act is warranted under the existing economic and social conditions, the strong presumption of constitutionality employed by the Court in the field of commerce should be controlling. Of some significance is the fact that use of state instrumentalities as a part of the federal process has never been declared an unconstitutional delegation of federal power.¹⁸ It is doubtful if the act in question here will be the first.

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1294 (1947). Since the dual system of government in this country is created by the Constitution, it would seem that an inability to control an activity because of constitutional limitations on each sovereign would justify use of the theory in these situations.

¹⁵ The inequity of a state decision based on a valid state law does not violate due process unless the result is "so gross as to be impossible in a rational administration of justice." *Chicago Life Ins. Co. v. Cherry*, 224 U.S. 25 at 30, 37 S.Ct. 492 (1917).

¹⁶ Cf. *United States ex rel. Portada v. Day*, (D.C. N.Y. 1926) 16 F. (2d) 328.

¹⁷ See *Prudential Ins. Co. v. Benjamin*, note 12 supra; KALLENBACH, *FEDERAL COOPERATION WITH THE STATES UNDER THE COMMERCE CLAUSE* 378-383 (1942).

¹⁸ Interdepartmental delegations were held unconstitutional in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837 (1935), and *Panama Refining Co. v. Ryan*, note 3 supra. Since that period very broad delegations to federal agencies have repeatedly been sustained. In *Yakus v. United States*, 321 U.S. 414, 64 S.Ct. 660 (1944), the Court stated that its function was limited to determining whether Congress had established standards sufficient to determine, in a proper proceeding, if its will had been obeyed. That the Court will extend itself to find a congressional declaration of policy and standards adequate for these purposes is evidenced by *Lichter v. United States*, note 15 supra; *American Power & Light Co. v. SEC*, 329 U.S. 90, 61 S.Ct. 132 (1946); *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375 (1943). Professor Jaffe has said that the cases since *Schechter Poultry Corp. v. United States*, supra, suggest that the Court follows no