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Looking Glass Law: Legislation by Reference in the States

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Looking Glass Law: Legislation by Reference in the States

*F. Scott Boyd**

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I. AN OVERVIEW

*Of course, the first thing to do was to make a grand survey of the country she was going to travel through.*¹

It's a good bet that if you pull a copy of your state's statute book off of the shelf and open it at random, you will find somewhere on the page in front of you a reference to other legislation. It may be a reference to one of your state's administrative rules or to the United States Code. More likely, it is a cross-reference to another section of the state's statutes.² Most of these references are intended to have the legal effect of incorporating³ the text of the referenced material into the adopting

1. LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 149 (Signet Classics 2002) (1865).

2. The widespread use of cross-references was noted in Ernest Means, *Statutory Cross References—The "Loose Cannon" of Statutory Construction in Florida*, 9 FLA. ST. U. L. REV. 1 (1981). His study found that of the 16,000 sections in the Florida Statutes in 1975, some 5,500 contained cross-references. Other states reported comparable numbers. The California Code has been compared to a "Russian nesting doll" because of its many references within other references. Scott A. Baxter, *Reference Statutes: Traps for the Unwary*, 30 MCGEORGE L. REV. 562, 563 (1999).

3. To "incorporate," after all, literally means to put into a body. The phrase "incorporation by reference" is further defined as a doctrine in law in which "the terms of a contemporaneous or earlier writing, instrument, or document capable of being identified can be made an actual part of another writing, instrument, or document by referring to, identifying, and adopting the former as a part of the latter." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1145 (3d ed. 1981). Further discussion of incorporating references is found *infra* Part II.A.3.

statute. Such incorporation by reference is not a new technique; it was used in an act of Parliament over seven hundred years ago.⁴

The use of such a simple, historic, and common drafting technique might at first seem relatively risk free, but nothing could be further from the truth. The legislative drafter or legal practitioner unfamiliar with the arcane legal doctrine applicable to referential legislation may well be surprised when a key piece of legislation⁵ is interpreted in an unexpected manner⁶ or even declared completely invalid.⁷ A reference statute may seem to the uninitiated to be only a simple reflection of the referenced material, but like the world in Alice's looking glass, on close examination it often proves to be quite a bit more complicated.

4. See Horace Emerson Read, *Is Referential Legislation Worthwhile?*, 25 MINN. L. REV. 261, 262 (1941).

5. The term "legislation" is used here in a very broad sense. It covers any published governmental requirement or restriction that is generally applicable and has the force and effect of law, including constitutions, federal statutes, regulations, state statutes, rules, and county and municipal ordinances.

6. Courts have often given restrictive interpretations to incorporating references quite clearly intended to include future changes to the referenced documents. In *Department of Legal Affairs v. Rogers*, 329 So. 2d 257 (Fla. 1976), the statute at issue adopted rules of the Federal Trade Commission "as from time to time amended." The Florida Supreme Court decided that the statute "intended" for the Department of Legal Affairs to conform its rules only to those Federal Trade Commission regulations and decisions in effect on or before the effective date of the Florida law, expressly noting that any other "construction" would render the statute unconstitutional. *Id.* at 267. Related cases are discussed *infra* note 235 and accompanying text.

7. See, e.g., *Lee v. State*, 635 P.2d 1282 (Mont. 1981) (holding unconstitutional a delegation to require state authorities to adopt speed limits required under an incorporated federal law); *State v. Rodriguez*, 379 So. 2d 1084 (La. 1980) (holding it unconstitutional for a statute to delegate to a federal agency or Congress the legislature's power); *State v. Dougall*, 570 P.2d 135 (Wash. 1977) (holding it unconstitutional to permit future federal designation of controlled substances to automatically become controlled in Washington); *State v. Grinstead*, 206 S.E.2d 912 (W. Va. 1974) (holding an attempted incorporation of future federal law controlling LSD unconstitutional); *Idaho Savings & Loan Ass'n v. Roden*, 350 P.2d 225 (Idaho 1960) (holding provisions delegating to the Congress power to make future state laws governing appellant's business unconstitutional); *Dawson v. Hamilton*, 314 S.W.2d 532 (Ky. 1958) (holding a state statute unconstitutional to the extent that it adopted time standards to be fixed in the future by Congress). Other cases are discussed *infra* note 228 and accompanying text.

Although the doctrine may be arcane, most states⁸ follow common principles when incorporating by reference. Nevertheless, opinions seldom explain the applicable interpretive canons in any detail. Instead, the reader is left to piece the complete conceptual quilt together from small bits and pieces gleaned from the cases. This Article traces the development of this complicated doctrine and attempts to explain it more comprehensively. Part II begins by distinguishing various types of references, and then, focusing on incorporation, describes how a basic incorporative reference is construed by the courts. Part III goes on to explain how courts expanded the classic doctrine through consideration of legislative intent. Part IV evaluates the judicial presumption created to infer intent and some issues this presumption has created. In Part V, the knotty interplay between incorporation by reference and the non-delegation doctrine is addressed, with special attention to intergovernmental relations. The Article concludes with suggestions intended to facilitate statutory interpretation consistent with legislative intent, while at the same time supporting cooperative federalism within the constraints of the non-delegation doctrine.

II. THE CLASSIC DOCTRINE

*You can just see a little peep of the passage in Looking-glass House, if you leave the door of our drawing room wide open: and it's very like our passage as far as you can see*⁹

A. Typology of References

Although the term "referential legislation" most often means incorporation by reference, in its broadest sense it also includes other types of references.¹⁰ Because these other references have

8. This Article primarily focuses on Florida law, but cites cases from throughout the states. While there are naturally some variations, the general history and issues discussed here have broad application.

9. CARROLL, *supra* note 1, at 131 (Alice).

10. Cecil Carr, *Legislation by Reference and the Technique of Amendment*, 22 J. COMP. LEGIS. & INT'L LAW 12, 12 (1940), notes that the term reference legislation covers some distinct drafting processes.

very different legal consequences and can be confused with incorporative references,¹¹ it is helpful to begin with a brief typology. This Article classifies legislative references into three types, according to their effect: informational, amendatory, and incorporative.¹²

1. *Informational References*

A legislative reference is termed “informational” if its only effect is to alert the reader to the existence of additional information or other material that might be of interest. An informational reference therefore neither affects the material to which it refers nor is in any way affected by it.¹³ In one sense, then, informational references have no real legal effect at all.

Informational references are rare. They sometimes occur when several governmental entities exercise concurrent jurisdiction. A provision of the Florida Statutes, for example, sets forth certain legal protections available to members of the United States Armed Forces under Florida law. It then goes on to state, “In addition to these state provisions, federal law also contains protections, such as those provided in the Service members’ Civil Relief Act (SCRA)”¹⁴ It is clear from this wording that the federal protections are distinct from the Florida ones, and that the reference is made only to provide information.¹⁵ Similarly, two or

11. See, e.g., *State v. J.R.M.*, 388 So. 2d 1227 (Fla. 1980) (holding that an amendatory reference is incorporative); *Commonwealth v. Dougherty*, 39 Pa. Super. 338 (Pa. Super. Ct. 1909) (holding that an incorporative reference violated prohibition on amendatory references).

12. While these particular titles may not always be used in cases or commentary, the basic concepts have long been recognized. See John W. Brabner-Smith, *Incorporation by Reference and Delegation of Power—Validity of “Reference” Legislation*, 5 GEO. WASH. L. REV. 198, 208 (1936); Carr, *supra* note 10, at 12; Arie Poldervaart, *Legislation by Reference—A Statutory Jungle*, 38 IOWA L. REV. 705, 705 (1953); Read, *supra* note 4, at 262.

13. Unlike an incorporative reference, no penalty or benefit can be assessed or withheld by the entity making the reference as a consequence of failure to meet the referenced standards, requirements, or prohibitions. Unlike an amendatory reference, no addition or modification is made to the scope or application of the referenced material.

14. FLA. STAT. § 250.82(1) (2007).

15. A later subsection of the Florida Statute provides that state courts have concurrent jurisdiction to enforce the federal statute to the extent allowed by

more governmental entities sometimes require permits for the same activity, and make informational references to another jurisdiction's independent licensing requirements.¹⁶

Informational references present few legal issues when they are used. The principle concern is that they may be misinterpreted as another type of reference, so the wording of an informational reference should make it quite clear that neither amendment nor incorporation of the referenced material is intended.

2. *Amendatory References*

A legislative reference is "amendatory" if its effect is to amend or revise the legislation to which it refers. The requirements of the referenced legislation may be changed in some fashion, or the sphere of application of the referenced legislation may be contracted or expanded.¹⁷

The case of *Central & Southern Florida Flood Control District v. Okeelanta Sugar Refinery, Inc.*¹⁸ provides a simple example of an amendatory reference. The Florida Supreme Court held that a 1959 law which amended section 4, chapter 30542 of the Laws of Florida to "be in full force and effect until terminated by law" was an attempt to change the expiration date of an existing law, and so constituted an amendatory reference.

Use of an amendatory reference in state legislation is widely prohibited or restricted by constitutional provisions.¹⁹ Amendatory

federal law, § 250.82(2), but there is no attempt to incorporate the federal statute as part of Florida substantive law.

16. This is not to be confused with a situation in which one government requires compliance with another entity's regulations as a condition for receipt of the first government's permit. This latter type of reference is clearly incorporation.

17. It is sometimes difficult to determine whether a reference is amendatory or incorporative. In *State v. Varela*, 636 So. 2d 559 (Fla. Dist Ct. App. 1994), the court concluded that a statute providing that escape from a juvenile detention facility "constitutes escape within the intent and meaning of s[ection] 944.40" was an incorporative reference, rather than an amendatory reference expanding the scope of section 944.40.

18. 168 So. 2d 537 (Fla. 1964).

19. Most states have constitutional provisions prohibiting amendment of laws by reference: ALA. CONST. art. IV, § 45; ARIZ. CONST. art. IV, pt. 2, § 14; ARK. CONST. art. 5, § 23; CAL. CONST. art. IV, § 9; COLO. CONST. art. V, § 24; FLA. CONST. art. III, § 6; GA. CONST. art. III, § V, ¶ III; IDAHO CONST. art. III, §

references have long been condemned as making interpretation of enacted statutes and their relationship to one another impossibly complex, allowing unscrupulous legislators to covertly amend laws, and generally permitting legislation to be enacted without proper deliberation.²⁰ As Judge Cooley explained:

The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to but not republished, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation.²¹

The wording of Florida's Constitutional prohibition is typical: article III, section 6, provides in part, "No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section, subsection or paragraph of a subsection." Similar prohibitions may be found in the Florida Statutes applicable to legislation by state agencies,²² counties,²³ and municipalities.²⁴

18; ILL. CONST. art. IV, § 8(d); KAN. CONST. art. 2, § 16; KY. CONST. § 51; LA. CONST. art. III, § 15(B); MD. CONST. art. III, § 29; MICH. CONST. art. IV, § 25; MISS. CONST. art. 4, § 61; MO. CONST. art. III, § 28; NEB. CONST. art. III, § 14; NEV. CONST. art. 4, § 17; N.J. CONST. art. IV, § VII, ¶ 5; N.M. CONST. art. IV, § 18; N.Y. CONST. art. III, § 16; N.D. CONST. art. IV, § 13; OHIO CONST. art. II, § 15(D); OKLA. CONST. art. 5, § 57; OR. CONST. art. 4, § 22; PA. CONST. art. 3, § 6; TEX. CONST. art. III, § 36; VA. CONST. art. IV, § 12; WASH. CONST. art. 2, § 37; W. VA. CONST. art. VI, § 30; WYO. CONST. art. 3, § 26.

20. See generally Brabner-Smith, *supra* note 12; Poldervaart, *supra* note 12, at 705; Read, *supra* note 4, at 262.

21. *People ex rel. Drake v. Mahaney*, 13 Mich. 481 (Mich. 1865).

22. Florida Statutes section 120.54(1)(i), part of Florida's Administrative Procedure Act, provides in part, "No rule may be amended by reference only.

It should be emphasized that these prohibitions apply only to laws that would expressly revise, amend, extend, or revive prior acts; they do not apply to incorporative references, which instead adopt the terms of an old act into an independent new act.²⁵ The

Amendments must set out the amended rule in full in the same manner as required by the State Constitution for laws."

23. Florida Statutes section 125.67, relating to county governments, provides in part, "No ordinance shall be revised or amended by reference to its title only. Ordinances to revise or amend shall set out in full the revised or amended section, subsection, or paragraph of a subsection."

24. Florida Statutes section 166.041(2), relating to municipalities, provides in part, "No ordinance shall be revised or amended by reference to its title only. Ordinances to revise or amend shall set out in full the revised or amended act or section or subsection or paragraph of a section or subsection."

25. In earlier years, a few courts held that incorporative references were also prohibited by these constitutional provisions. See *Doud v. Citizens' Ins. Co.*, 6 Pa. C.C. 329 (Pa. Com. Pl. 1889) (holding that Pennsylvania's constitutional provision meant that "when the provisions of a former law are to be incorporated with a subsequent statute, they, or the law containing them, shall be re-enacted and published at length"). The exclusion of incorporative references from constitutional prohibitions against amendment by reference is now well established, however. See *Keener v. City of Kendallville*, 191 N.E.2d 6 (Ind. 1963) (holding an act relating to off-street parking facilities does not amend, but rather incorporates other laws; therefore article 4, section 21 has no application); *Ballew v. Denson*, 320 P.2d 382 (N.M. 1958) (holding that an incorporation by reference statute did not contravene article 4, section 18 of the New Mexico constitution); *In re Opinion of the Justices*, 81 So. 2d 277 (Ala. 1955) (holding that a constitutional provision forbidding amendment by title not applicable to acts that merely adopt by reference the provisions of other laws on same subject); *Wash. Toll Bridge Auth. v. Yelle*, 200 P.2d 467 (Wash. 1948) (holding incorporation by reference statutes were not within prohibitions on amending by title); *State v. Waller*, 55 N.E.2d 654 (Ohio 1944) (holding the effect of incorporation of existing law is not to revive or continue in force the statute referred to but to carry into execution the statute in which the reference is made); *State ex rel. Berthot v. Gallatin County High Sch. Dist.*, 58 P.2d 264 (Mont. 1936) (holding a reference adopting a pre-existing statute was not "amendatory" nor repugnant to a constitutional provision barring amendment by reference to title); *Serv. Feed Co. v. City of Ardmore*, 42 P.2d 853 (Okla. 1935) (holding an act in form was original and in itself intelligible and complete and not revisory or amendatory of any existing law in violation of the constitution); *Campagna v. City of Baton Rouge*, 116 So. 403 (La. 1928) (holding a statute directing contracts to be pursued in the manner "now provided by law" did not attempt to revive or amend any particular law, but merely referenced existing laws); *Ex parte Burke*, 212 P. 193 (Cal. 1923) (holding that incorporation by reference is proper legislation and is not prohibited by constitutional article 4, section 24); *Poe v. Street Improvement Dist. No. 340*, 252 S.W. 616 (Ark. 1923) (holding that an act providing for improvements under laws applicable to original districts did not violate constitutional article 5, section 23, as amendment by reference); *Van Pelt v. Hilliard*, 78 So. 693 (Fla. 1918) (holding

two types of references are most easily distinguished by determining which legislation is made operative by the referencing statute: if the new legislation is made applicable, adopting the terms of the old legislation within it, the reference is incorporative; but if the old legislation itself is made applicable, as changed by the new legislation, the reference is amendatory.²⁶

The two types of references are discussed in *State ex rel. Attorney General v. Green*, which involved a law creating the city of Pensacola that incorporated an 1889 statute governing state elections to describe how the city elections were to be held.²⁷ The same legislative session also repealed the 1889 elections statute and created a new elections code.²⁸ The repeal took effect two days prior to the effective date of the law creating the city of Pensacola. The election was held pursuant to the 1889 statute and challengers sought to invalidate the election, claiming the Pensacola act had improperly amended or revived the repealed 1889 election statute.²⁹ Since the new law was the operative one, the Florida Supreme Court held that there had been no attempt to amend or revive a repealed statute; rather there had only been an incorporation of a repealed law by reference.³⁰ Nevertheless, the two types of references can be confused.³¹

that article III, section 16 does not apply to incorporative, only amendatory references); *People v. Crossley*, 103 N.E. 537 (Ill. 1913) (holding that a referencing act complete within itself does not amend or revive any other act); *State v. Bd. of Comm'rs*, 110 P. 92 (Kan. 1910) (holding a 1909 law supplemental, not amendatory, and so did not violate state constitution article 2, section 16).

26. *Poldervaart*, *supra* note 12, at 709. See also *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 389 (U.S. 1924) (holding a referenced law contributes nothing in the field to which it is translated; the strength comes altogether from its inclusion in the referencing law); *W. Cas. & Sur. Co. v. Young*, 339 S.W.2d 277 (Tex. App. 1960) (holding a law incorporated into and made part of the other does not operate by its inherent force, but takes its effect from the statute in which it is incorporated).

27. 18 So. 334 (Fla. 1895).

28. *Id.* at 338.

29. *Id.*

30. *Id.* at 339.

31. A few cases have even attempted to apply constitutional prohibitions against amendment by reference when the incorporative reference was to the legislation of a different legal entity: *State v. Armstrong*, 243 P. 333 (N.M. 1924) (holding a statute adopting by reference penal provisions of the National Prohibition Act was a violation of New Mexico Constitution article 4, section 18

3. Incorporative References

While informational references and amendatory references are interesting drafting techniques in their own right, this Article focuses on the incorporative reference. A reference is incorporative if its effect is to adopt the standards, requirements, or prohibitions of the referenced material as its own standards, requirements, or prohibitions. An incorporative reference occurs whenever legislation references material outside of itself and indicates expressly or by implication that this material should be treated as if it were fully set forth at that point in the legislation. The requirements of the referenced material are then said to be “incorporated into” or “adopted into” the legislation that adopted them, without the necessity of printing the text verbatim.

Incorporation by reference is a feature of legislation at every level and has been used in some interesting ways. The current Florida Constitution incorporates by reference some provisions of the old 1885 constitution, but then sets them forth verbatim anyway.³² A Florida Statute incorporates the common law and statutes of England down to the fourth day of July, 1776.³³ And every year the general statutes and laws of the state are themselves incorporated into a single revision and consolidation that becomes

as an attempt to extend the provisions of the federal act); *Commonwealth v. Dougherty*, 39 Pa. Super. 338 (Pa. Super. Ct. 1909) (holding that reference incorporating federal definition violated a prohibition on amendatory references).

The concerns behind these early cases appear to be similar to those expressed in cases applying the non-delegation doctrine. But it is difficult to logically accept that these constitutional prohibitions were intended to apply to the legislation of another entity—which a state would of course have no legal authority to amend by reference or otherwise. Adding to the confusion is the fact that a very few states have constitutional provisions that were evidently drafted to restrict incorporative references as well as amendatory references. Though as noted *infra* note 54, the courts have given extremely limited effect to these provisions.

32. See FLA. CONST. art. VIII, § 6(e), and the footnotes thereto.

33. FLA. STAT. § 2.01 (2007). Florida Statute section 775.01 also adopts the common law of England in relation to crimes without a termination date. Both statutes were enacted in 1829 and in fact come into play in case law with surprising frequency. See, e.g., *Fla. Dep’t of Corr. v. Abril*, 969 So. 2d 201 (Fla. 2007). Poldervaart, *supra* note 12, at 732, says that most states have similar provisions. But see LA. CONST. art. III, § 15(B) (“No system or code of laws shall be adopted by general reference to it.”).

the Florida Statutes.³⁴ Federal statutes adopt state law;³⁵ municipalities adopt both state law³⁶ and federal statutes;³⁷ state statutes adopt state agency regulations,³⁸ county ordinances,³⁹ federal statutes,⁴⁰ and federal agency regulations;⁴¹ and state regulations adopt state statutes,⁴² federal regulations,⁴³ and federal statutes.⁴⁴ Examples could be further multiplied, but the point is that these ubiquitous references form an extremely complicated web of legislative interconnection. Also, on top of this, all levels of government incorporate publications and specifications of private entities.⁴⁵

B. Authority and Procedures to Incorporate

A few attempts at utilizing incorporation by reference in legislation have been met with challenges to the concept itself. For

34. The general adoption of the Revised Statutes through incorporation in a subsequent act was expressly sanctioned as constitutional by the Florida Supreme Court in 1893 in *Mathis v. State*, 12 So. 681 (Fla. 1893). The Florida Legislature has for some time used the permanent statutory revision system. Beginning with the 1999 regular session, the Reviser's Adoption Act incorporating the Florida Statutes has been submitted to the Legislature annually. See FLA. STAT. §§ 11.241–.2425 (2007).

35. See, e.g., Assimilative Crimes Act, 18 U.S.C. § 13(a) (2006) (adopting the criminal law of the state in which federal enclaves are situated and making it applicable within those areas under federal law).

36. See, e.g., *Orr v. Quigg*, 185 So. 726 (Fla. 1938) (municipal incorporation of state misdemeanors).

37. See, e.g., *Wright v. Worth*, 91 So. 87 (Fla. 1922) (municipal incorporation of the Federal Volstead Act).

38. See, e.g., FLA. STAT. § 380.0551 (2007) (designating the Green Swamp Area as an “area of critical state concern” and expressly incorporating several chapters of the Florida Administrative Code).

39. See, e.g., § 380.0555(8)(a)(2) (incorporating certain zoning ordinances of the Franklin County Board of County Commissioners).

40. See, e.g., § 220.03(1)(n) (referencing the United States Internal Revenue Code; subsequent sections adopt it for various purposes).

41. See, e.g., § 316.46 (2007) (requiring compliance with motor vehicle safety standards contained in Title 49 of the Code of Federal Regulations).

42. See, e.g., FLA. ADMIN. CODE ANN. R. 14-22.0011(5)(g) (2007) (incorporating a definition of “Certified General Appraiser” from the Florida Statutes into the rule).

43. See, e.g., R. 64F-12.001 (incorporating definitions contained in Title 21 of the Code of Federal Regulations by reference).

44. See, e.g., R. 6C4-6.0021(7)(c)(2) (adopting the definition of “violent misconduct” in section 16 of Title 18 of the United States Code).

45. See, e.g., § 163.3209 (requiring vegetation maintenance and tree pruning conducted by utilities to conform to ANSI A300 standards).

example, a New Jersey case⁴⁶ concluded that it was unconstitutional for the state to adopt the existing provisions of another state's statute.⁴⁷ The rationale of many of these early cases was often that the hearings, debates, reports and deliberative processes involved in the legislative process had been improperly sidestepped by the summary adoption of the existing law of another jurisdiction.⁴⁸

As a general rule, however, the authority for a body to adopt other material by reference is considered to be an inherent part of the general power to legislate.⁴⁹ As one early Texas case concluded,

The practice of making the provisions of one statute applicable to another by a reference to the former law in the new act is of frequent occurrence in legislation, both in England and in this country, and such legislation has been uniformly recognized as valid, so far as we have been able to discover.⁵⁰

Reference statutes have been recognized as nothing more than a convenient way of creating provisions parallel to those in other legislation without unnecessary repetition.⁵¹

No special "incorporating" language is required in the reference itself,⁵² and the mere mention of external material

46. *Wilentz v. Sears, Roebuck & Co.*, 172 A. 903 (N.J. Ch. 1934), *cited in* Poldervaart, *supra* note 12, at 719.

47. The case did not involve an attempt to prospectively adopt changes that might be made in the future. The attempt to adopt future changes to referenced legislation of another jurisdiction is widely recognized as an unconstitutional delegation of power. *See infra* Part V.

48. Poldervaart, *supra* note 12, at 720.

49. Note, however, that the Florida Supreme Court has held that Florida municipalities have no power to adopt published codes or public records by reference, except to the extent that authority has been expressly granted by statute. *State ex rel. McFarland v. Roberts*, 74 So. 2d 88 (Fla. 1954). Florida Statutes section 165.191, relied upon in the opinion as providing such authority, was repealed in 1974. It should be noted that this case recognizes that the narrower power to adopt state misdemeanors as local offenses is based upon constitutional charter and does not require express statutory authorization. See further discussion *infra* note 237 and accompanying text.

50. *Quinlan v. Houston & Tex. Cent. Ry. Co.*, 34 S.W. 738, 741 (Tex. 1896).

51. *Surrency v. Winn & Lovett Grocery Co.*, 34 So. 2d 564, 564-65 (Fla. 1948).

52. *See, e.g., Commonwealth Edison Co. v. Ill. Pollution Control Bd.*, 468 N.E.2d 1339 (Ill. App. Ct. 1984) (holding that four appendices to the federal

constitutes an incorporation if it is necessary to consult the material to complete the meaning of the referencing legislation.⁵³ However, special restrictions or procedural requirements applicable to referential legislation are not uncommon and may be imposed by constitution,⁵⁴ statute,⁵⁵ or rule.⁵⁶ One difference in adoption

RCRA rules mentioned without any particular "incorporating" language became part of state law).

53. Sometimes applicable statutes do require specific language to affect an incorporation. FLA. STAT. § 120.55(1)(a)(4) (2007) ("The reference shall specifically state that the form is being incorporated by reference and shall include the number, title, and effective date of the form and an explanation of how the form may be obtained.")

54. At least four state constitutions appear on their face to restrict the use of incorporation by reference to some extent: LA. CONST. art. III, § 15(B) ("No system or code of laws shall be adopted by general reference to it."); N.J. CONST. art. IV, § VII, ¶ 5 ("No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of the act or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act."); N.Y. CONST. art. III, § 16 ("No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act."); N.D. CONST. art. IV, § 13 ("No bill may be amended, extended, or incorporated in any other bill by reference to its title only, except in the case of definitions and procedural provisions."). Louisiana's provision may be intended to protect its unique Civil Code. In Means, *supra* note 2, at 2, it is noted that the courts have declined to give literal effect to the New Jersey and New York provisions on the grounds of practical expediency and have routinely allowed incorporation of procedural law.

55. See, e.g., FLA. STAT. § 120.54(1)(i) (2007) (providing that agencies subject to Florida's Administrative Procedure Act may only incorporate material in existence on the date their rule is adopted). Thus by operation of law no changes to referenced material made after a rule was adopted are ever included in any incorporative reference found in the Florida Administrative Code. This statutory restriction is presumably intended in part to reinforce constitutional limitations on delegation, discussed *infra* Part V. But the plain language of Florida Statutes section 120.54(1)(i) also applies to references to forms, manuals, and other materials created by the agency itself, where no such constitutional concerns arise. The broad statutory language thus serves the additional purpose of ensuring that the rulemaking procedures of chapter 120 are followed each time agency policy is changed, by requiring the amendment of the incorporating rule each time a form, manual, or other material created by the agency is altered. In the absence of such a statutory restriction, and consistent with the American Convention discussed *infra* Part III, an agency could change its policy simply by rewriting its incorporated manual, without going through the rulemaking process established in the statute. Strictly read, this statutory prohibition against incorporation of any future changes also applies to all incorporative cross-references to other portions of the agency's own rules, but because in such cases the referenced material has itself gone through the complete rulemaking process, it seems unlikely that a court would so hold.

procedure involves the "reading" of incorporated material. The reading of a statute or ordinance, usually several times, is a common and traditional part of legislative processes.⁵⁷ The purpose of the reading requirement is to inform and focus the attention of legislators and allow for the passage of time before voting in order to foster deliberation by the enacting body.⁵⁸ Reading of the material incorporated by reference in legislation is not generally required, however:

In the reading of a bill, it seems to be sufficient to read the written document that is adopted by the two houses; even though something else becomes law in consequence of its passage, and by reason of being referred to in it. Thus, a statute which incorporated a military company by reference to its Constitution and by-laws, was held valid notwithstanding that the Constitution and by-laws, which would acquire the force of law by its passage, were not read in the two houses as a part of it.⁵⁹

The exemption for incorporated material may make sense as a practical matter because incorporated material is often very extensive and may be very technical in nature. In any event, the usefulness of reading has been greatly diminished with modern forms of communication,⁶⁰ and it is now often limited by

56. See, e.g., FLA. ADMIN. CODE ANN. R. 1S-1.005 (2007) (restricting the materials that may be incorporated in the rules of state agencies).

57. For a general discussion of reading requirements, see Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361 (2004).

58. See, e.g., *Casey v. S. Baptist Hosp.*, 526 So. 2d 1332, 1336 (La. App. 4th Cir. 1988) (holding that a readings requirement of the Constitution intended to facilitate informed and meaningful deliberation on legislative proposals); *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 772-73 (Alaska 1980) (holding that the purpose of a reading requirement is to ensure deliberation prior to passage); *Witmer v. Polk County*, 270 N.W. 323, 327 (Iowa 1936) (holding that the purpose of a constitutional provision requiring the reading of a bill before passage is to let every legislator know exactly what he is voting upon).

59. 1 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 289 (8th ed. 1927), *quoted in* *Tanner v. Premier Photo Serv., Inc.*, 125 S.E.2d 609, 614 (W. Va. 1962).

60. *State v. Kaufman*, 430 So. 2d 904, 907 (Fla. 1983) (holding that widespread publication of copies of bills means that reading a bill's number or

constitution or rule to a reading by title,⁶¹ so this usual exclusion for incorporated material⁶² is probably of little practical consequence.

A second requirement not usually applied to incorporated material is publication. As a general rule, not only state statutes and local ordinances, but also administrative regulations must be published.⁶³ However, material that has been incorporated by reference usually⁶⁴ need not be published along with the code that

short title alone identifies which bill is being considered and meets constitutional requirement of reading by title).

61. FLA. CONST. art. III, § 7 (1980) (decreeing bills are to be read by title only, unless one-third of the members present desire it be read in full).

62. *Tanner*, 125 S.E.2d at 611-16 (holding that the reading required by constitutional article 6, section 29 is the reading of a bill as drafted, and not material referred to therein); *Santee Mills v. Query*, 115 S.E. 202, 204-05 (S.C. 1922) (holding that a statute incorporating by reference provisions of the Federal Income Tax Act does not violate the South Carolina Constitution article III, section 18 "reading" requirement, which requires only a reading of the bill as drafted); *Bibb County Loan Ass'n v. Richards*, 21 Ga. 592 (Ga. 1857) (holding that an act incorporating a county Building and Loan Association was valid despite the fact that its incorporated constitution and by-laws were not read).

63. Some state constitutions require filing or publication of agency rules: *City of Kirkwood v. Mo. State Bd. of Mediation*, 478 S.W.2d 690, 699 (Mo. Ct. App. 1972) (holding a state constitutional provision required regulations of all state boards and agencies to be filed for publication in the office of the Secretary of State); *People v. Fogerty*, 219 N.E.2d 801, 801 (N.Y. 1966) (holding the constitution provided that no rule or regulation made by any state department is effective until filed in office of the Department of State); *Whitman v. Wis. Dep't of Taxation*, 4 N.W.2d 180, 186 (Wis. 1942) (holding that state constitution article 7, section 21 provides that a rule of an administrative body does not become effective until published). Other states require publication by statute: *Fla. Dep't of Transp. v. Foster & Kleiser, Inc.*, 365 So. 2d 224, 225 (Fla. Dist. Ct. App. 1978) (holding that a state rule was invalid if not filed with the Department of State within the prescribed time); *State ex rel. Bd. of Educ. of N. Canton Exempted Village Sch. Dist. v. Holt*, 186 N.E.2d 862, 863 (Ohio 1962) (holding rules of administrative agencies are invalid until properly filed with the Secretary of State); *State ex rel. Villines v. Freeman*, 370 P.2d 307, 309 (Okla. 1962) (holding that any rule or regulation of state agency not published by the state librarian shall be void and of no effect); *State v. Wacker*, 344 P.2d 1004, 1008 (Ariz. 1959) (holding a statute required regulations promulgated by a state agency to be filed with the Secretary of State); *Maestas v. Christmas*, 321 P.2d 631, 633-34 (N.M. 1958) (holding a state statute required rules and regulations of various state departments to be filed with the state librarian).

64. There is some authority to the contrary, primarily in cases involving zoning by municipalities, generally decided upon the grounds that specific requirements have been violated. *Bd. of County Comm'rs v. McNally*, 95 N.W.2d 153, 154 (Neb. 1959) (holding an ordinance void for failing to comply with a statute requiring any ordinance prescribing a penalty to be published).

adopts it.⁶⁵ Indeed, reduction in the size and complexity of published codes is the principle reason material is incorporated rather than being set forth verbatim in the first place. Thus text that has already been printed in other places in the code or in external documents is omitted, to be replaced by citation, and the resulting code becomes shorter and easier to read. The cost, of course, is that the legislation as published is now incomplete, and the reader must obtain a copy of the adopted material to determine the meaning of the legislation.

A third procedural requirement unique to incorporated material involves filing. Perhaps to accommodate the fact that incorporated materials can be too voluminous to be efficiently published but at the same time too obscure for citizens to easily locate without help,

Similar municipal restrictions often involve the material that can be incorporated, as discussed in notes 69–81 and accompanying text. *See also* State, Dept. of Health & Rehabilitative Servs. v. Fla. Project Dirs. Ass'n, 368 So. 2d 954 (Fla. Dist. Ct. App. 1979) (finding invalid an incorporation by reference of a forms index that had to then be consulted to get the list of forms because it did not meet the express statutory requirement that forms be listed by rule).

65. In the early case of *City of Napa v. Easterby*, 18 P. 253 (Cal. 1888), it was argued that maps and books incorporated by reference in a municipal ordinance had to be published along with the ordinance, but this argument was rejected as leading to absurd consequences: "all that is required to be published is the ordinance itself—the thing which is entered in the ordinance book." *Id.* at 255. This is the general rule. *See, e.g.,* Raymond v. Baehr, 163 N.W.2d 51, 53 (Minn. 1968) (holding that a building code incorporated by reference into a validly published ordinance was not invalid for lack of publication under a city charter requiring publication of ordinances); *City of Hazard v. Collins*, 200 S.W.2d 933, 935 (Ky. 1947) (holding that incorporated material enacted into law by reference need not be published in the ordinance book); *City of Tucson v. Stewart*, 40 P.2d 72, 75 (Ariz. 1935) (holding the publication of an ordinance adopting by reference the city's electrical code was sufficient); *City & County of Denver v. Bargan Land & Inv. Co.*, 267 P. 405, 406 (Colo. 1928) (holding that a referenced map need not be published when on file in the manager's office); *Ex parte City of Albany*, 106 So. 200, 202 (Ala. 1925) (holding a code was not required to be published *in extenso* as a part of the ordinance adopting it); *People v. Kavanaugh*, 507 N.Y.S.2d 952, 957 (N.Y. Dist. Ct. 1986) (holding that adoption by reference of federal rules and regulations into state rules did not require publishing of federal regulations); *People v. Poyma*, 283 N.W.2d 707, 709 (Mich. Ct. App. 1979) (holding that when an ordinance is adopting a code, the code need not be published in full, but the ordinance adopting the code must be); *Reisdorf v. Mayor & Council of Borough of Mountainside*, 277 A.2d 554, 575 (N.J. Super. Ct. Law Div. 1971) (holding that where a map incorporated in an ordinance was available for inspection, publication of the ordinance was not in violation of the publication statute).

special filing requirements often apply.⁶⁶ When material is incorporated by reference in Florida administrative rules, for example, the material being adopted must be filed with the Department of State along with the rule.⁶⁷ This provides public access to a definitive version of all referenced material, thereby avoiding issues of unconstitutional vagueness that might otherwise arise if it was not clear exactly what material was referred to by its description alone.⁶⁸

C. Material to Be Adopted

In addition to these special procedures, there are sometimes restrictions on the type of material that can be incorporated by reference. One restriction is that incorporated material must constitute a public record. This requirement is linked to the filing requirement just discussed. In some jurisdictions, it has been held that the act of filing the adopted material along with the ordinance is not sufficient to make it a public record. Rather, the material

66. See *Buchholz v. City of Oriska*, 611 N.W.2d 886, 887 (N.D. 2000) (holding that a statute granting municipalities the power to adopt material by reference requires the filing of a copy of the material for public use and examination); *N.Y. State Coalition of Pub. Employers v. N.Y. State Dep't of Labor*, 457 N.E.2d 785 (N.Y. 1983) (interpreting article IV, section 8 of the New York Constitution to require a complete copy of incorporated material to be filed with the Department of State); *City of Alamogordo v. McGee*, 327 P.2d 321, 325 (N.M. 1958) (holding that an ordinance itself contained data on boundaries of the district and referenced a map already on file with the city clerk, where anyone could inspect it was sufficient, although the filing requirement was not technically complied with); *Fierst v. William Penn Mem'l Corp.*, 166 A. 761, 763 (Pa. 1933) (applying statutory requirement that ordinance adopting material must indicate place where material is on file and can be examined); *B&T Express, Inc. v. Pub. Util. Comm.*, 763 N.E.2d 1241, 1250 (Ohio Ct. App. 2001) (holding that statute required filing of not only rule text but also print and electronic versions of adopted federal law with the Secretary of State and others).

67. Rule 1S-1.005(2) of the Florida Administrative Code provides in part, "The agency incorporating material by reference shall file with the Department of State a correct and complete copy of the referenced material with an attached certification page which shall state a description of the referenced material and specify the rule to which the referenced material relates."

68. See the discussion of vagueness in referential legislation *infra* Part II.D.3.

must be an existing public record at the time the incorporation is made.⁶⁹ As explained by the Supreme Court of Michigan:

An ordinance sometimes may refer to a public record already established by lawful authority and become effective without publication of such record as part of the ordinance. But Exhibit A was drafted solely for the purpose of the ordinance and to define the fire limits, had no prior official approval, and had no purpose, use, force, or official sanction except as it was given by and as part of the ordinance. An ordinance cannot at the same time establish a paper as a public record and also incorporate it by reference as a previously established public record. Without publication of the map, the ordinance was not published in full, did not comply with the statute, and is void.⁷⁰

This requirement that material constitute a public record before it can be adopted by reference is commonly limited to municipalities and has been imposed both by statute⁷¹ and judicial decision.⁷² While the filing requirement discussed earlier addresses availability after adoption, the "public record" limitation

69. See, e.g., *Fierst*, 166 A. at 763 (holding that an ordinance incorporating a zoning map that was attached to it only upon filing did not meet the requirement of describing the place where the incorporated material was on file and could be examined).

70. *Village of Durand v. Love*, 236 N.W. 855, 856 (Mich. 1931).

71. See, for example, *State ex rel. McFarland v. Roberts*, 74 So. 2d 88 (Fla. 1954), which discusses Florida Statutes section 165.191 (1953), authorizing municipalities to incorporate by reference public records, defined as only those adopted "prior to the exercise by the municipality of the authority to adopt or incorporate by reference as herein granted." (emphasis added). The statute was repealed in 1974.

72. See *Raymond v. Baehr*, 163 N.W.2d 51 (Minn. 1968) (holding that a code drawn by the city engineer and a committee of the council and approved prior to incorporation qualified as a public record); *City of Hazard v. Collins*, 200 S.W.2d 933 (Ky. 1947) (holding an incorporation invalid because the document must be approved by the law making body of the city and made a public record before it is incorporated); *City of Tucson v. Stewart*, 40 P.2d 72 (Ariz. 1935) (holding that the electrical code of the city of Tucson was a public record before it was incorporated, because it had been approved by the mayor and the council of the city of Tucson and lodged with the proper custodian); *L.A. Thompson Scenic Ry. Co. v. McCabe*, 178 N.W. 662, 664 (Mich. 1920) (holding that a building code incorporated by reference was a "fugitive paper" in the custody of the city clerk and was not a valid public record).

is more specifically designed to ensure that referenced material is well known or easily obtained by both legislators and the public at the time it is being considered for adoption.⁷³

Other jurisdictions impose restrictions on the type of material that may be referenced for similar reasons. For example, a rule of the Florida Department of State⁷⁴ requires material incorporated in administrative rules in Florida⁷⁵ to be “generally available” to affected persons⁷⁶ and “published by a governmental agency or a generally recognized professional organization.” Since these are limitations on what material may be referenced, it might be

73. Orval Etter, *Referential Practices in Municipal Legislation*, 39 OR. L. REV. 209, 242 (1960). See also FLA. STAT. § 120.55(2)(d) (2007) (requiring, as part of Florida’s Administrative Procedure Act, that the Florida Administrative Weekly website allow a user to view agency forms to be incorporated by reference in rules of state agencies before those rules are adopted, similarly reflecting a concern with public notice prior to adoption).

74. Rule 1S-1.005 of the Florida Administrative Code provides:

(1) Any ordinance, standard, specification or similar material may be incorporated by reference in a rule adopted pursuant to Section 120.54, F.S., and Rule 1S-1.002, F.A.C., subject to the following conditions:

(a) The material shall be generally available to affected persons.

(b) The material shall be published by a governmental agency or a generally recognized professional organization.

(2) The agency incorporating material by reference shall file with the Department of State a correct and complete copy of the referenced material with an attached certification page which shall state a description of the referenced material and specify the rule to which the referenced material relates.

75. Florida Statutes section 120.54(1)(i), as amended by chapter 2001-75 of the Laws of Florida, provides that the Department of State “may prescribe by rule requirements for incorporating materials by reference pursuant to this paragraph.” It is not entirely clear if this authority extends solely to the procedural aspects of incorporation, or, if the grant of authority does allow the Department to prescribe substantive limitations, what statutory standard governs its discretion.

76. In *Department of Health & Rehabilitative Services v. Florida Project Directors Association*, 368 So. 2d 954 (Fla. Dist. Ct. App. 1979), the court apparently applied similar language found in former Model Rule 28-3.035 of the Florida Administrative Code (June 10, 1980). Though the exact basis of the decision is hard to distill from the opinion, the court stated that the incorporation of a Departmental Forms Index into department rule did not comply with the model rules, which only permitted incorporation of material “generally available to affected persons;” therefore, the court held the incorporation and the rule invalid. *Id.* at 955. In reading the opinion, it should also be noted that until 1984, Florida Statutes section 120.53(1)(b) required in part that an agency “[a]dopt rules of practice setting forth the nature and requirements of all formal and informal procedures, including a list of all forms and instructions used by the agency in its dealings with the public” (emphasis added).

reasonable to conclude, in the fashion of the municipal ordinance cases mentioned above,⁷⁷ that they cannot be satisfied by the filing and publishing that occurs after adoption; but no cases addressing this issue have been found.

There are occasionally other restrictions as to the type of material that may be incorporated. Incorporation is often limited to standards, specifications, or similar material.⁷⁸ Building codes and manufacturing standards must be comprehensive and contain considerable detail if they are to perform their intended function of creating consistency. Other descriptions are best expressed through maps, plans, or graphics and are not easily translated into words. Incorporation of these types of standards and specifications reduces not only time-consuming enactment processes but also the voluminous text that must ultimately be published. Restricting adoptions to these types of materials is presumably intended to prevent abuse of incorporation when it is not necessary. Other cases restricting the adoption of penalty clauses⁷⁹ or limiting incorporations to procedural law⁸⁰ seem to reflect state constitutional considerations.

In the absence of such affirmative restrictions, it is possible to incorporate almost any material. One memorable illustration was the observation that federal law might direct the Postal Service to

77. See *supra* notes 69–73 and accompanying text.

78. See *Hillman v. N. Wasco County People's Util. Dist.*, 323 P.2d 664 (Or. 1958) (holding that a statute providing electrical installations in the state should be made in accordance with national electrical code, as approved by the American Standards Association); *Seewar v. Town of Summerdale*, 601 So. 2d 198 (Ala. Crim. App. 1992) (discussing a statute that limited municipal incorporations to technical and other like codes published in books or pamphlets, such as those pertaining to construction of buildings, installation of plumbing, fire prevention, parks, airports, and housing). Rule 1S-1.005 of the Florida Administrative Code limits incorporated material to an ordinance, standard, specification, or similar material. See *supra* note 74.

79. *State ex rel. McFarland v. Roberts*, 74 So. 2d 88 (Fla. 1954) (discussing Florida Statutes section 165.191, enacted in 1953, which authorized municipalities to incorporate public records but expressly prohibited the adoption of a penalty clause by reference); *Manning v. City of Lebanon*, 124 S.W.3d 562 (Tenn. Ct. App. 2003) (holding that a statute allowing cities to adopt codes by reference prevented the adoption of penalty clauses and required that penalty clauses be set forth in full in the adopting ordinance).

80. *Ballew v. Denson*, 320 P.2d 382 (N.M. 1958) (holding that only procedural law may be adopted by reference under state constitution article IV, section 10).

act in conformity with the inscription engraved on the General Post Office building in New York City.⁸¹

D. Some Preliminary Issues

In considering the legal results that follow from incorporation by reference, it is helpful to understand that use of the technique creates a new and previously nonexistent legal requirement. Thus before enactment of the adopting legislation there exists only the referenced material, but after enactment it is as if there were a separate copy of this material in existence incorporated within the new adopting legislation.⁸² Just as if we were simultaneously viewing an object and its reflection in a clear mirror, we should find it difficult to tell the difference between the original and this copy: they would appear identical in every way.

Under classic incorporation doctrine, referenced material takes on this separate existence as part of the adopting document, just as if the words of the referenced material had been actually set forth in full on the page where it was referenced. Understanding that the new legal requirement exists not as any part of the referenced material itself, but rather as a duplicate or “clone” of the referenced material that has been created within the adopting legislation⁸³ makes it much easier to resolve many of the issues that arise.

1. Determining Which Legislation Applies

When a legislative body adopts precepts from other legislation—whether that of its own making, or that of some

81. Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1488 (2000). At footnote 177, Siegel supplies the familiar words of Herodotus, “Neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds.” *Id.* at 1488 n.177.

82. *Van Pelt v. Hilliard*, 78 So. 693, 698 (Fla. 1918) (“The two statutes exist as separate, distinct, legislative enactments, each having its appointed sphere of action . . .”).

83. *State ex rel. Attorney General v. Green*, 18 So. 334 (Fla. 1895) clearly illustrates that the efficacy of the law adopting the incorporated material is completely independent of the legal effect of the law containing the material being referenced. In *Green*, the referenced material was part of a statute that had no legal effect at the time of the incorporation, because it had been repealed before the law containing the adoption even took effect. *Id.* at 335.

external legislative body—questions can later arise as to which piece of legislation is actually being applied. Is it the adopting legislation or the referenced legislation?⁸⁴ With an incorporative reference, a violation of the referenced requirements is a violation of the incorporating legislation, to be enforced under the authority of the entity that adopted the requirements.

In *Weithorn v. Adelstein*,⁸⁵ the City of North Miami Beach enacted an ordinance that incorporated the Florida election code by reference. A complaint filed in circuit court alleging violation of the ordinance was dismissed, and the District Court of Appeal affirmed. The court held that any violation of the municipal ordinance had to be prosecuted in the same manner as a violation of any other ordinance of the municipality, and the municipal charter lodged such jurisdiction in municipal court.⁸⁶ Though the state might have brought an action under the statute itself, a violation of the adopting ordinance was a distinct offense that the city had to bring in the usual fashion.⁸⁷ While the principle is generally well understood that a government entity adopting language from another entity's legislation is not thereby gaining any authority to enforce the other's legislation—but instead is simply exercising its own authority that happens to be couched in identical terms—confusion occasionally arises.⁸⁸

84. This question is somewhat parallel to the distinction between amendatory and incorporative references, discussed *supra* notes 25–31 and accompanying text.

85. 201 So. 2d 643 (Fla. Dist. Ct. App. 1967).

86. *Id.* at 644. See also *Baker's Supermarkets, Inc. v. Dep't of Agric.*, 540 N.W.2d 574 (Neb. 1995) (holding that the court's jurisdiction to consider the validity of a statute incorporating administrative regulations was under the Uniform Declaratory Judgments Act rather than the Administrative Procedure Act, providing review of administrative regulation under petition for declaratory judgment).

87. Issues involving the possibility of double jeopardy are discussed *infra* Part II.D.4.

88. If proper procedures have otherwise been followed, scrivener's errors or incorrect references resulting from such confusion have been considered harmless error. See *City of Litchfield v. Thorworth*, 169 N.E. 265 (Ill. 1929) (holding that errors in charging documents alleging violation of a referenced state statute in addition to a violation of the referencing ordinance that was actually being prosecuted constituted a surplusage that did not mislead or affect the prosecution).

2. *Jurisdictional Limits*

Except as expressly limited, the basic ability to incorporate by reference is now regarded as inherent in the power to legislate. This is not to say, of course, that a legislative body may necessarily use the technique in any given case, or on any given subject; for it is clear that use of this drafting technique in no way expands the jurisdiction of the incorporating entity.⁸⁹ Issues therefore arise as to whether or not the government entity has authority to legislate with respect to the subject matter of the referential provision.

In *Dismukes v. Town of Louisville*, a municipal ordinance purporting to incorporate the entire state criminal code was held invalid because under the applicable law the town had authority over only misdemeanors, not felonies.⁹⁰ In other cases, rather than invalidating the legislation in its entirety, courts have allowed application of the referenced material only to the extent of the referencing entity's authority.⁹¹ Incorporations by an administrative agency or special purpose government entity similarly must fall within the more limited scope of that entity's charter, notwithstanding that general law or another entity's ordinance or rule independently mandates compliance with additional requirements.⁹²

In similar fashion: a state statute that constitutionally may address only a single subject is not exempted from that requirement because the second subject is adopted by reference;⁹³

89. *Goodman v. Kendall Gate-Investco., Inc.*, 395 So. 2d 240 (Fla. Dist. Ct. App. 1981) (holding that adopting other statutes by reference was proper when it was not in conflict with organic law or enabling statute).

90. 57 So. 547 (Miss. 1912).

91. *See, e.g., Sloss-Sheffield Steel & Iron Co. v. Smith*, 57 So. 29 (Ala. 1911) (holding a municipal ordinance incorporating all misdemeanors under state law valid as to those misdemeanors over which the municipality had authority).

92. *Council of Lower Keys v. Charley Toppino & Sons, Inc.*, 429 So. 2d 67 (Fla. Dist. Ct. App. 1983) (holding that the Florida Department of Environmental Regulation was not required or authorized to deny air pollution permit for failure to comply with local zoning ordinances or land-use restrictions because issuance of permit was based solely on compliance with applicable pollution laws).

93. *Int'l Bus. Machines Corp. v. Korshak*, 217 N.E.2d 794 (Ill. 1966) (holding that it was permissible to incorporate by reference into a new act material that is germane to the subject expressed in title of new act, but matter cannot be included by reference which could not have been included directly).

a municipality without authority to create certain misdemeanors cannot do so by adopting them by reference;⁹⁴ and a state agency that cannot directly confer its authority on a federal agency cannot do so indirectly through incorporation.⁹⁵ Similar examples could be listed, but attention to the obvious point that the authority of a government entity is in no way expanded because reference legislation is utilized provides the answer to most issues that arise.⁹⁶

3. Other Grounds of Invalidity

Reference legislation by its very nature is particularly vulnerable to challenges of vagueness.⁹⁷ Referenced materials must be described with reasonable particularity so that a person of ordinary intelligence is properly advised of the conduct that is mandated or prohibited. In *State v. Rodriquez*, the appellees argued that statutory language prohibiting the acquisition of food stamps "in any manner not authorized by law" was unconstitutionally vague.⁹⁸ The defendants argued that such a broad reference failed to reasonably apprise a person of common understanding exactly what conduct was proscribed. The court disagreed, holding that taken in context, this reference was sufficiently definite to give reasonable notice that the reference

94. *Kreulhaus v. City of Birmingham*, 51 So. 297 (Ala. 1909) (holding attempted adoption of state misdemeanors void because some misdemeanors went beyond the power of the city to control).

95. *Fla. Citrus Processors Ass'n v. Jesse J. Parrish, Inc.*, 415 So. 2d 1299 (Fla. Dist. Ct. App. 1982) (holding that an agency rule adopting by reference citrus content standards of the federal government was limited to existing standards by the state's non-delegation doctrine); *Hillman v. N. Wasco County People's Util. Dist.*, 323 P.2d 664, 667 (Or. 1958) (holding unconstitutional a Public Service Commission order adopting the National Electrical Safety Code with subsequent changes made by the Federal Department of Commerce). The interplay between incorporation by reference and the non-delegation doctrine is discussed in detail *infra* Part V.

96. *Sloss-Sheffield Steel*, 57 So. at 29 (finding a municipality had full authority to utilize reference statutes provided that it otherwise has the power to legislate as to the subject matter).

97. Though often raised in the same case, the doctrines of vagueness and unlawful delegation are conceptually distinct. In *State v. Welch*, 279 So. 2d 11 (Fla. 1973), the Florida Supreme Court reversed a trial court's determination that a Florida statute incorporating future federal law was unconstitutionally vague, but went on to find that portions of the statute did constitute an unconstitutional delegation of legislative authority.

98. 365 So. 2d 157, 158 (Fla. 1978).

was to federal food stamp legislation and implementing regulations of the United States Department of Agriculture.⁹⁹

The argument that an incorporation of material is impermissibly vague often prevails, however. If requirements imposed by the referenced material are unclear, it is easy to see that the adopting legislation may have an unacceptable gap or be too uncertain to apply. First, references may be invalidated because the material adopted cannot be found. In a few cases, no law of the sort referenced existed.¹⁰⁰ More often, the references are too ambiguous or obscure to conclusively identify the material that has been adopted.¹⁰¹

Second, references are sometimes invalidated as being impermissibly vague because although the intended reference can be found, the material adopted is so broad that it provides no meaningful guidance. In *Southeast Aluminum v. Metro Dade*

99. *Id.* at 160. See also *City of Farmington Hills v. Betrus*, 377 N.W.2d 832, 834 (Mich. Ct. App. 1985) (holding that an adoption in an ordinance of "Traffic Code" was clearly to the uniform traffic code and thus was clearly identified).

100. In *Savage v. Wallace*, 51 So. 605, 607 (Ala. 1910), a statute made reference to a type of "stock law" that evidently had existed at the time the reference was made, but which was no longer known. The court concluded the statute was therefore too vague and indefinite to be applied. *Id.* The opposite situation arose in *McKee v. City of Geneva*, 627 S.E.2d 555 (Ga. 2006), in which the court found a reference to a document that was not yet in existence but was to be adopted sometime in the future also too indefinite to be applied. See also *S. Operating Co. v. City of Chattanooga*, 159 S.W. 1091 (Tenn. 1913) (finding a reference in an ordinance to chapter 593 nonexistent and null).

101. See *Rollins v. Town of Gordonsville*, 215 S.E.2d 637 (Va. 1975) (invalidating an ordinance because it referred to only the article and title numbers of the adopted code without a chapter number, where two of the eight chapters under the title contained an article 6); *State v. Doane*, 311 N.E.2d 803, 806 (Ind. 1974) (holding that a state statute defining "dangerous drug" to include "any drug the label of which is required by federal law to bear the statement: 'Caution: Federal law prohibits dispensing without a prescription'" did not meet the requisite standard of specificity as to which sections of federal law were sought to be incorporated); *People ex rel. Schoon v. Carpentier*, 118 N.E.2d 315 (Ill. 1954) (holding a statute adopting part of an unrelated statutory provision that had to be interpreted by an administrative official, and which required recourse to business customs, unconstitutionally vague, indefinite and uncertain); *Rutledge v. City of Greenville*, 152 S.E. 700 (S.C. 1930) (holding a reference in a 1901 general law inadequate for not clearly identifying the statute or statutes intended to be incorporated); *Yeo v. Tweedy*, 286 P. 970 (N.M. 1929) (holding that a reference to laws regulating the method and manner of use of waters of the state might refer to irrigation code or to conflicting artesian water act).

County, the county code made it a violation for any contractor to "[d]isregard or violate any county or Dade County municipal ordinance or state law pertaining to the contractor's business."¹⁰² The court held this provision unconstitutional on vagueness grounds, stating that while it was permissible to incorporate other statutes or ordinances by reference, the statutes or ordinances incorporated had to be described with some reasonable particularity.¹⁰³ Similar incorporations and judicial reactions are not uncommon.¹⁰⁴ As one commentator has noted, "it would certainly be dangerous if the legislature could make a reference large enough to include all possible provisions of the adopted set of laws, and leave it to the courts to step inside and say which ones could be rightfully included, and which should be excluded."¹⁰⁵

In other cases, the courts have not invalidated vague adopting legislation but instead engaged in statutory construction to give it some effect. While it is difficult to generalize about such interpretive efforts, a couple of tests can be discerned from the cases. Some courts have applied a default canon that provisions will not be held to have been incorporated unless the language of the referencing legislation indicates such an intention with a "reasonable degree of certainty."¹⁰⁶ Others have applied the rule

102. 533 So. 2d 777, 777 (Fla. Dist. Ct. App. 1988).

103. *Id.* at 778.

104. *Kreulhaus v. City of Birmingham*, 51 So. 297 (Ala. 1909) (attempted blanket adoption of all state misdemeanors held void for uncertainty where some misdemeanors went beyond the power of city to control and it was not clear to the public what acts were actually prohibited); *Hanrahan v. Alterman*, 396 A.2d 272, 279 (Md. Ct. Spec. App. 1979) (law providing that election to be held in accordance with "the laws of the State of Maryland" not sufficiently specific to validly incorporate Fair Election Practices Act and its penal provisions). But see *Sloss-Sheffield Steel & Iron Co. v. Smith*, 57 So. 29 (Ala. 1911), a case decided in Alabama only two years after *Kreulhaus*, in which the argument that adoption of the state's misdemeanors was too broad and uncertain was rejected because the state was the parent of the municipality and knowledge of these laws was already imputed to those governed by them.

105. Poldervaart, *supra* note 12, at 721.

106. See, e.g., *Bergeson v. Pesch*, 117 N.W. 431 (Iowa 1962) (finding no reasonable degree of certainty as to whether municipal speed limits were incorporated or not); *Hamilton v. City of Louisville*, 332 S.W.2d 539 (Ky. 1960) (finding the required reasonable degree of definiteness absent so adoption of the standard time fixed for Kentucky by an act of Congress or by order of the Interstate Commerce Commission could not be given effect); *Toronto Pipe Line Co., Dallas, Tex. v. Camerman Pipelines Co. (In re Toronto Pipe Line Co., Dallas, Tex.)*, 92 N.W.2d 554 (Neb. 1958) (holding it could not be said with a

that only referenced provisions that are "appropriate to the new legislation" will be considered to have been adopted.¹⁰⁷ In any event, it is easy to see that a given court's identification of the material that has been referenced might easily deviate from a careless drafter's original intent.

In addition to vagueness, referential legislation is also subject to many infirmities that affect other legislation.¹⁰⁸ In considering challenges to referential legislation, referenced material should be considered to be as much a part of the text as if it had been set out in full within the four corners of the adopting legislation. Depending on the context, giving effect to this judicial maxim can invalidate legislation or help it to survive challenge. For example,

reasonable degree of certainty that the legislature intended to make certain motor carrier licensure provisions applicable to pipe line common carriers); *Road Dist. No. 1 v. Sellers*, 180 S.W.2d 138 (Tex. 1944) (finding no reasonable degree of certainty that a statute incorporating general laws relative to county bonds was intended to adopt redemption provisions when there were conflicting provisions); *State ex rel. Bancroft v. Frear*, 128 N.W. 1068 (Wis. 1910) (finding no reasonable degree of certainty that legislative intent was for a primary election statute to incorporate general election law provision allowing a political party to make to fill a vacancy when the party nominee dies after ballots were printed); *Goodman v. Kendall Gate-Investco., Inc.*, 395 So. 2d 240 (Fla. Dist. Ct. App. 1981) (finding an ordinance adopting the South Florida Building Code did not also automatically incorporate OSHA safety standards, which had been in turn incorporated into the South Florida Building Code, because such a "reference within a reference" was too obscure to clearly indicate intention to replace common law safety standards);

107. See, e.g., *Peay v. Bd. of Educ.*, 377 P.2d 490 (Utah 1962) (finding specific incorporative reference to be a scrivener's error and substituting a similarly numbered section for the new subject); *Adams v. State*, 294 N.W. 396 (Neb. 1940) (holding that where a statute is adopted by another statute and referred to merely by words describing its general character, only those parts of it which are of a general nature, or which particularly relate to the subject of the adopting statute, will be considered as incorporated into the adopting statute); *State v. Bd. of Comm'rs*, 110 P. 92 (Kan. 1910) (holding that not all of the provisions of the 1893 statutes were incorporated by the 1909 act, but only those appropriate to the new subject).

108. The fact that the drafting technique of incorporation by reference is used does not add to or detract from the validity of the legislation. In *Davis v. Insurance Commissioner & Treasurer*, 445 So. 2d 630 (Fla. Dist. Ct. App. 1984), a municipal firefighter applicant challenged a Florida Department of Insurance rule that adopted minimum vision standards set forth in a ten year old National Fire Protection Association pamphlet. It was argued that the act of incorporating such old material was arbitrary and capricious, but the court correctly focused only on whether the standards themselves were directly related to the health and safety of firefighters and the public. *Id.* at 631.

where an otherwise valid statute adopted reference material that was itself found to be unconstitutionally vague, indefinite, and uncertain, the adopting statute was declared invalid.¹⁰⁹ On the other hand, an ordinance that would have been considered invalid as vesting unbridled discretion in building officials if considered without its incorporated building codes was found to be valid when these additional standards were considered as part of the adopting legislation.¹¹⁰

4. *Double Jeopardy*

The basic understanding that two distinct laws exist after incorporation—the first in the original legislation that is referenced and the second in its incarnation as part of the adopting document—also sheds light on issues relating to double jeopardy. When incorporation makes a single act a crime under two different government entities, the question of whether or not successive prosecutions are barred by the prohibition against double jeopardy depends upon whether or not the two government entities are regarded as distinct sovereigns.

When a particular action is made a crime by both a state and the federal government, the conviction or acquittal by one does not bar prosecution by the other. This follows from the fact that states do not derive their sovereignty from the federal government. States were independent constitutional entities before the federal government was conceived, surrendering some powers to form the union through their ratification of the U.S. Constitution, but

109. *People ex rel. Schoon v. Carpentier*, 118 N.E.2d 315 (Ill. 1954) (declaring unconstitutional an adopting statute where the referenced statute made the adopting law so vague, indefinite, and uncertain that men of ordinary intelligence had to guess its meaning).

110. *Thomas v. City of W. Palm Beach*, 299 So. 2d 11 (Fla. 1974) (finding valid a city ordinance that delegated to building officials discretion to determine if a dwelling was "unfit or unsafe" for human habitation or if the costs of repair exceed fifty percent of the cost of the dwelling after repair, where building codes were also incorporated to guide the inspectors' discretion). *See also State v. All Pro Paint & Body Shop, Inc.*, 639 So. 2d 707 (La. 1994) (holding standards contained in the incorporated Federal Resource Conservation and Recovery Act sufficient for guidance of the state agency). *Cf. City of Tucson v. Stewart*, 40 P.2d 72 (Ariz. 1935) (holding incorporative references to the National Electrical Code and the National Electrical Safety Code insufficient to save a vague ordinance requiring electrical installations to conform to "approved methods").

retaining residual sovereignty.¹¹¹ The states retain power to independently determine crimes, and in doing so they are exercising their own sovereignty, not any delegated sovereignty from the federal government.¹¹² As a result, “[w]hen a defendant in a single act violates the ‘peace and dignity’ of two sovereigns by breaking the laws of each, he has committed two distinct ‘offences.’”¹¹³ It follows that a state criminal statute incorporating provisions of federal law creates a second distinct offense, and the conduct denominated a crime by both may be punished by each.

A few incorporation cases involving state and federal authority, however, have espoused the view that dual offenses are not involved, only concurrent enforcement of a single offense. In the Oregon case of *State v. Smith*, the court declared that the violation of laws prohibiting the sale of intoxicating beverages constituted a single offense, enforceable by either the state or the federal government.¹¹⁴ Prosecution by one therefore constituted a bar to trial by the other on the grounds of double jeopardy.¹¹⁵ The decision seemed to be based on the wording of the Eighteenth Amendment, which provided that Congress and the several states had “concurrent power to enforce” prohibition.¹¹⁶ Most courts interpreted the prohibition laws differently, however, finding that violations of state laws incorporating federal provisions were violations of distinct (though identical) state offenses.¹¹⁷ Thus no double jeopardy existed.

111. *Printz v. United States*, 521 U.S. 898, 918–19 (1997).

112. *United States v. Wheeler*, 435 U.S. 313 (1978) (citing *United States v. Lanza*, 260 U.S. 377 (1922)).

113. *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (quoting *Lanza*, 260 U.S. at 382).

114. 199 P. 194 (Or. 1921).

115. *See also* *People v. Sell*, 17 N.W.2d 193 (Mich. 1945) (finding a municipal ordinance did not create new price control regulation but merely added the city’s enforcement sanction to federal law already applicable to Detroit during the war).

116. This was later explained in *State v. Charlesworth*, 951 P.2d 153 (Or. Ct. App. 1997).

117. *See, e.g., Cooley v. State*, 110 S.E. 449 (Ga. 1922) (holding that under a dual form of government, violation was an offense against the laws of both the United States and Georgia and could be punished under both laws without double jeopardy); *Ex parte* January, 246 S.W. 241 (Mo. 1922) (holding that both state and federal governments have power to investigate and punish for crimes involving the sale of intoxicating liquors, and conviction and punishment by the one, in a particular case, is no bar to the right of the other to punish again upon

As for double jeopardy in cases involving local and state governments, the case of *State v. Malone*¹¹⁸ is instructive. The City of Miami had incorporated into a municipal ordinance a state criminal statute prohibiting operation of a gambling room. The defendant was tried and acquitted for violation of the ordinance.¹¹⁹ But, he was then subsequently charged with a violation of the state statute based on the same set of facts and circumstances that had led to his prosecution in the municipal court. The District Court declared that it had long been settled that parallel charges under municipal and state authority did not violate double jeopardy.¹²⁰

Although *Malone* has not been expressly overturned, proper application of incorporation by reference doctrine demonstrates that it should no longer be considered good law. The fact that a local government has used the technique of incorporation by reference is irrelevant. As has been shown, the proper determination is made by considering the result if the referenced material had in fact been set forth verbatim. That is, by applying the principle of double jeopardy exactly as if the local government had created the identical offense *without incorporation*. At the time *Malone* was decided, Florida and many other states had concluded that conviction by a municipality did not bar trial by the state, since the state and local governments were separate sovereigns.¹²¹ But the double jeopardy provision in the Fifth

the same facts); *Youman v. Commonwealth*, 237 S.W. 6 (Ky. 1922) (holding that the power of the state to punish for possession of an illicit still was not affected by the fact that the defendant might also be guilty of a similar offense under federal law); *In re Opinion of the Justices*, 133 N.E. 453 (Mass. 1921) (holding that enforcement of the Eighteenth Amendment relies upon Congress and the several states passing distinct laws for a common end).

118. 227 So. 2d 896 (Fla. Dist. Ct. App. 1969).

119. *Id.* at 897.

120. *Id.*

121. See *Earwood v. State*, 426 P.2d 151 (Kan. 1967); *State v. Amick*, 114 N.W.2d 893 (Neb. 1962); *State v. Jackson*, 291 P.2d 798 (Wyo. 1955); *State v. Simpson*, 49 N.W.2d 777 (N.D. 1951); *State v. End*, 45 N.W.2d 378 (Minn. 1950); *State v. Musser*, 176 P.2d 199 (Idaho 1946); *May v. Town of Carthage*, 2 So. 2d 801 (Miss. 1941); *Miller v. Hansen*, 269 P. 864 (Or. 1928); *City of Milwaukee v. Johnson*, 213 N.W. 335 (Wis. 1927); *State v. Tucker*, 242 P. 363 (Wash.), *adhered to on reh'g* by 246 P. 758 (Wash. 1926); *State v. Garcia*, 200 N.W. 201 (Iowa 1924); *Webster v. Knewel*, 196 N.W. 549 (S.D. 1924); *Ex parte Sloan*, 217 P. 233 (Nev. 1923); *Koch v. State*, 41 N.E. 689 (Ohio 1895); *State v.*

Amendment is applicable to the states.¹²² And the U.S. Supreme Court determined in *Waller v. Florida* that for purposes of double jeopardy, cities and counties are subordinate political divisions of the state, not separate sovereigns.¹²³ There may be two distinct pieces of legislation, but two prosecutions of the same conduct by different entities of the same sovereign constitutes double jeopardy. The use of incorporation can in no way alter this result. Thus prosecution by a local government for violation of an ordinance adopting a state statute should bar subsequent prosecution for violation of the referenced statute, notwithstanding *Malone*.

5. *Effect of Subsequent Changes*

Perhaps one of the most common difficulties in interpreting referential legislation occurs when changes have been made to the referenced material between the time the incorporation takes place and the time the adopting legislation is actually being applied. It is easy to see that if the text of the referenced material had literally been set forth word for word in the adopting legislation, it would continue to read precisely the way it did when drafted. Any later changes to the referenced material would not affect it. Thus, the same result obtains when incorporation by reference is used.¹²⁴

One of the earliest cases describing this effect was *Van Pelt v. Hilliard*.¹²⁵ The court stated:

In the construction of such statutes the statute referred to is treated and considered as if it were incorporated into and formed part of that which makes the reference. The two statutes exist as separate, distinct, legislative enactments, each having its appointed sphere of action, *and the*

Clifford, 13 So. 281 (La. 1893); *McInerney v. City of Denver*, 29 P. 516 (Colo. 1892); *Pike v. City of Birmingham*, 53 So. 2d 394 (Ala. Ct. App. 1951).

122. *Benton v. Maryland*, 395 U.S. 784 (1969).

123. 397 U.S. 387 (1970).

124. *State v. J.R.M.*, 388 So. 2d 1227 (Fla. 1980) (quoting with approval the general rule contained in *Van Pelt v. Hilliard*, 78 So. 693 (Fla. 1918)).

125. 78 So. 693.

*alteration, change or repeal of the one does not operate upon or affect the other.*¹²⁶

This basic principle¹²⁷—that incorporation takes the referenced material as it exists at the time it is adopted and the adopting legislation is not affected by the subsequent amendment or repeal of the referenced material—is widely recognized among the states.¹²⁸ This rule has been said to be based upon unassailable logic¹²⁹ and has been routinely applied by courts throughout common law countries.¹³⁰ However logical it may be, this classic

126. *Id.* at 698 (emphasis added.)

127. As discussed *infra* Parts III and IV, the basic principle is often subject to qualification when there is an express or implied legislative intent in the adopting legislation that the incorporation is to include subsequent changes.

128. See *Bd. of Educ. v. Vic Regnier Builders, Inc.*, 648 P.2d 1143 (Kan. 1982); *County Comm'rs v. Teton County Youth Servs., Inc.*, 652 P.2d 400 (Wyo. 1982); *Med. Ass'n v. Joint City of Atlanta-Fulton County Bd. of Tax Assessors*, 207 S.E.2d 673 (Ga. Ct. App. 1974); *Belk v. Bean*, 247 So. 2d 821 (Miss. 1971); *Powell v. Levy Ct.*, 236 A.2d 374 (Del. 1967); *Gen. Installation Co. v. Univ. City*, 379 S.W.2d 601 (Mo. 1964); *Haveman v. Bd. of County Road Comm'rs*, 96 N.W.2d 153 (Mich. 1959); *Mogilner v. Metro. Planning Comm'n*, 140 N.E.2d 220 (Ind. 1957); *Commonwealth ex rel. Keiffer v. Ceraul*, 128 A.2d 187 (Pa. Super. Ct. 1956); *San Diego Co. v. Milotz*, 300 P.2d 1 (Cal. 1956); *Dairy & Consumers Coop. Ass'n v. Ariz. Tax Comm'n*, 243 P.2d 465 (Ariz. 1952); *School Dist. No. 1 in Arapahoe Co. v. Hastings*, 220 P.2d 361 (Colo. 1950); *Pac. First Fed. Sav. & Loan Ass'n v. Pierce Co.*, 178 P.2d 351 (Wash. 1947); *Adams v. State*, 294 N.W. 396 (Neb. 1940); *Wagner v. Ret. Bd. of Policemen's Annuity & Benefit Fund*, 17 N.E.2d 972 (Ill. 1938); *Gustafson v. Hammond Irrigation Dist. of Rosebud County*, 287 P. 640 (Mont. 1930); *State ex rel. Murphy v. Harlee*, 131 So. 866 (Fla. 1930); *Harris County Dist. Attorney's Office v. J.T.S.*, 296 S.W. 1070 (Tex. 1927); *State v. Armstrong*, 243 P. 333 (N.M. 1924); *Nampa & Meridian Irrigation Dist. v. Barker*, 223 P. 529 (Id. 1924); *Hutto v. Walker County*, 64 So. 313 (Ala. 1913); *State v. Caseday*, 115 P. 287 (Or. 1911); *Stoner v. Pittsburg, Cincinnati, Chi. & St. Louis Ry Co.*, 20 Ohio Dec. 448 (Ohio Com. Pl. 1909); *Ct. of Insolvency v. Meldon*, 38 A. 167 (Vt. 1897); *Collins v. Blake*, 9 A. 358 (Me. 1887); *Commonwealth v. Kendall*, 11 N.E. 425 (Mass. 1887); *In re Main St.*, 98 N.Y. 454 (N.Y. 1885); *Flanders v. Town of Merrimack*, 4 N.W. 741 (Wis. 1880).

129. Read, *supra* note 4, at 270.

130. See the analysis *id.* at 281-94, in which Read reviews treatment of the issue in the four principal common law countries. The classic rule, along with the so-called "Dexter presumption" discussed *infra* Part IV, has received widespread application in American courts. One exception occurred in *County of Seminole v. City of Lake Mary*, 347 So. 2d 674, 675 (Fla. Dist. Ct. App. 1977), where the district court stated, "Since Section 120.31 has been repealed, it is a nullity, and any reference to it in another statute that is still effective may properly be ignored." As noted in Means, *supra* note 2, at 6, the district court's statement "could not have been more contrary to the well established doctrines." Shortly after Florida's fourth district opinion, when the same statute was before

rule is evidently particularly confusing to many when referenced legislation is subsequently repealed, rather than simply amended.¹³¹ In that context, the classic rule was colorfully, though misleadingly, termed the "Lazarus rule."

In *Fisher v. City of Grand Island*, a state statute adopted appeal procedures applicable to justice of the peace courts.¹³² After adoption, but before the case arose, the referenced justice of the peace statute was repealed. The majority applied the general rule, holding that nothing which subsequently happened to the referenced material, including its repeal, affected the adopting legislation, which was still effective in its own right.¹³³ The dissenting opinion denounced this result, declaring that like the biblical Lazarus, the repealed law had somehow been miraculously resurrected by the majority opinion.¹³⁴

Though nicely dramatic, the analogy is fundamentally flawed. The dissent's characterization fails to reflect that two distinct manifestations of the adopted material exist.¹³⁵ When the classic rule is understood, it is quite clear that the referenced material has in no way been "resurrected," and that it is in fact the "clone"

the Florida Supreme Court in *State ex rel. City of Casselberry v. Mager*, 356 So. 2d 267, 268 n.3 (Fla. 1978), the court re-emphasized the classic rule, stating, "The fact that § 120.31 has been repealed, however, does not render its provisions ineffective for the purposes of § 171.081. We have held that the repeal of one statute which the Legislature has by reference incorporated into another will not affect the referencing statute." (citations omitted).

131. See, e.g., *Lake Mary*, 347 So. 2d 674.

132. 479 N.W.2d 772 (Neb. 1992). See Jeanelle R. Robson, "Lazarus Come Forth. And He That Was Dead Came Forth." *An Examination of the Lazarus Rule*: *Fisher v. City of Grand Island*, 26 CREIGHTON L. REV. 221 (1992).

133. *Fisher*, 479 N.W.2d at 774.

134. *Id.* (Shanahan, J., dissenting).

135. Among several arguments raised in dissent was a suggestion that the reference was in fact a general one from which the court could infer the legislative intent that subsequent changes to the referenced justice of the peace statute, including its repeal, would be effective as to the incorporating legislation. *Id.* at 776. This doctrine is termed the *Dexter* presumption in this Article and is discussed *infra* Part IV. If the dissent was correct that it was a general reference, the argument is sound. Even then, however, the "Lazarus" analogy logically fails, for it is always the adopting statute that is being applied, never the repealed one. The interpretation of the adopting statute is simply being changed to conform to the presumed intent of the legislature that adopted it. There is in either case no "resurrection" of a repealed statute, which could have no application to the case.

incorporated as part of the adopting legislation (that has never been repealed) that is being applied.

E. Proposal to Reduce Confusion

It is clear that many of the issues surrounding reference legislation involve accurate identification of the material incorporated. The filing and publishing requirements for referenced material discussed above¹³⁶ were created to help resolve some of these issues. The wide availability of electronic versions of legislative codes now offers the possibility of electronic filing and publishing of such materials with additional advantages. First, publishing filed material on the web would provide much wider public access. Filing a paper copy of incorporated material in City Hall or at the department headquarters of an agency with statewide jurisdiction accurately identifies the referenced material but provides limited access.¹³⁷ Many more people could read referenced material if it was filed in electronic form and made available online.¹³⁸ The use of hyperlinking technology could also

136. See *supra* text accompanying notes 63–68.

137. For example, Florida Statutes section 120.55(1)(a)(4) provides that forms used by a state agency in its dealings with the public shall not be published in the Florida Administrative Code but instead incorporated by reference and filed with the Florida Department of State in Tallahassee. This achieves the intended purpose of clearly identifying exactly which version of the form is to be used while reducing the size and cost of publishing the Code. However, it provides extremely limited access to people throughout the state who may be required to use the form.

138. While no data was found specifically relating to electronic filing of incorporated materials, the information on expanded public access when codes themselves are published electronically is persuasive. Prior to the implementation of the Florida Government Electronic Rulemaking System (eRules), <https://www.flrules.org>, a Joint Administrative Procedures Committee report indicated about 700 subscribers to the printed Florida Administrative Weekly. JOINT ADMIN. PROCEDURES COMM., FLA. LEG., REPORT ON INTERNET NOTICING OF THE FLORIDA ADMINISTRATIVE WEEKLY 3 (2003), <http://japc.state.fl.us/publications.cfm> (follow “Report on Internet Noticing—2003” hyperlink). As of November 30, 2007, statistics available from the Florida Department of State hosting facility—analyzed by CommerNet, Inc., www.commer.net, the eRule application service provider—showed over 3,000 subscribers signed up to receive email notification of the latest rule actions matching their individual interests, and over 100,000 visits from the general public to the eRule website each month. While the numbers are not directly comparable, they do suggest a broad expansion of public access. Since traditionally filed incorporated materials are much harder to view than the

provide immediate access directly from the adopting legislation. Rather than having to lay aside the text of the adopting legislation to search out a copy of the referenced material, a reader could simply “click” on the incorporated material, read it, and then “click” again to return to the adopting legislation.

Second, putting procedures in place to require such hyperlinks for incorporated material¹³⁹ would usefully compel members of the legislative body to confirm the exact material being incorporated during the enactment process, not only for the benefit of the voting members, but for the public and for technical staff that would later perfect the links. Precise identification of the incorporated material would frustrate the use of overly broad references, which have been held unconstitutional on vagueness grounds.¹⁴⁰

Government bodies could continue to utilize incorporative references in printed compilations of their codes, thus incurring no additional publishing costs, while linking these references to actual copies of the filed referenced material in the online versions. Hyperlink technology already exists in virtually all publishing formats and the cost for additional server space would be minimal.

One issue that would need to be considered in moving to electronic filing and publication requirements would be the treatment of copyrighted materials.¹⁴¹ As noted earlier, incorporation of building codes and other technical specifications is quite common. These materials are often copyrighted, and cases trying to balance the right of the copyright holder to protect original works and the right of the public to have full access to the law have already arisen.¹⁴² While the exact parameters of any ultimate

printed codes themselves, it might be supposed that electronic publishing of incorporated materials would result in an even more dramatic increase in public access.

139. Since December 31, 2007, Florida Statutes section 120.55(2)(d) has required that the Florida Administrative Weekly Internet website allow users to view forms that are being incorporated by reference in state agency rules.

140. See *supra* Part II.D.3.

141. Senate Bill 704 of Florida’s 2008 Regular Session provides for electronic publication of materials incorporated by reference in state agency rules, but exempts copyrighted materials. The bill passed both houses of the Florida Legislature, but has not yet been signed by the Governor.

142. Compare *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (holding website publication of a city law adopting a building code did not infringe the copyright of the organization that authored model code),

compromise between these competing rights are not yet clear, new technologies may also be involved in implementing that balance.

III. THE AMERICAN CONVENTION

*I can explain all the poems that ever were invented—and a good many that haven't been invented just yet.*¹⁴³

In *McKnight v. Crinnion*,¹⁴⁴ a case not unlike the *Grand Island* case discussed earlier,¹⁴⁵ an 1849 Missouri act provided that actions for the recovery of personal property should be adjudicated by justices of the peace using procedures set forth in an 1845 practice act governing circuit courts.¹⁴⁶ The 1849 act took effect slightly before a revision of the referenced 1845 act. The issue to be decided was whether the justices of the peace were to follow the old or new circuit court procedures.¹⁴⁷ The *Crinnion* court declined to follow the classic rule, stating:

It was not designed that the rule in the justices' courts should be different from that in the Circuit Court, but *that as often as the rule was changed for the Circuit Courts, the justices should be governed by it.*¹⁴⁸

Thus the court concluded that the legislative intent was that the procedures for justices should conform to those of the circuit courts as they were changed from time to time.¹⁴⁹ This result was certainly within the power of the Missouri legislature. It made

with *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516 (9th Cir. 1997) (holding the AMA did not lose its copyright in a system of medical procedure classification codes when the federal government required Medicaid and Medicare filers to use the codes). For detailed discussions of the complex issues involved, see Lawrence A. Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. 291 (2005), and Katie M. Colendich, *Who Owns "The Law"? The Effect on Copyrights when Privately-Authored Works Are Adopted or Enacted by Reference into Law*, 78 WASH. L. REV. 589 (2003).

143. CARROLL, *supra* note 1, at 189 (Humpty Dumpty).

144. 22 Mo. 559 (Mo. 1856).

145. See *supra* note 132 and accompanying text.

146. *Crinnion*, 22 Mo. at 559.

147. *Id.*

148. *Id.* (emphasis added).

149. *Id.*

sense. But legislative use of a reference statute to achieve such a purpose would have been completely incongruous. The classic rule unavoidably freezes the referenced text as of the moment of its adoption, while the intention of the legislature (at least as determined by the court) was to achieve precisely the opposite result. The classic interpretive maxim that referential legislation should be read as if the referenced material was set forth verbatim in the adopting statute was turned inside out.

If *Crinnion* was the first crack in the structure of classic incorporation doctrine, it was not the last. As described by one scholar:

[D]espite their initial declaration of firm loyalty to a rule coined of logic and dedicated to certainty, it was not long before the “American” courts, while in the throes of construction, resorted to the “Intention of the Legislature,” that Aladdin’s lamp which has so often enabled Anglo-American courts to conjure much from little or nothing.¹⁵⁰

Thus, as other legislatures and other courts similarly tried to effect pragmatic ends in the face of the logical but inflexible dictates of basic incorporation doctrine, the doctrine was gradually expanded. In short, the phrase “unless a contrary intent appears” was essentially engrafted onto the classic rule.¹⁵¹ In consequence,

150. Read, *supra* note 4, at 271.

151. Poldervaart, *supra* note 12, at 729. See also *Haw. Providers Network, Inc. v. AIG Haw. Ins. Co.*, 98 P.3d 233 (Haw. 2004); *In re Commitment of Edward*, 570 A.2d 917 (N.J. 1990); *Roddy Mfg. Co. v. Olsen*, 661 S.W.2d 868 (Tenn. 1983); *Bd. of County Comm’rs v. Teton County Youth Servs., Inc.*, 652 P.2d 400 (Wyo. 1982); *Sch. Dist. No. 17, Douglas County v. State*, 316 N.W.2d 767 (Neb. 1982); *City of Warrensburg v. Bd. of Regents of Cent. Mo. State Univ.*, 562 S.W.2d 340 (Mo. 1978); *Mach. Co. v. Yavapai County*, 491 P.2d 1132 (Ariz. 1972); *Overstreet v. Blum*, 227 So. 2d 197 (Fla. 1969); *People v. Reese*, 109 N.W.2d 868 (Mich. 1961); *Romanov v. Dental Comm’n*, 111 A.2d 9 (Conn. 1955); *Ex parte McMahan*, 237 P.2d 462 (Okla. Crim. App. 1951); *Egbert v. City of Dunseith*, 24 N.W.2d 907 (N.D. 1946); *McLeod v. Commercial Nat’l Bank*, 178 S.W.2d 496 (Ark. 1944); *O’Flynn v. E. Rochester*, 54 N.E.2d 343 (N.Y. 1944); *Noble v. Noble*, 103 P.2d 293 (Or. 1940); *Gilson Bros. Co. v. Worden-Allen Co.*, 265 N.W. 217 (Wis. 1936); *Trimmier v. Carlton*, 296 S.W. 1070 (Tex. 1927); *Perkins v. Winslow*, 133 A. 235 (Del. 1926); *Delahoussaye v. Bd. of Trustees*, 103 So. 152 (La. 1925); *Luzader v. Sargeant*, 30 P. 142 (Wash. 1892); *In re Kugler*, 55 Pa. 123 (Pa. 1867); *Turney v. Wilton*, 36 Ill. 385 (Ill. 1865); *Spring Valley Water Works v. City of San Francisco*, 22 Cal. 434 (Cal. 1863); *Ind. Alcoholic Beverage Comm’n v. Baker*,

as shall be seen, legislative bodies and courts were forced to grapple with additional issues.

IV. THE *DEXTER* PRESUMPTION

*My dear! I really must get a thinner pencil. I can't manage this one a bit; it writes all manner of things that I don't intend . . .*¹⁵²

A. General and Specific References

The "American convention" may be quite useful in those instances in which the intent of a legislative body is clearly stated, but it has a significant limitation: it is often difficult to find any indication of intent. The courts therefore quickly developed a presumption to aid in determining whether a legislative reference was intended to refer to material only as it existed at the time the adopting legislation became effective or rather was intended to refer to the material as it might change from time to time after the reference had been made.

The case of *Jones v. Dexter* involved a statute providing that personal property should be distributed according to the "law regulating descents."¹⁵³ The court reasoned that the general nature of this language—making no reference to any particular act, by its title or otherwise—indicated that it was the *legislative intent* that the 1828 statute remain consistent with the law of descents as it might change over time.¹⁵⁴ Therefore, rather than interpret the applicable law to be that contained in the statute governing descents of realty that had been in effect when the reference was made, the court instead applied a later statute that had superseded the adopted law. Other early cases soon applied similar presumptions of legislative intent.¹⁵⁵

286 N.E.2d 174 (Ind. Ct. App. 1972); *Davis v. City of Macon*, 178 S.E.2d 557 (Ga. Ct. App. 1970).

152. CARROLL, *supra* note 1, at 136 (The White King).

153. 8 Fla. 276, 278 (Fla. 1859).

154. *Id.* at 285.

155. *Culver v. People*, 43 N.E. 812 (Ill. 1896) (holding a reference that refers to general law regulating the subject in hand will be regarded as including the

On first consideration, the logic of these early cases seems reasonable enough. When legislation adopts specific provisions, it seems likely that its drafters must have known the exact wording of the provisions they wanted, and there is no reason to assume that unknown future amendments would also be deemed appropriate. On the other hand, when reference is made only to the law generally, it seems the intention might be to link the adopting statute to an entire body of law, not to any particular provision of it; so any changes to that body of law from time to time should be adopted as well.¹⁵⁶ This reasoning was combined with classic incorporation doctrine and crystallized into a general rule of construction:

Where one statute adopts the whole or a part of another statute by a particular or descriptive reference to the statute or provisions adopted, such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions, modifications, or repeals of the statute so taken unless it does so expressly or by necessary implication. But where the reference is not to any particular statute or part of a statute, but to the law generally which governs a specified subject, the reference will be regarded as including, not only the law on that subject in force at the date of the referential act, but also that law as it exists from time to time thereafter.¹⁵⁷

law in force when action is taken); *Cole v. Donovan*, 64 N.W. 741 (Mich. 1895) (finding a general reference to another law is intended to furnish a rule for future conduct and the law existing at the time when the rule is invoked should be consulted); *Gaston v. Lamkin*, 21 S.W. 1100 (Mo. 1893) (holding a general reference to established law is implemented by consulting the law governing such cases at the time the rule is invoked); *Newman v. City of N. Yakima*, 34 P. 921 (Wash. 1893) (holding that a statement that certain things should be done in accordance with existing law, without a specific reference, refers to the law in force at the time of application); *Kirk v. Rhoads*, 46 Cal. 398 (Cal. 1873) (holding that a statute providing only that the law "in force" was to be applied, without more specific reference, meant the law was in force at the time the case arose).

156. See *In re Edward S.*, 570 A.2d 917, 925 (N.J. 1990).

157. Read, *supra* note 4, at 271–72 (footnotes, emphasis omitted).

This formulation was widely accepted in the states.¹⁵⁸ It completed the expansion of a drafting technique originally designed to prevent only unnecessary repetition into a mechanism to also indicate how future changes in law are to be interpreted. While it cannot be doubted that judicial presumptions are often quite useful in bringing needed certainty to the law, the *Dexter* presumption itself was destined to foster only more confusion.

B. Presumption and Express Intent

The brief history of the *Dexter* presumption recounted here should have demonstrated that it was developed as a rule of construction to be applied when inferring legislative intent in the absence of any express indication. Most cases seem to apply it in that fashion,¹⁵⁹ but some cases have ignored express statutory language concerning the intended scope of the incorporation and arrived at a contrary result by relying on the *Dexter* presumption.

In *Palm Beach County National Utility Company, Inc. v. Palm Beach County Health Department*, the court determined that a county ordinance adopting a state agency rule did so through a general reference.¹⁶⁰ But any resulting presumption that the legislative intent was for the ordinance to reflect changes in the referenced state rules as they occurred from time to time should have easily been overcome by the express language in the

158. *In re Edward S.*, 570 A.2d 917; *Layton Sch. of Art & Design v. Wis. Employment Relations Comm'n*, 262 N.W.2d 218 (Wis. 1978); *Carruba v. Meeks*, 150 So. 2d 195 (Ala. 1963); *State v. Dist. Ct.*, 114 N.W.2d 317 (Iowa 1962); *State ex rel. Anderson v. Duffy*, 185 N.E.2d 435 (Ohio 1962); *Byrd v. Short*, 307 S.W.2d 871 (Ark. 1958); *State ex rel. Walsh v. Buckingham*, 80 P.2d 910 (Nev. 1938); *In re Easby*, 192 A. 646 (Pa. 1937); *In re Heiman's Will*, 2 P.2d 982 (N.M. 1931); *Dabney v. Hooker*, 249 P. 381 (Okla. 1926); *Nampa & Meridian Irrigation Dist. v. Barker*, 223 P. 529 (Idaho 1924); *Lyman v. Ramey*, 242 S.W. 21 (Ky. 1922); *State v. Ganong*, 184 P. 233 (Or. 1919); *State v. Leich*, 78 N.E. 189 (Ind. 1906); *Culver*, 43 N.E. 812; *Cole*, 64 N.W. 741; *Gaston*, 21 S.W. 1100; *Newman*, 34 P. 921; *Kirk*, 46 Cal. 398; *Arrington v. Arrington*, 618 P.2d 744 (Colo. Ct. App. 1980); *Campbell v. Hunt*, 155 S.E.2d 682 (Ga. Ct. App. 1967); *State ex rel. Springer v. Smith*, 189 So. 2d 846 (Fla. Dist. Ct. App. 1966).

159. See *In re Edward S.*, 570 A.2d 917; *Roddy Mfg. Co. v. Olsen*, 661 S.W.2d 868 (Tenn. 1983); *Union Cemetery v. City of Milwaukee*, 108 N.W.2d 180 (Wis. 1961); *Egbert v. City of Dunseith*, 24 N.W.2d 907 (N.D. 1946); *Trimmier v. Carlton*, 296 S.W. 1070 (Tex. 1927).

160. 390 So. 2d 115 (Fla. Dist. Ct. App. 1980).

reference itself. The incorporation was explicitly limited to those rules "to date adopted" by the state department.¹⁶¹ The incorporation was also explicitly stated to have "the same effect as if the provisions of each . . . rule had been set out in full."¹⁶² It is impossible to understand how the court could have reached the conclusions it did if the provisions *had* in fact been set out in full in the ordinance.

Cases such as *Palm Beach County* have applied the *Dexter* presumption to achieve a result contrary to explicit expressions of intent by the adopting legislative body. In doing so, they subvert the legitimate purpose of the *Dexter* presumption as a rule of construction applicable only when there is no more compelling evidence of intent upon which to rely.¹⁶³

C. Interpretive Complications

The *Dexter* presumption is not easy to apply. In theory the distinction between specific and general references sounds clear enough, but in practice references are often difficult to categorize.¹⁶⁴ In the *Palm Beach County* case discussed above,¹⁶⁵ for example, the referenced material was described as the rules adopted pursuant to Florida Statutes chapter 381. Note that while a specific statute was referenced by number, it was not primarily the statute that was being incorporated, but rather the administrative rules developed under the authority which that statute conferred. In the absence of any express intent in such a double reference, should subsequent changes to the rules also be considered as adopted? What if the statute itself were subsequently amended or

161. *Id.* at 116.

162. *Id.* (emphasis omitted).

163. When both the adopting and referenced statute are promulgated by the same legislative body, express intent might also appear in the legislation modifying or repealing the adopted statute. *Simmons v. State*, 280 A.2d 351 (Conn. 1971). The legislative intent of the entity later amending the referenced statute would supersede even an earlier contrary intent expressed in the adopting legislation.

164. Several commentators have noted this difficulty. See Means, *supra* note 2, at 11; Read, *supra* note 4, at 274; R. Perry Sentell, Jr., "Reference Statutes"—Borrow Now and Pay Later?, 10 GA. L. REV. 153, 156 (1975).

165. See *supra* notes 160–63 and accompanying text.

repealed? Should the reference be considered a general one as to the administrative rules¹⁶⁶ but a specific one as to the statute?

Or consider the nature of the references discussed in *State ex rel. Timken Roller Bearing Co. v. Industrial Commission*:

In the instant case the adopting statute, Section 1465-68b, refers to practically the entire body of the Workmen's Compensation Law from Section 1465-44 to Section 1465-108, General Code, excepting only Section 1465-90. There is no specific reference to any one section or part of any one statute. It would seem, therefore, that Section 1465-68b, General Code, was intended to apply to the Workmen's Compensation Law *generally* from Section 1465-44 to Section 1465-108, General Code, wherever applicable, not only as they existed and in form were effective in 1921 but as later amended and in form effective at the time the situation or facts arise to which the law is to be applied.¹⁶⁷

Despite the fact that the reference was made to a specific series of statutes by number, with the express omission of one section, the court nevertheless concluded the reference was a general one.

Examples abound. Compare *In re Heath*, in which language providing that appeals were to be conducted "in like manner as provided by law in reference to the final judgments, orders, and decrees of the circuit courts" was held to be a specific reference,¹⁶⁸ with *Davison v. Heinrich*, in which language providing that appeals were to be conducted in like "manner as appeals may be taken from justices of the peace" was held to be a general reference.¹⁶⁹ Compare *Newman v. City of North Yakima*, in which a reference to the "general law now in force" was construed to mean the law in force at the time the tax was levied instead of the law in force at the time of adoption,¹⁷⁰ with *Tillamook City v. County Court*, in which a reference to a road tax equal to that "now

166. Since, in *Palm Beach County*, the county itself was not in control of the rules promulgated by the state agency, would the county even have authority to adopt future changes? See *infra* Part V on delegation.

167. 24 N.E.2d 448, 450-51 (Ohio 1939).

168. 144 U.S. 92 (1892).

169. 172 N.E. 770 (Ill. 1930).

170. 34 P. 921 (Wash. 1893).

levied by law” was construed to mean the law in force at the time of adoption instead of the law at the time the tax was levied.¹⁷¹ Compare the suggestion by Brabner-Smith that a reference to an act by popular name also adopts subsequent changes,¹⁷² with the suggestion by Read that a reference to an act by popular name does not adopt subsequent changes¹⁷³ (though both acknowledge the difficulty of applying the *Dexter* presumption).¹⁷⁴

Further examples could be cited,¹⁷⁵ but the lesson for a legislative drafter is that the distinction between specific and general references created by the *Dexter* presumption provides courts with a generous flexibility. If there is in fact a true legislative intent as to the adoption of future changes, it is essential to state that intent in certain terms.

It is probably not by chance that most creative judicial interpretations construe what might appear to be a specific reference to be in fact a general one, and not the other way around. As Means suggests, “there are many instances—a vast majority of them, in [Means’] opinion—in which the legislature simply could not have intended the outcome that would be inferable on the basis of the common law principles.”¹⁷⁶ He goes on to describe several categories of specific references for which he suggests the actual expectation of legislators and the public alike is that any future changes to the referenced material will in fact be adopted, which is of course directly contrary to the *Dexter* presumption.¹⁷⁷ It may well be a similar conviction in judges that causes them to sometimes struggle against the result their own canon of construction suggests.¹⁷⁸

The most important category identified by Means, and the only one to be discussed here, includes references to provisions created

171. 107 P. 482 (Or. 1910).

172. Brabner-Smith, *supra* note 12, at 204.

173. Read, *supra* note 4, at 274.

174. Brabner-Smith, *supra* note 12, at 204; Read, *supra* note 4, at 274.

175. *See, e.g.*, Means, *supra* note 2, at 10–12.

176. Means, *supra* note 2, at 19.

177. *Id.* at 19–25. He identifies reciprocal cross-references, references having a negative implication, references for directory purposes, and references to provisions within the same statutory scheme. *Id.*

178. *See, e.g.*, *Herrmann v. Cencom Cable Assn., Inc.*, 978 F.2d 978 (7th Cir. 1992) (noting the maze of cross-references in the ERISA statute and concluding that adoption without future changes would be “bizarre”).

as part of the same statutory scheme. These references likely constitute a very high percentage of all incorporative references and include references within a body of law dealing with a given subject matter to other sections within that same body of law, as well as references to common penalty or procedure statutes that are applicable across many subject areas.¹⁷⁹

An example of a common procedure statute in Florida is the Administrative Procedure Act, which governs the quasi-legislative and quasi-judicial actions of most executive branch agencies. There are at least two thousand references within the Florida Statutes to chapter 120 and its various subsections.¹⁸⁰ While these references are clearly all specific ones, the intention of the legislature¹⁸¹ and the expectation of most readers is undoubtedly that these references refer to the APA or its provisions as they appear at the time the adopting statute is being read or applied, not at the time the references were initially made. Since the Administrative Procedure Act is amended frequently,¹⁸² any other interpretation would be chaotic, with different agencies being required to follow different procedures depending on when their particular reference to the Act was made.

Crimes and penalty provisions are also often linked as part of a common statutory scheme. In Florida, penalty provisions for various categories of felonies and misdemeanors are set forth in one section of the statutes, while a description of prohibited conduct can appear almost anywhere, with a cross-reference back to these penalty provisions. Again, the intention of the legislature

179. Means, *supra* note 2, at 21–25.

180. FLA. STAT. §§ 120.50–.81 (2007). This figure is based upon an electronic search of the individual section numbers contained within chapter 120. See The Florida Senate, The 2007 Florida Statutes, Title X, Chapter 120, <http://www.flsenate.gov/Statutes/> (select “Title X,” then follow “Chapter 120” hyperlink).

181. This legislative intent is clear because section 120.72 provides, Unless expressly provided otherwise, a reference in any section of the Florida Statutes to chapter 120 or to any section or sections or portion of a section of chapter 120 includes, and shall be understood as including, all subsequent amendments to chapter 120 or to the referenced section or sections or portion of a section. There are a few similar statutory construction provisions in the Florida Statutes, but they cover only a small portion of cross-references.

182. Florida’s Administrative Procedure Act has been amended every year since it was first adopted in 1974.

is that any change in the referenced penalty for a felony of the third degree, for example, would apply regardless of whether the reference appeared before or after the amendment to the penalty.¹⁸³ Other criminal provisions reference each other as well. Consider the recent amendment of the Florida Statutes relating to assault upon a law enforcement officer that had been previously referenced in a separate statute relating to juvenile justice. When the assault statute was amended, provisions of the juvenile justice statute referencing that offense were reenacted in full for purposes of updating the reference under the incorporation doctrine.¹⁸⁴

A few cases have gone so far as to engraft “common enactment variations” onto the *Dexter* presumption. These are usually intended to address specific references to related provisions that are part of the same statutory scheme.¹⁸⁵ These variations allow specific references to adopt future changes to other statutes enacted at the same time. Perhaps the best analysis appeared in *American Bank v. Goss*:

We shall assume that the general rule is as claimed by the respondent and that ordinarily an independent statute absorbing or incorporating by proper reference the provisions of another and independent statute would not be affected by amendments made to the latter after the incorporation. On the other hand, we think it must be

183. See FLA. STAT. § 775.082(10) (2007) (“The purpose of this section is to provide uniform punishment for those crimes made punishable under this section and, to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference.”). The legislative intent behind this language is clear. It is curious that the statute attempts to effect this end indirectly by stating that any reference is a general reference, so that application of the common law *Dexter* presumption will then arrive at the intended result rather than directly stating the legislative intent. This indirect approach may be contrived to avoid those cases in which an express intent is not followed if contrary to the *Dexter* presumption, criticized here at *supra* notes 160–63.

184. 2007 Florida Laws, section 7, chapter 2007-112, provides, “For the purpose of incorporating the amendment made by this act to section 784.07, Florida Statutes, in a reference thereto, paragraph (b) of subsection (1) of section 985.11, Florida Statutes, is reenacted to read: . . .” before setting out the statute in full as it read before the bill was passed. This undoubtedly addresses the technical legal problem but does not provide much public notice. Such language explaining the purpose of the reenactment is not codified, and only a very careful researcher would become aware of it.

185. Poldervaart, *supra* note 12, at 731.

equally clear that if one section or provision of a statute adopts and incorporates by reference the provisions of another section or subdivision of the same statute, a subsequent amendment of the latter will be regarded as affecting the entire statute including the subdivision which made the adoption. In such a case the entire statute will be regarded as reenacted at the time of the last amendment, and all of its provisions will be affected by the latter.¹⁸⁶

But common enactment variations have not been widely adopted, and many cases have applied the *Dexter* presumption despite a very close relationship between the adopting and referenced statutes.¹⁸⁷

In Florida, however, a confusing attempt was made to apply a common enactment variation applicable not to specific, but rather to general references. In *Williams v. State ex rel. Newberger*, the court painstakingly concluded that notwithstanding the general reference involved, since both the adopting and the referenced provisions had been re-enacted together as part of the same bulk revision in 1920, the adopting provision took the changes made as part of the common update in 1920, but not subsequently.¹⁸⁸

This case therefore made a class of general references that would have otherwise been considered to automatically adopt future changes not do so unless the statutes were enacted together as part of a bulk revision. The dissent would have relied upon the *Dexter* presumption and construed the adopting provision to have also been updated along with amendments to the referenced provisions enacted after 1920.¹⁸⁹

186. 142 N.E. 156, 157 (N.Y. 1923)

187. See, e.g., *Calumet Foundry & Mach. Co. v. Mroz*, 137 N.E. 627 (Ind. Ct. App. 1922) (holding that even when one section is made a part of another section of the same act by specific reference, such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute); *Flanders v. Town of Merrimack*, 4 N.W. 741 (Wis. 1880) (holding that where section 1210b referred to "the causes mentioned in 1210a" and 1210a was subsequently repealed, the specific reference was to be understood as enumerating the causes, thus applying the *Dexter* presumption without the common enactment variation).

188. 131 So. 864 (Fla. 1930). *State ex rel. Murphy v. Harllee*, 131 So. 866 (Fla. 1930), handed down the same day, was decided under the same analysis.

189. For a detailed critique of these cases, see Means, *supra* note 2, at 12-17.

This unusual Florida “common enactment” case has not been overruled (though it has seldom been cited),¹⁹⁰ but it seems unlikely that it would be decided in the same way today. In *State v. Camil*, the Florida Supreme Court expressly rejected the argument that the biennial (now annual) General Reenactment Statute¹⁹¹ automatically results in an update of all laws incorporated by reference in the Florida Statutes.¹⁹² The court concluded that such biennial revisions lack the requisite initial title notice to allow them to effect such substantive changes in existing law.¹⁹³ While the incorporation in *Camil* was an adoption of federal law, the reasoning of the case would apply equally to incorporations of state law. With respect to this issue, the bulk revision involved in the Williams case seems no different from the annual revisions that take place today. Since Florida cases have applied the *Dexter* presumption to find general references ambulatory after *Camil*, it might be concluded that Williams is no longer good authority.

D. Cross-reference Construction Provisions

The apparent judicial discomfort¹⁹⁴ with the results that the *Dexter* presumption engendered for provisions within the same statutory scheme was evidently shared by several state legislatures.¹⁹⁵ At least thirteen states¹⁹⁶ have enacted reference

190. Florida’s “common enactment” variation has not been applied in any case since the two original cases, but was discussed in *Reino v. State*, 352 So. 2d 853, 859 (Fla. 1977). Means, *supra* note 2, at 17–18, noted that the doctrine of incorporation was probably not applicable to the *Reino* case at all, and would have been of no help to the party arguing for its application if it had been.

191. The General Reenactment Statute is prepared each year pursuant to Florida Statutes section 11.2421.

192. 279 So. 2d 832 (Fla. 1973).

193. *Id.* at 834 (“We believe that it would be improper to arbitrarily permit a substantive inclusion by reference.”).

194. See *supra* notes 185–86 and accompanying text.

195. The speculation on the origins of Louisiana’s cross-reference construction statute, offered in *In re Joyce May Black*, 225 B.R. 610 (Bankr. M.D. La. 1998), may well reflect the actual intent of states in enacting construction legislation that has the effect of reversing certain elements of the *Dexter* presumption.

196. In California, each of several California codes has its own reference construction provision, e.g., CAL. GOV’T CODE § 9 (West 2007). Together, these provide comprehensive coverage. Other states have enacted a single

construction statutes that attempt to reverse the judicial presumption of legislative intent inferred for various categories of references. All of these statutes provide that under certain circumstances, when a state statute specifically references another state statute, the adopting statute also adopts future changes to that referenced material. None provide that when a state statute references the law generally, it adopts it only as it exists at the time of adoption, without future changes. These statutes thus do not reverse the *Dexter* presumption that the intent of a general reference is to adopt future changes, but instead actually extend the presumption to cover many specific references as well.

In fact, in eight of the thirteen states,¹⁹⁷ the construction statutes are not even worded as presumptions but on their face simply direct the result. A North Dakota statute, a typical provision, thus provides, "A reference to any portion of a statute applies to all reenactments, revisions, or amendments thereof."¹⁹⁸ In the other five states, a phrase similar to "unless a contrary intent is expressed" is included.¹⁹⁹ Considering the fact that it was the inflexibility of the *Dexter* presumption that evidently caused these states to attempt to partially overturn it with legislation in the first place, it is interesting that the first eight states do not sanction the courts to consider contrary intent or other factors. In any event, it seems doubtful that courts would conclude that they retain no discretion in the face of these statutes.

provision with application throughout the state's statutes, and sometimes beyond. See COLO. REV. STAT. § 2-4-209 (2007), DEL. CODE ANN. tit. 1, § 307(b) (2007), HAW. REV. STAT. § 1-25 (2007), IOWA CODE § 4.3 (2007), LA. REV. STAT. ANN. § 1:14 (2007), MINN. STAT. § 645.31(2) (2007), N.D. CENT. CODE § 1-02-40 (2007), OHIO REV. CODE ANN. § 1.55 (WEST 2007), OR. REV. STAT. § 174.060 (2007), 1 PA. CONS. STAT. § 1937 (2007), R.I. GEN. LAWS § 43-4-13 (2007), WYO. STAT. ANN. § 8-1-103(a)(iii) (2007). Other states, including Florida, have enacted construction statutes applicable only to a very limited range of statutes. Sam McKeen, *Constitutionality of City Ordinances Which Adopt State Statutes by Reference*, 37 OR. L. REV. 272, 274 (1958) offers some interesting thoughts on the effect of extending Oregon's construction statute to municipal ordinances.

197. California, Colorado, Delaware, Hawaii, Louisiana, North Dakota, Ohio, and Rhode Island.

198. See, e.g., N.D. CENT. CODE § 1-02-40 (2007).

199. Iowa, Minnesota, Oregon, Pennsylvania and Wyoming. See, e.g., IOWA CODE § 4.3 (2007).

Another interesting way to view these construction statutes is from the perspective of their scope. While most of the states²⁰⁰ seem to provide that the construction statute governs references to the statutes and other domestic law of the referencing state,²⁰¹ Delaware, Louisiana, and Minnesota provide that the construction statute applies to references to another statute *or any other law*.²⁰² It is not clear whether these statutes were intended, or have been interpreted, to do so, but it is within the authority of a legislative body to state its intention to adopt future changes to referenced legislation that has been promulgated by an external government entity.²⁰³

Before moving on to consider effects of the non-delegation doctrine, it should be noted here that careful use of the Internet in publishing codes²⁰⁴ could greatly complement cross-reference construction statutes in clarifying legislative intent. Incorporations intended (or required)²⁰⁵ to adopt material only as it exists on the date of initial reference could be hyperlinked to an exact copy of the original material.²⁰⁶ This copy of the material would then be

200. California, Colorado, Hawaii, Iowa, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Wyoming.

201. In *State v. Charlesworth*, 951 P.2d 153 (Or. Ct. App. 1997), it was noted that the Oregon construction statute did not apply to interpretation of statutes that refer to non-Oregon law. See also *State v. Dist. Ct.*, 114 N.W.2d 317 (Iowa 1962) (finding that a construction statute providing that any statute which adopts by reference a whole or portion of another statute shall be construed to include subsequent amendments has no relevance to an adopting statute that adopts general law).

202. DEL. CODE ANN. tit. 1, § 307(b) (2007); LA. REV. STAT. ANN. § 1:14 (2007); MINN. STAT. § 645.31(2) (2007).

203. In many states, of course, an attempt to adopt material to be promulgated in the future by another governmental or private entity constitutes a violation of the non-delegation doctrine. See *infra* Part V.

204. See *supra* notes 137–39 and accompanying text.

205. Florida's Administrative Procedure Act, for example, only authorizes the incorporation of material as it exists on the date the adopting rule becomes effective. FLA. STAT. § 120.54(1)(i)(1) (2007).

206. Material incorporated by Florida state agencies in their rules is currently filed in hard copy with the Department of State in conjunction with the rule adopting it. It is maintained by that office to provide the official record of exactly what was incorporated and to prevent subsequent changes to the incorporated material from being construed as being part of the rule without new rulemaking. § 120.54(1)(i)(1). Filing of such materials in electronic form would generally be less cumbersome.

separately maintained by the legislating body,²⁰⁷ preventing any amendments or repeal of the original material that was referenced from being construed as somehow also affecting the incorporated version. This electronic safeguard would involve only additional server space and minimal cost, because printed versions would still contain only the primary legislation and not the referenced material.

The basic legal conceptualization that referenced material takes on a unique incarnation unaffected by subsequent amendment or repeal of the original material²⁰⁸ could thus be effectively realized through use of the hyperlink technology, greatly reducing confusion for readers unfamiliar with this sometimes arcane doctrine. If, on the other hand, the legislative intent was to reference incorporated material as it may be subsequently changed, the hyperlink could be made to an external document maintained by the entity promulgating the referenced material²⁰⁹ or, in the case of cross-references, to subsequent versions as they take effect from time to time.²¹⁰ Reference construction statutes are not always consulted, and the careful implementation of a complementary system of hyperlinked documents could essentially match the usual reader's experience to actual legislative intent.²¹¹ Procedures that required either fixed or ambulatory hyperlinks to be made to

207. Fixed references should not be linked to external websites or material outside the control of the legislating body, because these sources obviously are likely to change over time.

208. See *supra* notes 82–83 and accompanying text.

209. Such external links would be less reliable than internal links, subject as they would be to actions of those outside the control of the legislating body, but no more so than most material on the Internet. It should also be noted that in many states there is a great likelihood that an attempted adoption of materials to be promulgated by an external entity sometime in the future will be declared unconstitutional. See *infra* note 228 and accompanying text.

210. The electronic version of the Florida Statutes maintained by the Florida Legislature at <http://www.leg.state.fl.us/Statutes> contains such ambulatory cross-reference links. Within each annual compilation of the Florida Statutes, the cross-references to other portions of the statutes are underlined and hyperlinked to the latest version of the referenced statute. As discussed *supra* in notes 177–84 and accompanying text, these links are to the text that in most cases is consistent with both legislative intent and with reader expectations, but most often not to the text that the “*Dexter* presumption” of prevailing judicial interpretation would conclude was operative.

211. Naturally, administrative and technical errors would still occasionally occur, and the careful lawyer would still have to research, but the system would be far superior to the existing regime in most states.

incorporated material would also require legislators to address the usually unconsidered question of the effect of subsequent changes to the referenced material, confirming the intent of the entire legislative body at the time of enactment.

Traditionally, filing requirements for incorporated material have been addressed primarily to local governments and state agencies.²¹² The benefits of electronic filing suggested here might also be considered by state legislatures and the Congress.

V. THE DELEGATION CONSTRAINT

*Oh, what fun it'll be, when they see me through the glass in here, and can't get at me.*²¹³

A. Non-delegation Doctrine

The distribution of power is one of the most fundamental issues in any social organization. In our political history, the primary divisions of governmental power at both the federal and state level have been constitutionally prescribed²¹⁴ and not left to legislative assignment,²¹⁵ so that the allocation could not be altered except through the cumbersome process of constitutional amendment.²¹⁶ Logically, reallocation of this power by any means other than constitutional amendment would be prohibited. It was simply

212. Etter, *supra* note 73, at 246.

213. CARROLL, *supra* note 1, at 132 (Alice).

214. Thirty-four of the fifty state constitutions have strict separation of powers clauses that contain language prohibiting one branch from exercising the powers of the others; six states have specific separation of powers clauses that divide the powers of government into three branches; the remaining ten states and the federal government have no explicit separation of powers clause at all, the doctrine being implied from the overall allocation of power. See Scott Boyd, *Legislative Checks on Rulemaking Under Florida's New APA*, 24 FLA. ST. U. L. REV. 309, 327–28 (1997) (referencing specific constitutional provisions of each state in the context of a discussion of cases relating to the legislative veto).

215. In support of a similar allocation in the proposed Constitution of the United States, Madison cites in Federalist Paper No. 48 the separation of power provisions of the constitutions of Virginia and Pennsylvania and explains the necessity of such separation to prevent the legislative department from controlling all of the powers of government. THE FEDERALIST NO. 48 (James Madison).

216. Madison notes in Federalist Paper No. 43 that the amendment process would guard “against that extreme facility which would render the Constitution too mutable.” THE FEDERALIST NO. 43 (James Madison).

stated by the Supreme Court in *United States v. Shreveport Grain & Elevator Co.*: "That the legislative power of Congress cannot be delegated is, of course, clear."²¹⁷

Though the proposition that only a legislature has the power to legislate may be unequivocal, the practical problems of governance have led to a more nuanced approach:

But while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts. Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.²¹⁸

As might be expected, the judicial decisions of the several states similarly reflect different views as to the point at which inevitable delegations go too far and become unconstitutional abdications. Despite the yearning for consistency, this is as it should be. The legislative power that cannot be delegated might be the power of a local government, or a state legislature, or the Congress, and the policy considerations and constitutional or charter provisions that shape the considerations of the appropriate court are not identical in every situation.²¹⁹ Despite this, examination of the interaction between non-delegation and

217. 287 U.S. 77, 85 (1932).

218. *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., concurring that no unconstitutional delegation of legislative authority existed, but dissenting on other grounds).

219. It is article II, section 3 of the Florida Constitution that prohibits the Florida legislature from delegating the power to legislate to others. *D'Alemberte v. Anderson*, 349 So. 2d 164 (Fla. 1977). See also *Anderson v. Tiemann*, 155 N.W.2d 322, 326 (Neb. 1967) (reaffirming an earlier decision that the state could not generally delegate to the federal government, but holding otherwise on the facts before it because the Nebraska Constitution had been amended to provide that the state could incorporate federal income tax provisions: what the state constitution generally prohibited, it now specifically allowed).

incorporation in the states reveals some generally accepted principles.

The *Dexter* presumption was originally crafted as an interpretive canon applicable to cross-references. The *Dexter* case involved one Florida statute's incorporation of another Florida statute. The rule is often still expressed in that same way: "When the adopting *statute* incorporates an earlier *statute* or a limited and a particular provision thereof by specific reference, such incorporation takes the statute as it existed at the time of incorporation and does not prospectively include subsequent modifications or a repeal of the incorporated statute or portions thereof."²²⁰

As has been shown, however, the *Dexter* presumption came to be more broadly applied to law promulgated by other government and private entities.²²¹ This expansion immediately brought incorporation by reference into direct contact with the non-delegation doctrine. In examining this interaction, references will be categorized here as either "internal" or "external." Although this distinction is only indirectly discussed in the case law, it is very useful in predicting and explaining the judicial decisions.

An internal reference is here defined as an adoption of material which is promulgated under the direct legal authority of the governmental entity making the reference. If state agency "A" has a rule that incorporates by reference a manual published by agency "A," a form designed by agency "A," or another rule of agency "A," the rule contains an internal reference. The most common internal references are known as cross-references.²²² A cross-reference is a reference to another portion of the same body of legislation in which the reference occurs,²²³ and so cross-references constitute a subset of internal references. The reference in one rule of agency "A" to another rule of the same agency

220. *Haw. Providers Network, Inc. v. AIG Haw. Ins. Co., Inc.*, 98 P.3d 233, 242 (Haw. 2004) (emphasis added) (citing *Union Cemetery v. City of Milwaukee*, 108 N.W.2d 180, 181-82 (Wis. 1961)).

221. *Hecht v. Shaw*, 151 So. 333, 333 (Fla. 1933) ("It is a general rule that when a statute adopts a part or all of another statute, *domestic or foreign, general or local*, by a specific and descriptive reference thereto, the adoption takes the statute as it exists at that time." (emphasis added)).

222. The widespread use of the cross-reference was noted *supra* note 2.

223. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 543 (1976) defines a cross-reference as "a notation or direction at one part of a work referring to pertinent information at another part."

would be a cross-reference, but references to a manual or form published by the same agency would not be, though all would be internal references. The more general term internal reference will be used here, for there is no practical difference in the legal treatment of cross-references and other internal references for purposes of the non-delegation doctrine.²²⁴

An external reference, on the other hand, is to material not promulgated under the direct legal authority of the adopting body. A state statute that refers to a federal statute contains an external reference because the state legislature exercises no direct legal control over the content of the federal statute. External references need not be to legislation of other government entities. If a county ordinance refers to standards for wind resistance established by the International Code Council, a non-governmental association, this is also an external reference, since the county exercises no direct legal control over the content of such standards.

When an internal incorporative reference is used, no delegation concerns arise. It is axiomatic that any delegation from a legislative body to itself—if that can be considered a delegation at all—is not an unconstitutional one, for exercise of the power by the legislative body is by definition consistent with the constitutional or charter provision originally vesting that power.²²⁵

When an external incorporative reference adopts only material in existence at the time the reference is made, there is similarly no

224. It should be noted that for other purposes of the incorporation doctrine, the distinction may be important. Florida Senate Bill 704 (2008), not yet signed into law by the Governor, would amend Florida's Administrative Procedure Act to distinguish cross-references from other internal references made in an administrative agency rule. It would make all cross-references automatically adopt any future changes made in the referenced rules without requiring amendment of the referencing rule (unless a contrary intent appears in the referencing rule). Other internal references, for example to agency manuals or forms, would continue to incorporate those materials only as they existed on the date of reference. This amendment would conform the law regarding cross-references to the usual expectation of the reader, while at the same time preserving the important requirement that subsequent changes in agency manuals and forms become effective only after rulemaking.

225. This logical conclusion has been followed in the cases and recognized by several commentators. *See, e.g.,* Read, *supra* note 4, at 283. Depending on how the "delegation" was effected, of course, other procedural issues might arise.

delegation.²²⁶ The adopting governmental body, in referencing existing external material, has had full opportunity to consider the content of this referenced material and so retains complete policy discretion. The legislating body may choose to adopt all of the external material without change, adopt it with modification, or not adopt it. There is no abdication. It is therefore critical in applying the non-delegation doctrine to determine if material is adopted only as it exists at the time of adoption. As has been shown, in the absence of more explicit expression of legislative intent, the *Dexter* presumption infers the intent to incorporate material only as it exists at the moment of adoption whenever a specific reference is used.²²⁷

When an external incorporative reference purports to adopt not only material in existence at the time the reference is made, but also subsequent changes to that material, most states have recognized that an unconstitutional delegation arises under some circumstances.²²⁸ It is impossible for the legislating body to know

226. See, e.g., *Riggins v. State*, 369 So. 2d 948 (Fla. 1979) (holding that a Florida statute which incorporated federal law in determining eligibility for the food stamp program as it existed on the date the Florida statute was enacted was not an unconstitutional delegation of legislative authority).

227. See *supra* Part IV.A.

228. See *Oklahoma City v. Okla. Dep't of Labor*, 918 P.2d 26 (Okla. 1995) (holding unconstitutional a statute adopting the wage level set under the Federal Davis-Bacon Act as delegating legislative authority); *Clemons v. Harvey*, 525 N.W.2d 185 (Neb. 1994) (holding a state incorporation of federal law could not constitutionally include provisions relating to medical assistance coverage for caretaker relatives that were not part of the federal law at the time of adoption but were adopted subsequently); *Radecki v. Dir. of Bureau of Worker's Disability Comp.*, 526 N.W.2d 611 (Mich. 1994) (holding the Worker's Disability Compensation Act incorporated by reference existing federal law because it would be an unlawful delegation of legislative power to adopt future legislation); *State v. Christie*, 766 P.2d 1198 (Haw. 1988) (holding state legislation adopting future legislation of another sovereign entity constitutes an unlawful delegation of legislative power); *State v. Thompson*, 627 S.W.2d 298 (Mo. 1982) (finding no delegation of power to control substances in Missouri through incorporation of federal statutes where substance is controlled only if the state must act to issue a rule after federal action); *Lee v. State*, 635 P.2d 1282 (Mont. 1981) (finding the legislature has authority to adopt existing federal statutes but requiring state authorities to adopt speed limits set under incorporated federal law is unconstitutional delegation); *Gumbhir v. Kan. State Bd. of Pharmacy*, 618 P.2d 837 (Kan. 1980) (finding unconstitutional a statute requiring a degree from a school accredited by a private organization from time to time); *State v. Rodriguez*, 379 So. 2d 1084 (La. 1980) (finding it unconstitutional for Louisiana to delegate to a federal agency or Congress its legislative power to make the possession of certain drugs a crime); *State v.*

Williams, 583 P.2d 251 (Ariz. 1978) (holding incorporation of regulations of a state department on unauthorized use of food stamps into state criminal law was a legitimate exercise of legislative power, but reference to future pronouncement in federal law would constitute unconstitutional delegation); *State v. Dougall*, 570 P.2d 135 (Wash. 1977) (finding an unconstitutional delegation for future federal designation of controlled substances to become controlled in Washington without affirmative state action); *First Fed. Sav. & Loan v. State Tax Comm'n*, 363 N.E.2d 474 (Mass. 1977) (finding constitutional a federal determination that deduction was allowed to a savings and loan because no future federal law was accepted as the law of the Commonwealth); *N. Lights Motel, Inc. v. Sweaney*, 561 P.2d 1176 (Alaska 1977) (finding no unconstitutional delegation in adoption of a code written by a national organization provided that no attempt was made to adopt future amendments); *People v. Harper*, 562 P.2d 1112 (Colo. 1977) (finding constitutional a statute incorporating only the scope of the federal enactment at the time of adoption and not future or prospective changes); *Hogen v. S.D. State Bd. of Transp.*, 245 N.W.2d 493 (S.D. 1976) (finding unconstitutional statutory direction to an agency to comply with all future changes in federal billboard or junk yard laws); *State v. Welch*, 363 A.2d 1356 (R.I. 1976) (holding that state incorporation of a federal controlled substances law could not constitutionally include subsequent changes that classified phencyclidine as a controlled substance); *State v. Grinstead*, 206 S.E.2d 912 (W. Va. 1974) (attempted adoption of future federal law controlling LSD was unconstitutional as an unlawful delegation of the legislative power); *State v. Julson*, 202 N.W.2d 145 (N.D. 1972) (interpreting a statute which incorporated provisions of the Federal Food, Drug, and Cosmetic Act to adopt only those provisions in existence at the time of adoption so the statute was not an unlawful delegation of legislative power); *Wallace v. Comm'r of Taxation*, 184 N.W.2d 588 (Minn. 1971) (finding a statute adopted federal provisions on sick pay which were in force at the time and could not grant to Congress the right to make future modifications or changes in Minnesota law); *Cheney v. St. Louis Sw. Ry. Co.*, 394 S.W.2d 731 (Ark. 1965) (finding an unconstitutional delegation for a statute determining certain taxable income through incorporation of future Federal Interstate Commerce Commission regulations); *Idaho Sav. & Loan Ass'n v. Roden*, 350 P.2d 225 (Idaho 1960) (finding unconstitutional provisions that delegated legislative power to the Congress and the Home Loan Bank Board to make future laws and regulations governing appellant's business); *Seale v. McKennon*, 336 P.2d 340 (Or. 1959) (finding unconstitutional a statutory direction to a state agency to adopt as the law of Oregon future laws of the United States and regulations of a federal agency); *Dawson v. Hamilton*, 314 S.W.2d 532 (Ky. 1958) (finding unconstitutional a state statute to the extent it adopts time standards to be fixed in the future by the Federal Congress or the I.C.C.); *City of Cleveland v. Piskura*, 60 N.E.2d 919 (Ohio 1945) (finding a city ordinance adopting future changes to federal law was an unlawful abdication of legislative authority); *Hutchins v. Mayo*, 197 So. 495 (Fla. 1940) (finding invalid a Citrus Commission rule that adopted federal standards for citrus fruits "as thereafter amended"); *Holgate Bros. Co. v. Bashore*, 200 A. 672 (Pa. 1938) (finding invalid a statute conforming working hours to schedule established by federal regulation as delegating power to a federal authority); *Darweger v. Staats*, 243 N.E. 380 (N.Y. 1935) (finding an unconstitutional delegation where a New York statute adopted federal NRA codes); *Green v. City of Atlanta*, 135 S.E. 84 (Ga. 1926) (holding that a

what changes may later be made by the entity promulgating the referenced material, or to exercise policy discretion with respect to those changes. The conclusion is that the legislating body has therefore allowed future amendment of the governing law to occur without the exercise of its discretion and so has abdicated its assigned role. In the absence of more explicit expression of legislative intent, the *Dexter* presumption infers the intent to adopt any future changes that might be made to the referenced material whenever a general reference is used.²²⁹

But if most states have at times recognized this relationship between incorporation and non-delegation, this is not to say that they have consistently done so.²³⁰ Statutes incorporating laws prescribing judicial procedures, rather than substantive law, have

reference ordinance fixing future salaries of Atlanta firemen by salaries of federal mail carriers was a surrender of legislative power); *State v. Intoxicating Liquors*, 117 A. 588 (Me. 1922) (finding invalid a statute incorporating by reference future enactments of Congress establishing definition of intoxicating liquors); *Santee Mills v. Query*, 115 S.E. 202 (S.C. 1922) (holding that a statute incorporating U.S. Department of Internal Revenue regulations did not incorporate future changes, but to do so would be unconstitutional); *Wagner v. City of Milwaukee*, 188 N.W. 487 (Wis. 1922) (finding unconstitutional an ordinance setting wages for city contractors to those set in the union scale as it might change from time to time); *Ex parte Elliott*, 973 S.W.2d 737 (Tex. App. 1998) (construing a statute adopting federal law to be laws in effect at the time of reference to preserve its constitutionality); *State v. Green*, 793 P.2d 912 (Utah Ct. App. 1990) (holding that crime definition and penalty powers are essential legislative functions that cannot constitutionally be delegated through incorporation of U.S. regulations); *People v. Pollution Control Bd.*, 404 N.E.2d 352 (Ill. App. Ct. 1980) (holding that legislative adoption of a private sporting group's sanction of events was an improper delegation of legislative authority); *People v. Kruger*, 121 Cal. Rptr. 581 (Cal. App. Dep't Super. Ct. 1975) (invalidating a state regulation adopting future federal regulations on yellowfin tuna as unconstitutional); *Wilentz v. Sears, Roebuck & Co.*, 172 A. 903 (N.J. Ch. 1934) (holding that the legislature could follow the federal government's policy, but it could not adopt it by reference to extent that New Jersey law would be later superceded by federal law).

229. See *supra* note 157 and accompanying text.

230. At least one commentator has suggested that it is impossible to discern any governing principles in incorporation by reference doctrine and urged the consideration of the need for uniformity in the substantive area being regulated. See Arnold Rochvarg, *State Adoption of Federal Law—Legislative Abdication or Reasoned Policymaking*, 36 ADMIN. L. REV. 277 (1984). While the perceived inconsistencies in almost all of the specific examples cited by Rochvarg seem to be explained by the principles outlined in this Article, the larger point that logical inconsistencies do exist cannot be denied.

sometimes been held to be "ambulatory" in adopting future changes to referenced external law without running afoul of the non-delegation doctrine.²³¹ Incorporations of accreditation lists, or criteria for specialized educational institutions, or practice standards issued by professional associations have often been exempted from application of the non-delegation doctrine.²³²

231. A series of early Florida cases seemed to flirt with this exception, but not expressly adopt it. *Kahn v. Weinlander*, 22 So. 653 (Fla. 1897) held that an act of 1828 that adopted rules of practice in U.S. courts by specific reference nevertheless made subsequent changes to the federal rules applicable in chancery causes in the courts of the Florida territory, but made no mention of non-delegation). Then *Farrell v. Forest Inv. Co.*, 74 So. 216 (Fla. 1917) changed the specific rule of practice followed in *Weinlander* because of yet another change in U.S. chancery rules, again without discussing non-delegation. Later *Surrency v. Winn & Lovett Grocery Co.*, 34 So. 2d 564 (Fla. 1948) suggested incorporation of the Federal Rules of Civil Procedure as to depositions was ambulatory but again did not discuss unconstitutional delegation, though the court did mention that both statutes related to procedural law. The constitutional prohibitions against incorporation by reference in New Jersey, New York, and New Mexico have sometimes been said to prohibit only the future adoption of substantive changes, not procedural ones. See *Port of N.Y. Auth. v. Heming*, 167 A.2d 609 (N.J. 1961) (finding a statute which adopted by reference only procedure necessary to effectuate its purposes was not prohibited by article IV, section 7); *Burke v. Kern*, 38 N.E.2d 500 (N.Y. 1941) (holding incorporation of procedure is not a violation of article III, section 16); *Ballew v. Denson*, 320 P.2d 382 (N.M. 1958) (holding procedural law may be adopted by another statute by reference without violation of constitutional article 4, section 16).

232. Accreditation issues may or may not involve incorporation by reference, depending on whether actual materials, as opposed to the entities producing those materials, are referenced in the legislation. Incorporation doctrine should be consistent with a state's general policy as to such delegations, however. The general rule is that accreditation by professional associations is not an unconstitutional delegation. See, e.g., *Lucas v. Me. Comm'n of Pharmacy*, 472 A.2d 904 (Me. 1984) (finding a statute requiring a degree from a pharmacy school to be accredited by the American Council on Pharmaceutical Education not unconstitutional); *In re Murphy*, 393 A.2d 369 (Pa. 1978), *appeal dismissed*, 440 U.S. 901 (1979) (holding a requirement that a law degree be from an ABA accredited law school is not an unconstitutional delegation); *Ex parte Gerino*, 77 P. 166 (Cal. 1904) (finding that a statute prescribing that State Board of Medical Examiners should accept standards for diplomas prescribed from time to time by an association composed of colleges devoted to the work of preparing persons for the profession, makes the standard sufficiently fixed, definite, and certain); and cases cited therein. Florida is a bit equivocal. In *Attwood v. State ex rel. Newman*, 53 So. 2d 825, 827 (Fla. 1951), an "accredited college of pharmacy" was construed as necessarily being fixed as of the date of the enactment to preserve the constitutionality of the statute. Similarly, in *Spencer v. Hunt*, 147 So. 282, 287 (Fla. 1933), it was held that it did not matter whether accredited dental colleges meant only those colleges already accredited or those that a board determines later to be accredited, as that term was defined on the date the

While generally adoption of promulgations of private entities is found to be unconstitutional, in other cases it is not.²³³ Reciprocal

law took effect, but there would be an unconstitutional delegation if the statute were interpreted to allow the board to redefine "accredited" from time to time. *Cf. State ex rel. Kaplan v. Dee*, 77 So. 2d 768 (Fla. 1955) (upholding a statute requiring an applicant to be a graduate of a veterinary college recognized by the AVMA, but not expressly discussing how changes in the list of schools "recognized" from time to time would be interpreted); *Fla. Bd. of Bar Exam'rs ex rel. Barry Univ. Sch. of Law*, 821 So. 2d 1050 (Fla. 2002) (in which the timing issue is similarly not discussed, but in which the nature of the delegation under consideration that the ABA have accredited a law school within a specified time from graduation implicitly applied the court's ruling that no unconstitutional delegation was involved to changes in accreditation from time to time). *But see Gumbhir*, 618 P.2d 837 (finding unconstitutional a statute requiring a degree from a school to be accredited by a private organization in the future); *Allen v. State Bd. of Veterinarians*, 52 A.2d 131 (R.I. 1947) (finding constitutional a statute requiring graduation from veterinary school recognized by AVMA must adopt standards in place when the statute was enacted, not as changed over time); *State ex rel. Kirschner v. Urquhart*, 310 P.2d 261 (Wash. 1957) (finding unconstitutional a statute that declares accredited schools to be those on a list thereafter promulgated by a private association as attempting to delegate legislative power).

233. *Plastic Pipe & Fittings Ass'n v. Cal. Bldg. Standards Comm'n*, 22 Cal. Rptr. 3d 393 (Cal. Ct. App. 2004) (finding no unconstitutional delegation to the International Association of Plumbing and Mechanical Officials where there was no automatic approval of future changes); *Kingery v. Chapple*, 504 P.2d 831 (Alaska 1972) (approving a regulation incorporating motorcycle safety standards of the United States Standards Institute Safety Code, but noting that automatic incorporation of future changes would be unconstitutional); *Hillman v. N. Wasco County People's Util. Dist.*, 323 P.2d 664 (Or. 1958) (finding unconstitutional the adoption of the national electrical code as it was changed from time to time); *Blitch v. City of Ocala*, 195 So. 406 (Fla. 1940) (holding that a municipal ordinance requiring roofing shingles to conform to test specifications of the National Board of Fire Underwriters would be invalid as a delegation of authority if held to include future changes); *City of Tucson v. Stewart*, 40 P.2d 72 (Ariz. 1935) (finding it unconstitutional to allow an ordinance requiring construction to be in accordance with future regulations of a private association); *Wagner*, 188 N.W. 487 (finding unconstitutional an ordinance that set wage rates paid to city contractors to the wage set by the union scale as it might change from time to time); *State v. Crawford*, 177 P. 360 (Kan. 1919) (finding adoption of an electrical code promulgated by a private organization and revised from time to time was an unconstitutional delegation); *People v. Pollution Control Bd.*, 404 N.E.2d 352 (Ill. App. Ct. 1980) (holding legislative adoption of private sporting group's sanction of events was an improper delegation of legislative authority); *People v. Mobil Oil Corp.*, 422 N.Y.S.2d 589 (N.Y. Dist. Ct. 1979) (finding that local government adoption of a private association's future standards on flammable and combustible liquids was an unconstitutional delegation of legislative authority). *But see Colo. Polytechnic Coll. v. State Bd. for Cmty. Colls. & Occupational Educ.*, 476 P.2d 38, 42 (Colo. 1970) (finding a statute incorporating accreditation standards of

legislation, imposing a tax or fee on foreign corporations doing business in a state based upon incorporation by reference of the fees that similar corporations must pay in the referenced state, is also often found to be constitutional.²³⁴ Many other cases construe legislation referencing external materials in such a way as to avoid constitutional issues.²³⁵

private associations of colleges for purposes for matriculation was not unconstitutional); *State v. Wakeen*, 57 N.W.2d 364 (Wis. 1953) (finding a statute adopting the definition of "drug" from United States Pharmacopeia and any future changes was not an unconstitutional delegation); and cases cited therein.

234. See, e.g., *Gallagher v. Motor Ins. Corp.*, 605 So. 2d 62 (Fla. 1992) (holding incorporation of future enactments of other states into a formula for measuring Florida's retaliatory tax was not unconstitutional delegation). Cases are often not clear because they mix consideration of federal due process or equal protection grounds. See *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985). At least one state, in an old case, found such reciprocity to constitute an unconstitutional delegation, however. *Clark v. Port of Mobile*, 67 Ala. 217 (Ala. 1880) (finding a reciprocity statute setting the amount of the Alabama insurance license tax based on other state's taxes violated the prohibition on delegation of power). Cases upholding reciprocity schemes often consider them as extensions of the theory underlying contingency statutes, mentioned *infra* notes 293-95 and accompanying text.

235. In *Brazil v. Division of Administration, State Department of Transportation*, 347 So. 2d 755, 757 (Fla. Dist. Ct. App. 1977), the statute provided that it was the duty of the department to regulate signs relating to food, lodging, camping, vehicle service, and attractions "*subject to current federal regulations*." (emphasis added). This was held ambiguous because the term "current" could be read to mean those regulations "current" when the adoption took place, or "current" at a later time when the department was carrying out its responsibilities. The court, noting that it would be an unconstitutional delegation of legislative power for the legislature to adopt a federal rule in advance, interpreted the statute as incorporating only those regulations in effect at the time of the statute's enactment. *Id.* at 758.

The canon counseling the judiciary to interpret legislation in a constitutional manner can easily collide with the *Dexter* presumption. In *State v. Rodriguez*, 365 So. 2d 157 (Fla. 1978), all seven members of the Florida Supreme Court agreed that a Florida statute which purported to adopt future changes to federal food stamp legislation would be unconstitutional. Four justices concluded that the legislation at issue only incorporated federal law *as it existed* when the Florida statute was enacted, and so held the statute constitutional; three justices dissented, concluding that the Florida statute unconstitutionally incorporated *future* federal law. *Id.* at 160-61. The dissenting opinion, authored by Justice Sundberg, argued that the distinction between general and specific references must be applied to the Florida statute. *Id.* at 162 (Sundberg, J., dissenting). He maintained that since the reference was clearly a general one, making criminal as it did the use, transfer, acquisition, alteration, or possession of food stamps "in any manner not authorized by law" without citing any specific federal statute or regulation, the reference incorporated future changes, and so constituted an

B. Intergovernmental Relations

Intergovernmental relations are naturally affected by incorporation by reference and the non-delegation doctrine. Federal adoption of state or local legislation is of course governed by federal law, and so unconstitutional delegation is not generally found.²³⁶ Local government adoption of state and federal law is fairly common, and has received mixed treatment.²³⁷

unconstitutional delegation. *Id.* See also *Ex parte Elliott*, 973 S.W.2d 737 (Tex. App. 1998) (interpreting a statute adopting federal regulations "as amended" to mean as they had been amended up to the time of adoption by reference, thus the statute was not an unconstitutional delegation); *Clemons v. Harvey*, 525 N.W.2d 185 (Neb. 1994) (concluding a state incorporation of federal law could not include provisions relating to medical assistance coverage that was not part of the federal law at the time of adoption); *State v. Gill*, 584 N.E.2d 1200 (Ohio 1992) (interpreting a statute incorporating federal food stamp law "as amended" as adopting only those provisions existing on that date to preserve constitutionality); *Indep. Cmty. Bankers Ass'n v. State*, 346 N.W.2d 737 (S.D. 1984) (finding a reference to the Federal Bank Holding Company Act "as amended" meant as it existed at the moment of reference); *State v. Julson*, 202 N.W.2d 145 (N.D. 1972) (interpreting a statute incorporating provisions of the Federal Food, Drug, and Cosmetic Act to adopt only provisions in existence at the time of adoption to preserve constitutionality); *Johnston v. State*, 181 S.E.2d 42 (Ga. 1971) (finding a statute not unconstitutional if its incorporation is limited to present regulations); *Wallace v. Comm'r of Taxation*, 184 N.W.2d 588 (Minn. 1971) (limiting adopted federal provisions on sick pay to those in force at the time); *Seale v. McKennon*, 336 P.2d 340 (Or. 1959) (interpreting "and to maintain that status" as only referring to one section referenced to preserve constitutionality); *Palermo v. Stockton Theatres*, 195 P.2d 1 (Cal. 1948) (interpreting a reference as specific to avoid the issue of constitutionality); *Blitch v. City of Ocala*, 195 So. 406 (Fla. 1940) (holding a municipal ordinance to have referenced only specifications in existence on the date the ordinance took effect to preserve constitutionality). A critique of such restrictive interpretations may be found in Jonathan E. Becker, *State v. Gill: Unconstitutional Delegations Go Uncorrected*, 20 OHIO N.U. L. REV. 169 (1993).

236. Except for two 1935 cases, the U.S. Supreme Court has never declared a statute unconstitutional on delegation grounds, despite frequent statements that the legislative power may not be delegated. As would be expected, incorporations of future state and local law similarly pass muster. Incorporation of state criminal law arises under the Assimilative Crimes Act (ACA), which provides that when a person on a federal enclave commits an act that is not a violation of federal law but is a violation of the laws of the state in which the enclave is located, the person may be prosecuted in federal court and shall be subject to a punishment like that provided for by state law. 18 U.S.C. § 13 (2006).

237. In *State ex rel. Springer v. Smith*, 189 So. 2d 846 (Fla. Dist. Ct. App. 1966), the court was confronted with a city ordinance that made unlawful the commission of any act recognized as a misdemeanor by the Florida Statutes.

State incorporation of provisions of the U.S. Code and Code of Federal Regulations will be considered here in greater detail. These incorporations are especially critical because they implicate the fundamental relationship between the states and the national government in our federal system. While states have probably adopted federal law on almost every imaginable subject, historically there have been a few issues that have resulted in numerous states adopting the same or similar law. These subject

One issue before the court was whether the ordinance prohibited acts that the State of Florida did not declare to be misdemeanors until after the ordinance took effect in 1955. *Id.* at 847. The court cited *Hecht v. Shaw*, 151 So. 333 (Fla. 1933), for the *Dexter* presumption that when a statute incorporates the law on a particular subject generally, it includes not only the law in force on the date the adopting statute becomes effective, but also all subsequent laws on that subject. *Id.* The fourth district then ended its inquiry, apparently concluding that the *Hecht* case authorized the city to make such a future incorporation. *Id.* at 848.

The *Hecht* case, of course, concerned one Florida statute adopting another Florida statute—an internal reference—so no delegation was possible there. 151 So. at 333. In *Smith*, by contrast, the court determined that it was the municipality's intent to delegate the authority to define violations of the city's own ordinance to an external entity: the state legislature. 189 So. 2d at 848. Similarly, in *Jaramillo v. City of Homestead*, 322 So. 2d 496 (Fla. 1975), the Florida Supreme Court stated in dicta that an ordinance which incorporated state law by general reference resulted in subsequent amendments and repeals of the state law having the effect of amending the municipal ordinance. *Id.* at 498.

These cases do not appear to have considered Florida Statutes section 165.091, which expressly restricted municipal incorporation by reference to material in existence on the date of adoption, and which seems to have been in effect in each case when the adoptions were made. Section 165.091 was repealed by 1974 FLA. LAWS 74-192. As discussed in the case of *State ex rel. McFarland v. Roberts*, 74 So. 2d 88 (Fla. 1954), the authority to incorporate state misdemeanors existed prior to the enactment of section 165.091 under the charter power of cities under Florida's constitution. *Id.* at 89. The Florida Supreme Court recognized in *Rodriguez*, 365 So. 2d 157, that a general reference provides no immunity from application of the non-delegation doctrine when an external reference is involved. *Id.* at 160. Since local governments are subdivisions of a sovereign state, it is conceivable that some special exception to non-delegation may exist, but research did not uncover any commentary or case containing a reasonable explanation of why this might be so. The cases more often just cite to historical precedent, which is mixed. Compare *Robinson v. Tax Comm'r*, 574 N.E.2d 596 (Ohio Com. Pl. 1989) (finding a municipal tax ordinance referencing future amendment of state statute was an unlawful delegation of legislative authority), with *Evans v. Sunshine Jr. Stores*, 587 So. 2d 312 (Ala. 1991) (finding that a municipal ordinance that referred generally to law relating to the subject under consideration adopted subsequent modifications, including the repeal of the state statute it referenced).

areas provide useful points to compare the treatment of incorporation in the different states.

1. Prohibition

Prohibition was one of the first experiments in concurrent federal and state enforcement. The structure imposed by the Eighteenth Amendment to the U.S. Constitution²³⁸ and the National Prohibition Act (the Volstead Act)²³⁹ allowed states to take disparate approaches to implementing prohibition. A few state statutes that incorporated provisions of the federal act by reference found their way to the courts. Massachusetts determined that state incorporation of provisions of substantive law to be passed by the Congress in the future constituted unconstitutional delegation in violation of their state constitution.²⁴⁰ Maine concurred.²⁴¹ The California Supreme Court “conceded” that statutes with future incorporation would be unconstitutional, but expressly declined to apply that rule to the Volstead Act, since future incorporation was not applicable to the case at hand.²⁴² The Nevada Supreme Court invalidated that state’s statute on the grounds that the title of the act had not properly expressed the subject in its title as constitutionally required, referring as it did to only the National Prohibition Act and containing no other description; but delegation apparently lurked in the shadows.²⁴³ In

238. The Eighteenth Amendment was ratified by the requisite number of states by January 29, 1919.

239. National Prohibition Act, 41 Stat. 305 (Oct. 28, 1919) *repealed* by U.S. CONST. amend. XXI.

240. *In re* Opinion of the Justices, 133 N.E. 453 (Mass. 1921).

241. *See* State v. Intoxicating Liquors, 117 A. 588 (Me. 1922). Maine had amended its liquor law to define “any beverage containing a percentage of alcohol, which by federal enactment, or by decision of the Supreme Court of the United States, now or hereafter declared, renders a beverage intoxicating” to be intoxicating under state law. *Id.* at 589. At the time of enactment of the state statute, the Eighteenth Amendment had been ratified, but the Volstead Act had not become law.

242. *Ex parte* Burke, 212 P. 193, 194 (Cal. 1923) (finding nothing in the statute which made it invalid so far as it adopted the existing provisions of the Volstead Act).

243. *Ex parte* Mantell, 216 P. 509, 510 (Nev. 1923). The dissent interestingly mentions an “official opinion of the Attorney General” that had concluded the statute was unconstitutional as making future amendments of the U.S. Congress part of the Nevada law, but this issue was not before the court. *Id.* at 511.

New Mexico, the state's statute was found invalid under the constitutional provision against amendatory references, the court finding it also applicable to certain incorporative references.²⁴⁴

But consider treatment of the delegation issue in Pennsylvania,²⁴⁵ which had incorporated into its statute the federal definition of "intoxicating liquor" just as the Maine statute had, yet found no unconstitutional delegation. The opinion concluded that a provision that made no change whatsoever in the law and could have been omitted without effect could not invalidate the statute.²⁴⁶ The court went on to address in greater detail the question of whether there had been a violation of the state's constitutional prohibition against amendatory references,²⁴⁷ concluding there had not.

2. *New Deal Legislation*

In the 1930s, there was a wave of federal and state interacting legislation intended to address the Great Depression. Again, a few states utilized incorporation by reference. In Pennsylvania, the supreme court took a very different position than it had in the prohibition case fifteen years earlier.²⁴⁸ Before the court was a state statute directing a state department to set a schedule of hours of labor and providing that this schedule had to conform to schedules to be later established by federal authorities.²⁴⁹ The court declared it unconstitutional, saying, "A more sweeping abdication of power and duty it would be difficult to imagine."²⁵⁰ New York invalidated a state statute requiring the state to file copies of all federal regulations promulgated to implement the National Industrial Recovery Act and making these regulations

244. *State v. Armstrong*, 243 P. 333 (N.M. 1924) (a detailed analysis finding state adoption of the Volstead Act to be "blind legislation" and concluding the admittedly incorporative reference was covered by the constitutional prohibition).

245. *Commonwealth v. Alderman*, 119 A. 551 (Pa. 1923). The court notes that the Volstead Act, the only piece of legislation on the subject, was enacted prior to the indictment. *Id.* at 553.

246. *Id.* at 552-53.

247. See the discussion of amendatory references *supra* Part II.A.2.

248. *Holgate Bros. v. Bashore*, 200 A. 672 (Pa. 1938).

249. *Id.* at 674.

250. *Id.* at 678.

New York law.²⁵¹ New Jersey invalidated a state statute essentially providing that the National Industrial Recovery Act was to be the state code.²⁵² The court called the statute “vicious legislation” and declared that the New Jersey Legislature must declare the law.²⁵³ In Nebraska, a state statute appropriating money for work relief under terms and conditions provided by an act of Congress to be passed in the future was declared unconstitutional.²⁵⁴

In California, the State Agricultural Adjustment Act created a more subtle link to the National Agricultural Adjustment Act. The orders and regulations of the Federal Secretary of Agriculture “heretofore *or hereafter* made” were declared to be California law “*when and in so far as* within the standards” specified in the *state* act.²⁵⁵ The state director was authorized by the statute to issue marketing licenses consistent with federal regulations only after having made an affirmative administrative determination that the federal regulations carried out the purposes of the state act and conformed to its standards.²⁵⁶ In *Brock v. Superior Court*, the California Supreme Court approved, concluding:

There is, therefore, no automatic incorporation by reference of future federal laws, but a declared policy of making our law correspond with federal regulation under circumstances set forth in our statute, and an adequate, constitutional means for carrying that policy into effect.²⁵⁷

The court therefore held that the insertion of an accountable intermediary—exercising the discretion of the state consistent with standards set forth in California law—destroyed any unconstitutional link between state law and future federal law. The court upheld the statute against contentions that it constituted both an unconstitutional delegation to the state director and an

251. *Darweger v. Staats*, 196 N.E. 61 (N.Y. 1935).

252. *Wilentz v. Sears, Roebuck & Co.*, 172 A. 903 (N.J. Ch. 1934).

253. *Id.*

254. *Smithberger v. Banning*, 262 N.W. 492 (Neb. 1935).

255. *Brock v. Superior Court*, 71 P.2d 209, 212 (Cal. 1937).

256. *Id.* at 211.

257. *Id.* at 213.

unconstitutional delegation to the Congress and the U.S. Secretary of Agriculture.²⁵⁸

3. Taxation

The complicated tax codes enacted by the federal government and most states have offered another area in which states have often sought to adopt federal definitions, procedures, deductions, and even rates.²⁵⁹ Comparison of these cases reveals no general rule about the extent to which this may constitutionally be done. Some states have invalidated provisions adopting future changes.²⁶⁰ Others have explicitly adopted provisions of the federal tax code only as they exist at the time of adoption; other courts have construed incorporating statutes in that way to avoid application of the rule that incorporation of future changes would be unconstitutional delegation.²⁶¹ In addition, Colorado, Kansas, Missouri, Nebraska, New York, and Virginia have adopted state constitutional amendments allowing state incorporation of federal

258. *Id.*

259. Jim B. Grant, Jr., *Conforming the State Income Tax to Federal Tax Law: Prospective Incorporation of Federal Changes and the Non-delegation Doctrine*, 40 ALA. L. REV. 233 (1988).

260. See *Cheney v. St. Louis Sw. Ry. Co.*, 394 S.W.2d 731 (Ark. 1965) (holding that establishing the appellee's tax liability to the state based upon a formula subject to prospective federal legislation or administrative rules was unconstitutional).

261. Florida readopts the provisions of the United States Internal Revenue Code each year, see FLA. STAT. § 220.03(1)(n) (2007), to avoid any questions of unconstitutionality. Note that the Florida Supreme Court held in *Presbyterian Homes of Synod of Florida v. Wood*, 297 So. 2d 556 (Fla. 1974) that a statute granting tax exemptions to homes for the aged based upon income limitations of the residents was unconstitutional because it provided that these income limitations were to be adjusted to conform to later increases established by the U.S. Department of Housing and Urban Development. See also *Thorpe v. Mahin*, 250 N.E.2d 633 (Ill. 1969) (finding a statute adopting federal income tax law as it was in effect on the date of state enactment was not an unconstitutional delegation of state legislative power to Congress); *Featherstone v. Norman*, 153 S.E. 58 (Ga. 1930) (finding adoption of existing exemptions and method of income tax was not unconstitutional where the statute did not make future federal legislation part of the state law); *Santee Mills v. Query*, 115 S.E. 202 (S.C. 1922) (reviewing an adoption of federal tax regulations that was ambiguous as to its intention to adopt future changes and interpreting it as adopting only existing law to keep the statute to the legitimate field of legislation).

tax law.²⁶² But at least five states have decided that future incorporation of some provisions of federal tax law is not an unconstitutional delegation.²⁶³

4. Drug Laws

The discovery and development of new drugs has made the control and prosecution of controlled substances a dynamic area. Many states have tried to adopt provisions of federal law classifying such drugs to draw upon greater federal scientific expertise and to promote uniformity. In *Freimuth v. State*, a Florida statute enacted in 1967 specifically described certain types of drugs that were prohibited but went on to restrict "any other drug to which the drug abuse laws of the United States apply."²⁶⁴ The opinion noted that at the time of the incorporation, the hallucinogenic drug STP was not registered by the federal

262. See COLO. CONST. art. X, § 19; KAN. CONST. art. 11, § 11; MO. CONST. art. X, § 4(d); NEB. CONST. art. VIII, § 1; N.Y. CONST. art. III, § 22; VA. CONST. art. IV, § 11. See also *Carter v. Dir. of Revenue*, 805 S.W.2d 154 (Mo. 1991); *Anderson v. Tiemann*, 155 N.W.2d 322 (Neb. 1967); *Rathborne v. Collector of Revenue*, 200 So. 149 (La. 1941) (holding that a state statute adopting definition of "capital assets" from federal statute could not mean subsequently adopted changes since under article III, section 18, the legislature shall never adopt a system or code of laws only by general reference).

263. See *McFaddin v. Jackson*, 738 S.W.2d 176 (Tenn. 1987) (holding that a statute adopting provisions of the federal tax code included future amendments but was not unconstitutional delegation since Tennessee had fixed the rates of the inheritance tax); *First Fed. Sav. & Loan v. State Tax Comm'n*, 363 N.E.2d 474 (Mass. 1977) (finding that a federal determination on deduction allowed to a savings and loan is not a case in which future federal law is accepted by the legislature as the law of the Commonwealth and thus is not an unconstitutional delegation of power); *Katzenberg v. Comptroller of Treasury*, 282 A.2d 465 (Md. 1971) (holding that state adoption of a federal definition of "income" is not an unconstitutional delegation without discussion of the effect of future changes, but that the statute appeared to refer to future changes); *Commonwealth v. Warner Bros. Theatres*, 27 A.2d 62 (Pa. 1942) (holding statutory adoption of a federal definition of "net income" in excise tax was not an unconstitutional delegation of legislative power notwithstanding that the amount of the deduction varied by federal law from time to time); *Underwood Typewriter Co. v. Chamberlain*, 108 A. 154 (Conn. 1919) (finding that a state statute imposing a tax based upon the net income subject to taxation under federal law did not represent an unconstitutional delegation of legislative power to Congress, particularly where the state statute made no attempt to include future legislation or regulations).

264. 272 So. 2d 473, 476 (Fla. 1972).

government: it did not appear in the Federal Register until 1968.²⁶⁵ The court held that it would be an unconstitutional delegation to apply amendments to the federal regulations that occurred after the enactment of the Florida law.²⁶⁶ This view is widely held.²⁶⁷

A few states²⁶⁸ have upheld drug abuse statutes patterned after the Uniform Controlled Substances Act. While some of these cases address different arguments, cases considering whether or not there was an unconstitutional delegation to the federal

265. *Id.*

266. *Id.*

267. *See* State v. Green, 793 P.2d 912 (Utah Ct. App. 1990) (holding unconstitutional an incorporation of federal provisions defining crime and penalty); State v. Rodriguez, 379 So. 2d 1084 (La. 1980) (finding it unconstitutional for the Louisiana legislature to delegate to a federal agency or Congress its legislative power to make the possession of certain drugs a crime); Cilento v. State, 377 So. 2d 663 (Fla. 1979) (finding valid a statute regulating controlled substances and incorporating a federal list when classification by the federal agency preceded the state legislative action prohibiting sale); State v. Dougall, 570 P.2d 135 (Wash. 1977) (finding a statute unconstitutional delegation insofar as it permitted future federal designation of controlled substances to become controlled or deleted substances under the Uniform Controlled Substances Act by means of board inaction or acquiescence); People v. Harper, 562 P.2d 1112 (Colo. 1977) (finding constitutional a statute incorporating by reference the Federal Controlled Substances Act at a time when natural and synthetic cocaine were prohibited substances under such Act); State v. Welch, 363 A.2d 1356 (R.I. 1976) (holding that state incorporation of a federal controlled substances act could not constitutionally include subsequent changes that classified phencyclidine as a controlled substance); State v. Grinstead, 206 S.E.2d 912 (W. Va. 1974) (invalidating an attempted adoption of future federal law controlling LSD as an unconstitutional delegation of the legislative power); State v. Julson, 202 N.W.2d 145 (N.D. 1972) (interpreting a statute incorporating provisions of the Federal Food, Drug, and Cosmetic Act to adopt only provisions in existence at the time of adoption and holding it not an unlawful delegation of legislative power); Johnston v. State, 181 S.E.2d 42 (Ga. 1971) (finding a statute not an unconstitutional delegation of legislative power to Congress because its express language limits the regulations which are to be applicable to present regulations); State v. Workman, 183 N.W.2d 911 (Neb. 1971) (finding unconstitutional incorporation of a changing federal drug list); State v. Johnson, 173 N.W.2d 894 (S.D. 1970) (finding a statute which prohibited sale of any drug designated by regulations under federal act unconstitutional); State v. Emery, 45 N.E. 319 (Ohio 1896) (interpreting a reference in a statute to the United States Pharmacopoeia to refer to the then existing edition because an attempt to incorporate future editions would be an unconstitutional delegation).

268. *See* State v. Thompson, 627 S.W.2d 298 (Mo. 1982); *Ex parte* McCurley, 390 So. 2d 25 (Ala. 1980); State v. King, 257 N.W.2d 693 (Minn. 1977); State v. Lisk, 204 S.E.2d 868 (N.C. Ct. App. 1974); Hilton v. State, 503 S.W.2d 951 (Tenn. Ct. App. 1973).

government in light of that act's *Brock*²⁶⁹ structure are most pertinent here. In Missouri, *State v. Thompson* involved a prosecution for illegal possession of pentazocine.²⁷⁰ The federal Drug Enforcement Administration had placed pentazocine on the schedule IV list of controlled substances in January of 1979. The state Division of Health similarly controlled pentazocine about one month later.

The Missouri Supreme Court pointed to two factors in holding the state statute constitutional. First, the statute did not provide that possession of any drug added to schedule IV was automatically a violation of Missouri law or require the Division of Health to automatically control it.²⁷¹ Rather, the statutory scheme required the state agency to consider whether or not to similarly restrict the drug, apply state statutory criteria in doing so,²⁷² and amend Missouri's schedule of controlled substances by rule, expressly indicating that the Division of Health had no objection to such control.²⁷³ Second, while containing a presumption of similar control by the state, the federal government action triggered only mandatory *consideration* of a substance.²⁷⁴ The "default" in the absence of affirmative state decision and implementing action was that the substance would not be controlled.

5. Cooperative Federalism

Perhaps the most intricate examples of state and federal interaction in government administration involve programs coordinated by the federal government but largely implemented through state legislation that meets federal standards.²⁷⁵ Congress ensures consistency with federal standards either by providing for

269. *Brock v. Superior Court*, 71 P.2d 209 (Cal. 1937) (discussed *supra* note 255 and accompanying text).

270. 627 S.W.2d 298.

271. *Id.* at 301.

272. *Id.* at 302. The court noted that federal action was not the sole factor considered in controlling a substance, but rather concluded that state standards set forth throughout the statute must be applied. *Id.* at 301 n.2.

273. *Id.* at 300.

274. *Id.* at 303.

275. As commentators have recognized, such collaboration may have policy benefits. Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 WM. & MARY L. REV. 1343, 1350 (2005).

only partial or potential preemption in conjunction with acceptable state regulatory regimes²⁷⁶ or by providing funding for state programs implemented in accordance with federal standards.²⁷⁷ In each case, however, the governing law is state law.

Maintaining state consistency with federal standards over time can be difficult. It is not impossible for state statutes to be amended each time incorporated federal material is amended,²⁷⁸ but it can be a burden, particularly if the referenced material changes frequently. If a state attempts to avoid frequent amendments by attempting to adopt future federal changes by reference, on the other hand, this may be held to violate the non-delegation doctrine.

The Resource Conservation and Recovery Act of 1976 (RCRA) is a cooperative federalism program based upon partial preemption created to establish a national system for regulating hazardous wastes.²⁷⁹ It authorizes each state to develop its own program consistent with federal minimum standards. The Texas Solid Waste Disposal Act defined solid waste by referencing "solid waste identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended."²⁸⁰

In *Ex parte Elliott*, the court noted that the final "as amended" might be read to conclude that it was the intention of the Texas legislature to allow future amendments to RCRA to be automatically incorporated.²⁸¹ However, the court also noted that a specific incorporation takes the statute as it appeared at the time of

276. See, e.g., David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1 (2000).

277. See, e.g., Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (Feb. 1998).

278. The Florida statute adopting the United States Internal Revenue Code is amended each year to incorporate changes made in the federal law. See FLA. STAT. § 220.03(1)(n) (2007).

279. 42 U.S.C. §§ 6901–92k (2006).

280. TEX. HEALTH & SAFETY CODE ANN. § 361.003(12) (Vernon 2007).

281. 973 S.W.2d 737 (Tex. App. 1998).

adoption without subsequent amendments.²⁸² The court then observed that a construction that was unconstitutional should be avoided and concluded that the phrase "as amended" meant as RCRA had been amended up to the time of its adoption by state law, and not subsequently.²⁸³ Other states have come to similar conclusions.²⁸⁴

The Medicaid Act, Title XIX of the Social Security Act, is a cooperative federalism program based upon contingent funding designed to provide medical assistance to persons whose income is insufficient to meet the costs of medical care.²⁸⁵ A participating state may also elect to provide various other optional medical services outlined in federal law. In *Clemens v. Harvey*, questions involving delegation of authority to the federal government arose.²⁸⁶ Under Medicaid, Nebraska had for many years provided

282. *Id.* at 742.

283. *Id.*

284. *See* State v. Carey, 920 P.2d 1 (Ariz. Ct. App. 1995) (holding that a rule that expressly incorporated hazardous waste provisions of federal RCRA regulations without future editions was unaffected by the invalidity of the referenced federal regulations); *People v. Harris Corp.*, 483 N.Y.S.2d 442 (N.Y. App. Div. 1984) (invalidating the adoption of a federal list of hazardous wastes under RCRA where a complete copy of the federal regulations existing at the time of adoption was not filed because the constitution forbids wholesale incorporation of federal regulations). *But see* State v. All Pro Paint & Body Shop, Inc., 639 So. 2d 707 (La. 1994) (upholding state incorporation of federal RCRA's requirements because Louisiana retained power to adopt its own hazardous waste laws in lieu of the federal program).

285. 42 U.S.C. §§ 1396-96s (2007).

286. 525 N.W.2d 185 (Neb. 1994). A detailed consideration of the case may be found in Jeffery R. Kirkpatrick, *Restraining Agency Action: Administrative Discretion and Adoption of Statutes by Reference in Clemens v. Harvey*, 75 NEB. L. REV. 621 (1996). Another interesting delegation case involving Medicaid is *Diversified Investment Partnership v. Dep't of Social & Health Services*, 775 P.2d 947 (Wash. 1989), which examined a state statute providing that when any provision of state law created a conflict with federal law that threatened the loss of federal funding, the state provisions in conflict were automatically rendered inoperative. The statute then authorized the implementing state agency to promulgate an interim rule amending any existing regulations and provided for submission of changes to the state legislature. *Id.* at 948-49. Changes to the federal Medicaid program subsequently created such a conflict, and the state provision declaring any conflicting state provisions inoperative was challenged as an unconstitutional surrender of power to the federal government. *Id.* at 949. The Washington Supreme Court determined otherwise. It noted that the general rule that the legislature may properly condition the operative effect of a statute upon a future event specified in the law and that this does not transfer the state legislative power to render judgment to the persons or entity capable of bringing about that event. *Id.* at 952.

medical services to certain "caretaker relatives" who were not eligible for Aid to Dependent Children (ADC) benefits because their income or resources were above the ADC standard, but were low enough to make them eligible for the medical assistance benefits.²⁸⁷ At the time the operative Nebraska statute adopted federal Medicaid law, these "caretaker relative" provisions were mandatory, but federal law was subsequently amended to make them optional.²⁸⁸ In reliance upon this change in federal law, the state agency overseeing Medicaid subsequently eliminated these benefits administratively, without seeking any amendment of the Nebraska statute.²⁸⁹

The Nebraska Supreme Court noted that the state statute had incorporated the federal Medicaid legislation at a time when these benefits were mandatory and concluded that it would be an unconstitutional delegation of constitutional authority for that statute to adopt later federal changes without legislative consideration.²⁹⁰ It therefore ruled that the caretaker relative benefits remained in force in Nebraska until changed by state law.

The *Clemens* case thus illustrates that cooperative federalism requires adequate supporting legal authority to be enacted by both the state and the federal government. It is obvious that without overarching federal statutory authority, no cooperative program even exists. Notwithstanding provisions of federal law however, a state agency without adequate state statutory authority to do so

The court's decision seems perfectly correct on that point, but it begs the question as to the authority for the new interim regulations. Perhaps the wrong state provision was challenged, for it is seldom that the simple repeal of inconsistent authority would leave in place adequate state authority to allow the agency to automatically conform its regulations to the new federal provisions.

287. *Clemens*, 525 N.W.2d at 187.

288. *Id.* at 188-89.

289. *Id.*

290. *Id.* at 189. See also similar issues involving food stamp programs. *State v. Gill*, 584 N.E.2d 1200 (Ohio 1992) (upholding a statute incorporating federal food stamp law "as amended" and adopting only those provisions that existed on that date); *State v. Rodriguez*, 365 So. 2d 157 (Fla. 1978) (interpreting a statute providing that any person who knowingly uses food stamps in any manner not authorized by federal food stamp law to refer to law and regulations in effect at the time the statute was enacted to preserve its constitutionality); *State v. Williams*, 583 P.2d 251 (Ariz. 1978) (declaring a portion of a reference to future federal legislation on use of food stamps an unconstitutional delegation of legislative power).

cannot comply with federal standards. While not an issue in the *Clemens* case because of the fact that the state law mandated greater benefits than were optional in the federal program, in other circumstances a lack of state authority to comply with required federal standards could result in loss of funding and failed implementation of the program.²⁹¹ Thus the statutory structures by which a state incorporates federal law by reference are of critical importance.

C. Accountable Intermediaries

The cases discussed above demonstrate that fidelity to the need for both nationwide uniformity and flexibility on the one hand and independent state legal authority on the other can make implementation of cooperative federalism programs especially tricky.²⁹² Two universally recognized exceptions to the non-delegation doctrine can help. Contingency legislation and subsidiary legislation can be combined in a statutory structure that can survive scrutiny under the non-delegation doctrine.

Contingent legislation arises when a legislative body creates a law and provides that all or a portion of it is to take effect only upon the happening of a given fact or contingency.²⁹³ A legislative body may delegate to executive agents or boards the power to determine this fact or state of affairs upon which the effectiveness of the law depends. Conditioning the operative effect of legislation upon the happening of a future event specified by the legislative body is not a delegation of legislative power to the persons or entity capable of bringing about that event or determining that it has occurred.²⁹⁴ However, the legislation must

291. *West Virginia v. U.S. Dep't of Health & Human Servs.*, 289 F.3d 281 (4th Cir. 2002) (finding that a lack of West Virginia legislation to implement changes to federal Medicaid law risked loss of all or part of its funding).

292. Rossi, *supra* note 275, outlines tensions that can be present in cooperative federalism programs, reviews several approaches state courts have used to address them, and suggests interpretations of state separation of power doctrine that are less independent and more integrated into a federal constitutional whole.

293. Samuel Mermin, "Cooperative Federalism" Again: *State and Municipal Legislation Penalizing Violation of Existing and Future Federal Requirements*, 57 YALE L. J. 1, 9 (1947).

294. See, e.g., *The Aurora*, 11 U.S. (7 Cranch) 382 (1813); *Diversified Inv. P'ship v. Dep't of Soc. & Health Servs.*, 775 P.2d 947 (Wash 1989) (ruling that

be complete in itself. It is the operative *effect* of the legislation, and not its *content*, that is made contingent upon the fact or event.²⁹⁵

Subsidiary legislation might be defined as the implementing legal instruments issued by a designated agent pursuant to power delegated by a superior governing law. The non-delegation

a state statutory provision in conflict with federal Medicaid property reimbursement is not an incorporation of future federal law or an unconstitutional transfer of legislative power); *State v. Dumler*, 559 P.2d 798 (Kan. 1977) (holding a provision in a statute regulating highway speeds providing that it would expire on the date when Congress removed all restrictions on maximum speed limits not to be an adoption of future federal legislation or an unconstitutional delegation); *People v. Parker*, 359 N.E.2d 348 (N.Y. 1976) (finding that a statute which defined "predicate felony" under the former habitual offender statute as a crime for which imprisonment exceeding one year could be imposed, regardless of whether crime was committed in New York or out-of-state, did not result in delegation of legislative power, but that the New York definition of "felony" applied to crimes committed in other jurisdictions, a factual determination, and thus there was no adoption of statutes of another state); *Gibson Prod. Co. v. Murphy*, 100 P.2d 453 (Okla. 1940) (upholding a provision of the Oklahoma Unemployment Compensation Act prescribing that it is ineffective if the Federal Social Security Act is declared invalid).

295. Such contingent legislation is similar to another exception to the non-delegation doctrine: the determination of scientific or statistical facts. In *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 311 (Fla. 1984), a state department determined future fuel price adjustments by applying a statutory formula. The formula utilized changes in the average monthly gasoline price component of the Consumer Price Index issued periodically by the United States Department of Labor. *Id.* at 315. *Eastern Air Lines*, citing the incorporation by reference doctrine, argued that this statutory incorporation of future publications of another government entity was an unconstitutional delegation. *Id.* at 316. The Florida Supreme Court declined to so hold. Although the opinion contains no precise exposition of the court's reasoning, mention is made that the statutory power of the U.S. Secretary of Labor is to collect, collate, and report statistics. *Id.* at 315. The court also notes that the Florida statute incorporated the federal index for the purposes of making a ministerial determination, and that there was no incorporation of "federal statutes or administrative rules which substantively change the law." *Id.* at 316. The court seems to be recognizing that no delegation took place because publication of the Consumer Price Index is not a statement of law or policy in any sense, but merely a reporting of *objective facts that exist outside of any decision to be made by the federal agency*. *Id.* at 316-17. The publication of an index of price information constitutes a ministerial act, not the exercise of discretion. *Cf. Presbyterian Homes of Synod of Florida v. Wood*, 297 So. 2d 556 (Fla. 1974) (holding the granting of tax exemptions depending upon income limitations unconstitutional because the limitations were governed by *policy determinations* made by the federal government).

doctrine as interpreted in all fifty states allows legislative bodies to delegate to its administrative agents. A fairly recent survey concluded that a large majority of the states²⁹⁶ require that the delegating statute contain sufficient standards or principles to govern these agencies in their exercise of discretion. These statutory standards not only provide guidance to the agency but also provide a basis for legislative oversight and judicial review. A small minority of states²⁹⁷ allow delegation to an agent if sufficient procedural safeguards are in place.²⁹⁸

The legislative standards approach applicable in most states creates a distinction between validly delegated “administrative” power and invalidly delegated “legislative” power.²⁹⁹ The

296. Gary Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567 (1994), concluded that all but six states require either strict or loose standards; the remaining six require only procedural safeguards.

297. *Id.* at 598–99 (identifying only California, Iowa, Maryland, Oregon, Washington, and Wisconsin as following the procedural safeguards approach).

298. The Florida Supreme Court summarized the procedural safeguards approach associated with Professor Kenneth Culp Davis and explained its rejection in Florida in *Askew v. Cross Key Waterways*, 372 So. 2d 913, 922–25 (Fla. 1978) (“Professor Davis maintains that there should be a shift in emphasis from legislatively imposed standards for administrative action to procedural safeguards in the administrative process The Davis view is an entirely reasonable one as demonstrated by its adoption in the federal courts and a minority of state jurisdictions, nonetheless, it clearly has not been the view in Florida Until the provisions of Article II, Section 3 of the Florida Constitution are altered by the people we deem the doctrine of non-delegation of legislative power to be viable in this State.”).

299. Perhaps the most widely quoted test was set forth in *Cincinnati, Wilmington & Zanesville Railroad Co. v. Clinton County Comm’rs*, 1 Ohio St. 77, 88–89 (Ohio 1852) (“The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.”). See *Taxpayers of Mich. Against Casinos v. State*, 732 N.W.2d 487 (Mich. 2007); *Opinion of the Justices*, 892 So. 2d 332 (Ala. 2004); *Carmel Valley Fire Prot. Dist. v. State*, 20 P.3d 533 (Cal. 2001); *Joytime Distribs. & Amusement Co., Inc. v. State*, 528 S.E.2d 647 (S.C. 1999); *Opinion of the Justices*, 725 A.2d 1082 (N.H. 1999); *Mead v. Arnell*, 791 P.2d 410 (Idaho 1990); *Von Ruden v. Miller*, 642 P.2d 91 (Kan. 1982); *Madison Metro. Sewerage Dist. v. Dep’t of Natural Res.*, 216 N.W.2d 533 (Wis. 1974); *Dixon v. Zick*, 500 P.2d 130 (Colo. 1972); *Pine v. Leavitt*, 445 P.2d 942 (Nev. 1968); *State v. Rivera*, 149 N.W.2d 127 (Iowa 1967); *State ex rel. State Park & Recreation Comm’n v. N.M. State Auth.*, 411 P.2d 984 (N.M. 1966); *Remington Arms Co. v. G.E.M. of St. Louis, Inc.*, 102 N.W.2d 528 (Minn. 1960); *Remington Arms Co. v. Skaggs*, 345 P.2d 1085 (Wash. 1959); *Graves v. Johnson*, 63 N.W.2d 341 (S.D. 1954); *City of Alexandria v. Alexandria Fire*

distinction lies in the sufficiency of the standards included within the delegation. If the legislature has included sufficient standards in the delegation, then it is found to have only delegated administrative power to carry the law out pursuant to those standards. If the legislature has not included sufficient standards to bind the delegatee and provide for judicial review, then it has delegated legislative power to make the law, and such delegation is found to be constitutionally invalid.

The delineation of applicable standards saves an otherwise unconstitutional delegation, because the administrative agent is obliged by law to follow the guiding standards in exercising the delegation and courts can require compliance with those standards. It follows that standards which do not provide such guidance, or delegates who are not obliged to follow them, will result in an unconstitutional delegation. Nevertheless, cases occasionally suggest that the presence of legislative standards in an external reference might somehow authorize the adoption of subsequent changes.³⁰⁰ These cases attempt to use the concept of subsidiary

Fighters Ass'n, Local No. 540, 57 So. 2d 673 (La. 1952); Terrell v. Loomis, 235 S.W.2d 961 (Ark. 1951); Robertson v. Schein, 204 S.W.2d 954 (Ky. 1947); State *ex rel.* Nelson v. Butler, 17 N.W.2d 683 (Neb. 1945); Bailey v. State Bd. of Pub. Affairs, 153 P.2d 235 (Okla. 1944); Chester County Inst. Dist. v. Commonwealth, 17 A.2d 212 (Pa. 1941); First Suburban Water Util. Dist. v. McCanless, 146 S.W.2d 948 (Tenn. 1941); Milk Comm'n v. Dade County Dairies, 200 So. 83 (Fla. 1940); Williamson v. Hous. Auth., 199 S.E. 43 (Ga. 1938); Dunn v. City of Indianapolis, 196 N.E. 528 (Ind. 1935); Van Winkle v. Fred Meyer, Inc., 49 P.2d 1140 (Or. 1935); State *ex rel.* Orr v. Kearns, 264 S.W. 775 (Mo. 1924); Biffer v. City of Chicago, 116 N.E. 182 (Ill. 1917); Armour & Co. v. City of Richmond, 87 S.E. 609 (Va. 1915); O'Neill v. Yellowstone Irrigation Dist., 121 P. 283 (Mont. 1912); Clyde v. Cummings, 101 P. 106 (Utah 1909); Dent v. United States, 71 P. 920 (Ariz. 1903); Kennedy v. Mayor of Pawtucket, 53 A. 317 (R.I. 1902); Metro. Life Ins. Co. v. Ins. Comm'r, 473 A.2d 933 (Md. Ct. Spec. App. 1984); Martin v. State Liquor Auth., 252 N.Y.S.2d 365 (N.Y. App. Div. 1964); Two Guys from Harrison, Inc. v. Furman, 156 A.2d 57 (N.J. Super. Ct. Law Div. 1959); Ferch v. Hous. Auth., 59 N.W.2d 849 (N.D. 1953); *In re* Blackstone, 190 A. 597 (Del. Super. Ct. 1937).

300. Consider the curious dicta of State *ex rel.* Ware v. City of Miami, 107 So. 2d 387 (Fla. Dist. Ct. App. 1958), in which the court invalidated a city ordinance purporting to require written certification from the Florida State Welfare Board as a condition of city renewal of a nursery license. The third district went on to suggest that had the city included as part of its ordinance the guides or standards to be applied by the State Board in determining the applicant's fitness, the ordinance would have been valid. *Id.* at 388. There is of course no legal authority for a city to prescribe the standards which must be

legislation directly, by providing in the adopting legislation that certain standards govern the entity promulgating the referenced material.

This approach is logically flawed. The external body promulgating the referenced material is, by definition, not an agent of the adopting governmental entity, and so courts cannot compel compliance with the standards. This principle is quite clear in cooperative federalism cases. As the Supreme Judicial Court of Massachusetts declared long ago, "No discussion is required to demonstrate that the Congress of the United States cannot be treated as a subsidiary board or commission" ³⁰¹ No state has legal authority to dictate that the federal government comply with standards adopted by the state to guide its discretion, and no court has the power to compel such compliance.

However, the concepts of contingency and subsidiary legislation have been successfully employed in cooperative federalism situations through the use of accountable intermediaries, as discussed in the *Brock* model, above. ³⁰² Accountable intermediaries are bona fide agents of the state, created under its authority and bound by law to follow standards prescribed by the state legislature. If constructed properly, a statute may assign these intermediaries responsibility to utilize subsidiary legislation to implement state law in response to changes in federal standards.

In the cooperative federalism context, subsidiary legislation passing constitutional muster in non-delegation states appears to

applied by a state board. *Id.* Even if the city had authority to bind a State Welfare Board in this way, it would be completely impractical to have a state board apply different standards to each nursery application depending on its city of origin. See also Comment, *Constitutional Law—Validity of State Recovery Acts Adopting Federal Codes*, 33 MICH. L. REV. 597 (1934), which suggested that the unconstitutionality of attempted state adoption of future federal administrative codes of fair competition formulated under the National Industrial Recovery Act might be avoided by inclusion of standards within the state legislation *directed to the federal officers adopting the codes*. The Comment did not discuss how the inclusion of "standards" that would not be consulted or applied by anyone could somehow affect constitutionality. Research uncovered no state recovery acts that attempted to include standards applicable to federal officers adopting the codes.

301. *In re Opinion of the Justices*, 133 N.E. 453, 454 (Mass. 1921).

302. See *supra* note 255 and accompanying text.

involve four elements. First, a change in federal standards may not automatically trigger a change in state law, but under a theory of contingent legislation may mandate that accountable state agents take action.³⁰³ Such statutory direction is not a delegation to the federal government, but only a direction to the accountable intermediary to take action in response to a contingency that has occurred.

Second, the accountable intermediary cannot be directed by state law to automatically adopt subsidiary legislation consistent with the federal changes.³⁰⁴ Rather, the action that must be taken is *consideration* of changes to state policy. The intermediaries must be given the opportunity to exercise state discretion to adopt, or not adopt, such changes.³⁰⁵

Third, in making the determination, accountable intermediaries must apply³⁰⁶ sufficient state statutory criteria. In crafting the statutory standards guiding agency discretion, such standards as uniformity, reciprocity, avoidance of federal preemption, or retention of federal funding could be among other legitimate policy standards to be considered. It is critical that such "federalism goals" not be the sole criteria, however, for such a statute would provide no opportunity for the accountable intermediary to decide

303. *State v. Thompson*, 627 S.W.2d 298 (Mo. 1982) (in which the control of a drug by the federal government triggered mandatory consideration of a substance, but no substance was automatically controlled in Missouri without the Missouri Division of Health rulemaking).

304. *Hogen v. S.D. State Bd. of Transp.*, 245 N.W.2d 493 (S.D. 1976) (holding unconstitutional statutory direction to a state agency to comply with all future changes in federal billboard or junk yard laws); *Seale v. McKennon*, 336 P.2d 340 (Or. 1959) (holding unconstitutional statutory direction to a state agency to adopt as the law of Oregon the future laws of the United States and regulations of a federal agency).

305. *N. Am. Safety Valve Indus., Inc. v. Wolgast*, 672 F. Supp. 488 (D. Kan. 1987) (upholding a statute as not unconstitutional because the state agency was required to review changes to the adopted material made by private industry and to take further action to adopt them before they became Kansas law).

306. While the statute must contain sufficient criteria, how those criteria were actually applied to facts is not generally a subject for judicial scrutiny. In *Cilento v. State*, 377 So. 2d 663 (Fla. 1979), the Florida Supreme Court declined to examine what, if any, "independent fact-finding efforts" were conducted by the Florida Legislature in support of its decision to adopt federal schedules of controlled substances. The court noted, "Where a factual predicate is necessary to the validity of an enactment, it is to be presumed that the necessary facts were before the legislature." *Id.* at 665. The same principle is invoked in support of subsidiary legislation.

not to adopt federal changes, no matter how otherwise contrary to state policy. The result would be mandatory adoption and in consequence an unconstitutional delegation.³⁰⁷ Federalism goals should be listed as controlling only when consistent with the other specified criteria applicable to the program area.³⁰⁸

Fourth, the intermediary must be required to take affirmative action to adopt the federal standards. Under the governing statute, the result in the absence of affirmative state action must be that the federal standards are *not* adopted.³⁰⁹ State action will take the form of subsidiary legislation of some kind otherwise consistent with state law.

The basic challenge in implementation of cooperative federalism programs is to allow federal standard makers sufficient flexibility to effect periodic changes in uniformly applicable standards while at the same time preserving the federal structure of our government by allowing each state to affirmatively exercise its discretion consistent with its own non-delegation doctrine. State referential legislation drafted following the *Brock* model as described here can substantially achieve these goals.

There is of course a time delay associated with such affirmative state approvals, but subsidiary legislation can be put in place much more quickly and efficiently than an amended state statute could. States can even create expedited rulemaking procedures applicable to the adoption of federal legislation.³¹⁰ If federal government agencies implementing cooperative programs could then limit the frequency of changes to federal standards and provide advance notice when changes are to be made, near seamless implementation could be achieved in many cases.

307. *Lee v. State*, 635 P.2d 1282 (Mont. 1981) (statute directing attorney general to proclaim speed limit required by federal law to receive federal highway funds was unconstitutional).

308. *See Brock v. Superior Court*, 71 P.2d 209 (Cal. 1937).

309. *State v. Dougall*, 570 P.2d 135 (Wash. 1977) (unconstitutional delegation occurred because statute permitted future federal designations of controlled substances to become controlled under state law by means of Board inaction or acquiescence).

310. *See, e.g., FLA. STAT. §120.54(6)* (2007) (providing a twenty-one day process for the adoption of federal standards).

VI. CONCLUSIONS

*If your Majesty will only tell me the right way to begin, I'll do it as well as I can.*³¹¹

On first glance, looking-glass law seems simple enough. Why not replace lengthy text with a simple reference to an identical version already published elsewhere? As has been shown, however, the drafter or interpreter of legislation who, like Alice, takes the time to explore behind this deceptively smooth surface, will find a topsy-turvy world of possibly unexpected consequences.

Incorporation by reference is at heart nothing more than a drafting technique to avoid the time and expense of setting forth all of the referenced language verbatim in the referencing statute, and its proper legal interpretation is just the same as if that more tedious task had in fact been done. However, the very omission of language creates the first danger inherent in reference legislation: confusion in determining exactly what was adopted. Statutes using incorporation by reference have been declared invalid for uncertainty when it was impossible at the time of application to identify the adopted provisions or when references were found so broad as to be unacceptably vague.

A greater number of unexpected consequences have arisen from the modification of incorporation by reference doctrine to allow automatic adoption of subsequent changes in the material to be adopted by the referencing provision if that was the legislative intent. The prospective adoption of changes that necessarily remain unknown at the time of enactment imparts an entirely new level of uncertainty, and courts in some cases have simply refused to so interpret a legislative reference depending on the nature of the subsequent changes.

The judicially devised *Dexter* presumption has not brought more certainty to the law, but has exacerbated problems. The general rule seems clear enough:

When a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, such provisions

311. CARROLL, *supra* note 1, at 172 (Alice).

are incorporated in the form in which they exist at the time of the reference, and not as subsequently modified; whereas, where the reference is general, such as a reference to a system or body of laws or to the general law relating to the subject in hand, the referring statute takes the law or laws not only in their contemporary form but also as they may be changed from time to time.³¹²

But the distinction between specific and general references can be difficult to apply in practice. More importantly, the presumption often fails to reflect the likely actual intention of the legislative body or the usual expectation of most readers, especially when applied to cross-references—a second inherent danger.

Finally, attempted incorporation of the future legislation of a different governmental or private body is often declared unconstitutional as an improper delegation of legislative power. The invalidation of reference legislation can frustrate legislative intent to maintain inter-jurisdictional consistency, particularly in state implementation of federal programs under concepts of cooperative federalism.

Several mechanisms and structures may be put in place to address these issues. Electronic filing of incorporated material has the potential to substantially eliminate most vagueness issues by identifying exactly what material has been adopted. The second issue—faithful implementation of legislative intent as to whether an adoption by reference includes subsequent amendments to the referenced material—can also be aided tremendously by electronic linkage. Careful implementation of a system of electronic hyperlinks by the legislating body can provide the reader with immediate access to the versions of incorporated material consistent with legislative intent over time.

Another mechanism to ensure more faithful implementation of legislative intent regarding fixed and ambulatory references is the referential legislation construction provision. Construction provisions providing that cross-references also adopt subsequent amendments to legislative cross-references, except as expressly

312. *Seale v. McKennon*, 336 P.2d 340, 345–46 (Or. 1959).

provided otherwise, provide a better default rule than the *Dexter* presumption.³¹³ Combined with careful use of hyperlink technology, statutory construction provisions can improve not only interpretive certainty but also fidelity to actual legislative intent.

The final issue highlighted by this Article—the unconstitutionality of attempted adoption of legislation yet to be promulgated by other entities—is perhaps the most critical. Especially in the cooperative federalism context, incorporation doctrine often pits the “irresistible force” of central policy coordination directly against the “immovable object” of state constitutional law precepts, to the benefit of neither. Minor structural adjustments in these programs at both the federal and state levels could restore not only consistency with state non-delegation doctrine but also the very “cooperative” element deemed so essential for their success. The seemingly insoluble dilemma of either maintaining uniformity over time or alternatively providing for affirmative state assent is at its core little more than a timing problem.³¹⁴ With federal administrative cooperation, state acceptance through action by accountable intermediaries consistent with the *Brock* model could substantially reduce non-delegation concerns.

The review of incorporation by reference attempted here was too broad to cover the many variations and inconsistencies that exist across the states, of course, but it did discern common principles in interpretation of this historic doctrine. The courts of the various states, each interpreting the doctrine in light of that state’s own constitution, created ways to address many of the dangers inherent in reference legislation and have prepared a foundation for new ideas—such as electronic hyperlinks to

313. Florida does not have a universal statutory construction provision relating to adoptions by reference, though it has adopted more focused provisions in a few instances. Several other states do have more universal statutory construction provisions relating to adoptions by reference. See *supra* Part IV.D.

314. While there may be rare instances when state legislatures actually oppose implementation of state programs consistent with federal standards, in the author’s experience these are extremely rare. The mechanisms of contingent funding and partial preemption—those twin workhorses of cooperative federalism—usually provide ample incentive. Concern is more often with maintaining consistency with such federal standards without unconstitutionally abdicating state legislative authority as interpreted by the state’s courts.

incorporated material—that promise even greater success. The doctrine remains viable.³¹⁵ As incorporation by reference outgrew its humble origins as a simple space saving technique and was transformed into a device used to adopt the future legislation of other governmental entities, the legal doctrines governing its use took on infinitely greater importance. Incorporation by reference doctrine implicates nothing less than the fundamental allocation of governmental power in our society and is worthy of far more attention by courts and legislative bodies than it has usually received.

315. Some recent cases include: *Young Partners, LLC v. Bd. of Educ.*, 160 P.3d 830 (Kan. 2007) (holding that adoption of statute by reference makes it as much a part of the later statute as though it had been incorporated at full length); *Johnsen v. State*, 269 Neb. 790 (Neb. 2005) (holding that the effect of a specific reference is the same as if the adopted language had been written out); *Haw. Providers Network, Inc. v. AIG Haw. Ins. Co., Inc.*, 98 P.3d 233 (Haw. 2004) (holding that a general reference adopts prospectively future alterations including repeal of the incorporated law); *Pentagon Acad., Inc. v. Ind. Sch. Dist. No. 1*, 82 P.3d 587 (Okla. 2003) (finding that a reference statute adopts other statutes and makes them applicable to the subject of the legislation); *Cloyd v. State*, 943 So. 2d 149 (Fla. Dist. Ct. App. 2006) (holding a statute incorporating federal regulations to be adopted in the future unconstitutional to that extent); *Jager v. Rostagno Trucking Co., Inc.*, 728 N.W.2d 467 (Mich. Ct. App. 2006) (holding that a referenced provision becomes part of the legislative enactment as it existed at the time of the legislation without subsequent amendments); *Plastic Pipe & Fittings Ass'n v. Cal. Bldg. Standards Comm'n*, 22 Cal. Rptr. 3d 393 (Cal. Ct. App. 2004) (suggesting the court would construe the statute to require affirmative government approval to avoid unconstitutional adoption of future changes to referenced building standards); *Ball Corp. v. Fisher*, 51 P.3d 1053 (Colo. Ct. App. 2001) (determining that a statute specifically incorporating enumerated provisions adopts them at the time of the adoption, without subsequent amendments, absent express legislative declaration to the contrary).

