1958

Effect of Changes in Legislation Incorporated by Reference

Edward R. Hayes

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/1217

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
Effect of
Changes in Legislation
Incorporated by Reference

The traditional objections raised by opponents to incorporation by reference have been based on unlawful delegation of legislative powers and due process limitations. Professor Hayes analyzes these objections in the light of the recent Supreme Court decision, United State v. Sharpnack, and suggests that re-examination of the underlying principles of such incorporation is needed.

Edward R. Hayes*

It is a cardinal principle of our fundamental law, inherent in our constitutional separation of the government into three departments and the assignment of the law making function exclusively to the legislative department, that the legislature cannot abdicate its power to make laws, or delegate this power to any other department or body.¹

One method by which a legislature may simplify its task of enacting laws is to make use of the provisions of an existing statute where appropriate to the problem before it. This may be accomplished by copying these provisions in full, or more simply by incorporating them in the new law by reference. Whether any incorporation by reference should be permitted has sometimes been doubted.² It may be an unwise method of legislating, but where the reference is only to existing law, courts have had little difficulty upholding the referring legislation.³ A more difficult problem is presented when the reference is not only to existing law but also to

* Professor of Law, Drake University Law School.
2. See Dickerson, Legislative Drafting § 8.2 (1954); Freund, Legislative Regulation § 16 (1932); Walker, The Legislative Process 343 (1948); Poldervaart, Legislation by Reference—A Statutory Jungle, 38 Iowa L. Rev. 705, 707–08 (1953).
that law as it may thereafter be modified; the problem is intensified when that law is a statute of another jurisdiction.

To some writers and judges there is no doubt that a legislature is powerless to enact a statute providing for incorporation by reference of prospective laws.\(^4\) They believe this position is implicit in federal and state constitutions and supported by policy, precedent and principle. But the recent decision of \textit{United States v. Sharpnack}\(^6\) sustained one congressional incorporation by reference of state laws, as subsequently modified, against a challenge that such incorporation violated the federal constitution. This decision may well affect consideration given by federal and state courts to other federal and state referential legislation.

In recent years there has been considerable agitation for revision of state income tax laws, involving incorporation by reference of the federal internal revenue code as it may be amended from time to time.\(^8\) This is one reason why it seems appropriate to analyze \textit{Sharpnack} and consider its implications, to discuss the reasons advanced for incorporating an existing law as it may thereafter be modified, and to examine the arguments raised in support of and in opposition to such incorporations.

\section{I. United States v. Sharpnack—Background; Decision}

Gerald Sharpnack was indicted in a United States district court, charged with having committed certain offenses in 1955 at Randolph Air Force Base, a federal enclave in Texas. The charge was laid under the Federal Assimilative Crimes Act,\(^7\) which since 1948 has made acts committed in such an enclave, and not punishable by any other congressional enactment, a federal offense if punishable by a law of the state in which the enclave is situated which was \textit{effective at the time the act occurred}. There was no other federal law applicable to the charged offenses; but they were violations of a Texas law enacted in 1950.\(^8\) On defendant's motion the district court dismissed the indictment "for the reason that Congress may not legislatively assimilate and adopt criminal statutes of a state which are enacted by the state

\begin{itemize}
  \item[5.] 355 U.S. 286 (1958).
\end{itemize}
On appeal to the Supreme Court, the judgment of the district court was reversed, and the indictment upheld.

There has been an Assimilative Crimes Act since 1825, but not until 1948 was there clear reference to prospective state legislation. Examination of the history of this legislation is useful both for background to an analysis of the Sharpnack decision, and for understanding the reasons behind a legislature's decision to incorporate not only existing but also prospective legislation by reference.

Only a small part of this country was under exclusive federal jurisdiction in the early days of the Republic. But the commission in such areas of acts which were crimes at common law or under the statutes of adjacent states became a problem of much concern. Some federal crimes were defined in 1790, but the legislation did not cover many criminal offenses, especially those recognized under common law. Once it was determined that there was no federal common law of crimes applicable to offenses committed in federal enclaves, the need for further legislation became apparent. Although this could have been accomplished by detailed legislation, the congressional committee to which the problem was referred apparently concluded that it should not undertake the task of developing a complete criminal code applicable to the limited areas of federal enclaves and the few people that would be affected. Instead legislation was proposed and enacted to adopt for each enclave the offenses (not otherwise

9. United States v. Sharpnack (W.D. Texas 1957) (unreported, the quoted language appears in 355 U.S. at 287; the district court also called the act "a delegation of Congress' legislative authority to the States in violation of the Constitution of the United States." 355. U.S. at 287 n.2.)

10. Act of April 30, 1790, ch. 924, 1 Stat. 112.

11. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812), discussed in Perkins, CRIMINAL LAW 24 n.6 (1957). At about the same time it was held that, once the United States acquired exclusive jurisdiction over an enclave, the criminal laws of the state in which it was situated would not be in force and the state courts were without jurisdiction. Commonwealth v. Clary, 8 Mass. 73 (1811). For a recent related case, see Matter of Denetclaw, 83 Ariz. 299, 320 P.2d 697 (1959), involving the jurisdiction of the state to try an Indian for a traffic offense committed on a stretch of U.S. Highway 68 located across an Indian reservation.

12. 1 Story, Life of Story 244, 293, 297 (1851); 40Annals of Cong. 929 (1823).

13. Representative Daniel Webster said that the committee proposing the assimilative crime act, which had been asked to inquire into the problems of crimes on federal enclaves "did not suppose it incumbent on them to enter into the details of a complete code of penal laws for a few hundred of the people in the United States' dock yards and arsenals." 1 Gales & Seaton, Register of Debates in Congress 338 (1825).

14. The original act provided that if offenses were committed in federal enclaves, for which punishment was not specifically provided by federal law, the offender "shall . . . be liable to, and receive the same punishment as the laws of the state in which [the enclave] . . . is situated, provide for the like offence when committed within the body of any county of such state." Act of March 3, 1825, ch. 63, § 8, Stat. 115. Some subsequent reenactments expressly limited assimilation to state laws "now in force" or as the "laws of the State . . . now provide." Act of March 4, 1909, ch. 321, § 289, 35 Stat. 1145; Act of July 7, 1898, ch. 576, § 2, 30 Stat. 717; Act of April 5, 1866, ch.
punishable under federal law) which were punishable by the state in which the enclave was situated.

As the initial Assimilative Crimes Act did not specifically include or exclude changes in state laws occurring after its enactment, its effect was not entirely clear. When a factual situation substantially like that presented by Sharpnack arose in 1832, the question of what laws the act incorporated was referred to the Supreme Court, and was submitted without argument. The Court’s answer, in United States v. Paul,\(^\text{15}\) is brief, and reported in full is:

Mr. Chief Justice Marshall stated it to be the opinion of the Court, that the third section of the act of Congress, entitled “an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes,” passed March 3, 1825, is to be limited to the laws of the several states in force at the time of its enactment. This was ordered to be certified to the Circuit Court for the southern district of New York.\(^\text{16}\)

Because of the absence of argument by counsel or Court, it was not clear whether the Court’s opinion rested on constitutional grounds or on grounds of statutory construction. Both views have been advanced. Nearly all federal decisions discussing the point have assumed the Paul rule to be one of statutory construction,\(^\text{17}\) although at least one court cited the case in support of a constitutional contention.\(^\text{18}\) Interestingly, another federal judge cited Paul, soon after it was decided, as authority for the theory that Congress constitutionally had power to adopt prospective legislation of the states,\(^\text{19}\) perhaps reasoning that as Marshall had not referred to a constitutional limitation, there was none. Several state courts have cited Paul, and other cases,\(^\text{20}\) for the proposition that referential statutes

---

\(^{15}\) 31 U.S. (6 Pet.) 141 (1832).

\(^{16}\) Id. at 142.


\(^{18}\) Hollister v. United States, 145 Fed. 773 (8th Cir. 1906).

\(^{19}\) “There is no doubt that congress may, by clear enactment, adopt the prospective legislation of the states, and impart to it the effect of an act of the national government.” Gaines v. Travis, 9 Fed. Cas. 1062, 1064 (No. 5,180) (S.D.N.Y. 1849), citing Paul as its authority.

\(^{20}\) One is Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838). This case held that the Act of Feb. 27, 1801, ch. 15, § 3, 2 Stat. 105, providing that the Circuit Court for the District of Columbia was to have “all the powers by law vested in the circuit courts . . . of the United States” referred to the powers provided in the Act of Feb. 13, 1801, ch. 4, 2 Stat. 89, even though that act was repealed fifteen months later, and all other circuit courts no longer had the power to issue writs of mandamus. Justices
INCORPORATION BY REFERENCE

were limited in their application to persons, places, or things as they existed at the time the statute was enacted.21 Most of the state courts which have cited Paul have not read it so restrictively (or if they did, have rejected it), and it is sometimes cited by them to support the proposition that referential statutes do not adopt additions to or modifications of the statute referred to, unless they do so by express intent.22

Paul established that the 1825 act incorporated only state criminal laws in effect at the time the act was adopted; it might also imply that the act was effective only as to federal enclaves in existence as such at that time.23 But no change in the act was made until 1866. By that time a number of new states had been admitted to the Union, and had adopted criminal laws. Some of the state criminal laws in effect in 1825 had been repealed or revised—this was especially true where the state law had been primarily common law. New federal enclaves existed, both in the recently admitted and the older states. The Southern states had just entered the reconstruction period and the extent of federal authority therein was unclear. All these factors were an influence in the congressional decision to rewrite the Assimilative Crimes Act. As revised, the act was applicable to federal enclaves then or thereafter in existence, but assimilated only state laws “now in force,” thus making clear the congressional intent not to include prospective state legislation.24 But to keep the criminal law of the federal enclave substantially in accord with that of its adjacent state, frequent reenactments were found necessary.25 Finally, in 1948, while revising the Criminal Code of

Taney and Catron, dissenting, thought the repeal of the first act did affect the proper interpretation of the second. Many courts would agree with the dissenting judges on the theory that the second act referred to general rather than to specific law. Dickerson, Legislative Drafting § 8.2 (1954).

21. See, e.g., Hall v. State, 20 Ohio 8 (1851) (holding inapplicable to defendant a statute prohibiting sale of liquor in certain counties, within three miles of an iron furnace—defendant’s liquor store had been established some time before the law was enacted but within one of the counties referred to; after enactment an iron furnace was erected within three miles of his store).


25. See note 14 supra.
the United States, Congress rewrote the Assimilative Crimes Act to refer to the state laws "in force at the time of" the alleged offense. It was thought this would make unnecessary the periodic reenactments to keep abreast of changes in state laws, and would promote uniformity between the law of an enclave and that of its adjoining state.\(^2\)

The principal constitutional arguments against incorporation by reference of prospective legislation, to be examined subsequently in greater detail, are based on due process (the difficulty of ascertaining applicable law, and the lack of uniformity in application), and on improper delegation of legislative power. Mr. Justice Burton, writing for the seven-judge majority in *Sharpnack*, dealt with the due process issues without referring to due process and without citing authorities in support of his position. He said that a different code may be adopted for each federal enclave and that whether Congress set forth the state laws in full or by reference, the resulting federal law would be as definite and ascertainable as the state laws themselves. In addition, citing only one of the many cases discussing the implications of *Paul*, he held *Paul* to decide only a question of statutory construction rather than the constitutional issue which *Sharpnack* presented.\(^2\)\(^7\) To these conclusions the dissenters, Mr. Justice Douglas (with Mr. Justice Black concurring), made no comment.

Justice Burton's principal argument, once having decided that Congress could adopt local law for the adjoining enclave and could keep such adoption current, is that adoption which includes prospective state laws is not a delegation of congressional legislative authority to the states. He considers such adoption to be "a practical accommodation of the mechanics of the legislative functions of State and Nation in the field of police power where it is especially appropriate to make the federal regulation of local conduct conform with that already established by the State."\(^2\)\(^8\) He points out that Congress has made use of future state legislation a number of times "in connection with the exercise of federal legislative power" and cites one case holding that such a statute did not improperly delegate legislative power.\(^2\)\(^9\) He also refers to cases upholding delegation to local legislative bodies of broad powers where Congress has retained power to revise, alter or revoke the local legislation.\(^2\)\(^0\)


\(^2\)\(^7\) Justice Burton refers to Franklin v. United States, 216 U.S. 559, 568 (1910), which is in complete accord with his position as to *Paul*, but which, as the Assimilative Crimes Act then referred only to existing law, may be only dictum.

\(^2\)\(^8\) 355 U.S. at 294.

\(^2\)\(^9\) Clark Distilling Co. v. Western Md. R.R., 242 U.S. 311, 326 (1917).

INCORPORATION BY REFERENCE

no reference is made to the numerous state court decisions dealing with the same problem of delegation of power under state constitutions. Apparently important to Justice Burton is the fact that if a state should adopt a criminal law which Congress felt inappropriate for an adjacent federal enclave, Congress could act to make it ineffective for that enclave.31

The dissenting justices agree that Congress may incorporate some prospective legislation, but object to this particular incorporation as involving an inadequate determination of basic policy to guide the states. To illustrate his objection, Justice Douglas suggests that Congress could adopt for a federal enclave “the state law governing speeding as it may from time to time be enacted,” for it has determined the basic policy—thou shalt not speed. But this delegation was a blanket one—thou shalt not offend. Some state criminal laws, such as a blue law, or a segregation law, could become federal crimes under this statute, he argues, even though a majority in Congress would never specifically have approved such laws.32 Justice Douglas is thinking in part of the problem of delegation to administrative officials, where Congress has been required to prescribe adequate guide lines for administrative action.33

The majority opinion by its terms applies only to the incorporation in the Assimilative Crimes Act of subsequently adopted state legislation, and holds that action, under the limitations prescribed by the Court, to be “a reasonable exercise of congressional legislative power and discretion.”34 But the limitations apparently prescribed, at most, are that Congress act under the federal police power, that it reasonably decide in its discretion whether to incorporate prospective legislation, and that it retain power to change the law if displeased by any subsequent state legislation that would otherwise have been automatically incorporated.

II. RATIONALE FOR INCORPORATING BY REFERENCE

An understanding of the reasons for incorporating any material into statutes by reference is helpful to an understanding of the reasons for incorporation of prospective material as well. Objectors to any incorporation see it as a device to adopt clauses and provisions which, if fully spelled out and understood by all legislators, might fail of passage.35 The alertness of newspapermen and lobbyists co-

31. See 355 U.S. at 294, 296.
32. See 355 U.S. at 298-99.
34. 355 U.S. at 297.
er a legislative session would be some check on actions so motivated. Ordinarily, the incorporation technique is used not for evil motives but for convenience, and, perhaps more important, to achieve some desired uniformity or conformity. (A danger which must always be recognized is that because of insufficient analysis of the material referred to or careless language, the result will be confusion and ambiguity.)

Convenience is achieved where making laws by reference saves time and energy for draftsman and legislator, and results in a less bulky code or book of statutes. Although the language used must be precise, there will be much less wrestling over exact language. Extensive legislation, such as a major part of the Federal Internal Revenue Code, may be placed on a state's statute books as state law, with little printing cost. Imagine the problem a state would face in enacting the substance of the Internal Revenue Code otherwise, especially without typographical errors.

Why is uniformity or conformity important? Some hint of the answer, from the federal viewpoint, can be drawn from the previous discussion of the Assimilative Crimes Act. The main significance of the crimes involved, federally, is not their nature but the fact that they occurred on federal territory. It may have been happenstance that the occurrence was on federal rather than state territory. The acts involved were primarily matters with which the states had concerned themselves, and local policies, whatever they might be, were acceptable to Congress. Let the criminal law of each enclave, as to such crimes, be that of the adjoining state. One commentator has

36. The effectiveness of such checks depend on the understanding of each group. (Some newspapermen regularly covering legislative sessions display more understanding of the consequences of a proposed law than many legislators—especially where, as in many states, there has been frequent turnover in the membership of the legislature.)

37. Poldervaart, supra note 35, at 708. A common example of in futuro reference found in state laws is a statement of canons of statutory construction ordinarily to be applicable to legislation now in force or thereafter enacted. See, e.g., Iowa Code §§ 4.1, 4.2 (1954). A danger of this type of reference, which incorporates itself into other statutes, is that it may be overlooked by lawyers and judges at times when its use in interpreting some statute would be highly relevant. Where incorporation by reference effects a change in policy, some consequences may be overlooked and unprovided for. By incorporating existing federal income tax law, Iowa for the first time imposed a state income tax on capital gains. No provision was made for those taxpayers who, for federal income tax purposes, were reporting income from sales in previous years on some installment method. To some extent this and several similar problems were dealt with by regulations of the State Tax Commission. Hayes, The New Iowa Income Tax Regulations, 5 Drake L. Rev. 15, 17 (1955).

38. Justice Burton stated, in a footnote, 355 U.S. 286, 293 n.9, that the Court was not passing on the effect of the Assimilative Crimes Act where a state law which could be assimilated is in conflict with a specific federal criminal statute or with federal policy. He referred to several cases, among them Williams v. United States, 327 U.S. 711 (1946) (applying federal age limit of 16 rather than state limit of 18 in statutory rape case), and Johnson v. Yellow Cab Transit Co., 321 U.S. 383 (1944) (disent thought Oklahoma statute against transportation of liquor to destinations in state was
suggested the adoption of a similar assimilative statute for civil matters, occurring in federal enclaves, that under our federal scheme are primarily left to state control.\(^{39}\)

Many state legislatures have made some reference to federal laws. This may occur where the state is attempting to supplement federal law, as in the migratory bird,\(^ {40}\) prohibition,\(^{41}\) narcotics and little NIRA\(^ {42}\) situations. The state may wish to take advantage of some federal “grant-in-aid” program, or other form of aid to the states. For example, nearly every state has attempted through referential legislation to take advantage of the eighty percent credit in the basic federal estate tax.\(^ {43}\) A failure of a state’s law, advertent or inadvertent, to conform to federal law, may result in loss of some “grant-in-aid” benefits.\(^ {44}\)

A state may also wish to take advantage of the experience and decisions of some federal agency. A federal health or quality standard may be useful.\(^ {45}\) The work of a federal agency searching out violators of federal law can be utilized by the state, where state law conforms. As an example, in the income tax area the state can “ride-the coat-tails” of federal tax laws and their enforcement.\(^ {46}\) Thus, the state’s administrative problems may be reduced and perhaps a
smaller staff needed to enforce the state's laws. It is in this area of income taxes that there has been much agitation, recently, for state conformance to federal law. One of the strong forces for this is generated by taxpayers and their counsel. Conformity greatly simplifies the task of reporting taxable income. Federal regulations and decisions under federal law are of more interpretive value when incorporation is used. Uncertainties and ambiguities in the statute are more readily reduced.

But, admitting the virtues of uniformity, and skirting the dangers of careless drafting that may promote confusion instead, is incorporation by reference necessary to achieve that goal? After all, there is the example of the various uniform laws which have been promulgated, and which no state adopting them has incorporated by reference. But what uniform law has been adopted in full, without change by some legislature? Incorporation by reference would avoid the modifications imposed by those legislators who cannot resist the urge to tinker with words. And experience has shown that, as each state has its own text, its courts feel free to interpret and to disagree with other courts construing identical language in the

47. Some attorneys feel that state tax administration personnel tend, for reasons of state economy and politics, to be less capable than similar employees of the Internal Revenue Service; and that their clients may be unduly and unwarrantedly harassed because of this. (At the time I was connected with the Iowa State Tax Commission several of the Income Tax Division employees seemed to me to be highly competent. At least one, however, is no longer with the commission, primarily because there was a change in the political party in control.) Several supporters of state bills adopting federal income tax law undoubtedly hope they will result in substantial elimination of most state auditing of returns.

48. Although some states had from time to time revised their laws to make the text conform to federal provisions, in many instances this was not done, was not done completely, or was not done promptly. Abdnor, Notable Differences in State and Federal Income Tax Statutes, 38 Minn. L. Rev. 1 (1953); Kinsey, Comparison of the Oregon Personal and Corporation Income-Tax Laws with the Federal Income-Tax Law (2 pts.), 29 Ore. L. Rev. 120, 175 (1950); Kurz, Variations in Colorado and Federal Income Tax Laws, 30 Dicta 24 (1953); Miller, Proposal for a Federally-Based New York Personal Income Tax, 13 Tax L. Rev. 183 (1958). "General conformity . . . sometimes leads practitioners to overlook or fail to recognize the differences that do exist." Abdnor, supra at 3.

49. See Byers, Microfilming of Business Records, 6 Drake L. Rev. 74, 86-87 (1957), which describes the many modifications to the Uniform Photographic Copies of Business and Public Records as Evidence Act. Hardly any Uniform Act has been adopted without modification by some legislature. Some modifications are dictated by local necessity, but others seem based on the feeling that "we can do a better job" of writing the law, "uniformity be damned."
INCORPORATION BY REFERENCE

Incorporation by reference probably would not eliminate completely differing interpretations in different jurisdictions (especially where a point is first decided by a court of the incorporating state), but the decisions of courts of the originating jurisdiction probably would have more force.

Both convenience and uniformity can be obtained, to a considerable extent, even though only existing law is incorporated. But if the incorporated statute is one which is subject to frequent changes, uniformity rapidly disappears, and there is a question of the convenient way to handle the resulting problems. Where a state has incorporated by reference portions of the existing federal income tax law only, nearly every federal amendment would call for prompt state action if the administrator and some taxpayers and attorneys are not to be confronted with difficult adjustments. Many state legislatures are not in continuous session; some meet regularly for a short time every other year, and are pressed by all kinds of business during their session; calling special sessions may be undesirable either politically or because of cost factors. For these reasons, if the objectives of conformity or uniformity and of convenience are to be obtained in the most useful fashion, it may be desirable to incorporate both existing law and future modifications thereof.

III. ARE REFERENCES TO PROSPECTIVE CHANGES IMPROPER?

As other writers have indicated, the principal evils seen in incorporation of existing legislation are threefold: "(1) the difficulty of ascertaining just what it is that is being incorporated by the reference; (2) the opportunity it affords unscrupulous legislators and lobbyists to secure enactment of legislation which otherwise would fail of passage; and (3) the increased likelihood of improvident legislation enacted without that intelligent consideration and understanding of the matters involved which is so essential to the procurement of wise and wholesome legislation." Despite these factors, incorporation by reference, at least of existing legislation, has long been permitted, sometimes in the face of constitutional provisions apparently forbidding its use.

There are a number of courts which have said flatly that future modifications of a referred law cannot be incorporated, sometimes

50. "By actual count there are eighty sections of the N.L.L. that have different meanings in different states as a result of conflicting court decisions in the several states." Malcolm, The Uniform Commercial Code as Enacted in Massachusetts, 13 Bus. Law. 490 (1958).


52. Freund, Legislative Regulation § 16 (1932); 1 Sutherland, Statutes and Statutory Construction § 1925 (3d ed. 1943); Poldervaart, supra note 51, at 708-16.
citing cases supposedly supporting, without discussion of the basis for such holding. From the decisions and writers analyzing the issue, it would seem that three constitutional objections may be raised involving: (1) due process, in that the referring law may be unclear, (2) equal protection because discrimination results; and (3) legislative authority, in that the legislature has improperly delegated its power, particularly objectionable in this case since the legislature is unable to control the law of its jurisdiction.

Due Process—Clarity and Definiteness

As indicated, one claim of objectors to incorporation of in futuro material is that due process provisions or their equivalent are violated, because the law enacted is not certain, clear or definite. This objection runs against incorporation of existing laws as well. Reference makes it necessary to look well beyond the four corners of the statute to ascertain its meaning, often to material outside the laws of the enacting jurisdiction.53

In some instances ascertaining the meaning of a statute is difficult even though no incorporation by reference is involved.54 Undoubtedly incorporation by reference may increase interpretation difficulties.55 And particularly troublesome is a general reference such as was found in Town of Conway v. Lee,56 where a town ordinance provided that all acts constituting state statutory or common-law crimes should also be an offense against the town. This was held to be an improper reference, and the opinion contains some talk about the difficulty in having to examine yearly volumes of statutes.57 While the Federal Assimilative Crimes Act presents similar difficulties, none of the justices in Sharpnack felt that there was sufficient lack of certainty, clarity or definiteness to violate the federal constitution.

Except for instances of reciprocal legislation, which perhaps are

53. "The person who would know the law and avoid penalty must obtain the statutes of another jurisdiction and read those, obtain the rules, read them, and then keep up on all changes both in the statute and the rules." Walker, The Legislative Process 344 (1948); Poldervaart, supra note 51, at 720–21. See also McCartin, The Constitutionality of the Federal Assimilative Crimes Act, 17 Fed. B.J. 157, 164 (1957); Note, 1950 Wis. L. Rev. 726, 729.
54. If one could tell what a statute means, just by staring intently at its four corners and the stuff inside them, what purpose would sets of annotated codes and statutes serve?
55. Note, 1950 Wis. L. Rev. 736, at 729 n.21, points out by way of illustration that interpretation of one Wisconsin statute, Wis. Stat. § 231.21(3), requires examination of seven different chapters of the statutes to ascertain the proper procedure to sell trust property.
57. But many American states have general reference statutes incorporating English common law. Some of the problems presented by such general references are described in Poldervaart, supra, note 51, at 732–34.
INCORPORATION BY REFERENCE

It is rare for one state to incorporate by reference a law of another state. In view of the difficulties in ascertaining and understanding the referring law which would result, such an incorporation might be found to offend due process. Occasionally references have been made to materials prepared by some private organization, as, for example, the "National Electrical Code" of a National Board of Fire Underwriters Associations, the New York Standard Fire Insurance Policy, and a medical association's list of accredited medical schools. Some of these references have been held improper, in opinions resting primarily on grounds of improper delegation of legislative authority but usually including, or apparently influenced by, arguments based on the difficulty present in determining the law's meaning. A "due-process" concern that the law of State A should change automatically when State B changes its law, or Association X in State C revises its approved code or list may be reasonable if most of A's citizens are in a poor position to learn of the changes.

Where State A's reference is to another of its own laws, concern over inability to ascertain the law is less justified, and most opinions dealing with this type of reference revolve therefore only around ascertainment of legislative intent. What about reference by State A to federal law, or by Congress to a state law? This does involve reference from one jurisdiction to another, but in view of our federal system and resulting dual relationships the situation is not the same as a reference from State A to State B. Everyone in State A is subject to the laws of State A and also to those of the federal government. In some instances, such as the income tax situation, State A's income tax may be clearer if the state has incorporated federal law by reference than if it has its own full text; and a person violating the Assimilative Crimes Act may have been more familiar with the criminal law of the adjoining state than with federal criminal law.

59. KAN. GEN. STAT. § 4863 (1915), held to be unconstitutional in State v. Crawford, 104 Kan. 141, 177 Pac. 360 (1919).
60. Scottish Union & Nat'l Ins. Co. v. Phoenix Title & Trust Co., 28 Ariz. 22, 235 Pac. 137 (1925), construing a state fire insurance law requiring use of the policy form known as the "New York Standard" as it "now or may hereafter be constituted," held that reference could be made to the existing form but not to its subsequent modification, and held the statute constitutional to the extent it referred to an existing form.
61. Such a reference was held unconstitutional, in State v. Urquhart, 50 Wash. 2d 131, 310 P.2d 281 (1957). But other courts have permitted it. Ex parte Gerino, 143 Cal. 412, 77 Pac. 166 (1904), followed in Arwine v. Board of Medical Examiners, 151 Cal. 499, 91 Pac. 319 (1907); see Jones v. Kansas State Bd. of Medical Registration and Examination, 111 Kan. 813, 208 Pac. 639 (1922).
62. It is sometimes argued that each state's domestic law includes not only that of its own legislature and courts but also federal legislation. FREUND, LEGISLATIVE REGULATION § 16 (1932); See Ex parte Lasswell, 1 Cal. App. 2d 183, 203, 36 P.2d 678, 687 (1934).
law. For these reasons there may be less of a due process problem in the federal-state and state-federal type of reference, than is present in the reference by State A to laws of State B.

**Discrimination**

An argument which may primarily be directed toward the Assimilative Crimes Act and some other federal referential legislation is that of discrimination. McCartin illustrates this with the example of a father, visiting his soldier son stationed at an army post in State K, who while on the post sells his car either to the son or to another soldier on Sunday. State K has a law prohibiting Sunday sales, and this sale in federal territory may therefore be in violation of the Assimilative Crimes Act. But were the army post in State O, which has no such Sunday law, no federal crime would be committed. It must be noted that even though the father was from State N and unfamiliar with the laws of either K or O, if he made the sale outside the enclave and on adjoining land in state jurisdiction, he would have committed an offense in K but not in O. The objection, then, is not because of the father’s lack of knowledge, and is not primarily addressed to the *in futuro* aspect of the reference.

A somewhat similar problem in federal-state relations was resolved in *Erie v. Tompkins* to allow results in federal courts to vary according to state law in diversity cases. The Sharpnack opinion indicates that Congress could enact a complete code for each enclave and the fact that the various codes differed would not be unconstitutional discrimination. If so, it was reasoned, neither would an incorporation by reference such as Sharpnack involved. The principal case on which a discrimination argument can be supported is *Knickerbocker Ice Co. v. Stewart*. It involved an amendment to the Judiciary Act regarding the admiralty jurisdiction of federal courts, which preserved to injured employees engaged in maritime work not only their common-law remedy (previously saved) but also any rights and remedies under the applicable state workmen’s compensation law. Speaking for a five-man majority, Mr. Justice McReynolds held that the amendment exceeded the power of Congress, primarily because it improperly delegated legislative power, but also because it resulted in inconsistent maritime law from area to area. Mr. Justice Holmes, for the dissent, thought the amendment constitutional, and pointed out that the Court previously had sus-

---

65. 253 U.S. 149 (1920).
66. In *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917), the Court had held that this did not preserve, in admiralty, remedies under state workmen’s compensation laws; the amendment was intended to overrule that case.
tained a law directing common-law practice in the district courts to conform as near as possible to that prevailing in state courts. Mr. Justice Burton's opinion cites Holmes' Knickerbocker dissent, and in a footnote refers to the majority opinion ("which we do not now reexamine") as based on a supposed constitutional requirement of "harmony and uniformity" of law throughout the admiralty jurisdiction." No other court appears to have utilized the discrimination argument to decide that a referential law was improper—and this argument should have little bearing on the question whether incorporation of in futuro material is improper when existing material could properly be referred to.

**Delegation**

The objection most strongly asserted against incorporation of future legislation, rules or materials, at least from bodies other than the legislature proposing to act by reference, is that an unconstitutional delegation of legislative power will occur. This argument in many instances is not based on prohibitory language to be found in the federal or a state constitution, but is read into the constitution by implication from theories of separation of powers. Support for this is found in constitutional phrases, such as: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives"; in writings of various philosophers, such as Montesquieu, and of legal writers, such as Cooley, and in precedent.

That the language of most constitutions does not necessarily forbid the legislature from delegating portions of its power, at least subject to adequate supervision, is apparent; delegation to municipalities has long been permitted, and many courts will permit a limited amount of delegation to administrative bodies when they find the legislature has set adequate standards for action. Our attention has been called elsewhere to the fact that theories of

---

69. U.S. CONST. art. 1, § 1.
70. LUCE, LEGISLATIVE PROBLEMS 4 (1935). Mr. Luce, at 502, says: "The remarkable thing is that the expounders of the maxim [that there can be no delegation] themselves admit such serious modifications, limitations, and exceptions that a critic may fairly ask whether in fact it has anything but artificial vitality."
71. 1 COOLEY, CONSTITUTIONAL LIMITATIONS 224 (8th ed. 1927). These references usually ignore immediately subsequent paragraphs pointing out some qualifications to the doctrine of nondelegability. Id. at 227-32.
philosophers, economists and political scientists are not by implication part of our constitutions—though they may be relevant in interpretation of the language used by the draftsmen. Legal writers are not in agreement that reference to in futuro material is unconstitutional. And, despite language found in some opinions to the contrary, a considerable number of cases would uphold such references in many instances.

Prior to Sharpmack two lower federal courts in assimilative crimes cases clearly took the position that adoption of prospective legislation was improper delegation, an abdication of legislative duties. In both the discussion on this point was dictum, as in each the assimilative statute by its terms applied only to state law in existence at the time of the last previous reenactment of the statute. Mr. Justice Fuller avoided the issue, in Franklin v. United States, saying of the statute which then referred only to existing law:


74. Perhaps Cooley should be understood as considering such references unconstitutional. See note 71 supra. McCartin and others have considered specific acts of this type to be invalid, and from their arguments appear to believe that practically all statutes making this type of reference are unconstitutional. McCartin, The Constitutionality of the Federal Assimilative Crimes Act, 17 Fed. B.J. 157 (1937); Note, 8 U. Cin. L. Rev. 310 (1934). But the contrary position has been strongly urged:

[T]he better view favors the validity . . . [of such statutes. Even] where another legislature may change not only the operation of local law but its substantive content, the statute should be sustained for its enactment has not amounted to any permanent loss of sovereignty or legislative power. . . . The advantages gained by uniformity of law between the states and the advantage of uniformity with congressional legislation, to say nothing of protection against retaliatory legislation, outweighs the disadvantages which may temporarily arise from changes in foreign laws.

2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 310 (3d ed. 1943). Sutherland, op. cit. supra, § 5208 points out that: "State statutes have been passed which adopted federal statutes with the administrative rulings to be made under them. These acts have been received badly, most of them being declared unconstitutional for delegating legislative power to the administrative board. . . . [But] if sufficient standards are prescribed for the administrative rulings, the acts may be held constitutional."

75. See State v. Urquhart, 50 Wash. 2d 131, 310 P.2d 261 (1957), and Brock v. Superior Court, 9 Cal. 2d 291, 299, 71 P.2d 208, 213 (1937). The Brock court, discussing references to rules and regulations of the federal Secretary of Agriculture in provisions for state-sanctioned marketing agreements, said that "the attempt to make future regulations of another jurisdiction part of the state law is generally held to be an unconstitutional delegation of legislative power." The court then decided that the question was not really in issue, so did not have to be decided. Other in futuro references in California legislation have been held constitutional, both before and after Brock, although only Brock is frequently cited by courts outside California. People v. Oyama, 29 Cal. 2d 164, 173 P.2d 794 (1946), rev'd on other grounds sub. nom. Oyama v. California, 332 U.S. 633 (1948); Natural Milk Producers Ass'n v. City and County of San Francisco, 20 Cal. 2d 101, 124 P.2d 25 (1942); Arwine v. Board of Medical Examiners, 151 Cal. 499, 91 Pac. 319 (1907); Ex parte Gerino, 143 Cal. 412, 77 Pac. 66 (1904); Ex parte Lasswell, 1 Cal. App. 2d 183, 36 P.2d 678 (1934).

There is, plainly, no delegation to the States of authority in any way to change the criminal laws applicable to places over which the United States has jurisdiction.\footnote{Franklin v. United States, 216 U.S. 559, 566 (1910).}

Justice Burton recognized that \textit{Franklin} had not involved the issue of \textit{in futuro} incorporation. He ignored the two lower court decisions just mentioned, which some state courts have cited, and their dicta must inferentially be taken as overruled by \textit{Sharpnack}.

As noted in the discussion of the discrimination objection, one of the points made by Mr. Justice McReynolds in \textit{Knickerbocker Ice Co. v. Stewart}, was that of improper delegation: "Congress can not transfer its legislative power to the States—by nature this is non-delegable."\footnote{253 U.S. 149, 164 (1919).} Five cases are cited in support of the quoted statement. Each contains supporting language; but in each case the statute challenged as unlawfully delegating legislative power was upheld either on the theory that the delegee was only finding a fact essential to the effectiveness or application of the law, or was adopting permissible supplementary regulations.\footnote{ICC v. Goodrich Transit Co., 224 U.S. 194 (1912) (ICC could by rule require submission of reports and uniform accounting, even as to intrastate transportation activities); Butte City Water Co. v. Baker, 196 U.S. 119 (1905) (in disposing of public lands, regulations by local legislatures or committees of miners regarding location of claims could be applied; such rules are "supplementary regulations," not acts of "legislative character in the highest sense of the term." 196 U.S. at 126); Buttfield v. Stranahan, 192 U.S. 470 (1904) (administrative officials may establish standards regarding impure or unwholesome tea, as to which the statute forbade importation); Field v. Clark, 143 U.S. 649 (1892) (under a tariff act, the President could suspend free importation of certain goods where the exporting country imposed reciprocally unequal duties on American products); \textit{In re Rahrer}, 140 U.S. 545 (1890) (federal act upheld which permitted state prohibition laws to apply to imported liquor while still in the original package).} Mr. Justice Holmes, dissenting and joined by Justices Brandeis, Clarke, and Pitney, argued that the amendment should be read to incorporate only existing state law, under the \textit{Paul} rule, but that in any event:

\begin{quote}
I assume that Congress could not delegate to state legislatures the simple power to decide what the law of the United States should be in that district. But when institutions are established for ends within the power of the States and not for any purpose of affecting the law of the United States, I take it to be an admitted power of Congress to provide that the law of the United States shall conform as nearly as may be to what for the time being exists. A familiar example is the law directing the common-law practice, etc., in the District Courts to 'conform, as near as may be, to the practice,' etc., 'existing at the time' in the State Courts. Rev. Stats. § 914. This was held by the unanimous court to be binding in \textit{Amy v. Watertown}, 130 U.S. 301.\footnote{253 U.S. at 169.}
\end{quote}

An act establishing certain forest reservations had authorized the Secretary of Agriculture to set up rules and regulations for their
use, and provided that violations of such rules and regulations were crimes. In *United States v. Grimaud* the defendant demurred to an indictment for grazing sheep in one of the reservations without obtaining the permit required by a rule adopted pursuant to that act, arguing unlawful delegation of legislative power. The Court assumed that some delegations would be improper, but held this was not. “It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations.” Here, though, the “violation . . . is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty.”

In two significant cases federal statutes have been invalidated on delegation of power arguments, both dealing with aspects of the National Industrial Recovery Act of 1933 and powers given therein to the President. Neither case cites *Knickerbocker*, although referring to the cases cited therein and to other cases, such as *Grimaud*. In one, after analysis of various cases, the Court said: “Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend.” This would indicate that delegation is limited, but not forbidden. Is one limitation that there shall be no incorporation by reference of legislation as it may be modified? The majority in *Knickerbocker* seemed so to hold, although Mr. Justice Holmes pointed out that the conformity laws had been sustained though referring to state court practice existing at the time the federal court acted. This sustaining, plus the feeling that Congress retained control of basic policy, influenced the *Sharpnack* Court to conclude that on the facts presented there had been no improper delegation of congressional legislative power in violation of federal constitutional requirements. This, of course, is not directly determinative of the problems state courts must face when construing state court constitutions. Nor does it have any bearing on the question whether a state delegation presents federal constitutional questions regarding power to delegate (a question which apparently has not been raised in any case and one that is not likely to arise).

Most of the state cases dealing with incorporation by reference of federal laws, federal administrative rules and standards, or stand-

82. 220 U.S. 506 (1911).
83. *Id.* at 517.
84. *Id.* at 522.
86. Panama Refining Co. v. Ryan, *supra* note 85, at 430. (Emphasis added.)
87. Amy v. Watertown (No. 1), 130 U.S. 301 (1889).
incorporation by reference

ards promulgated by private agencies, as now or hereafter in effect, make little reference to federal decisions. Some, striking down such legislation, do so without citation of any supporting authority. In many instances a case holding such a reference invalid can be balanced with another holding an identical or almost identical reference valid.

Among the first cases dealing with state reference to future federal laws were those involving legislation enacted by some states, after adoption of the eighteenth amendment, which supplemented federal prohibition laws and which defined "intoxicating liquors" by reference to existing or subsequent federal definitions. Several courts, in frequently cited opinions, have called this an unlawful delegation of legislative powers, and an abdication by the representatives of the people of their power, privilege and duty to enact laws.88 One of these opinions contains perhaps the best expression of the nondelegability argument against constitutionality:

[Legislative power] cannot be surrendered or delegated or performed by any other agency. The enactment of laws is one of the high prerogatives of a sovereign power. It would be destructive of fundamental conceptions of government through republican institutions for the representatives of the people to abdicate their exclusive privilege and obligation to enact laws.89

But another court sustained a similar state prohibition law as merely augmentative and deferring to the superior authority of federal law.90

Similar state supplementary action occurred in connection with NIRA and OPA. Some states in 1933-1934 set up state recovery administrations, often making the codes adopted under federal laws applicable to the state regulation. Although it had been argued that such statutes were invalid,91 in Ex parte Lasswell92 a state statute was upheld as not unwarranted delegation. The court applied a "primary standard" concept (that the state had made the federal code to be adopted a standard of fair competition), and argued that

88. In re Opinion of the Justices, 239 Mass. 606, 133 N.E. 453 (1921). To the same effect, see State v. Vino Medical Co., 121 Me. 438, 117 Atl. 588 (1922). In re Burke, 190 Cal. 326, 212 Pac. 193 (1929), sustained a similar California law as referring only to existing federal law, there being no federal changes to clutter the picture. The court said: "It may be conceded [counsel had] that this provision [referring to federal law as changed] is not valid, although we do not decide it, since it is not involved." 190 Cal. at 328, 212 Pac. at 194.
91. Note, 8 U. Cinc. L. Rev. 310 (1934). Note, 34 Colum. L. Rev. 1077 (1934) thought their validity uncertain. Note, 33 Mich. L. Rev. 597 (1935), took the position that the statutes could be upheld by a court satisfied that the term "fair competition" defined an adequate standard for the guidance of administrative action.
this was legislation requiring administration to fill up the details. It added: "... incidental powers may be delegated to a body or be measured by a standard not under the control of the state and ... they may be subject to change. ..." As will be noted later, Lasswell sometimes is miscited by opponents of incorporation legislation. Somewhat similar state laws and city ordinances which made a violation of OPA regulations a misdemeanor were upheld in two states, but held invalid in one which later attempted to distinguish its holding to allow some incorporation of future federal laws.

Smithberger v. Banning and State v. Crawford are two often cited cases which held referring statutes invalid on delegation grounds. The first refers to federal laws which were then before Congress for adoption and is an example of hasty, poor draftsmanship; the latter refers to a code of a private association and could well rest on a "due process" argument. The effect of each case has been weakened by subsequent decisions from the same courts, though this usually is overlooked.

In several instances a statute has been upheld as referring only to existing law or materials, the court stating that reference therein to

---

93. 1 Cal. App. 2d 203, 36 P.2d at 687. The opposite result was reached in Darweger v. Staats, 267 N.Y. 290, 196 N.E. 61 (1934), but this decision may rest primarily on a unique provision of the New York constitution.


95. City of Cleveland v. Piskura, 145 Ohio St. 144, 60 N.E.2d 910 (1945); later distinguished on the ground that the invalid law imperatively commanded or prohibited performance of an act; but a law would be valid though incorporating future federal laws if it only authorized or permitted performance of acts to which such laws would apply. Opdyke v. Security Sav. & Loan Co., 157 Ohio St. 121, 105 N.E.2d 9 (1952) (stockholders in state building and loan association unsuccessfully attempted to enjoin its conversion into a federal saving and loan association, arguing that some state-imposed conditions requiring compliance with federal laws and agency regulations were improper delegations of legislative power).


97. 104 Kan. 141, 177 Pac. 380 (1919).


99. In Dudding v. Automatic Gas Co., 145 Tex. 1, 193 S.W.2d 517 (1946), a statute was upheld which, for guidance of the state railroad commission in administering an act regulating handling and use of liquefied petroleum, adopted the gas standards previously prescribed by the National Board of Fire Underwriters. The statute authorized the commission to adopt changes made by the board, but did not require adoption. The court said the prospective adoption problem was not then present, and it would not decide that question.

100. In Board of Regents v. County of Lancaster, 154 Neb. 398, 402, 48 N.W.2d 221, 223 (1951), Smithberger is explained as involving an improper delegation to an outside agency "by appropriating $4,000,000 without providing any rules or standards for its expenditure." (Emphasis added.) Jones v. Kansas State Bd. of Medical Registration & Examination, 111 Kan. 813, 208 Pac. 699 (1922), held valid an administrative rule under which the medical examining board refused to examine graduates of medical schools listed by the American Medical Association as "Class C." A Class C school was one which permitted state boards, but not the AMA, to inspect its operation.
subsequent modifications was or would be improper. One of the
most frequently cited of these cases is Scottish Union & Nat'l Ins.
Co. v. Phoenix Title & Trust Co., 101 concurring a state fire insurance
law requiring use of a policy form known as the “New York Stan-
ard” as it “now or may hereafter be constituted.” However, the
counsel who sought to take advantage of the statutory requirement
“concedes, and we think correctly, that the portion of [the statute]
... adopting future changes ... is unconstitutional,” 102 and he
contended that the assumed unconstitutional part could be severed
leaving a valid reference to existing material. The court agreed with
counsel, and its entire discussion of delegability is the language
quoted above. 103

The earliest decision construing a state law levying a tax based on
the net income on which tax was paid to the federal government
sustained the law, apparently even where applied to future changes
in federal law. In Underwood Typewriter Co. v. Chamberlain 104 the
court said:

The federal Income Tax Law is a domestic statute. No delegation of legis-
lation authority is involved in adopting its definition of net income. It is a
matter of convenience to taxpayers and economy to the State not to set up
a separate standard and another administrative establishment for the
measurement of taxable net income. 105

Similar laws of other states were upheld, but only by interpreting
them as adopting the federal law then in force, in Santee Mills v. Quer y 106 and Featherstone v. Norman. 107 While Santee assumes that
reference to the law as amended would exceed the legislature’s power, relying only on one of the prohibition cases for this conclu-
sion, 108 it can be considered as primarily a statutory interpretation
case. It has been widely cited, however, on the delegation argument, and Underwood Typewriter usually is not referred to.

101. 28 Ariz. 22, 235 Pac. 137 (1925).
102. 28 Ariz. at 27, 235 Pac. at 138.
103. The Arizona court, in Valley Nat’l Bank of Phoenix v. Clover, 62 Ariz. 538,
159 P.2d 292 (1945), upheld a state law providing that no veteran entitled to benefits
under the Federal Servicemen’s Readjustment Act, or his spouse, should be under legal
disability because of minority to make contracts with reference to such benefits. The
court said this merely adopted federal law to determine who was entitled to the benefits
of the state law; the basic policy was that of the state law. A comparable case is People
v. Oyama, 29 Cal.2d 164, 173 P.2d 794 (1946), upholding the state’s alien land law
although it used as a primary standard eligibility to citizenship under federal laws. That
decision was reversed, but not because of the reference, in Oyama v. California, 332
U.S. 633 (1948).
104. 94 Conn. 47, 108 Atl. 154 (1919), aff’d, 254 U.S. 113 (1920).
105. 94 Conn. at 65, 108 Atl. at 160–61.
App. 552, 6 S.E.2d 405 (1939) (despite its date, involving a 1930 tax return).
Thereafter state attempts to incorporate federal tax law languished for some time, until Alaska in 1949 imposed a tax of ten percent of the federal tax, and referred to the Internal Revenue Code as amended or as hereafter amended. This law was attacked as unlawful delegation, and a number of cases were cited to support that contention, among them Ex parte Lasswell. The district court agreed that according to the majority of cases the act was improper, but considered Lasswell to hold otherwise and to be persuasive; further, as there had been no applicable subsequent federal amendments, it was unnecessary to consider the effect of future changes. The court of appeals also upheld the Alaska law, both as to incorporation of existing and of future federal law, relying in part on the widespread state laws adopting the federal estate tax laws by reference to take advantage of the eighty percent credit, and to the Conformity Act, to which Mr. Justice Holmes referred in his Knickerbocker dissent.

Since 1950, and especially since 1954, a number of states have utilized the technique of reference to the Internal Revenue Code, either to define state taxable income, or to provide that the state tax be a percentage of the federal. Nearly all have specifically referred to the Code as it may be amended. Kentucky incorporated only the Code as then in existence, and the Iowa reference was at first not clear although some supporters argued it referred only to existing law. Only in New Hampshire have reported decisions relating

111. Alaska S.S. Co. v. Mullaney, 180 F.2d 805 (9th Cir. 1950).
112. E.g., MONT. REV. CODES ANN. § 64-4905 (1947). See Kamins, Federally-Based State Income Taxes, 9 NAT'L TAX J. 46 (1956); Note, 17 MONT. L. REV. 203 (1956). According to Kamins, the Attorney General of Kansas and Pennsylvania have ruled that such statutes are valid. In Brown v. State, 323 Mo. 138, 19 S.W.2d 12 (1929), a similar reference to the Federal Estate Tax Act of 1926 was sustained, the court saying this was not incorporation by reference but reference only for identification of the minimum tax. Although much comment sometimes is made of the fact that there has been no litigation regarding the reference in state estate tax laws to the federal estate tax, it should be noted that no taxpayer could benefit by litigating the point—if the state didn't get the money, the federal government would. Kamins also notes that in some states, such as Vermont, the taxpayer is given an alternative of following the federal basis or computing under a detailed state tax; because of the difficulties in computing separately, nearly all taxpayers probably will use the federal basis without investigating what might otherwise be due; and this method may discourage litigation over the in futuro reference.

114. Iowa Laws 1955, ch. 208, at 236, referred to but did not define "Internal Revenue Code of 1954." See Miller, The New Iowa Income Tax Law, 41 IOWA L. REV. 85 (1955). Mr. Miller is the principal author of the Iowa law. He indicated to me at one time that he thought reference to the federal law as amended probably would be constitutional. However, as many legislators were doubtful on this point, the law was written without such reference; statements in legislative discussion were that future changes were not incorporated, and Mr. Miller thereafter consistently has so stated. In
to such laws appeared. There it has been held that the state law may define state net income as net income under the federal code then in effect, but may not impose a tax of ten percent of the federal tax because the state tax would then be a graduated rather than a flat rate tax, the state having no authority to levy a graduated tax. There is no discussion of the propriety of a non-graduated tax based on federal net income computed in accordance with subsequent changes in federal law.

The latest state court pronouncement comes in the field of professional licensing. Several California decisions have permitted its state medical examining board to recognize diplomas from schools meeting standards of the Association of American Medical Colleges in the year of their graduation, even though graduation might occur (and new standards be applicable) after the statute creating the board was enacted. In 1957 the Washington court held a somewhat similar statute invalid, relying on State v. Crawford, and also saying: "Statutes adopting existing Federal rules, regulations or statutes are valid but attempts to adopt future Federal rules, regulations or statutes are unconstitutional and void." For the quoted proposition the court cited various decisions, in some of which the point was but dictum, and also cited Ex parte Lasswell.

No reference was made to cases opposed to the proposition. The Alaskan income tax cases were ignored, and the court apparently failed to recognize that Lasswell actually is contra to its position.

1957 the Iowa legislature did take action to adopt all federal changes made to that time since the 1955 law became effective. Iowa Laws 1957, ch. 209, § 1, at 268. I argued that in view of the failure to follow the Kentucky method, and the uncertainty whether "Internal Revenue Code of 1954" referred only to the law as initially enacted, that the original Iowa law could be interpreted to incorporate subsequent federal changes, although I recognized that the court would not necessarily make such an interpretation. See Hayes, The New Iowa Income Tax Regulations, 5 Drake L. Rev. 15, 16 (1955).

This point was made more directly in a speech at the Tax School of the Iowa State Bar Association, in December, 1955. The 1957 legislation makes clear the legislative intent that federal modifications after 1956 are not adopted unless and until the Iowa legislature chooses to do so.

117. Ex parte Gerino, 143 Cal. 412, 77 Pac. 166 (1904), followed in Arwine v. Board of Medical Examiners, 151 Cal. 499, 91 Pac. 319 (1907).
119. 50 Wash. 2d at 137, 310 P.2d at 265.
120. As I have not had access to the briefs and arguments of counsel, I do not know to what extent the opposing arguments were called to the court's attention. The result of the case is one which to many may seem eminently just. Plaintiff was a refugee, a graduate of a foreign medical school, who with her husband (also a doctor) had come to the states. Under the law in force when they arrived in Washington, both qualified for admission to practice. He was admitted but she delayed application for several years while staying home to raise their child. By the time she applied for admission the law had been so changed that she would qualify only if the foreign school from which she was graduated was on a list of the Medical Association as approved for the year of her graduation. No list of any school, of the type called for, had been made by the Association.
Some delegation of legislative power is permitted by nearly all state courts today. In the closely related problem of delegation of authority to administrative bodies there has been a marked tendency to uphold delegating legislation.\textsuperscript{121} Some decisions which have stated that a reference to a statute is unconstitutional, if (or to the extent that) subsequent modifications are included, do not indicate that much independent thought was given to the issue. The statement is dictum in some cases, and where so has usually been assumed to be true by court and counsel without argument. Supporting citations include other cases in which the matter was dictum. Rarely are cases permitting such references mentioned by a court invalidating them.\textsuperscript{122}

While the \textit{Sharpnack} decision has no direct bearing on the question whether \textit{in futuro} incorporation affronts state constitutional restrictions on legislative power to delegate, it must be treated as overruling dictum in several federal decisions cited by some state courts as bearing on the question by analogy. \textit{Sharpnack} may induce courts hereafter faced with the issue to make a more careful analysis of the problem, and it may lead more courts to say that such incorporation is a matter of legislative policy within the judgment of the legislature. Shortly before \textit{Sharpnack} was decided, the New Jersey court reached that conclusion in a carefully reasoned opinion which may also have considerable impact on other state courts. Upholding a state net weight law which required the state superintendent to fix standards in accordance with standards previously or subsequently fixed by federal authorities, the court in \textit{State v. Hotel Bar Foods Inc.} said:

\begin{quote}
Although the early decisions generally spoke in prohibitory terms, it is now established that legislative delegations are permissible so long as they are accompanied by sufficient basic standards. . . . Realistically viewed, the distinction [between cases where the state agency was authorized to adopt federal regulations and those where it was required to do so] seems insubstantial and hardly sufficient to determine basic issues of constitutionality. The ultimate and controlling policy decision— as to whether there shall be uniformity of federal–state regulation in the field— rests always with the Legislature and it does not in any vicious sense abdicate its legislative judgment or authority. [Clearly existing law can be adopted; unless prospective law may also be adopted] the State’s policy of uniformity would, as a practical matter, soon be defeated.\textsuperscript{123}
\end{quote}

\textsuperscript{121} Davis, \textit{Administrative Law} 86 (1951).
\textsuperscript{122} See, \textit{e.g.}, Florida Industrial Comm’n v. Peninsular Life Ins. Co., 152 Fla. 55, 10 So. 2d 793 (1943) (referring to incorporation of regulations, and their interpretations, of a federal administrative agency after the state law became effective). In Note, 70 \textit{Harv. L. Rev.} 685, 688 n.33, it is pointed out that many courts holding \textit{in futuro} referential legislation invalid adopt their position without discussion.
Any court analyzing the problem presented by *in futuro* incorporation should give consideration to two objections thereto on which the nondelegability argument seems to be based. Prior cases often have not stated these objections with clarity. The first is the feeling, which Mr. Justice Douglas expresses in *Sharpnack*, that the law referred to may not fit the policy of the incorporating legislature if changed and the person subjected to it because of incorporation would not then have had the considered judgment of the legislature on the matter. Horack, who has taken the position that adoption which includes prospective legislation is constitutional, attempts to meet this objection by arguing that the incorporating legislature has retained power to change the statute if unsatisfactory changes are made in the law referred to; he also feels that any temporary disadvantages are outweighed by the advantages gained by uniformity.  

The other objection seems to be a feeling that laws should be made by elected representatives of the people, responsible to the electorate for their actions, and certainly should not be made by outsiders deliberately setting out to change the law. This attitude is especially significant where authority is delegated to administrative bodies or to private groups having a special interest in the subject matter involved. Horack's answer to the first objection has some relevance here as well. In addition, should the objection be of substantial significance where subsequent changes result because of actions by other legislative bodies primarily concerned with their own law?

**IV. Conclusion**

Courts concerned with state references to prospective legislation of Congress, or of other states, must now evaluate those references in the light of *Sharpnack*, and also of *Hotel Bar Foods*. The effect of those cases may well be to decrease reliance on implied constitutional objections to delegation of legislative power. As in the cases involving delegation to administrative agencies, more attention will be directed toward the standards provided by the referring legislature. And the "due process" limitations, relating to clarity and definiteness, should increase in importance. Some courts may be reluctant to uphold references by a state to material of a private organization, or to statutes of another state (apart, perhaps, from reciprocal type legislation), but references by a state to federal legislation may generally meet with readier acceptance.

Referential legislation, its consequences carefully analyzed by the legislature before adoption, prepared by careful draftsmen, can serve a useful purpose in limited but sometimes highly important...
situations. In many of these situations, its usefulness is substantially increased if the reference includes prospective as well as existing legislation. But “unwisely handled, it leads to endless confusion and ambiguity,” and where its undesirable effects are apparent this may encourage a reviewing court to search for constitutional grounds on which to strike down what appears to be unwise, or ill-considered legislation.