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"COOPERATIVE FEDERALISM" AGAIN: STATE AND MUNICIPAL LEGISLATION PENALIZING VIOLATION OF EXISTING AND FUTURE FEDERAL REQUIREMENTS: I

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• THE problem of integrating our triple-layered sovereignties into a "cooperative federalism" has been with us since the inception of the federal system, and more recently has been the subject of considerable scholarly attention.¹ The practical desirability of such integration has long been apparent; for, in the fulfillment of broad national policy, supplementation of the federal power with the energy and experience of local administrative, judicial, and police systems in areas of concurrent responsibility can be invaluable. Attempts to effect coordinated intergovernmental action have not been infrequent. As the Supreme Court approvingly observed in 1883, the federal government has "from the time of its establishment . . . been in the habit of using, with the consent of the States, their officers, tribunals, and institutions as its agents"² to achieve the larger national goals.³ Under the pressure of recent wartime needs, new impetus was given to one important technique of intergovernmental cooperation: the "adoption" and enforcement within its jurisdiction by one sovereignty of the laws or regulations of another sovereignty on a given subject matter. Spur-

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1. See CLARK, *THE RISE OF A NEW FEDERALISM* (1938); KALLENBACH, *FEDERAL COOPERATION WITH THE STATES UNDER THE COMMERCE CLAUSE* (1941); *Symposium on Cooperative Federalism*, 23 IOWA L. REV. 455 (1938); Corwin, *National-State Cooperation—Its Present Possibilities*, 46 YALE L. J. 599 (1937), reprinted in 3 ASS'N OF AMER. LAW SCHOOLS, *SELECTED ESSAYS ON CONSTITUTIONAL LAW* 973 (1938); Grant, *The Scope and Nature of Concurrent Power* 34 COL. L. REV. 995 (1934), reprinted in 3 ASS'N OF AMER. LAW SCHOOLS, *SELECTED ESSAYS ON CONSTITUTIONAL LAW* 784 (1938); Koenig, *Federal and State Cooperation Under the Constitution*, 36 MICH. L. REV. 752 (1938); Comment, 56 YALE L. J. 276, 299-302 (1947); Notes, 34 COL. L. REV. 1077 (1934); 33 MICH. L. REV. 597 (1935).

2. *United States v. Jones*, 109 U.S. 513, 519 (1883) (upholding authority of Congress, in exercise of eminent domain, to use state courts to determine value of property).

3. For examples of state and local cooperation with the federal government, see notes 42, 53, 56, 57 *infra*.

red on by a certain amount of exhortation from the OPA,⁴ a few states and scores of municipalities implemented the enforcement of federal price, rent and rationing regulations, by enacting legislation prescribing local penalties for violation of the federal regulations.⁵ It is the pur-

4. Thus, Deputy Administrator for Enforcement Thomas I. Emerson testified in 1944 before the House Banking and Currency Committee (*Hearings on H. R. 4376*, 78th Cong., 2nd Sess. 155): "In addition to the other Federal agencies, we have done our best to procure the cooperation of State and local enforcement officials. For one thing we have encouraged the States to pass laws, State laws, which make it a violation of the State law to violate an OPA regulation.

"We have also encouraged the cities and municipalities to pass similar laws. New York, Rhode Island, and Wisconsin have passed such laws, and 59 cities have passed municipal ordinances. Those are extremely important to us. They provide a prompt and efficient method of handling many of the smaller violations such as occur among the retail trade

"In addition to legislation, we have obtained very substantial help from other enforcement officials in the States and municipalities. Many of the States and cities have assigned policemen to work with us on our counterfeiting problems. Others have assigned us help on gasoline. We have used weights and measures inspectors in cities, and the market inspectors."

The Office of Price Administration did not attempt a largescale sustained campaign. It was not successful in obtaining affirmative sponsorship of its model state law and municipal ordinance from the Council of State Governments or the National Association of Municipal Law Officers. One of the unfavorable points of view encountered by the Office is typified by this fragrant editorial, entitled, "A Bum Ordinance," from the February 1944 issue of the Iowa State League of Municipalities' magazine, *American Municipalities*: "The OPA is reported to have sent out an ordinance, to the cities and towns, making it an offense to violate any rule of the OPA. This is just another example of the imbecility of the long hairs down at Washington. A city or town has no power whatever to pass an ordinance making it an offense for violating a rule of some crazy individual at Washington and, even if they did have the power, it would be ridiculous to make it an offense to violate some rule of the OPA that no one knows anything about. If you have received such an ordinance play safe and pay no attention to it. This ordinance is an example of the almost universal stupidity of many of the half-baked individuals who have been called to Washington but who would be doing the country a lot more good if they were out digging ditches, as that would be more in keeping with their mentality."

5. Texts of the various state laws and ordinances are set forth in 1 PIKE & FISCHER OPA SERV., (General Desk Book) 5001-6516. The state laws were those of New York (covering price and rent), California (rationing), Rhode Island (rationing) and Wisconsin (rationing). Ordinances numbered over 80, but 25 in the State of Ohio were invalidated in April, 1945, by the decision holding the Cleveland ordinance unconstitutional. *City of Cleveland v. Piskura*, 145 Ohio St. 144, 60 N.E.2d 919 (1945).

The ordinances generally covered price and rationing violations; a number specifically mentioned rent violations, and even where they did not, it was the assumption of some local courts that a reference to "commodity or service" was sufficient to cover rental of housing accommodation.

In the overwhelming majority of ordinances, there was no requirement that the violation be wilful before the penalty became applicable. The same was true of the state laws of Rhode Island and Wisconsin, and was possibly true of the New York statute. The ambiguity in New York arises from the fact that §101 (6) of the New York War Emergency Act made punishable as an infraction any wilful violation not made punish-

pose of this article to consider the validity of this technique of ancillary, adoptive legislation, upheld by the New York Court of Appeals⁶ and the Supreme Courts of Michigan⁷ and Porto Rico⁸ but found unconstitutional by the Supreme Court of Ohio.⁹

The test cases and the problems they raise have, it is submitted, a significance extending beyond the emergency period. The validating decisions are of particular interest in the light of the fact that constitutional lawyers have generally considered attempts by a state or city to penalize the violation of a federal requirement, as the latter may be amended from time to time, an improper delegation of power to the

able as a misdemeanor or infraction "in any of the preceding subdivisions of this section, or by or pursuant to any other provision of this act." The State War Council resolution (pursuant to § 7 (6) of the Act authorizing the Council to adopt various federal regulations and "to adopt rules and issue orders with respect to . . . enforcement . . .") adopted the regulations under the Price Control Act and provided in § 2 that violations be punishable as infractions. This, it may be argued, made violations punishable as infractions "pursuant to any other provision of this Act" within the meaning of § 101 (6) above referred to; hence the penalty established by § 101 (6) itself, for wilful violations not otherwise made punishable, is inapplicable, and the provision of the resolution that "every violation" (*i.e.* regardless of wilfulness) is an infraction, is applicable. The Court of Appeals in *People v. Mailman*, 293 N.Y. 887, 59 N.E.2d 790 (1944), apparently assumed that the applicable penalty provisions were those of § 101 (6) of the Act rather than § 2 of the resolution; indeed the complaint charged violation of the resolution and § 101 (6) of the Act. See also note 14 *infra*.

The size of the penalties varied considerably among the ordinances and laws. The maximum fine varied from \$10 (Middlesborough, Ky.) to \$500 (*e.g.* Detroit) and the maximum imprisonment varied from 10 days (*e.g.* Mt. Sterling, Ill.) to 5 years (some offenses under the California law). The penalty under the New York law and pursuant resolution was up to \$25 fine and/or up to 5 days' imprisonment. The New York City Ordinance (Local Law No. 34) had a penalty of up to \$100 fine and/or up to 30 days' imprisonment; the ordinance applicable only to wholesalers or middlemen (Local Law No. 35) had a penalty of up to \$500 and/or up to 90 days' imprisonment.

In most cases, the prohibitions applied at all levels of distribution; but in some instances (*e.g.* some ordinances in West Virginia and New Jersey, and those in Yonkers and Troy, N.Y.) price-control was at the retail level only. Generally the price-control penalties applied only to sellers, but in some instances (*e.g.* New York City) to commercial purchasers as well. The ultimate consumer was not penalized as to any illegal price or rent transaction, and only in a few ordinances was he penalized as to rationing transactions (in West Virginia; Troy, Yonkers, New York City; Mt. Sterling, Ill.; Sioux City, Iowa; Houma, Louisiana).

Most ordinances also provided that municipal business licenses could be suspended upon violation of the ordinance.

6. *People v. Mailman*, 293 N.Y. 887, 59 N.E.2d 790 (1944), *affirming* 182 Misc. 870, 49 N.Y.S.2d 733 (App. Part, Sp. Sess. 1944) (state law); *accord*, *People v. Lewis*, 295 N.Y. 42, 64 N.E.2d 702 (1945) (city ordinance).

7. *People v. Sell*, 310 Mich. 305, 17 N.W.2d 193 (1945) (three judges dissenting).

8. *Irizarry v. District Court of Ponce*, 2 PIKE & FISCHER OPA OP. & DEC. 2196 (1944).

9. *City of Cleveland v. Piskura*, 145 Ohio St. 144, 60 N.E.2d 919 (1945) (one judge dissenting).

federal government; and there is strong authority for that view.¹⁰ In addition, there are substantial questions as to whether the constitutional provisions of some states prohibiting incorporation of other laws by reference would be a barrier; whether differences between the federal, state and municipal provisions, with respect to the size of the penalty or the scope of the prohibition (*e.g.* the municipal omission of a federal or state requirement that there be wilfulness before the penalty is applicable), constitutes such a conflict or inconsistency as to invalidate the law of the lesser jurisdiction; whether Congress "occupied the field" by the federal acts governing price and rent control and rationing so as to invalidate, without more, any local legislation on the subject; and whether, finally, the police power or any other power of states and cities is ample enough to regulate so all-embracing a field of economic activity. Problems of double jeopardy also suggest themselves, but they have not arisen in these cases; and in any event would be insubstantial in most jurisdictions.¹¹ With the exception of double jeopardy, each of the foregoing issues is considered below, with principal attention given to the problem of delegation.

THE ISSUE OF DELEGATION OF LEGISLATIVE POWER

Of all the objections made to the adoptive statutes and ordinances, the most prominent, and most difficult to deal with, is the objection that they make an invalid delegation of legislative power to the federal government. In other words, when an ordinance or state law permits some unknown future change in federal regulations to determine what shall be an offense against the city or state, the local legislative body is said to be abdicating its legislative function. This was the view of the Ohio court in *City of Cleveland v. Piskura*.¹² However no invalid delegation was found to exist by the highest courts of New York, Michigan or Porto Rico. While the opinions of the three latter courts show the influence of the special nature of the Emergency Price Control Act,

10. See Note, 133 A.L.R. 401 (1941); *Darweger v. Staats*, 267 N.Y. 290, 196 N.E. 61 (1935); Opinion of the Justices, 239 Mass. 606, 133 N.E. 453 (1921); *State v. Vino Medical Co.*, 121 Me. 438, 117 Atl. 588 (1922), and *State v. Gauthier*, 121 Me. 522, 118 Atl. 380 (1922); *Uhden, Inc. v. Greenough*, 181 Wash. 412, 43 P.2d 983 (1935); *Smithberger v. Banning*, 129 Neb. 651, 262 N.W. 492 (1935); *Hutchins v. Mayo*, 143 Fla. 707, 197 So. 495 (1940); *Florida Industrial Commission v. State*, 155 Fla. 772, 21 So.2d 599 (1945); *Holgate Bros. Co. v. Bashore*, 331 Pa. 255, 200 Atl. 672 (1938).

11. As to prosecutions by the federal government on the one hand, and state or city government on the other, see *United States v. Lanza*, 260 U.S. 377 (1922) and cases cited therein; *Hebert v. Louisiana*, 272 U.S. 312 (1926). As to state plus city prosecutions, see 3 MCQUILLIN, *LAW OF MUNICIPAL CORPORATIONS* (2d ed. 1943, Kearney) §934; Grant, *Penal Ordinances in California* 24 CALIF. L. REV. 123, esp. 123-8 (1936); Notes, 48 A. L. R. 1106 (1927); 22 A.L.R. 1551 (1923). But cf. the rule in federal plus territorial prosecutions, *Grafton v. United States*, 206 U.S. 333 (1907); *Puerto Rico v. Shell Co.*, 302 U.S. 253, 264 (1937).

12. 145 Ohio St. 144, 60 N.E.2d 919 (1945).

they rest also on other principles, discussed below, which have application to the normal peacetime situation.

(a) Before discussing the merits of the objection to *in futuro* adoption, it may be well to consider a preliminary type of delegation which may be present in this adoptive legislation: the delegation by a state or city to an intermediary administrative or executive agency of the same sovereignty of the authority to determine whether and to what extent federal regulations shall be adopted. Thus Section 7 (6) of the New York State War Emergency Act empowered the State War Council to "adopt and promulgate in this state any rationing, freezing, price fixing or other order or regulation imposed by the authority of the federal government"¹³ and "to adopt rules and issue orders with respect to the enforcement" thereof.¹⁴ This provision and the War Coun-

13. NEW YORK WAR EMERGENCY ACT, §7(6).

14. This latter phrase can be read, as indicated *supra* note 5, to mean that the War Council was being given authority to determine what penalty should be applicable to violations of its orders. Such a reading is supported by the following considerations: (1) §101-a of the Act gives certain courts jurisdiction over "violations constituting misdemeanors or infractions under this act *or under* any rule, regulation or order duly promulgated pursuant to this act, committed within the territorial jurisdiction of such courts." (emphasis added) (2) The War Council had been given its powers under §7(6) in the year *before* §101(6) was enacted providing for punishment of certain wilful violations. (3) §101(6) provides for punishment of wilful violations not made punishable by §101 "or by *or pursuant to* any other provisions of this act," (emphasis added) suggesting that the "pursuant to" refers to §7(6). Hence the War Council was authorized, "pursuant to" §7(6) to declare as it did that "*every violation* of any such regulations or orders shall constitute and be an infraction of this order, triable and punishable pursuant to the provisions of the New York State War Emergency Act, as amended." (By "triable" the Council was evidently referring to the court jurisdiction provided for in the Act, *e.g.* § 101-a, and by "punishable" to § 102 which was headed "punishment for infractions," and provided that "any person convicted of an infraction as defined by this act shall be punished by a fine of not more than twenty-five dollars or five days in jail or both.") The alternative reading of the above-quoted part of the resolution is to say that it is merely hortatory or educational, calling the public's attention to the statutory penalties. (4) In 1946, in incorporating into the general business law the substance of the War Emergency provisions with regard to price, rent and rationing regulations, the legislature provided (L. 1946, c. 405) that "any person who shall violate" (rather than wilfully violate) a regulation under the Emergency Price Control Act as amended was punishable by fine up to \$25, or up to 5 days in jail or both.

If the indicated construction is correct, then another constitutional problem would be raised by the New York legislation: delegation of the legislative power to create penalties. *See, e.g.,* *People v. Ryan*, 267 N.Y. 133, 195 N.E. 822 (1935); *People v. Grant*, 267 N.Y. 508, 196 N.E. 553 (1935). Since the Council was composed of several leading legislative as well as executive officials including the President pro tempore of the Senate, the Senate minority leader and Senate Finance Committee Chairman, the Speaker of the Assembly, and the Chairman of the Assembly Ways and Means Committee, it might have been regarded as a "quasi-legislative" agency not amenable to the rule against administrative creation of penalties. In addition it is significant that the legislature in §100 (d) of the Act declared that "the penalty or punishment" imposed for infractions "shall not be deemed for any purpose a penal or criminal penalty or punishment."

cil's resolution adopting and promulgating the regulations issued under the Emergency Price Control Act were upheld by the New York Court of Appeals in *People v. Mailman*.¹⁵ The lower court whose decision was affirmed without opinion in that case did not discuss the validity of the delegation to the War Council. The delegation seems at first blush rather difficult to defend because of the lack of any apparent "standards" to guide the Council's discretion in the creation of prohibitions. However, (1) the Council's discretion was strictly confined in the sense that the Council was not authorized to vary the content of the promulgated regulation from that of the federal regulation; (2) the Council was not authorized to create any new prohibitions previously inapplicable to the inhabitants of the state. The federal wartime regulations were already the law of the land, applying alike in interstate and intrastate commerce. Nevertheless, it was true that the Council's discretion was unconfined by any legislative standards governing the *circumstances under which* and *the extent to which* the federal regulations were to be adopted.

An analogous though somewhat more careful use of an intermediary agency for purposes of adoption of federal regulations was involved in *Brock v. Superior Court*,¹⁶ where the California court sustained a state agricultural adjustment act which empowered the state director of agriculture, after hearings, to issue licenses if there existed a corresponding federal marketing agreement or license for the particular business and if the administrative officials under the state license included only those holding corresponding positions under the federal order, and to approve of marketing agreements which conformed with the terms of the federal marketing agreement. Here, as in the *Mailman* case, there were no strict standards to govern the agency's discretion, but the court felt that the law clearly stated its purposes (prevention of waste through disorderly marketing, raising of the price level to a specified point, equal opportunities to growers and producers in the available market) and adequately specified the necessary prerequisites of a corresponding federal regulation with like terms and an agency with like personnel, so that the director, after hearing, could adequately

In *People v. Mailman*, 293 N.Y. 887, 59 N.E.2d 790 (1944), the Court of Appeals apparently assumed, as did the court below, that the applicable penalty provisions were those of §101 (6) rather than §2 of the resolution. This view was taken in all the briefs filed in support of the law in the *Mailman* case; and the complaint charged violation of the resolution and §101 (6) of the Act. Thereafter, after more intensive consideration of the statute, the Price Administrator urged the other view and persuaded the Appellate Part, Special Sessions to adopt it. *People v. Lewis*, 186 Misc. 921, 928 (App. Part, Sp. Sess.), *aff'd on other grounds*, 295 N. Y. 42, 64 N.E.2d 702 (1945).

15. 293 N.Y. 887, 59 N.E.2d 790 (1944), *affirming* 182 Misc. 870, 49 N.Y.S.2d 733 (App. Part, Sp. Sess. 1944).

16. 9 Cal.2d 291, 71 P.2d 209 (1937).

and within reasonable limits exercise his judgment whether the federal regulations conformed to the intent of the state law.

The *Brock* case illustrates the modern trend to uphold the adequacy of standards which state an "intelligible principle"¹⁷ to guide the administrative agency, though the principle may be broad enough to permit very wide discretion in the administrative agency.¹⁸ The case is even more important for pointing to one method of avoiding the delegation problem involved in *in futuro* adoption of federal regulations: the creation of a state agency to determine, under prescribed standards, whether and to what extent the federal regulations are to be adopted, including a new determination whenever the federal regulations change. As the court emphasized, the California law involved "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."¹⁹

The intermediate agency device has, of course, its limitations. Since every change in the pertinent federal regulations must be evaluated by the state agency prior to adoption, the device is practically useless in the OPA type of situation, where the constant amendment of thousands of federal regulations would seem to require continuous and impossibly speedy reevaluation by the local agency of the federal pattern of control. This factor in addition to the potential local confusion inherent in the *partial* adoption and enforcement of federal requirements was doubtless influential in causing the New York State War Council, on April 28, 1943, to adopt "all" regulations of the Price Administrator under the Emergency Price Control Act.²⁰

In the *Brock* case, as has been stated, the court upheld the alleged delegation to the federal government since there was "no automatic incorporation by reference of future federal laws". The cases in which the doctrine of invalid delegation through incorporation of future federal regulations has been applied, *did* involve an "automatic" incorporation. It is to these cases that we now turn.

17. Taft, C. J., in *Hampton v. United States*, 276 U.S. 394, 409 (1928).

18. The tendency in the state courts has been more marked in the field of broad, complex regulations of business activity such as those in the *Brock* case than in other fields. See, e.g., Jaffee, *An Essay on Delegation of Legislative Power*, II, 47 COL. L. REV. 561, 581-92 (1947). See generally, Note, *Permissible Limits of Delegation of Legislative Power*, in 79 L. Ed. 474 (1935). The sanctioning of very broad standards is even more evident in the federal cases. See note 46 *infra*.

19. 9 Cal.2d 291, 298, 71 P.2d 209, 213 (1937) (emphasis added).

20. The War Council's resolution, which was renewed from year to year thereafter, declared in §1, "Solely for purposes of enforcement, all regulations and orders established by the Price Administrator pursuant to the Emergency Price Control Act of 1942, as amended by Public Law 729—77th Congress and Public Law 151—78th Congress, are hereby adopted and promulgated in the State of New York."

(b) One thing to be noted at the outset is that the state or municipal adoption of *existing* federal provisions does not fall within the delegation doctrine. It is an obvious and proper convenience for a legislature which has determined that existing provisions of its *own* other laws or regulations should be made applicable, to do so through incorporation by reference instead of setting them out in full; Congress has often done this, with Supreme Court approval,²¹ and so have the local legislatures where not inhibited by state constitutional provisions against incorporation by reference as a matter of legislative *form*.²² The device is just as convenient and proper when the existing provisions are those of other sovereignties as it is when they are of the same sovereignty. Thus, some of the leading cases holding invalid the state adoption *in futuro* of federal regulations, also recognize that adoption of *existing* federal regulations would be no invalid delegation of legislative power.²³

It is to be observed, moreover, that even where there is a genuine *in futuro* adoption, the person attacking such adoption will have no standing to raise the issue if in fact no change in the adopted requirements occurred between the time of adoption and the time of the contested application to him (the latter time, in a suit for violation of the adopting legislation, would be the time of violation). This is because of the familiar constitutional principle that one who complains of an unconstitutional aspect of legislation ". . . must show that the alleged unconstitutional feature injures him,"²⁴ and because, as indicated, adoption of existing requirements is not an invalid delegation. The point has been made in at least one of the adoption cases.²⁵ This "no-standing" principle may be applicable independently of the severabil-

21. See *Panama R.R. v. Johnson*, 264 U.S. 375, 391-2 (1924); *Engel v. Davenport*, 271 U.S. 33, 38 (1926); *Alton Railroad Co. v. United States*, 315 U.S. 15, 19 (1942).

22. This formal requirement, which would be important only in a few states, is treated in the second installment of this article.

23. Thus in *State v. Vino Medical Co.*, 121 Me. 438, 442, 117 Atl. 588, 590 (1922) the court said: "We are not aware of any objection on constitutional grounds to the adoption, by legislative enactment, of any *existing* definition or standard enacted by Congress, by which the intoxicating character of liquor shall become fixed by law in this state." (emphasis added) Again, in *Hutchins v. Mayo*, 143 Fla. 707, 713, 197 So. 495, 498 (1940) the court said: "We do not question the authority of the Legislature to make optional the regulations of the . . . [federal agency] . . . as they then existed." See to the same effect, *Green v. City of Atlanta*, 162 Ga. 641, 135 S.E. 84 (1926); *Scottish Union and National Insurance Co. v. Phoenix*, 28 Ariz. 22, 235 Pac. 137 (1925).

24. *Premier-Pabst Sales Co. v. Grosscup*, 298 U.S. 226, 227 (1936).

25. "To date there has been but one piece of national legislation on the subject in hand—the Volstead Act, and this was passed prior to the present indictment; appellant, not being harmed by any change in the law since its first pronouncement, cannot complain on that score." *Commonwealth v. Alderman*, 275 Pa. 483, 487, 119 Atl. 551, 553 (1923).

ity of the adopting legislation as between existing and future requirements.²⁶ At any rate, such severability can generally be urged, and has often been successfully urged, in the adoption cases,²⁷ to sustain the legislation insofar as existing requirements were adopted.

In the ensuing discussion, it is assumed that a state or municipal prohibition against violation of present and future federal administrative regulations under a named federal statute is an *in futuro* adoption. It is of course possible to argue that the basic requirements adopted are those of the statute (particularly if the local statute so states), and insofar as the federal *regulations* conform to the statutory standards, prohibiting violation of a subsequently changed federal regulation is still merely an adoption of *existing* federal requirements—namely those of the statute itself; hence only if the statute has undergone pertinent amendment by the time of the violation would there be an *in futuro* adoption problem. However, the cases holding *in futuro* adoption invalid²⁸ do not rest upon any distinction between statute and regulation. Nor, unless the federal regulations were of a quite minor nature, would it be realistic to stress the distinction.

Coming then to the *in futuro* adoption problem, there is more than one theory by which such adoption can be defended against the charge of invalid delegation.

(1) *Contingency theory*: One of the early theoretical tools used in dealing with the delegation issue was the judicial principle that the legislature may, without being guilty of an invalid delegation, make a complete law take effect upon the happening of a "fact" or "contingency," and may delegate the authority to determine the happening of that fact or contingency.²⁹ As the doctrine developed, it came to be applied even in some situations where the determination of the particular "fact" or happening of the particular "contingency" depended upon the exercise of judgment and discretion by a delegate—*e. g.* the

26. In numerous cases the "no standing" doctrine has been applied without discussion of severability of the provision involved. And there are some rather explicit rejections of the idea that severability has anything to do with the question of legal standing. *See, e.g.* Yazoo and Miss. R.R. v. Jackson Vinegar Co., 226 U.S. 217, 219-20 (1912); Dollar Co. v. Canadian C. and F. Co., 220 N.Y. 270, 282-3, 115 N.E. 711, 714-5 (1917).

27. *Scottish Union & Nat. Ins. Co. v. Phoenix Title and Trust Co.*, 28 Ariz. 22, 235 Pac. 137 (1925) (eliminating adoption of future changes in New York standard fire insurance contract); *Green v. Atlanta*, 162 Ga. 641, 135 S.E. 84 (1926) as explained in *Featherstone v. Norman*, 170 Ga. 370, 395, 153 S.E. 58, 70 (1930) (eliminating adoption by municipality of future changes in federal pay scales); *Ex parte Burke*, 190 Cal. 326, 212 Pac. 193 (1923) (eliminating adoption of future changes in federal Volstead Act).

28. *See* note 10 *supra*.

29. *E.g.* *The Aurora*, 7 Cranch 382 (U.S. 1813); *Field v. Clark*, 143 U.S. 649 (1892); *Locke's Appeal*, 72 Pa. 491 (1873); *State v. Atlantic Coast Line R.*, 55 Fla. 617, 47 So. 969 (1908); *Elwell v. Comstock*, 99 Minn. 261, 109 N.W. 698 (1906); *State v. Corvallis & E.R.*, 59 Ore. 450, 117 Pac. 980 (1911).

president's judgment as to international tariff relationships,³⁰ the judgment of groups of individuals determining whether a law shall be effective, under "local option" legislation,³¹ or the judgment of sister states, under "reciprocal" or "retaliatory" legislation enacting taxes or license requirements applicable to foreign corporations or otherwise making state law dependent on the provisions of other states.³²

30. *Field v. Clark*, 143 U.S. 649 (1892). See Jaffee, *supra* note 18, at 566 for comment on the scope of this discretion.

31. Thus in *Locke's Appeal*, 72 Pa. 491 (1873), the court said: "The law did not spring from the vote, but the vote sprang from the law. . . . To assert that a law is less than a law because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare. . . . The legislature cannot delegate its power to make a law, but it can delegate a power to determine some fact or state of things. . . ." *Id.* at 498. Again in *State v. Parker*, 26 Vt. 357, 365 (1854), the Court said: "If the operation of a law may fairly be made to depend upon a future contingency then, in my apprehension, it makes no essential difference what is the nature of the contingency, so it be an equal and a fair one, a moral and legal one, not opposed to sound policy and so far connected with the object and purpose of the statute as not to be a mere idle and arbitrary one. . . . It seems to me that the distinction attempted between the contingency of a popular vote and other future uncertainties is without all just foundation in sound policy or sound reasoning." For a collection of cases on local option and state-wide referenda legislation (the former have been generally upheld, the latter generally invalidated), see Note, *Permissible Limits of Delegation of Legislative Power*, 79 L. Ed. 474, 560-73 (1935).

32. *Clay v. Dixie Fire Ins. Co.*, 168 Ky. 315, 181 S.W. 1123 (1916); *Phoenix Ins. Co. v. Welch*, 29 Kan. 672 (1883); *Home Ins. Co. v. Swigert*, 104 Ill. 653 (1882); *State v. Ins. Co.*, 115 Ind. 257, 17 N.E. 574 (1888); *Texas Co. v. Dickinson*, 79 N. J. L. 292, 75 Atl. 803 (1910); *State v. Davis*, 132 Ohio St. 308, 7 N.E.2d 652 (1937); *Interstate Trucking Co. v. Damman*, 208 Wis. 116, 241 N.W. 625 (1932); *People v. Fire Ass'n of Philadelphia*, 92 N.Y. 311 (1883), *aff'd*, 119 U. S. 110 (1886).

These are the so-called "reciprocal" or "retaliatory" state statutes which make the license or tax provisions for foreign corporations operating in State *A* dependent upon the analogous provisions of the home State *B* of such corporations, applicable to corporations of State *A* operating as foreign corporations in State *B*. The typical approach in these cases is shown in the extensive opinion of the New York Court of Appeals upholding a New York statute taxing foreign insurance companies on the basis of the tax imposed by those states on New York companies, in the *Fire Association* case *supra*, at 318-9: "But in the statute before us nothing is left to anybody's discretion. That is certain which can be rendered certain, and the act fixes the tax by reference to an extrinsic fact which determines its amount in excess of a fixed and established rate. Because that extrinsic fact is the legislation of another State, it does not follow that the legislative discretion of such other state is in any manner substituted for our own. . . . [W]hat would be certainly constitutional if done *seriatim*, by several and separate acts, does it become unconstitutional when the same precise and identical result, founded upon exactly the same legislative discretion, is accomplished by one?"

State statutes making it unlawful to sell liquor manufactured in a state whose laws discriminate against liquor manufactured in the enacting state were upheld by the Supreme Court without discussion of the delegation issue, which was not raised. *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U. S. 391 (1939); *Finch & Co. v. McKittrick*, 305 U. S. 395 (1939). The issue might have been raised, however. The

The courts in upholding these laws felt that the ultimate discretion and judgment was that of the legislature enacting the conditional legislation; that the law was "complete" within the meaning of the rule, since the relevant contingency was contained within it. As stated in one of the cases last referred to, involving a "reciprocal" statute: "In all these cases it is the law of the home government which is enforced, and the action of the foreign government only makes the contingency upon which the law becomes operative. *There is no difference in principle between such contingency and any other which may be provided for in the statute.*"³³ On the principle of the cases, then, state and municipal legislation would not be making an invalid delegation of legislative power if the "contingency" upon which their content and effectiveness depended was the existence of certain federal legislative or administrative requirements.

(2) *Theory of standards*: The more modern and familiar principle by

suits were federal court suits for injunctions to restrain enforcement because of alleged violation of the commerce clause, and of the due process and equal protection clauses of the 14th Amendment. The due process contention apparently did not include, as other state delegation cases in the Supreme Court have, a contention that the delegation was so arbitrary as to violate federal due process. See Jefferson, *The Supreme Court and State Separation and Delegation of Powers*, 44 *Col. L. Rev.* 1 (1944). Another type of reciprocal statute enacted in several states is one which allows aliens who are non-residents of the United States to inherit property within the jurisdiction only if their respective countries grant reciprocal rights to American citizens. See Note, 56 *Yale L. J.* 150 (1946). These do not seem to have been attacked as invalid delegations to a foreign country. Still another type was involved in *Texarkana v. Arkansas Gas Co.*, 305 U. S. 188 (1939). The city of Texarkana, Texas, had granted a utility franchise which provided that if the company should be compelled to (by Arkansas authorities), or should voluntarily, establish rates for the adjacent city of Texarkana, Arkansas, which were less than those fixed by the franchise, such lower rates should apply also in Texarkana, Texas. The Supreme Court rejected the delegation objection by saying: "It is true, extra-state action determines that the rate shall lessen; but the council has power over the rates at all times." *Id.* at 197.

33. *Phoenix Ins. Co. v. Welch*, 29 Kan. 672, 678 (1883) (*italics added*). The court evidently did not mean to imply anything more than that the action of another government was no less properly a "contingency" than some other non-governmental action. It did not mean that the power to base the effect of a law upon a contingency was unlimited. Thus, as the N. Y. court observed in the *Fire Association* case, *supra* note 32 at 322: "But it is said the doctrine thus asserted would permit one state to adopt the law of another state, together with its future changes, by one sweeping enactment; and, for an example, that New York might enact that the rate of interest here for the loan of money should be such and the same as that which should be from time to time prescribed by the law of Maine. These are seeming, but in reality false, analogies. They are pure cases of an abdication of its functions by the legislature and of an unwarranted delegation of its authority. But that is so because there is no dependent or causative connection between the domestic and the foreign law . . . and because . . . the event upon which the law is made to take effect is not one on which the expedience of the law, in the judgment of the lawmakers, depends. In other words, no legislative judgment is involved."

which delegations of legislative power are tested is the *adequacy of the standards* laid down by the legislature to control the action of the delegate.³⁴ In the ordinary case of delegation by a legislature to an administrative agency of the same sovereignty, the blanket objection is not made that the legislature cannot properly adopt future administrative regulations. The administrative agency is given the power to create and administer regulations *in futuro* precisely because the legislature feels itself unable to deal efficiently and expeditiously with future situations requiring quick, expert action. What preserves the delegation from unconstitutionality is the fact that the administrative agency's discretion is guided by adequate legislative standards.

Applying that test to the local OPA legislation, it could plausibly be argued that the legislation was in effect adopting the *standards of the federal acts*, in prohibiting violations of regulations issued thereunder; and the constitutional adequacy of these standards as upheld by the federal courts under the Federal Constitution³⁵ is of considerable weight in determining adequacy of the standards under the various state constitutions. The Supreme Courts of Porto Rico³⁶ and Michigan³⁷ adopted, at least in part, this approach, which had been suggested in a lower court California case a decade earlier, upholding the Cali-

34. *Yakus v. United States*, 321 U.S. 414 (1944); *United States v. Rock Royal Co-op*, 307 U.S. 533 (1939); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Hampton v. United States*, 276 U.S. 394 (1928); *People ex rel. Gamber v. Sholem*, 294 Ill. 204, 128 N.E. 377 (1920); *Michigan Milk Marketing Board v. Johnson*, 295 Mich. 644, 295 N.W. 346 (1940); *Ferretti v. Jackson*, 88 N.H. 296, 188 Atl. 474 (1936); *Seignious v. Rice*, 273 N.Y. 44, 6 N.E.2d 91 (1936).

35. The standards of the Emergency Price Control Act were upheld in *Yakus v. United States*, 321 U.S. 414 (1944); *Bowles v. Willingham*, 321 U.S. 503 (1944). The standards of the Second War Powers Act governing the rationing authority were upheld in numerous appellate and trial courts. *See, e.g., O'Neal v. United States*, 140 F.2d 908 (C.C.A. 6th 1944), *cert. denied*, 322 U.S. 729 (1944); *United States v. Randall*, 140 F.2d 70 (C.C.A. 2d 1944).

36. "The Legislature, in adopting by reference the Federal Act, has laid down broad standards, which the Supreme Court of the United States has upheld despite contentions that the Federal Act constitutes an invalid delegation of legislative power (*Yakus v. United States*; *Bowles v. Willingham*, *supra* note 35. In also providing in effect that the Federal regulations to be promulgated by the Administrator under the Federal statute, shall also be insular regulations, the legislature has simply selected the Federal Administrator as the administrative official who shall have the power 'to fill up the details' within the broad but valid standards laid down in the law itself." *Irizarry v. District Court of Ponce*, 2 PIKE AND FISCHER, OPA OP. & DEC. 2196, 2199 (Sup. Ct., Porto Rico, 1944). While this theory of the court is useful, the decision on delegation has limited value because it involved a territory. As the Court recognized: "In addition, . . . there may be no constitutional objection to action by the Legislature of Porto Rico, the agent of Congress, in delegating back to Congress, its creator, the authority to legislate it originally received from Congress." *Id.* at 2200. Similarly, cases involving municipal adoption of state provisions are not strong authorities on the delegation issue.

37. The court quoted from the Porto Rico decision in this connection. *People v. Sell*, 310 Mich. 305, 323, 17 N. W.2d 193 (1945).

formia law adopting federal NRA codes.³⁸ If then the standards were proper, and, as has been stated, the usual delegation to an administrative agency is obviously not invalidated by the fact that it involves a granting of discretion as to future regulations, then the residual element in the objection to such adoptive legislation must come down to this: the delegation is improper because it is to an administrative officer of *another sovereignty*. While the Ohio Supreme Court in the *Piskura* case felt this was fatal,³⁹ the Porto Rico and Michigan courts thought otherwise, again following the lead of the lower California court.

For, as the California court observed, "we are a nation, not an alliance of foreign states, and our President is not a foreign potentate."⁴⁰ Or, as the Supreme Court said in 1883 of the same state-federal relation, running in the other direction: use by the federal government of state instrumentalities "has not been deemed violative of any principle *or as in any manner derogating from the sovereign authority* of the federal government; but as a matter of convenience and as tending to a great saving of expense."⁴¹ The practice referred to was impressively common both before and after this case.⁴² Moreover, it is difficult to ac-

38. *Ex parte Laswell*, 1 Cal. App. 2d 183, 36 P.2d 678 (1934). The California statute provided for establishment of state codes by a state official for those industries not covered by federal codes, but provided that any code "approved, prescribed or issued under Title I of the said Act of Congress commonly known as the National Industrial Recovery Act for any trade . . . shall supersede any code or codes approved under the provisions of this act for such trade . . . and shall immediately become the code of fair competition provided for in this act for the said trade . . . and shall be enforceable as such under the provisions hereof." Statutes of California, 1933, c. 1037, § 2. The court in the *Laswell* case, after observing that the state had declared its policy to cooperate with the national government in eliminating unfair competitive practices, establishing a parity in conditions of employment, etc., said of the California statute: "So far as this case is concerned, we may say that the *federal statute was adopted* by the state and that it was provided in the adopting statute that when the federal authorities had fixed a code for the operation of any industry, that code automatically became the state code therefor." *Ex parte Laswell*, *supra* at 188, 36 P.2d at 680 (italics added).

39. "Such prices are determined by the Price Administrator, a federal agency, over whom council has no authority or control. That body did not and could not establish a policy or fix standards for his guidance. Therefore in the last analysis the offense is the violation of an order of the Price Administrator. Such an ordinance is invalid because of its attempted delegation of legislative power to a federal agency." *City of Cleveland v. Piskura*, 145 Ohio St. 144, 158, 60 N. E.2d 919, 925 (1945).

40. *Ex parte Laswell*, 1 Cal. App.2d 183, 203, 36 P.2d 678, 687 (1934).

41. *United States v. Jones*, 109 U. S. 513, 519 (1883) (italics added).

42. State statutory authorization for the use of federal officials by the states (See, e.g., employment of Federal Power Commission by state utility commission to make an investigation for it, upheld in *Garvey v. Trew*, 170 P.2d 845 (Ariz. 1946)) has not been as common as the reverse.

Thus, under the Selective Service draft statutes of World War I, considerable administrative authority was placed in the hands of state officials, and the contention that this constituted an invalid delegation of federal legislative power to state officials was held by the Supreme Court to be "too wanting in merit to require further notice". *Arver*

cept the loss of sovereignty argument in face of the fact that delegations

v. United States, 245 U. S. 366, 389 (1918). Nor have the Courts taken the argument seriously in other similar cases of federal authorization to state and local officials to discharge federal functions. *Robertson v. Baldwin*, 165 U. S. 275 (1897) (arrests of deserting seamen by local justices of the peace); *Harris v. Superior Court*, 51 Cal. App. 15, 196 Pac. 895 (1921), *Gambino v. United States*, 275 U. S. 310 (1927) (participation by municipal police in enforcement of National Prohibition Act) (and see Executive Order of May 8, 1926 authorizing the commissioning of state officers as federal agents to assist in enforcing National Prohibition Act, discussed in Hart, *Some Legal Questions Growing Out of the President's Executive Order for Prohibition Enforcement*, 13 VA. L. REV. 86 (1926)); enforcing National Prohibition Act, discussed in Hart, *Some Legal Questions Growing Out of the President's Executive Order for Prohibition Enforcement* 13 VA. L. REV. 86 (1926); *Goulis v. Stone*, 246 Mass. 1, 140 N. E. 294 (1923) (arrest warrant and preliminary hearing by state judicial officer for offense under National Prohibition Act); *Matter of Spangler*, 11 Mich. 298 (1863), *Druecker v. Salomon*, 21 Wis. 621 (1867) (participation in administration of Civil War draft statute by governor, county commissioners, and township assessors); *Dallemagne v. Moisan*, 197 U.S. 169 (1905) (local police officer arresting crew-member of foreign vessel, under federal treaty authorization); *Parker v. Richard*, 250 U.S. 235 (1919), *Marcy v. Bd. of Comm'rs*, 45 Okl. 1, 144 Pac. 611 (1914) (state court approval as a condition of alienation of lands by certain Indian heirs); *United States v. Jones*, 109 U.S. 513 (1883) (state court determination of value of property taken under federal power of eminent domain); *Holmgren v. United States*, 217 U.S. 509 (1910); *Levin v. United States*, 128 F. 826 (C.C.A. 8th 1904); *Indiana v. Killigrew*, 117 F. 2d 863 (C.C.A. 7th 1941); *In re Connor*, 39 Cal. 98 (1870); *Eldredge v. Salt Lake County*, 37 Utah 188, 106 Pac. 939 (1910) (state court conduct of naturalization proceedings and collection of fees). That the authorization involved in these cases is to be distinguished from compulsion, see *Prigg v. Pennsylvania*, 16 Pet. 539, 621, 630 (U.S. 1842); *Kentucky v. Dennison*, 24 How. 66 (U.S. 1860); *Dallemagne v. Moisan*, *supra* at 174; *Holmgren v. United States*, *supra* at 517; *Stephens, Petitioner*, 70 Mass. 559 (1855).

Many similar provisions do not seem to have received any specific judicial treatment. A provision of the Migratory Bird Conservation Act, 45 STAT. 1222 (1929), 16 U.S.C. § 715 (1940), authorizes, under certain conditions, cooperation by state officers in enforcement of federal regulations, as does the Plant Quarantine Act, 37 STAT. 316 (1912), 7 U.S.C. § 156 (1940), and as did the 1906 Food and Drugs Act, 34 STAT. 768, 769 (1906), 21 U.S.C. § 12 (1934) [repealed 52 STAT. 1059 (1938)]. Federal statutes have authorized local officers to use local warrants in apprehending and returning fugitive slaves, Fugitive Slave Act of 1850, 9 STAT. 462, have authorized the use of state jails for federal prisoners, REV. STAT. § 5539 (1875), 18 U.S.C. § 693 (1940), 46 STAT. 325-6 (1930), 18 U.S.C. §§ 753b-f (1940), REV. STAT. §§ 5548-50 (1875), 18 U.S.C. §§ 705-7 (1940), the use of state judicial officers and city mayors to make arrests of federal offenders and take them before committing magistrates, 31 STAT. 956 (1901), 18 U.S.C. §§ 591, 595 (1940), the taking by local judicial officers of depositions admissible in federal courts, REV. STAT. § 863 (1875), 28 U.S.C. § 639 (1934) [incorporated in Rule 28(a), FED. R. CIV. P.], and the issuance by such local officers of subpoenas upon application of a disputant in a contested congressional election, REV. STAT. §§ 110, 112 (1875), 2 U.S.C. §§ 206, 208 (1940) [see *In re Loney*, 134 U.S. 372 (1890)], and place a "duty" upon state governors to assist, in a prescribed manner, in the apprehension of interstate fugitives, REV. STAT. § 5278 (1875), 18 U.S.C. § 662 (1940), though this may be construed as permissive rather than mandatory. See *Kentucky v. Denison*, *supra*. The Federal Motor Carrier Act gives important duties to "joint boards" whose membership is composed of nominees named by state commissions—these nominations and the decisions of the joint boards

even to non-governmental bodies, when justified by the circumstances, are upheld as proper.⁴³

There is, however, a second use of the "standards" principle which is even more significant than that above indicated. For it avoids the "as if" quality of the argument that a state or city has adopted the standards of a federal act when all that it does explicitly is to prohibit violations of regulations under the federal act. This second technique is expressly to embody *standards in the local law itself*. This might be done by setting forth, or incorporating by reference, the then existing standards of the federal act,⁴⁴ or adopting independent state standards against which the action of the federal delegate is to be tested. The latter technique is illustrated by a recent proposal for "creation of a national corporation by Congressional statute and the negotiation of an interstate compact which embodies a delegation to this Corporation of important state powers over water resources. . . . To sustain the legality of the proposal against attacks based upon the prohibition against delegations of power, the compact should embody a mandatory instruction that the delegated authority is to be exercised by the Cor-

being subject to ICC approval. And the ICC may avail itself of the cooperation, services, records and facilities of the state authorities; and space and facilities in Washington are to be assigned for national representatives of the state commissions and for the joint boards. 49 STAT. 543, 550 (1935), 49 U.S.C. §§ 301, 305 (1940).

For description of cooperation in food and drug administration, interstate game supervision, ICC matters and others, see CLARK, *RISE OF A NEW FEDERALISM* (1938); Koenig, *Federal and State Cooperation Under the Constitution*, 36 MICH. L. REV. 752 (1938); Lindahl, *Cooperation Between the ICC and the State Commissions in Railroad Regulation*, 33 MICH. L. REV. 338 (1935); Kauper, *Utilization of State Commissioners in the Administration of the Federal Motor Carrier Act*, 34 MICH. L. REV. 37 (1935); and for cooperation between the TVA and state agencies see Comment, 56 YALE L. J. 276, 287-8 (1947).

For discussion of prohibitions of state constitutions against state employees' holding offices of trust or profit under the federal government and conclusion that the prohibitions are inapplicable, see Kauper, *supra*.

43. See Note, 79 L. Ed., 474, 495-501 (1934); Jaffee, *Law-Making by Private Groups*, 51 HARV. L. REV. 201 (1937); Note, 37 COL. L. REV. 447 (1937). In addition it is significant that state reciprocal statutes making the inheritance rights of alien non-residents dependent upon the legal treatment of American citizens by *foreign* governments have not been regarded as abdications of local sovereignty to a foreign sovereignty. See note 32 *supra*. It has also been suggested (Comment, 56 YALE L. J. 276, 301 n. 115) that alleged transfers of sovereignty are sometimes treated judicially as transfers merely of "jurisdiction." See *Central R. R. v. Jersey City*, 70 N.J.L. 81, 56 Atl. 239 (Sup. Ct. 1903).

44. Changes in the federal statutory standards would require changes in the local law, but this would not be too impractical, since changes in the federal statute as distinguished from regulations would be relatively infrequent. An *in futuro* adoption of federal standards as well as of federal regulations would doubtless strike many courts as being (assuming the "standards" approach to delegation is used) an invalid abdication of the legislative function. It could no longer be said that the state had, either expressly or impliedly, prescribed any standards of its own. The issue did not come up in the OPA cases.

poration in strict conformity with the general plan of development and the additional 'primary standards' established by the signatory states."⁴⁵

Such an independent prescription of standards is not likely to result in a state's unwittingly banning some unforeseen action that a national administrator may in the future deem it advisable to take. For the judicial trend in recent years in cases involving broad business regulation is to sanction the most flexible kind of standards where the nature of the problem demands it.⁴⁶ At any rate, it is clear that an *express* (if not necessarily detailed) statement of standards in the local legislation is a safer method than that used in the local legislation punishing OPA violations.

(3) "*Law of the land*" theory: On the delegation issue, one element of the reasoning of the Michigan court in *People v. Sell*,⁴⁷ and perhaps the only element in the reasoning of the lower New York court, affirmed without opinion in the *Mailman* case, was the principle that since the federal requirements were already the "law of the land," applying in both interstate and intrastate commerce, the scope of any delegation was thereby minimized. The federal government was not being delegated the authority to make new prohibitions applicable to intrastate commerce; it already had authority over intrastate commerce under the war power and had already applied its prohibitions thereto under the Price Control Act. These Courts were therefore able to distinguish the earlier unfavorable cases⁴⁸ on the ground that these earlier cases involved federal statutes applicable only to interstate commerce.⁴⁹

45. Comment, *Governmental Techniques for the Conservation and Utilization of Water Resources: An Analysis and Proposal*, 56 YALE L. J. 276, 295 (1947).

46. "With the exception of the NRA and some of the first agricultural marketing acts, almost no important administrative delegation has been disapproved. At least delegation has been upheld where the task, if it is to be done at all, must be delegated and where the 'standard' must of necessity be general." Jaffee, *supra* note 18, at 593. Federal cases since the NRA cases demonstrate their exceptional character. See *Fahey v. Maloney*, 67 Sup. Ct. 1552 (U.S. 1947); *American Power & Light Co. v. SEC*, 67 Sup. Ct. 133 (1946); *Yakus v. United States*, 321 U.S. 414 (1944); *Opp Cotton Mills v. Administrator*, 312 U.S. 126 (1941); *United States v. Rock Royal Co-op*, 307 U.S. 533 (1939).

47. 310 Mich. 305, 17 N.W.2d 193 (1945).

48. *E.g.*, *Darweger v. Staats*, 267 N.Y. 290, 196 N.E. 61 (1935) (holding invalid the New York adoption of federal NRA codes); *Hutchins v. Mayo*, 143 Fla. 707, 197 So. 495 (1940) (holding invalid the Florida adoption of future federal food and drug grading regulations).

49. The Michigan and New York courts were also able to cite as authority, *Commonwealth v. Alderman*, 275 Pa. 483, 119 Atl. 551 (1923), which upheld a Pennsylvania liquor control law that defined the phrase "intoxicating liquors" as "anything found and determined, from time to time, to be intoxicating by act of Congress passed pursuant to, and in the enforcement of the Constitution of the United States." The court said: "The above quoted statutory provisions do not present a delegation of legislative power contrary

(4) *Special theory of inter-governmental relations*: The two major theories thus far suggested as usable in defense of the typical attempt at adoption legislation have, perhaps, a somewhat unreal or strained quality about them when applied to the problem at hand. Both the "contingency" and the "standards" principles evolved from the attempt of legislatures to allow an administrative servant of the same sovereignty to take some action not feasible for the legislature itself to take. And the legislature protected itself by (1) allowing the administrative determination to be a relatively minor, non-policy determination of a fact or contingency, which would then bring into play the already "complete" policy determination of the legislature; or (2) by outlining, in advance, the "standards" which would control any important action to be taken by the subordinate. Though cases have here been cited in which these theories were applied to relations between governments, the theories are more appropriate for the situation which gave them birth: the fear of unrestrained, significant action by a subordinate. A state or municipal legislature passing a statute providing

to the Constitution of Pennsylvania, but simply an acceptance by our legislature of the inevitable, an acknowledgment of that which the federal Supreme Court, interpreting the Eighteenth Amendment . . . has pronounced the law of the land operative throughout the entire territorial limits of the United States, and binding all legislative bodies, courts, public officers and individuals within those limits. . . ." 275 Pa. 483, 486, 119 Atl. 551, 552. *But see*: State v. Intoxicating Liquors, 121 Me. 438, 117 Atl. 588 (1922); Opinion of Justices, 239 Mass. 606, 133 N.E. 453 (1921). The same point was made by the Pennsylvania court in the case of Holgate Bros. v. Bashore, 331 Pa. 255, 200 Atl. 672 (1938), involving a Pennsylvania statute which prescribed maximum hours of labor and provided that "with respect to any industry whose schedule of hours is established by Federal regulation, the schedule to be fixed by the State Department of Labor and Industry with the approval of the Industrial Board, shall conform to the schedule established by any such Federal regulatory body." The Court held the act invalid and distinguished the *Alderman* case by saying: "Under national prohibition the state acts were merely augmentative. The national act, passed pursuant to the eighteenth amendment, applied to everyone whether the states had their own acts or not. Consequently all involved in the *Alderman* case was a deference to the superior authority of the federal law. . . . But as to hours of labor the Federal government cannot regulate beyond the field of interstate commerce. Beyond that lies the exclusive province of the states. Therefore when the present act requires the hours schedules of the Department to conform to those of some Federal authority it is to that extent delegating its exclusive power to the Federal government." 331 Pa. 255, 269, 200 Atl. 672, 678. The reasoning of the *Alderman* case was followed by other New York courts besides the lower court in the *Mailman* case: Mosner v. Haddock, 46 N.Y.S.2d 343 (Sup. Ct. 1944), *aff'd without opinion*, 268 App. Div. 752, 48 N. Y. S.2d 802 (1st Dep't, 1944); Butter & Egg Merchants' Ass'n v. LaGuardia, 181 Misc. 889, 47 N.Y.S.2d 913 (Sup. Ct. 1944); People v. Brongofsky, 50 N.Y.S.2d 32 (Mag. Ct. 1943). Some of the language of the Michigan and New York courts indicates a confusion between (a) the concept of minimized scope of the delegated power because intrastate commerce is already subject to the identical prohibitions imposed under federal power, and (b) the concept that state power over intrastate commerce being "exclusive" cannot be delegated to the federal government. The latter notion, it is submitted, is subject to question. See discussion of "consent" *infra* at pp. 20 ff.

for action to be taken by an administrative official has, normally, no way of knowing who the appointee will be and what policies he would be inclined to follow if unrestrained. But a state or municipal legislature is familiar enough with the announced political policies of an incumbent federal administration, knows the standards and purposes which have been outlined in a particular piece of federal legislation (*e.g.* the Federal Food, Drug and Cosmetic Act) and may also know the identity of the federal administrator, if already appointed. In the light of such knowledge, and of the needs of its own state or city, the legislature may reasonably deem it in the public welfare to adopt as *its* policy, a program of having the local requirements exactly *keep pace* with the federal requirements. This identity may well seem more important to the legislature than the fact that the federal regulations may now or later include some requirements which it would not itself have authorized originally.⁵⁰ And such an identity of requirements would be a locally determined local policy, not a policy imposed by the federal government. There is, in this view, no need to talk of "standards" or "contingencies"; the focus of attention of the legislative will is not the detailed, substantive federal requirements (it has already determined that *in general* they comport with its own desires) but the desirability of local-federal uniformity in a particular field.

Several factors fortify such a consideration of the category of inter-governmental relations as a proper *exception* to the traditional "standards" analysis of the delegation issue. In the first place, one important intergovernmental relation—that between states and cities—has even traditionally been treated as an exception to the usual analysis. Thus it is not an invalid delegation for a state to delegate to a municipality the broadest kind of governmental powers without standards more restrictive than the preservation of the "health, safety and general welfare" of the municipal population—though no clear theory has been enunciated by the courts, which are apparently moved to uphold the delegation by "immemorial practice" and the necessities of the situa-

50. Cf. Lehman, J., dissenting in *Darweger v. Staats*, 267 N. Y. 290, 315, 197 N.E. 61 (1935), which held the New York adoption of federal NRA codes invalid: "The Legislature has not left to others the determination of the policy of the state, or what regulations are wise and are calculated to remedy conditions which might otherwise injuriously affect the public welfare. It has said that, under present conditions and regardless of the wisdom of a particular regulation, the public welfare requires that the same regulations should be applied to interstate and intrastate business." And cf. Holmes, J., dissenting in *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 169 (1919): "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."

tion.⁵¹ Secondly, the intergovernmental relation on the international plane has similarly been treated as a traditional exception.⁵²

Thirdly, there are a number of favorable cases involving federal-state relations, in which the state legislation, though not typically cast in the precise form of adoption and enforcement of federal requirements, did permit federal law to affect or determine state law—and the legislation was upheld, either with no discussion of delegation or cursory denials that an invalid delegation was involved, or assertions that the local rather than the federal legislative will was the controlling source of resulting local requirements.⁵³ Indeed the case-law does not

51. See, e.g., *Stoutenburgh v. Hennick*, 129 U.S. 141 (1889); *Danville v. Hatcher*, 101 Va. 523, 44 S.E. 723 (1903); *Chicago v. Stratton*, 162 Ill. 494, 44 N.E. 853 (1896); *Wilson v. Compton Bond and Mtg. Co.*, 103 Ark. 452, 146 S.W. 110 (1912); *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969 (1908); *Ex parte Brewer*, 68 Tex. Crim. 387, 152 S.W. 1068 (1913); GELLHORN, *ADMINISTRATIVE LAW, CASES AND COMMENTS* 207-9 (1940).

52. See authorities cited in *Steward Machine Co. v. Davis*, 301 U. S. 548, 597 (1936).

53. Thus state tax laws allowing the amount of the tax to depend on provisions of the federal tax law have been generally upheld. *Underwood Typewriter Co. v. Chamberlin*, 94 Conn. 47, 108 Atl. 154 (1919), *aff'd*, 254 U. S. 113 (1920); *Brown v. State*, 323 Mo. 138, 19 S. W.2d 12 (1929); *Opinion of the Justices*, 85 N.H. 572, 154 Atl. 633 (1931); *Hagood v. Doughton*, 195 N.C. 811, 143 S.E. 841 (1928); *Opinion of the Justices*, 137 Atl. 50 (Maine, 1927); *Gillum v. Johnson*, 7 Cal.2d 744, 62 P.2d 1037 (1936); *In re Thalmann's Estate*, 177 Misc. 1055, 32 N.Y.S.2d 695 (Surr. Ct. 1941). *But see* *Santee Mills v. Query*, 122 S.C. 158, 115 S.E. 202 (1922). The apparent dependence upon Congress' future changes in the business of a national bank was held not to invalidate a state tax upon those who compete with the business of national banks. *People ex rel. Pratt v. Goldfogel*, 242 N.Y. 277, 151 N.E. 452 (1926). A New York statute was upheld which required that steam or electric railroads controlled by a foreign corporation charge no more per mile for rides within New York City than the interstate rate from New York City charged by such foreign corporation—which interstate rates were subject to ICC control and could fluctuate from time to time. *Transit Commission v. Long Island R.R. Co.*, 248 App. Div. 749, 288 N.Y. Supp. 938 (2d Dep't 1936), *aff'd*, 272 N.Y. 27, 3 N.E.2d 622 (1936). A statute which, in order to obtain federal grants-in-aid, declared that the state "accepts the provisions of any law of the United States making appropriation to be apportioned among the states for vocational rehabilitation of disabled persons," was upheld in *Watkinson v. Hotel Pennsylvania*, 195 App. Div. 624, 187 N.Y. Supp. 278 (1921), *aff'd*, 231 N.Y. 562, 132 N.E. 889 (1921). See also *Spahn v. Stewart*, 268 Ky. 97, 103 S.W.2d 651 (1937). *But see*: *Smithberger v. Banning*, 129 Neb. 651, 262 N.W. 492 (1935); *Illinois Power & L. Co. v. Centralia*, 11 F. Supp. 874 (E. D. Ill. 1935), *vacated and remanded on other grounds*, 89 F.2d 985 (C.C.A. 7th 1937). A Kentucky law was held valid, which was construed to make the pay of its state guard officers depend on the pay of officers of the corresponding grades in the U.S. Army. *James v. Walker*, 141 Ky. 88 (1910) *rehearing denied*, 147 Ky. 646 (1912). *But see* *Green v. Atlanta*, 162 Ga. 641, 135 S.E. 84 (1926). A regulation of a Virginia liquor board that the consignee of liquor transported through Virginia must be one with a legal right to receive the liquor at destination was attacked on the ground that "Virginia has not authority to penalize prospective violations of the criminal laws of North Carolina or the United States" (The U.S. laws being § 2 of the 21st Amendment and legislation passed pursuant thereto prohibiting transportation of intoxicating liquor into a state for de-

fully reveal the broad extent to which such state laws, adopting or dependent upon federal provisions, have been enacted.⁵⁴

It is worthy of separate comment that in a few additional instances

livery or use therein in violation of its laws) but it was upheld by the Supreme Court on the theory that compliance with the law of the U.S. or a sister state was an appropriate standard for Virginia's determination of who could safely be allowed to transport liquor through her own territory. *Carter v. Virginia*, 321 U.S. 131 (1944). An Arizona law that all those entitled to servicemen's benefits under the federal statute were free from the disability of minors to make contracts was held not to delegate power unlawfully. *Valley National Bank of Phoenix v. Glover*, 61 Ariz. 538, 159 P.2d 292 (1945). The case of *Houston v. Moore*, 5 Wheat. 1 (U.S. 1820) concerned a Pennsylvania law that state militiamen "neglecting or refusing to serve when called into actual service, in pursuance of any order . . . of the President . . . shall be liable to the penalties defined in the Act of Congress of the 28th of February, 1795, c. 227, or to any penalties which may have been, prescribed since the date of that act, or which may hereafter be prescribed by any law of the United States" and provided for trial by court martial. The act, after being construed to give state military tribunals jurisdiction to enforce the federal requirements rather than creating concurrent prohibitions and penalties was upheld; but amid all the sharp divergencies of views expressed by the divided court, *no one* urged that there was any unconstitutional infirmity because of delegation of legislative power. There is some judicial authority (short of clear holding) apparently accepting state adoption of federal food and drug standards. *Smith v. Alphin*, 150 N.C. 425, 64 S.E. 210 (1909); *Cleveland Macaroni Co. v. State Bd. of Health*, 256 Fed. 376 (N.D. Cal. 1919). *But see* *Hutchins v. Mayo*, 143 Fla. 707, 197 So. 495 (1940). In *Johnson v. Elliott*, 168 S.W. 968 (Tex. Civ. App. 1914) a state law was upheld under which a license to sell non-alcoholic beverages in certain areas was made dependent upon the applicant not being a federal liquor permittee. In *State v. Brothers*, 144 Minn. 337, 175 N.W. 685 (1919) the court answered "No" to the certified question whether a section of the state law invalidly delegated legislative power to the federal government by providing that it was intended to implement enforcement of the National Prohibition Act; that its effective date would be January 16, 1920, but if the sale of intoxicating liquor became illegal within the state by act of Congress prior thereto, the state law was to be immediately effective; and that termination of the 18th Amendment would terminate the state law. Not dissimilar is *City of Pittsburgh v. Robb*, 143 Kan. 1, 53 P.2d 203 (1936) upholding a statute regarding issuance of municipal bonds, which was to be ineffective upon termination of National Industrial Recovery Act, and *Howes Bros. Co. v. Mass. Unem. Comp. Comm'n*, 296 Mass. 275, 5 N.E.2d 720 (1936), *cert. denied*, 300 U.S. 657 (1937), upholding a state unemployment compensation law to be effective on approval of the Social Security Board. *Cf.* on the latter point, *Beeland Wholesale Co. v. Kaufman*, 234 Ala. 249, 174 So. 516 (1937).

During World War II there was widespread adoption by cities (and a good many convictions thereunder) of the "Model Ordinance on Black-outs and Air-Raid Protection," recommended by the National Institute of Municipal Law Officers. The ordinance among other things authorized and directed the Mayor, or appropriate local officials "to carry out black-outs and air raid protection measures . . . at such times and for such periods as are authorized or ordered by the Army or Navy. . . ." See NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, MUNICIPALITIES AND THE LAW IN ACTION IN 1941 109-11 (1942).

54. An extended outline is to be found in Comment, 33 MICH. L. REV. 597, 601-3 (1935).

there were suggestions of a doctrine of state "consent".⁵⁵ This is particularly significant in the light of the now entrenched "consent" doctrine sometimes used in a fourth group of cases, those upholding *federal* legislation adopting state laws or permitting them to operate in what would otherwise be a federal sphere—some of these cases being more

55. In *United States v. Bekins*, 304 U.S. 27, 47, 51-3 (1938), Chapter X of the Bankruptcy Act, enacted in 1937 and providing for composition of indebtedness of taxing agencies or instrumentalities described therein, was held not to be an "unconstitutional interference with the essential independence of the State as preserved by the Constitution" for the reason that "the State has given its consent." This consent was given by a 1934 California statute granting the right to taxing districts to file the composition petition mentioned in the Bankruptcy Act "as amended from time to time," and the instant case involved the 1937 amendment. The Court observed: "It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power. This is constantly illustrated in treaties and conventions in the international field by which governments yield their freedom of action in particular matters in order to gain the benefits which accrue from international accord. Oppenheim, *International Law*, 4th ed., vol. 1, §§ 493, 494; Hyde, *International Law*, vol. 2 § 489; *Perry v. United States*, 294 U.S. 330, 353. . . . The State is free to make contracts with individuals and give consents upon which the other contracting party may rely with respect to a particular use of governmental authority. . . . While the instrumentalities of the national government are immune from taxation by a state, the state may tax them if the national government consents (*Baltimore Nat. Bank v. State Tax Comm'n*, 297 U.S. 209, 211, 212) and by a parity of reasoning the consent of the State could remove the obstacle to the taxation by the federal government of state agencies to which the consent applied.

"Nor did the formation of an indestructible Union of indestructible States make impossible cooperation between the Nation and the States through the exercise of the power of each to the advantage of the people who are citizens of both. . . ." *Id.* at 51-3 (italics added).

In *Hopkins Federal Savings & Loan Ass'n v. Cleary*, 296 U.S. 315 (1935), the Court held that the conversion of Wisconsin building and loan associations into federal associations under the Home Owners' Loan Act of 1933 which provided for such conversion without requiring the state's consent was "of no effect when voted against the protest of Wisconsin," *Id.* at 343, it being an "illegitimate encroachment by the government of the nation upon a domain of activity set apart by the Constitution as the province of the states." *Id.* at 338. The whole opinion strongly implies, however, that state consent would have validated the federal action.

The cases of *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), and *Carmichael v. Southern Coal Co.*, 301 U.S. 495 (1937), upheld federal and state taxes respectively, levied pursuant to the federal social-security plan. The Court rejected in both cases the argument that the state had been unlawfully "coerced" through the system of federal credits into enacting its unemployment compensation law and surrendering important powers to the federal government. The Court said in the *Carmichael* case that "the deposit by the state of its compensation fund in the Unemployment Trust Fund involves no more of a surrender of sovereignty than does the choice of any other depository for state funds. The power to contract and the power to select appropriate agencies and instrumentalities for the execution of state policy are attributes of state sovereignty. They are not lost by their exercise." *Id.* at 526. It said in the *Steward* case that "the inference of abdication thus dissolves in thinnest air when the deposit is conceived of as dependent upon a statutory consent. . . . The states are at liberty, upon obtaining the consent of Congress, to make agreements with one another. Constitution, Art. I, § 10, par. 3. . . .

or less explicitly based on a "consent" theory,⁵⁶ while others were based on the same kind of fragmentary rationale mentioned in the preceding paragraph.⁵⁷

We find no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment. . . ." 301 U.S. 548, 597. Indication has previously been made, note 42 *supra*, of the cases in which the federal use of state officials for performance of federal duties has been held proper because of state consent.

56. The most recent and definitive case is *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946). A South Carolina 3% tax on premiums of foreign insurance companies from business within the state, imposed without reference to whether the transactions were local or interstate, was upheld against the claim that it discriminated against interstate commerce, since whatever merit the claim would have was dissipated by congressional consent given in the Act of March 9, 1945, 59 STAT. 33 (1945), 15 U.S.C. §§ 1011-5, (Supp. 1946). This act (passed after interstate insurance transactions had been subjected to the federal commerce power by *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944)) declared that the continued state regulation and taxation of the insurance business was in the public interest, that Congressional silence was not to be construed as barring such regulation, that the insurance business and persons engaged therein "shall be subject to the laws of the several states which relate to the regulation or taxation of such business"; and that no federal act, unless it specifically relates to insurance, is to be construed as impairing state laws regulating or taxing insurance. 59 STAT. 33, 34 (1945).

The Court used a consent theory, which it regarded as explaining various previous decisions; it was "the very basis on which the second *Wheeling Bridge* case and indeed the *Clark Distilling* case have set the pattern of the law for governing situations like that now presented," 328 U.S. 408, 427, though the consent doctrine was not expressed as such in these cases. The *Wheeling Bridge* case (*State of Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. 421 (U.S. 1855)) upheld a federal law validating certain bridges which the Court had previously held to be an obstruction to navigation. The case of *Clark Distilling Co. v. Western Md. Ry.*, 242 U.S. 311 (1917), upheld the Webb-Kenyon Act prohibition against shipment in interstate commerce of intoxicating liquor into any state where intended to be received, used, etc., in violation of the law of that state. A law similar to the Webb-Kenyon Act, but applying to convict-made goods (*Ashurst-Sumners Act*) was upheld in *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, 299 U.S. 334 (1937), and one with respect to interstate shipments of dentures constructed from casts not made by or under authority of a dentist licensed under the destination state, where that state restricts construction or supply of dentures to its own licensed dentists, was sustained in *United States v. Johnson*, 149 F.2d 53 (C.C.A. 7th 1945), *cert. denied*, 326 U.S. 722 (1945). The Lacey Act of 1900 prohibiting interstate shipment of animals or birds killed in violation of local laws was sustained in *Rupert v. United States*, 181 Fed. 87 (C.C.A. 8th 1910), and Congress has successfully used the same technique in connection with interstate commerce in stolen motor cars, *Brooks v. United States*, 267 U.S. 432 (1925), oil produced in excess of state quotas, *Griswold v. President of U.S.*, 82 F.2d 922 (C.C.A. 5th 1936), *Genecov v. Fed. Petrol. Bd.*, 146 F.2d 596 (C.C.A. 5th 1944), *cert. denied*, 324 U.S. 865 (1945), and interstate transportation of persons unlawfully kidnapped, *Gooch v. United States*, 297 U.S. 124 (1936). A related type of law—divesting goods of their interstate character upon arrival in the state even though still in the original package—was sustained with respect to liquor in *In re Rahrer*, 140 U.S. 545 (1891) and with respect to convict-made goods in *Whitfield v. Ohio*, 297 U.S. 431 (1936). The provision (§ 1606(a)) of the Internal Revenue Code that "no person required under a state law to make payments to an unemployment fund shall be relieved

These "consent" cases may have a special significance: if Congress may validly consent to operation of state laws in an admittedly federal sphere (*i. e.* one which in the absence of consent, would be barred to the states by the Constitution) then perhaps there is no logical reason why a state cannot consent to the operation of federal laws in an ad-

from compliance therewith on the ground that he is engaged in interstate or foreign commerce or that the state law does not distinguish between employers engaged in interstate or foreign commerce and those engaged in intrastate commerce," was upheld in *Perkins v. Pennsylvania*, 314 U.S. 586 (1942), *affirming on motion* 342 Pa. 529, 21 A.2d 45 (1941); *Standard Dredging Co. v. Murphy*, 319 U.S. 306 (1943); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

57. Thus where the amount of a federal tax was made to depend upon provisions of the law in particular states, it was declared that "such variations do not infringe the constitutional prohibitions against delegation of the taxing power. . . ." *Phillips v. Comm'r of Internal Revenue*, 283 U.S. 589, 602 (1931). Congress may with respect to federal elections properly punish violations by state officials of their election duties under state law, the latter being considered as in effect "adopted" by Congress. *Ex parte Siebold*, 100 U.S. 371, 387-9 (1879) (the *in futuro* aspect of the adoption is not clear in the case and was not discussed as such). There are provisions in the federal code to the effect that where an act not specifically subject to punishment under federal law is in violation of the laws of the state in question, the offender shall be subject to the same punishment as is provided for such an offense by the state laws in force at the time of commission of the offense. Conviction under such a provision was affirmed by the Supreme Court without discussion of delegation, in *Burns v. United States*, 274 U.S. 323 (1927). In *United States v. Paul*, 6 Pet. 141 (U.S. 1832) and *Franklin v. United States*, 216 U.S. 559 (1910), where early laws of the same type as that in the *Burns* case, *supra*, did not explicitly indicate, as does the statute in the latter case, that the state laws referred to were those existing at the time of the offense, the Court interpreted the statute as referring to the state laws existing at the time of passage of the federal law. It should be noted that in the *Burns* case there had apparently been no change in the "adopted" California statute between the date of the federal statute and the date of the offense. In *United States v. Mason*, 213 U.S. 115 (1909), while declaring REV. STAT., §5509 inapplicable to the particular case, the Court said it was not improper for that section "to so measure the punishment for the Federal offense as to make it equal to the punishment prescribed by the State for the crime committed against the State in the act of violating the Federal law." *Id.* at 124. Where the Act of 1789 had declared that pilots should continue to be regulated in conformity "with such laws as the states may respectively hereafter enact for the purpose until further legislative provision shall be made by Congress," an 1803 Pennsylvania law regulating pilotage was upheld in *Cooley v. Board of Wardens*, 12 How. 299 (U.S. 1851), on the theory that the nature of the subject-matter was not such as to require uniform, exclusive federal regulation. Exemption and priority provisions of state laws in force at the time of filing of a bankruptcy petition have been adopted as controlling in federal bankruptcy legislation and this was declared to be not an invalid delegation. *Hanover Nat. Bank v. Moyses*, 185 U.S. 181, 190 (1902). The Conformity Act, predecessor of the Federal Rules, provided for conformity of procedure in federal court cases to the procedure prevailing at the time of the case, in similar state court cases. This has innumerable times been applied by the courts, with scarcely any question raised as to its validity. *Beers v. Haughton*, 10 Wheat. 51 (U.S. 1825); *Army v. Watertown*, 130 U.S. 301 (1889). So, too, the requirement that federal jurors have the same qualifications and exemptions as those applicable to state jurors at the time when the federal jurors are summoned has been

mittedly state sphere.⁵⁸ A few decisions pointing in the direction of a state consent theory have been indicated⁵⁹ but the analogous federal consent cases offer stronger support, for the rationale has been firmly established ever since *Prudential Insurance Co. v. Benjamin*,⁶⁰ and it goes at least as far in granting free scope to the other sovereignty as do the theories of "delegation" or "adoption" (which the Supreme Court said was not present in the *Prudential* case).⁶¹ The consent theory need

applied again and again without question (*see, e.g.,* *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946)). For a review of early federal statutes (on jurors, marshals, procedure, criminal laws, etc.) which were made dependent on present and prospective state provisions for their operation and the course of judicial decision by which the validity of such early legislation was generally upheld, often without discussion of the delegation point, see Barnett, *Delegation of Legislative Power By Congress to the States*, 2 AM. POL. SCI. REV. 347 (1907). See also *Butte City Water Co. v. Baker*, 196 U.S. 119 (1905), which upheld Congress' delegation to local legislatures and to miners within mining districts of the power to make supplementary regulations regarding location, etc., of claims on public lands (the Court describing the regulations as "minor and subordinate"). Also worth noting are such provisions as 27 STAT. 449, 42 U.S.C. § 81 (1893); 20 STAT. 37, 42 U.S.C. § 86 (1878); 25 STAT. 355, 42 U.S.C. § 106 (1888), penalizing non-compliance by vessels with local health and quarantine regulations; 41 STAT. 1073, 16 U.S.C. § 812 (1920), providing for compliance with applicable state regulations as a condition to a license under the Federal Power Act. For a restrictive reading of this latter clause *see* *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946). Of interest is also § 10(a) of the Labor Management Relations Act, 1947, Pub. L. No. 101 (June 23, 1947), authorizing the NLRB to "cede . . . jurisdiction" to state agencies in some disputes "even though . . . affecting commerce," and § 14(b) making federal legality of "union shop" agreements dependent on legality under state law. And *see* Mr. Justice Frankfurter's concurring opinion in *Bethlehem Steel Co. v. N. Y. State Labor Relations Board*, 67 Sup. Ct. 1026, 1032 (1947).

58. The proposition that a doctrine of federal consent to state action in a federal sphere implies the complementary doctrine of state consent to federal action in a state sphere may be disputed on the theory that federal and state power are fundamentally different in character: the argument runs that federal consent merely leaves the field open for the operation of a pre-existing and plenary state police power, whereas the federal government can exercise only those powers specifically enumerated by the Constitution and hence is incapable of exercising an unenumerated power notwithstanding state consent to such exercise. The counter-argument is that "plenary" state power does not come into play unless the Constitution has failed to give Congress authority over the matter in question. If the Constitution has given authority to Congress, the "plenary" nature of state police power is unavailing. The Constitution apparently stands in the way, no less than it apparently stands in the way of a federal attempt to exercise an unenumerated power. Hence when the Supreme Court permits Congress to consent to state power over a federal sphere (*e.g.,* interstate commerce), it is doing so in spite of a *seeming* constitutional bar to state power. So too, it may be urged, a state may consent to federal power over a state sphere (*e.g.* intrastate commerce) in spite of a seeming constitutional barrier.

59. See note 55 *supra*.

60. 328 U. S. 408 (1946). See Dowling, *Interstate Commerce and State Power—Revised Version*, 47 COL. L. REV. 547, 560 (1947).

61. The Court observes (328 U.S. 408, 438): "The argument grounded upon the first clause of Article I, § 8, requiring that excises shall be uniform throughout the United

not of course swallow up all constitutional limitations. At least one restriction is that voiced by the New York Court of Appeals in upholding a state reciprocal tax law (on the "contingency" theory): that there be some responsible "legislative judgment" as to "expediency," some "dependent or causative connection between the domestic and the foreign law,"⁶²—or, stating it in the form of the broader, familiar criterion for testing validity of legislative action, that there be a non-arbitrary basis for the consent.

There is still another indication in the precedents that the traditional "standards" analysis for intragovernmental delegation is inappropriate for intergovernmental relations. Recurrent in some of the opinions previously referred to is the observation that the one sovereignty has not delegated its sovereign function to the other because it can always repeal the authority it has given.⁶³ This seems to be an unexpressed recognition that intergovernmental relations should be treated differently when it comes to the delegation issue. For obviously if this power-of-repeal theory were applicable to intragovernment delegation, the

States, identifies the state exaction with the laying of an excise by Congress, to which alone the limitation applies. This is done on the theory that no more has occurred than that Congress has 'adopted' the tax as its own, a conception which obviously ignores the state's exertion of its own power and, furthermore, seeks to restrict the coordinated exercise of federal and state authority by a limitation applicable only to the federal taxing power when it is exerted without reference to any state action. The same observation applies also to the contention based on Article I, § 1." "The related contention that Congress' 'adoption' of South Carolina's statute amounts to an unconstitutional delegation of Congress' legislative power to the states obviously confuses Congress' power to legislate with its power to consent to state legislation. They are not identical, though exercised in the same formal manner. See *Clark Distilling Co. v. Western Maryland R.*, 242 U.S. 311, 327." 328 U.S. 408, 438, n. 51.

Paraphrasing this position, an intergovernmental adoption or delegation makes the one legislature continually responsible for the consequences of the exercise of power by the other; the foreign law becomes its own law. On the other hand, legislative consent constitutes a conferring of both power and responsibility: in the exercise of its plenary power over a particular subject matter the one sovereignty determines that it will allow the other, subject to its power of repeal, to take over that subject matter completely. Surely, then, the consent doctrine assumes more of a concession or abdication of "sovereignty" than the delegation or adoption concepts. A court which freely accepts the former doctrine could not logically reject the latter concepts on sovereignty grounds. It was apparently not the sovereignty issue which concerned the Court in the *Prudential* case. Once the state tax was viewed as having been adopted by Congress, there would have been not only the unintended result of two sets of taxes but the serious obstacle of Article I, § 8, to non-uniform federal excises. This could no longer have been met by stressing the "state's exertion of its own power." Nor would it be logically met by the other element in the Court's reasoning, appropriately paraphrased: that the constitutional restriction applies to the laying by Congress of an excise specifically set forth, and not when it lays it by reference to a state tax.

62. *People v. Fire Ass'n of Philadelphia*, 92 N.Y. 311 (1883), *aff'd*, 119 U.S. 110 (1886). See note 33 *supra*.

63. See *City of Texarkana v. Arkansas Louisiana Gas Co.*, 306 U.S. 188, 197 (1939);

typical delegation to an administrative agency could never be held invalid.

In short, a sizable body of precedent exists for the invocation of an "intergovernmental relations" exception to the usual delegation analysis. And even on the usual analysis, as already shown, intergovernmental delegations or adoptions are defensible. Already at least two prominent students⁶⁴ have criticized the cases⁶⁵ which underlie the comment that "it is generally held that the adoption by or under authority of a state statute of prospective Federal legislation, or Federal administrative rules thereafter to be passed, constitutes an unconstitutional delegation of legislative power."⁶⁶ It is submitted that the rule should and will give way with the years.

(The concluding section of this article will appear in the next number of the JOURNAL.)

Steward Machine Co. v. Davis, 301 U.S. 548, 592-3, 594-6 (1937); Carmichael v. So. Coal Co., 301 U.S. 495, 526 (1937); Clark Distilling Co. v. Western Md. Ry. Co., 242 U.S. 311, 326 (1917); *Ex parte Laswell*, 1 Cal. App. 2d 183, 36 P. 2d 678, 687 (1934).

64. GELLHORN, CASES AND COMMENTS ON ADMINISTRATIVE LAW 220 (1940): "When . . . a statute is designed to absorb content from extra-state action, the superior-subordinate relationship is no longer present, since the extra-state agency is not subject to the control of the enacting legislature. For this reason, specificity of command should no longer be the measure of the statute's adequacy. Rather, emphasis should be placed upon the statute's containing a sufficiently precise statement of the source and character of the contemplated extra-state action, so that there may be a ready determination whether the action in fact taken is the type of action which the legislature intended to affect the operation of the original enactment. In other words, the inquiry should shift from the question, 'Has the legislature *controlled* the act of the subordinate?', to the question, 'Has the legislature furnished enough criteria so that the extrinsic legislation may be *identified* as the legislation to which the domestic policy is to conform?'"

1 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 310 (3d ed. 1943): "The better view favors the validity of the statute in all three circumstances [i.e. (1) adoption of another sovereignty's existing legislation; (2) making legislation contingent upon another sovereignty's adoption of a law; (3) adoption of prospective legislation of another sovereignty.] Even in the third situation 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. It is possible that for a period of time after the change in the "foreign statute" and before the local legislature convenes, the law of the jurisdiction may not reflect local legislative desires; but this is so even with regard to purely local enactments. The local legislature retains its power to change the statute if it is not satisfactory. 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."

65. See note 10 *supra*.

66. Note, 133 A.L.R. 401 (1941).