EXPEDITE
No Hearing Set
Hearing is Set
Date:

SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF THURSTON

JOHN WORTHINGTON, Petitioner/Plaintiff, v. WASHINGTON STATE ET AL, Respondents,	NO. DECLARATION IN SUPPORT IN OF PETITION FOR JUDICIAL REVIEW, COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF

John Worthington hereby declares as follows:

1. I am the plaintiff in this action. I am over the age of 18 years, competent to testify, and I have personal knowledge of the facts stated herein.
2. On April 1, 2021 I filed a petition for adoption amendment repeal with the Pharmacy, Quality Assurances Commission. (PQAC). On May 26, 2021 PQAC denied the petition. (Exhibit 1)

I declare under penalty of perjury under the laws of the United States that the foregoing is True and correct.

Respectfully submitted on this 10th day of June, 2021.

BY:// _____

John Worthington Pro Se
90 S.RHODEFER RD. E-101
SEQUIM WA.98382

EXHIBIT 1

PHARMACY QUALITY ASSURANCE COMMISSION

JOHN WORTHINGTON, **PETITIONER,** V. **PHARMACY QUALITY ASSURANCE COMMISSION** **AGENCY,**	PETITION FOR ADOPTION AMENDMENT REPEAL PURSUANT TO RCW 34.05.330

REQUEST TO REPEAL WASHINGTON STATE DRUG SCHEDULES

This Petition under RCW 34.05.330 alleges the Washington State drug schedules have to be repealed, because they were adopted by reference from a treaty and uniform law commission, and were not promulgated constitutionally.

The Petition alleges the materials used to develop the drug schedules were not purchased and submitted to the Washington State public, with indexes, finding aids and guides.

The Petition also alleges the Commission then failed to take public comment on the materials, and promulgate the drug schedules after careful consideration of public comments and any adversarial process, including the submission of any binding medical and scientific studies disputing the schedules adopted by reference from the Uniform Law Commission.

The Petition also alleges the drug schedules have not been promulgated with sunset clauses, and are an illegal delegation of law making authority and violate the Washington State Constitution and the delegation doctrine.

The Petition also alleges that the true process of Incorporating International drug codes for Washington State would mirror the International building code process.

The Petition also alleges, that until the International drug codes are promulgated constitutionally in Washington State using the same process for adopting International building codes, the international treaties used to develop the drug schedules, are not enforceable.

The Petition is supported by the terms of the International drug treaty itself, and law reviews showing adoption by reference is not constitutional.

The Petition is also supported by law reviews showing a sunset clause is required to avoid an illegal delegation of law making authority.

The Petition is supported by Washington State case law State v. Dougall, 89 Wn. 2d 135,(1977). (Only the legislature can decide criminal laws.)

The Petition is also supported by State Ex Rel. Kirschner v. Urquhart, 310 P.2d 261, 50 Wash. 2d 131 (1957) (Legislative power is nondelegable.)

Wherefore, pursuant to the arguments above, WAC 246-945-040 and WACs 246-945-051 through 246-945-056, should be repealed.

S/ JOHN WORTHINGTON
90 S. RHODEFER RD E-101
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425-919-3910

Hello WSPQAC,

As previously argued by myself, the current drug schedules are unconstitutional because they have not been properly promulgated by the State of Washington, and the federal government cannot require any federal regulatory requirements be followed.

Therefore, any marijuana/hemp rules or laws promulgated by Washington State in response to a federal law would be ultra vires, void ab initio, and nullified.

Washington State has to first legally promulgate drug schedules in RCW 69.50 and WAC 246-945-040 before adding or removing any drugs from the schedule or enforcing any law or rule which were not properly promulgated or derived from a properly developed drug schedule.

The only remedy for this problem is to follow the same steps used to develop Washington State building codes.

As shown in the attachments, drug schedules cannot be adopted by reference and must contain sunset clauses just like the Washington State Building codes.
The current RCW and WAC for Washington State drug schedules are unconstitutional, because the International treaty and materials used by the Uniform law Commission to develop and promulgate the current drug schedules were not purchased and published for public inspection and setting a comment period, then promulgating the rule. The rule or manual of Pharmaceutical codes then has to be sun set to avoid delegation of law making authority.

For their part the federal government is powerless to enforce the international drug codes until Washington State constitution violations are corrected.

Even when passed in 1971, the material used by the Uniform law commission to establish the drug schedules, were then required to be made available to the public, whose comments were required to be considered and addressed, and any rule or law would have to have a sunset clause to avoid delegation of Washington State delegation of law making authority.

Although the State of Washington honor's the current Washington State Pharmaceutical code I do not.

I have not seen any of the materials used to adopt these codes or laws and these codes and laws have not been sun settled so they remain as unconstitutional now as they always have been.

Thank you.

John Worthington

RE: Washington State Controlled Substances Act

Hello Members of the 2018 Washington State legislature,

I am advocating a new procedure for determining laws and administrative codes for controlled substances in Washington State.

This new proposed procedure is based upon the current method of developing building codes for Washington State. This procedure is far more constitutionally sound than the current procedure and will help protect Washington State now that the Cole memo has been officially withdrawn by Attorney General Jeff Sessions, in favor of actual agency rulemaking.[1]

Mr. Sessions actually did the State of Washington a favor. Now Washington State can properly promulgate our own law rather than rely on wink and nod memos that can mislead or change with presidential administrations.

Our current form of adopting international and federal drug laws does not comply with Washington State Constitutional protocol. This is proven by the Washington State Building code process which is actually compliant with Washington State Constitution, and gives a perfect visual aid on how international drug laws should be properly promulgated here in our state..

The first step is to purchase the three international treaties that the federal controlled substances act is based upon. Those treaties would then be published for public inspection by the citizens of Washington State. A comment period would be allowed, and then our Washington Pharmacy Board would draft a periodic version of the Washington State Pharmaceutical codes.

These steps are taken for the Washington State Building code process for a reason. The delegation of our drug control law making to international or federal bodies and the adoption of laws and materials by reference by an international body without allowing the public to view and reference cited published materials violates the Washington State Constitution.

[1] EXHIBIT 1

Two of the treaties themselves clearly state there are no enforcement responsibilities in the treaties if it violates a state constitution.

There are several factors which have changed since the Uniform Controlled Substances Act has passed in 1971.

The act was written to be a top down system of control. In 1971 a federal scheme was allowed to be forced upon the states. However, the Anti-Commandeering rulings prevented the ability of the federal government to force a federal drug control regime on the states. At that point the state's should have been required to properly promulgate their own pharmaceutical codes, but the criminal justice influences still convinced state law makers that there continued to be a federal hierarchy.

The schedule for marijuana was challenged by several petitions to reschedule marijuana and the federal courts upheld rulings which allowed the DEA to ignore medical and scientific evidence, because the act also relied upon the international treaty for its drug schedules.

In one such petition to the Washington State Pharmacy Board, the BOP refused to comment on binding medical and scientific findings and deferred to the international treaty.

Federal agencies are allowed to defer to international treaties and delegate their law making authority to them and adopt their laws by reference.

States have Constitutions which require laws be promulgated a certain way or the act of adopting laws by reference are an unconstitutional delegation of law making authority.

Washington State only allows laws to be created through the legislature, referendum and initiative. While the Uniform Controlled Substances act itself was adopted by the legislature, the drug schedules were adopted by reference, and they were permanently adopted, and did not contain sunset clauses to avoid delegating law making authority to the International treaties. This is why our state building codes are periodically released. The Pharmaceutical codes should be no different.

The State of Wisconsin recognized this flaw and changed its constitution to allow the federal government to decide its drug laws so they could adopt the international and federal drug laws without sunset clauses and publishing materials for public inspection with finding guides.[2] International drug treaties are copy written and cannot be published without permission from the international bodies. When they are 'published' for public inspection, they cannot be "published" online. Hard copies of the treaty, which is the base model code, which is adopted by reference, should be available at the reference desk at your local library, at the counter of your local pharmacy or some other logical public facility. None of this is done for the Uniform Controlled Substance act here in Washington. That makes the drug schedule unconstitutional.

The time is now for debating this issue. The legislature should capitalize on the new Sessions policy to withdraw the Cole Memo, repeal the old uniform Controlled Substances Act, and properly promulgate a new Washington State constitutionally complaint pharmaceutical code. Because the federal government had deferred to the international treaty and has abandoned on ongoing drug classification process, and because the treaties specifically state that the treaties do not have force of law if they violate state constitutions, even the federal controlled substances act has no force of law in states.

Or the legislature should change the Washington State Constitution to allow the federal government or an international body to make laws for Washington State.

My guess is the people of Washington State would not want to defer to the federal government on this issue any longer.

John Worthington
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[2] Publishing would be the act of making hard copies not electronic copies.

UNODC
United Nations Office on Drugs and Crime

The International Drug Control Conventions

Single Convention on Narcotic Drugs of 1961
as amended by the 1972 Protocol

Convention on Psychotropic Substances of 1971

United Nations Convention against Illicit Traffic in
Narcotic Drugs and Psychotropic Substances of 1988

with final acts and resolutions

UNITED NATIONS

3. Any psychotropic substance or other substance, as well as any equipment, used in or intended for the commission of any of the offences referred to in paragraphs 1 and 2 shall be liable to seizure and confiscation.

4. The provisions of this article shall be subject to the provisions of the domestic law of the Party concerned on questions of jurisdiction.

5. Nothing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.

Article 23. Application of stricter control measures than those required by this Convention

A Party may adopt more strict or severe measures of control than those provided by this Convention if, in its opinion, such measures are desirable or necessary for the protection of the public health and welfare.

Article 24. Expenses of international organs incurred in administering the provisions of the Convention

The expenses of the Commission and the Board in carrying out their respective functions under this Convention shall be borne by the United Nations in such manner as shall be decided by the General Assembly. The Parties which are not Members of the United Nations shall contribute to these expenses such amounts as the General Assembly finds equitable and assesses from time to time after consultation with the Governments of these Parties.

Article 25. Procedure for admission, signature, ratification and accession

1. Members of the United Nations, States not Members of the United Nations which are members of a specialized agency of the United Nations or of the International Atomic Energy Agency or Parties to the Statute of the

International Court of Justice, and any other State invited by the Council, may become Parties to this Convention:

(a) By signing it; or

(b) By ratifying it after signing subject to ratification; or

(c) By acceding to it.

2. The Convention shall be open for signature until 1 January 1972 inclusive. Thereafter it shall be open for accession.

3. Instruments of ratification or accession shall be deposited with the Secretary-General.

Article 26. Entry into force

1. The Convention shall come into force on the ninetieth day after forty of the States referred to in paragraph 1 of article 25 have signed it without reservation of ratification or have deposited their instruments of ratification or accession.

2. For any other State signing without reservation of ratification, or depositing an instrument of ratification or accession after the last signature or deposit referred to in the preceding paragraph, the Convention shall enter into force on the ninetieth day following the date of its signature or deposit of its instrument of ratification or accession.

Article 27. Territorial application

The Convention shall apply to all non-metropolitan territories for the international relations of which any Party is responsible except where the previous consent of such a territory is required by the Constitution of the Party or of the territory concerned, or required by custom. In such a case the Party shall endeavour to secure the needed consent of the territory within the shortest period possible, and when the consent is obtained the Party shall notify the Secretary-General. The Convention shall apply to the territory or territories named in such a notification from the date of its receipt by the Secretary-General.

Article 35. Action against the illicit traffic

Having due regard to their constitutional, legal and administrative systems, the Parties shall:

(a) Make arrangements at the national level for co-ordination of preventive and repressive action against the illicit traffic; to this end they may usefully designate an appropriate agency responsible for such co-ordination;

(b) Assist each other in the campaign against the illicit traffic in narcotic drugs;

(c) Co-operate closely with each other and with the competent international organizations of which they are members with a view to maintaining a co-ordinated campaign against the illicit traffic;

(d) Ensure that international co-operation between the appropriate agencies be conducted in an expeditious manner; and

(e) Ensure that where legal papers are transmitted internationally for the purposes of a prosecution, the transmittal be effected in an expeditious manner to the bodies designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that legal papers be sent to it through the diplomatic channel;

(f) Furnish, if they deem it appropriate, to the Board and the Commission through the Secretary-General, in addition to information required by article 18, information relating to illicit drug activity within their borders, including information on illicit cultivation, production, manufacture and use of, and on illicit trafficking in, drugs; and

(g) Furnish the information referred to in the preceding paragraph as far as possible in such manner and by such dates as the Board may request; if requested by a Party, the Board may offer its advice to it in furnishing the information and in endeavouring to reduce the illicit drug activity within the borders of that Party.

Article 36. Penal provisions

1. *(a)* Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture,

extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

(b) Notwithstanding the preceding subparagraph, when abusers of drugs have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration in conformity with paragraph 1 of article 38.

2. Subject to the constitutional limitations of a Party, its legal system and domestic law,

(a) (i) Each of the offences enumerated in paragraph 1, if committed in different countries, shall be considered as a distinct offence;

(ii) Intentional participation in, conspiracy to commit and attempts to commit, any of such offences, and preparatory acts and financial operations in connexion with the offences referred to in this article, shall be punishable offences as provided in paragraph 1;

(iii) Foreign convictions for such offences shall be taken into account for the purpose of establishing recidivism; and

(iv) Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgement given.

(b) (i) Each of the offences enumerated in paragraphs 1 and 2 *(a)* (ii) of this article shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. Parties

extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

(b) Notwithstanding the preceding subparagraph, when abusers of drugs have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration in conformity with paragraph 1 of article 38.

2. **Subject to the constitutional limitations of a Party, its legal system and domestic law, (a) (i)** Each of the offences enumerated in paragraph 1, if committed in different countries, shall be considered as a distinct offence; (ii) Intentional participation in, conspiracy to commit and attempts to commit, any of such offences, and preparatory acts and financial operations in connexion with the offences referred to in this article, shall be punishable offences as provided in paragraph 1; (iii) Foreign convictions for such offences shall be taken into account for the purpose of establishing recidivism; and (iv) Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgement given. (b) (i) Each of the offences enumerated in paragraphs 1 and 2 (a) (ii) of this article shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. Parties

WASHINGTON STATE BUILDING CODE

CHAPTER 51-50 WAC

INTERNATIONAL BUILDING CODE 2012 Edition

Includes adoption of and amendments to the 2012 International Existing Building Code and ICC/ANSI A117.1-2009

Washington State Building Code Council

Effective July 1, 2013

WASHINGTON STATE PHARMACEUTICAL CODE

CHAPTER RCW 69.50
WAC 246-887-020

INTERNATIONAL PHARMACEUTICAL CODE
2018 Edition

Includes adoption of and amendments to the:

SINGLE CONVENTION ON NARCOTIC DRUGS, 1961,

CONVENTION ON PSYCHOTROPHIC SUBSTANCES, 1971,

AND

CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCOTROPHIC SUBSTANCES, 1988

Washington State Board of Pharmacy
Effective July 1, 2018

APPENDIX B
Adoption by Reference

INTRODUCTION

A standard drafting technique is to adopt provisions from another statute or material from an external source. Adopting material by reference has the advantage of eliminating verbiage. See 82 C.J.S. Statutes s. 71. It also promotes uniformity in the statutes, especially when proceedings and penalty provisions are adopted. Finally, the material adopted may have been interpreted by a court and defined by continued use.

On the other hand, adoption by reference has several drawbacks. If the adopted material is subsequently changed, it is unclear whether the statute incorporating the material is similarly changed. For example, s. 36.54 (2) (a) 1., stats., defines a "corporation" to mean a nonstock corporation organized under ch. 181, stats. How does future amendment, creation, or repeal of a part of ch. 181, stats., affect s. 36.54 (2) (a) 1., stats.? Does "nonprofit–sharing corporation" mean a corporation organized under the old law or under the new law?

A second problem concerns adopting external material by reference, such as federal statutes or regulations, rules or laws of other states, municipal ordinances, and private codes. In these cases the legislature incorporates material it did not write. If the legislature enacts the statute pending the writing of the incorporated material, or if the incorporated statute provides for adoption of future changes to the incorporated material, the legislature may be unconstitutionally delegating its law–making power. See 16 C.J.S. Const. Law 138, 16 Am Jur 2nd 343, 50 OAG 107 (1961), 66 OAG 331 (1977), and 68 OAG 9 (1979). For cases holding the opposite, see *People ex rel. Pratt v. Goldfogle*, 151 NE 452 (NY 1926) and *Commonwealth v. Goldfogle*, 119 A. 551 (PA 1923). (Also note that New York has passed a constitutional amendment specifically authorizing such an incorporation.) Read "Is Referential Legislation Worthwhile?" 25 Minn. L.R. 261 (1941), extracts reprinted in *Sutherland Stat Const* (6th Ed), s. 32A:15.

To clarify judicial construction of incorporated provisions, this appendix deals separately with the adoption of a statute by reference and with the adoption of material from an external source by reference.

ADOPTING A STATE STATUTE BY REFERENCE

If one Wisconsin statute refers to another Wisconsin statute, the problem of improper delegation does not arise because the legislature creates both laws and therefore does not delegate its law–making power to another entity. The problem presented is the correct construction of the adopting statute.

A. The Basic Rule.

When one statute adopts another, either by numerical reference or by description of the adopted statute, the adopting statute is treated as if the words of the adopted statute were written into the adopting statute but, under the basic rule, no changes to the adopted statute affect the meaning of the adopting statute. Even if the adopted statute is repealed, the reference in the adopting statute retains its vitality. Anno., 168 A.L.R. 627, 628. This strict interpretation of the adopting statute, which incorporates no subsequent changes to the adopted statute, has been embraced in all situations in Great Britain and is commonly called the English Rule. Read *Sutherland Stat Const* (6th Ed), Vol. IA, p. 964.

Wisconsin adopted the English Rule in *Sika v. The Chicago and Northwestern Railway Company*, 21 Wis. 370, 371 (1867), overruled on other grounds by *Curry v. Chicago & Northwestern Railway Co.*, 43 Wis. 665, 681 (1878), where the court held: "A statute which refers to and adopts the provisions of another statute, is not repealed by the subsequent repeal of the statute adopted." *See Sutherland Stat Const* (6th Ed), s. 23:33. In *State v. Lamping*, 36 Wis. 2d 328 (1967), the court restated its position in a case involving a defendant who had deposited fill in a lake without obtaining a permit. In determining whether it had jurisdiction to decide the case, the court referred to s. 30.03 (4) (a), stats., which adopted s. 111.07 (7), stats., by reference, and stated: "The effect of such specific reference is the same as if the incorporated section was set forth verbatim and at length therein." Id. at 336.

B. Problems Associated with the Basic Rule.

The basic rule that the adopted statute is frozen in the adopting statute so that later changes to the adopted statute have no effect on the adopting statute reduces the efficiency of the legislature. Frequently, a requester intends that the adopting statute be continually updated by incorporating all future amendments to the adopted statute. This is especially true if the adopted statute deals only with procedural matters; the basic rule would hinder uniformity in procedure unless all adopting statutes were amended every time an adopted statute was changed. For this reason, courts have moved from the English Rule to an "American Rule." Note: 1950 Wis. L.R. 726. The American Rule presumes that an adopting statute is treated separately from the adopted statute, unless the legislative intent rebuts the presumption. If the legislature so intends, the court will construe the adopting statute to incorporate all later changes of the adopted statute.

C. Determining Legislative Intent.

A law that explicitly states the proper construction of statutory references is the most persuasive method of signifying legislative intent. In 1979, the Wisconsin legislature created s. 990.001 (5) (b), stats., as a rule of statutory construction covering adoption of statutes. Section 990.001 (5) (b), stats., provides that any reference to a decimal–numbered statute is to the current text of the adopted statute, including all amendments to the adopted statute. Section 990.001 (5) (b), stats., states:

> 990.001 (5) (b) When a decimal–numbered statute of this state contains a reference to another decimal–numbered statute of this state, the reference is to the current text of the statute referenced and includes any change that has been inserted into and any interpretation or construction that has been adopted with respect to the referenced statute since the reference was first incorporated into the statute, whether or not the referenced statute is a general, specific, substantive or procedural statute. When a decimal–numbered statute refers to another decimal–numbered statute in a specific prior edition of the Wisconsin statutes, the reference does not include subsequent changes to the statute referenced.

Hence, it is not necessary to include in a draft an explicit statement construing a statutory reference, unless the requester's intent is to freeze the adopted statute and incorporate no later changes. If that is the intent, specify the edition of the Wisconsin statutes from which the adopted statute is drawn, using, for example, "s. 295.13, 1995 stats."

Before the creation of s. 990.001 (5) (b), stats., the Wisconsin court haphazardly construed adoptions by reference. The court looked to the type of reference in the adopting statute to aid in its construction. The court treated a specific reference to an adopted statute, by statute number or by description, as a verbatim transcription unaffected by later changes to the adopted statute. On the other hand, the court inferred from a general reference to the body of law dealing with the subject of the adopted statute that the legislature intended to incorporate all later changes to the adopted statute into the adopting statute, including repeal of the adopted statute. *George Williams College v. Williams Bay*, 242 Wis. 311, 316 (1943); *Union Cemetery v. Milwaukee*, 13 Wis. 2d 64, 68–9 (1961); *Allison v. Ticor Title Insur-*

ance Co., 979 F. 2d 1187, 1201–03 (7th Cir. 1992); Anno., 168 A.L.R. 627, 628.

The Wisconsin court did not adhere strictly to the dichotomy between general and specific references. The court was willing to hedge its bets, seeking to transform specific references to an adopted statute into general references and vice versa to accomplish its purpose of determining legislative intent. *See Gilson Bros. Co. v. Worden–Allen Co.*, 220 Wis. 347, 352 (1936). The existence of s. 990.001 (5) (b), stats., ends the confusion surrounding this aspect of statutory construction if the adopted law is a decimal–numbered Wisconsin statute. See *State v. Christensen*, 110 Wis. 2d 538, 544–47 (1983) in which the court applied s. 990.001 (5) (b), stats., rejecting the old rule of *Union Cemetery* in a case involving a reference to a statute that had been repealed. If the reference is to a described federal act, however, *Union Cemetery* may still apply. See *Dane County Hospital & Home v. LIRC*, 125 Wis. 2d 308, 323–24 (Ct. App. 1985).

INCORPORATING MATERIAL FROM EXTERNAL SOURCES

A. The Problem: Improper Delegation of Law-Making Power.

Statutes not only refer to other statutes, but also incorporate material from external sources such as federal statutes or regulations. If the court finds that the legislature incorporated external material into a statute without incorporating later changes, a court has no grounds to strike down the law as an improper delegation of law–making power. The legislature theoretically has examined all relevant external material and passed judgment on its value. Read *Sutherland Stat Const* (6th Ed), Vol. IA, pp. 969–970. But if a court interprets a statute that incorporates external material as incorporating later changes in the material, a new question arises: has the legislature unconstitutionally delegated its legislative power to make laws by allowing the external source to dictate additions to the statutes?

Article IV, section 1, of the constitution provides: "The legislative power shall be vested in a senate and assembly." If the adopting statute seeks to incorporate external material yet to be created or external material including any later changes, the statute may be defective as an improper delegation.

B. Valid Delegation of Nonlegislative Power.

1. Delegation of fact–finding authority.

If a court cannot limit a statute adopting external material to incorporate only the material existing when the statute is adopted, the court will determine whether the legislature is delegating a law–making power or a fact–finding power. In *State v. Wakeen*, 263 Wis. 401 (1953) the legislature delegated to the federal government the power to define "drug." The defendant was prosecuted for the unlawful sale of drugs. Section 151.06 (1), 1951 stats., defined "drug" to mean articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, "or any supplement to any of them."

The defendant challenged this as an unconstitutional delegation of law–making power. The court found that the delegation was valid, despite the fact that criminal penalties attached, because the law depended only upon a determination of facts. The court explained that legislation must adapt to a host of complex conditions with which the legislature cannot deal directly. The court cited, in illustration, the fact that the licensing of members of professions depends on graduation from approved schools, an external condition subject to change without direct legislative oversight. Id. at 408–09.

For a contemporary illustration of the holding in *Wakeen*, note the incorporation of federal regulations throughout ch. 961, stats., the Uniform Controlled Substances Act. This chapter lists drugs in five schedules with varying restrictions on use; each schedule states that the listing for any spe-

cific drug must be disregarded if excepted under federal regulations. See s. 961.14 (2) (intro.), stats., as well as other subsections in Schedules I to V, ss. 961.14 to 961.22, stats.

The incorporation of federal regulations and all future changes to the regulations is based on two premises. First, statutes are written in recognition of the Supremacy Clause, in article VI of the U.S. Constitution, which applies to the findings of Congress expressed in 21 USC 801 (3) to (6) that the federal Uniform Controlled Substances Act controls both interstate and intrastate commerce. Second, the state legislature's delegation of the power to define "drug" to federal agencies is a delegation of fact–finding powers, which *Wakeen* specifically validates.

In *Williams v. Hoffmann*, 66 Wis. 2d 145, 155–56 (1974), the supreme court determined that the legislature had validly incorporated the laws of other states and countries when it enacted the Uniform Anatomical Gift Act, s. 155.06, 1973 stats. Section 155.06 (7) (c), 1973 stats., provided:

> 155.06 (7) (c) A person who acts in good faith in accord with the terms of this section or with the anatomical gift laws of another state (or a foreign country) is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for his [sic] act.

The court in *Williams* upheld this provision on the grounds that the legislature had delegated no law–making authority but rather recognized the laws of other jurisdictions as they apply to those jurisdictions. Id. at 155–56. The Uniform Anatomical Gift Act is now s. 157.06, stats.

The court relied upon *Wakeen* in *Niagara of Wis. Paper Corp. v. DNR*, 84 Wis. 2d 32 (1978). In *Niagara of Wis. Paper Corp.*, two paper companies challenged the conditions of their pollutant discharge permits, issued in 1974 and scheduled to expire in 1978. DNR had promulgated rules prescribing the best practical control technology (BPTs) to be used. Section 147.021, 1977 stats., required that state standards not be more restrictive than federal standards. In 1974, the environmental protection agency (EPA) had published only interim guidelines for BPTs, on which DNR based its rules. In 1977, the EPA published less restrictive final regulations. The paper companies sought to have their permits changed to comply with the federal regulations. The circuit court agreed with the paper companies, and DNR challenged this interpretation of s. 147.021, 1977 stats., as causing an improper delegation in violation of article IV, section 1, of the constitution.

The court, citing *Wakeen*, held that the legislature may delegate nonlegislative powers and that the legislature had delegated to the EPA a fact–finding determination. The EPA, which was only to decide on current BPTs, did not usurp law–making powers. The court also held that the legislature could deviate from the federal standards by reviewing DNR rules incorporating those standards, or by changing s. 147.021, 1977 stats. Id. at 51–2.

2. Contingent legislation.

A court may also refuse to overturn a statute incorporating later changes of the adopted external material on the ground that the statute's operation is simply contingent upon later external events. Read *Sutherland Stat Const* (6th Ed), Vol. IA, pp. 970–971. In *Niagara of Wis. Paper Corp.*, the court found the operation of s. 147.021, 1977 stats., to be contingent upon the EPA's issuance of regulations. Id. at 51. See *State ex rel. Broughton v. Zimmerman*, 261 Wis. 398, 413–15 (1952), overruled in part by *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 564 (1964).

More recently, the court of appeals has upheld a statute incorporating a federal law that had been repealed and recreated since its incorporation into state law. In *Dane County Hospital & Home v. LIRC*, 125 Wis. 2d 308, 323–24 (Ct. App. 1985), the court decided that the applicability of s. 102.61, stats., depends in part on the happening of a contingency: an applicant's eligibility for and receipt of certain federal benefits. The court stated that there had been no unlawful delegation of legislative authority but did not explain its reasoning thoroughly.

The supreme court, in *Krueger v. Department of Revenue*, 124 Wis. 2d 453 (1985), found that the legislature, in defining "Wisconsin adjusted gross income" to mean the same as adjusted gross income under the federal Internal Revenue Code, intended to apply future interpretations and modifications of the federal definition to the definition in state law.*

In neither *Dane County Hospital & Home* nor *Krueger* was the issue of improper delegation thoroughly briefed or addressed, and the opinions do not fully define unconstitutional delegation. It appears, however, that Wisconsin courts are increasingly willing to uphold statutes adopting federal law, at least.

C. Constitutional Requirement That Laws Be Enacted By Bill.

In *Milwaukee Journal Sentinel v. Wisc. Dep't of Admin.*, 2009 WI 79, 319 Wis. 2d 439, the supreme court considered the validity of a provision in a collective bargaining agreement that purported to create an exception to the open records law. 2003 Senate Bill 565, which became 2003 Wisconsin Act 319, ratified the collective bargaining agreement in the customary way, by referring to the agreement and requiring the director of the Office of State Employment Relations to file an official copy of the agreement with the secretary of state. The bill contained no reference to the open records exception. The court said that "[i]f a right is given to the public by statute, such as the right to seek disclosure of public records, the legislature may generally take that right away through legislative action in compliance with constitutional mandates," but held that the provision in the collective bargaining agreement was not enacted by bill or published, as required by article IV, section 17 (2), of the constitution. Id. at 461. The court rejected the argument that the open records exception was validly incorporated into law by the reference in the bill to the collective bargaining agreement, while recognizing that "under certain circumstances, incorporation by reference may be effective to work a change in the law." Id. at 462. The court distinguished the *Wakeen* case, discussed in item B.1. above, noting that in *Wakeen* the statute expressly stated that it was adopting the definitions in the referenced document and that the legislation incorporated a recognized standard, rather than language "being given the force of law." *Milwaukee Journal Sentinel* at 462–463. It is not clear how broadly the court will apply the reasoning in this case.

CONCLUSION AND SUGGESTIONS

In Wisconsin, s. 990.001 (5) (b), stats., specifies as a general rule of statutory construction that any change to an adopted statute is also reflected in an adopting statute. Some commentators have argued that this solution is undesirable because later changes in a statute have unforeseen effects on other statutes. Note: 1950 Wis. L.R. 726, 730; Sentell, 10 Georgia L.R. 153, 154–155 (1975). Use of the cross–reference index and of computer searches can effectively negate this argument, however, by locating all adopting statutes and bringing them to the attention of the legislature. When you change a statute, consider whether each reference should incorporate that change or should specifically adopt only the prior law. If the latter, change the reference to s. XX.XX, 2... stats. Use a similar referent when you insert a reference into a statute that is an exception to the general rule of s. 990.001 (5) (b), stats.; that is, if the intent is to incorporate no future changes to the adopted statute.

* The opinion refers to incorporation by reference of future changes in the internal revenue code. However, s. 71.02 (2) (b) 6, 1979 stats., explicitly defined "internal revenue code" to include only those provisions in effect on December 31, 1979. In contrast, see *Cleaver v. Department of Revenue*, 158 Wis. 2d 734 (1990), in which Justice Bablitch wrote the opinion of the court, as in *Krueger*, and in which the court found that future amendments to the Federal Internal Revenue Code did not apply because the statute in question explicitly excluded amendments after December 31, 1976, for the taxable year 1977.

Adopting external material into a statute may lead to constitutional difficulties, particularly if the adopting statute provides that later changes to the material are adopted.

If a requester insists that you write a bill before adopted external material is written or insists that later changes to existing external material be incorporated, try to determine if the request constitutes an unconstitutional delegation; if it may, explain the issue in a drafter's note.

NOTE: See secs. 9.03 and 9.04, *Drafting Manual*, for drafting techniques.

1984

State Adoption of Federal Law - Legislative Abdication or Reasoned Policymaking?

Arnold Rochvarg
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A. State Adoption of Federal Drug Laws In State v. Dougall,18 the issue was whether valium was a controlled substance under Washington law. Valium had not been designated a controlled substance by the Washington legislature, nor had the appropriate state agency held any rulemaking proceeding on valium. The state agency had designated valium a controlled substance, however, pursuant to a state law adopted in 1971 which provided that if a substance is designated a controlled substance under federal law, the substance similarly is controlled under Washington law effective thirty days after its publication in the Federal Register, unless within that thirty-day period, the state agency objects to the designation. 19 If the agency objects, a rulemaking proceeding is required.20 If no objection is taken by the agency, however, rule making is not required for the federal law to become the state law. In the case of valium, the drug became controlled under federal law in June 1975,21 the state agency did not object, and in July 1975, all state prosecutors were notified of valium's designation.22 The Washington Supreme Court, however, reversed a conviction of defendant Dougall who was charged with possession of valium in 1976. The court ruled that the adopting statute was unconstitutional because of its attempt to adopt a federal law enacted after Washington's drug law had been enacted. The statute
was invalid because it permitted law to become binding in Washington "without appearing in either a state statute or the state administrative code."2s The power to define a crime in Washington, the court reasoned, belongs solely to the Washington legislature.

STATE ADOPTION OF FEDERAL LAW—LEGISLATIVE ABDICATION OR REASONED POLICYMAKING?

Arnold Rochvarg*

I. INTRODUCTION

There is little doubt that in order to best fulfill public policy goals, coordination between the federal and state governments is desirable.[1] Coordination has been sought over the years, for example, by federal grants-in-aid,[2] and the enactment of federal laws which are dependent upon state law.[3] One technique which has been employed by the states to further coordinate state and federal law is incorporation of federal law into state law. Although it is beyond question that there is no constitutional problem when a state legislature adopts *existing* federal law or regulations,[4] constitutional questions do arise

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[1]*See* People v. DeSilva, 32 Mich. App. 707, 189 N.W.2d 362, 364 (1971); Clark, *Interdependent Federal and State Law as Form of Federal-State Cooperation*, 23 IOWA L. REV. 539 (1938).

[2]*See* Comment, *Cooperative Federalism and Worker Protection: The Failure of the Regulatory Model*, 60 TEXAS L. REV. 935, 962-963 n.7-9 (1982); Comment, *Federal Grants and the Tenth Amendment: "Things As They Are" and Fiscal Federalism*, 50 FORDHAM L. REV. 130 (1981); Tomlinson and Mashaw, *The Enforcement of Federal Standards in Grant-In-Aid Programs: Suggestions for Beneficiary Involvement*, 58 VA. L. REV. 600 (1972); Comment, *Governmental Techniques for the Conservation and Utilization of Water Resources: An Analysis and Proposal*, 56 YALE L.J. 276, 300 (1946).

[3]*See, e.g.*, United States v. Howard, 352 U.S. 212 (1957)(interpreting Federal Back Bass Act which relies on state law to define circumstances when it would be improper to transport fish over state lines); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961(1)(A) (state law crimes as acts of racketeering activity); *See generally* Mermin, *Cooperative Federalism: "Cooperative Federalism" Again: State and Municipal Legislation Penalizing Violation of Existing and Future Federal Requirements: I*, 57 YALE L.J. 1 (1947).

[4]*See, e.g.*, Adoue v. State, 408 So. 2d 567, 570 (Fla. 1982); Lee v. State, 635 P.2d 1282 (Mont. 1981); State v. Williams, 119 Ariz. 595, 583 P.2d 251, 254 (1978); People v.

when a state attempts to adopt *future* federal laws or regulations.[5] The regional reporters are replete with cases stating that statutes which incorporate future federal law are unconstitutional because they impermissably delegate legislative power from the state legislatures to the federal government.[6] The basic rationale of these cases is that by incorporating future federal law, the state legislatures are abdicating their legislative power because they maintain no control over Congress or any federal agency.[7]

The purpose of this article is to discuss state adoption of future federal law. After presenting a brief introduction to the delegation doctrine, the article will analyze cases from various states which have addressed challenges on delegation grounds to state statutes which attempt to adopt future federal law. This analysis will show that statements such as that made by one state court that "the courts have uniformly and without deviation held that any attempt by the legislature to incorporate into our law future [federal] regulations is an unconstitutional delegation"[8] is misleadingly broad in that they suggest that states can never incorporate future federal law. The article will then attempt to provide a framework which differs from the one usually employed by courts in analyzing this issue. Finally, the article will apply this approach to a few substantive areas where states have attempted to adopt future federal law.

II. THE DELEGATION DOCTRINE

The basis of the delegation (or non-delegation) doctrine is that there can be no delegation of a delegated power.[9] Having been delegated the

DeSilva, 189 N.W.2d at 365; State v. Workman, 186 Neb. 467, 183 N.W.2d 911 (1971); Thorpe v. Mahin, 43 Ill. 2d 36, 250 N.E.2d 633, 640 (1969); Anderson v. Tiemann, 182 Neb. 393, 155 N.W.2d 322, 325 (1967); Brock v. Superior Court, 9 Cal. 2d 291, 71 P.2d 209, 213 (1937); People v. Downes, 49 Mich. App. 532, 212 N.W.2d 314, 317-18 (1973).

[5]*See, e.g.*, State v. Williams, 583 P.2d at 254-55; Freimuth v. State, 272 So. 2d 473, 476 (Fla. 1972); State v. Johnson, 84 S.D. 556, 173 N.W.2d 894, 895 (1971); People v. DeSilva, 189 N.W.2d at 365 n.5; Horner's Market Inc. v. Tri-County Met. Transportation Dist., 20 Ore. App. 385, 467 P.2d 671 (1970), *aff'd*, 256 Ore. 98, 471 P.2d 798 (Or. 1970); Yelle v. Bishop, 55 Wash. 2d 1081, 347 P.2d 1081, 1091 (1959); *See generally* Annot., 133 A.L.R. 401 (1941).

[6]*See, e.g.*, Adoue v. State, 408 So. 2d at 570; State v. Urquhart, 50 Wash. 2d 131, 310 P.2d 261, 264 (1957); Brock v. Superior Court, 71 P.2d 209; State v. Webber, 25 Me. 319, 133 A. 738 (1926); Dearborn Independent v. City of Dearborn, 331 Mich. 447, 49 N.W.2d 370 (1951); Smithberger v. Banning, 129 Neb. 651, 262 N.W. 492 (1935); Florida Industrial Comm. v. Peninsular Life Ins. Co., 155 Fla. 55, 10 So. 2d 793 (1943); *See also* Annot., 133 A.L.R. 401 (1941).

[7]Adoue v. State, 408 So. 2d at 570; State v. Williams, 583 P.2d at 255; State v. Urquhart, 310 P.2d at 264; Crowly v. Thornbrough, 294 S.W.2d 62, 66 (Ark. 1956); Mermin, *supra* note 3, at 4.

[8]Freimuth v. State, 272 So. 2d at 476.

[9]Shankland v. Washington, 5 Pet. 390, 395 (U.S. 1831).

power to make laws by the electorate, a legislature, it is argued, cannot redelegate this power to another lawmaking body.[10] Most of the cases involving the delegation doctrine concern the validity of a delegation from a legislature (a state legislature or Congress) to an administrative agency (state or federal).[11] Case law has developed the proposition that delegations of legislative power to administrative agencies will be upheld as long as the delegation contains sufficient standards; in this way the agency is provided with guidance for the exercise of its discretion, and a court performing its review function is provided a measure against which challenged administrative action can be judged.[12]

As mentioned above, the delegation doctrine has also been applied in cases involving state statutes adopting federal law. In order to evaluate the application of the traditional delegation doctrine to the state adoption cases, it is important to emphasize that the delegation doctrine is based on protecting the ideals of democratic political theory. The delegation doctrine ensures that important choices of social policy are made by officials who are politically responsive and accountable to the popular will.[13] It is feared that delegations of legislative power "create repositories of power largely insulated from the constraints of the democratic process."[14] Excessive delegation may indicate a legislature's unwillingness to make the difficult policy choices necessary to implement meaningful policy. A doctrine which limits delegation prohibits those who have sought the public trust through the electoral process to "pass the buck" to those who are not politically accountable.[15]

III. JUDICIAL REACTION TO VALIDITY OF STATE STATUTES ADOPTING FEDERAL LAW

State statutes adopting federal law which have been challenged as improper delegations of legislative power have involved various sub-

[10]J. LOCKE, OF CIVIL GOVERNMENT 141 ("The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over the other"), *noted in* B. SCHWARTZ, ADMINISTRATIVE LAW 35 (1984).

[11]*See, e.g.*, Fahey v. Mallonee, 332 U.S. 245 (1947)(delegation from Congress to Federal Home Loan Bank Board upheld); People v. Tibbitts, 56 Ill. 2d 56, 305 N.E.2d 152 (1973)(delegation from Illinois legislature to Illinois Human Relations Commission held invalid).

[12]*See* Industrial Department v. American Petroleum Institute, 448 U.S. 607 (1980) (Justice Rehnquist concurring).

[13]*Id.*; *Accord*, Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972).

[14]Cottrell v. Denver, 636 P.2d 703, 709 (Colo. 1981).

[15]Wright, *supra* note 13, at 575; B. SCHWARTZ, ADMINISTRATIVE LAW: A CASEBOOK 140 (1983).

stantive areas ranging from migratory birds[16] to branch banking.[17] Although the substantive areas differ from case to case, the judicial analysis in these cases does not appear to depend on any consideration of the substantive area being regulated. As discussed below, this is a major weakness of the cases. To illustrate the current state of the law on the issue of state adoption of federal law, this article will focus on cases involving state adoption of federal drug laws, federal highway speed limits, federal tax laws, and federal price control laws.

A. State Adoption of Federal Drug Laws

In *State v. Dougall*,[18] the issue was whether valium was a controlled substance under Washington law. Valium had not been designated a controlled substance by the Washington legislature, nor had the appropriate state agency held any rulemaking proceeding on valium. The state agency had designated valium a controlled substance, however, pursuant to a state law adopted in 1971 which provided that if a substance is designated a controlled substance under federal law, the substance similarly is controlled under Washington law effective thirty days after its publication in the Federal Register, unless within that thirty-day period, the state agency objects to the designation.[19] If the agency objects, a rulemaking proceeding is required.[20] If no objection is taken by the agency, however, rulemaking is not required for the federal law to become the state law. In the case of valium, the drug became controlled under federal law in June 1975,[21] the state agency did not object, and in July 1975, all state prosecutors were notified of valium's designation.[22] The Washington Supreme Court, however, reversed a conviction of defendant Dougall who was charged with possession of valium in 1976. The court ruled that the adopting statute was unconstitutional because of its attempt to adopt a federal law enacted after Washington's drug law had been enacted. The statute

[16]Powers v. Owen, 419 P.2d 277 (Okla. Crim. App. 1966).

[17]McHenry State Bank v. Harris, 89 Ill.2d 542, 434 N.E.2d 1144 (1982). Other substantive areas covered by such statutes include minimum wages, Crowly v. Thornbrough, 294 S.W.2d 62; citrus fruit grading, Hutchins v. Mayo, 143 Fla. 707, 197 So. 495 (1940); time zones, Dawson v. Hamilton, 314 S.W.2d 532 (Ky. 1958); foodstamps, State v. Rodriguez, 365 So. 2d 157 (Fla. 1978); livestock, Seale v. McKennon, 336 P.2d 340 (Ore. 1959).

[18]89 Wash.2d 118, 570 P.2d 135 (1977).

[19]570 P.2d at 136 citing WASH. REV. CODE § 69.50.201(d).

[20]*Id.*

[21]*Id.* at 137.

[22]*Id.* at 136. The notice informed the state prosecutors that valium had been considered a controlled substance under state law since July 2, 1975, thirty days after its designation by the federal government.

was invalid because it permitted law to become binding in Washington "without appearing in either a state statute or the state administrative code."[23] The power to define a crime in Washington, the court reasoned, belongs solely to the Washington legislature.[24]

State v. Thompson[25], which involved a Missouri drug statute, should be compared to *Dougall*. Although at first blush the Missouri law appears almost identical to the one struck down in *Dougall*, the *Thompson* court held it to be "significantly different," and consequently constitutional.[26] The Missouri statute provided that if any substance was "designated, rescheduled or deleted as a controlled substance under federal law," the state Division of Health "shall similarly control the substance" thirty days after publication in the Federal Register by issuing an order, unless the Division of Health before the thirty-day period, objected to the inclusion, rescheduling or deletion.[27] If the state agency objected, a public hearing was required.[28] *Thompson* involved the drug pentazocine. That drug had been listed as a controlled substance by the federal Drug Enforcement Administration,[29] and because the state agency did not object, it likewise became controlled in Missouri. In defense of the charge of possession of this drug, defendant Thompson argued that the "automatic inclusion of substances by inaction" of the Division of Health was unconstitutional.[30]

The Missouri Supreme Court, en banc, rejected this claim stating that defendant "overlooked" the role that the Division of Health played in classifying drugs.[31] The court viewed the statute not as an automatic adoption statute, but one which required the state agency to "act affirmatively" in deciding whether to object to the federal decision.[32] The Washington statute held invalid in *Dougall* differed from the Missouri statute in that, pursuant to the former statute, if the

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[23] *Id.* at 137.

[24] *Id.* at 138. The court cited State v. Emery, 55 Ohio 364, 45 N.E. 319 (1896) which involved a prosecution for the sale of drugs which were not controlled under standards promulgated by the United States Pharmacopoeia which existed at the time an Ohio law was enacted, but had only become listed as a controlled substance under a later revision of the Pharmacopoeia's list. The court reversed a conviction obtained under this statute stating that "to hold that the sale could thus be made unlawful would be equivalent to holding that the revisers of the book could create and define the offense—a power which belongs to the legislative body and cannot be delegated." 45 N.E. at 320.

[25] 627 S.W.2d 298 (Mo. 1982).

[26] *Id.* at 301.

[27] *Id.* at 302.

[28] *Id.*

[29] *Id.* at 299.

[30] *Id.* at 301.

[31] *Id.* at 302–03.

[32] *Id.* at 301.

federal government classified a drug, then "*the substance shall be controlled,*" while with the Missouri law, if the federal government classified a drug "the *Division of Health shall similarly* control" the substance.[33] The court stated that because a substance could be controlled in Missouri only if the state agency decided not to object, "no delegation of power to control substances in Missouri has been delegated to the federal government."[34] Unlike the Washington statute which empowered a federal agency to classify drugs in Washington, in Missouri it "is the Division of Health, not a federal agency which schedules a substance."[35]

B. State Adoption of Federal Highway Speed Limits

During the energy crisis of 1974, Congress enacted legislation which in effect denied federal highway funds to any state which had a maximum highway speed limit in excess of 55 miles per hour.[36] In response to these federal acts Montana, in 1974, enacted a statute providing that the

> attorney general shall declare by proclamation a speed limit in the state whenever the establishment of such a speed limit by the state is required by federal law as a condition to the state's continuing eligibility to receive funds authorized by the Federal Highway Act of 1973 and all acts amendatory thereto or any other federal statute. . . . The attorney general shall by further proclamation change the speed limit adopted pursuant to this section to comply with federal law.[37]

In 1974, the attorney general of Montana issued a proclamation setting a 55 miles per hour speed limit. The Montana Supreme Court in *Lee v. State*,[38] held the statute unconstitutional because of its "mandatory directions to the attorney general to proclaim a speed limit not less than that required by federal law," and "to terminate such proclaimed speed limit whenever such a speed is no longer required by federal law."[39]

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[33]*Id.* at 302.

[34]*Id.*

[35]*Id.*

[36]Emergency Highway Energy Conservation Act, Pub. L. No. 93–239, 87 Stat. 1016 (1974) and Federal-Aid Highway Amendments of 1974, Pub. L. No. 93–643, (codified as amended at 23 U.S.C. § 101 *et seq.* (1982)).

[37]MONT. CODE ANN. § 61–8–304, *noted in* Lee v. State, 635 P.2d 1282 (Mont. 1981). Prior to 1974, the maximum speed limit in Montana was 65 mph on interstate and divided highways, and 60 mph on other roads. State v. Shurtliff, 635 P.2d 1294, 1295.

[38]635 P.2d 1282 (Mont. 1981). Plaintiff alleged a violation of his right to drive in excess of 55 mph "as he was accustomed to doing prior to the issuance of the proclamation." *Id.* at 1284.

[39]*Id.* at 1286. The court distinguished Masquelette v. State, 579 S.W.2d 478 (Tex. Crim. App. 1979), State v. Dumler, 221 Kan. 386, 559 P.2d 798 (1977), and State v. Padley, 195 Neb. 358, 237 N.W.2d 883 (1976) on the grounds that those jurisdictions had adopted statutes which committed the decision whether to adopt the new federal law to

reference adopted numerous provisions of chs. 341 through 348 of the state motor vehicle code as part of their local traffic ordinances. This also is true of the provisions of ch. 176 and s. 66.054 regulating the sale of intoxicating liquors and fermented malt beverages. Others have adopted chapters H 61, 62 and 63 of the Wisconsin Administrative code, commonly known as the "State Plumbing Code," in order to avoid conflict with regulations of the state board of health governing plumbing design, construction and installation [s. 145.04]. When the new Grade A milk law takes effect July 1, 1959, cities and villages desiring to institute their own milk licensing and inspection programs may wish to adopt the Grade A regulations of the state department of agriculture so that their ordinances will be in reasonable accord with such regulations as required by s. 97.046 (6). [See also Commonwealth v. Alderman (Pa., 1923), 119 Atl. 551, adoption of definition in federal law by state legislature.]

Use of the adoption by reference technique has enabled local units of government to achieve desirable uniformity in their laws governing such matters as traffic regulation, building construction, health and sanitation, without surrendering their autonomy to the state or national governments [23 Col. L. Rev. (1923), 674].

Adoption by reference of national and state codes and standards enables local authorities to benefit from the exhaustive research and study of experts in many fields. The rule that when the legislature adopts the wording of a statute from another state, it also adopts the court decisions construing that statute, probably applies to adoption of statutes, codes and regulations by reference in municipal ordinances. Therefore, the governing body may be able to ascertain in advance how the code or regulation will operate and enforcement officials will be guided in applying a new ordinance.

Dangers of Adopting by Reference

It is generally held that a state statute which adopts by reference the general state law on a specific subject includes subsequent amendments, but that a statute adopting a specific law incorporates only those provisions of that law existing at the time of its adoption [George Williams College v. Williams Bay (1943), 242 Wis. 311]. However, not even the legislature may adopt by reference future legislation of other bodies [Gibson Auto Co. v. Finnegan (1935), 217 Wis. 401; State ex rel. Wisconsin Inspection Bureau v. Whitman (1928), 196 Wis. 472]. Likewise, municipal ordinances may incorporate by reference future enactments, amendments, revisions or determinations of the local village board or common council but not the future legislative actions of the state legislature or other organizations or officials [133 A.L.R. 401 (1941); State v. Home Bar Foods Inc. (N. J., 1955), 110 A. (2d) 726; Wagner v. Milwaukee (1922), 177 Wis. 410]. Any attempt to do so might render the ordinance void for uncertainty and would constitute an unlawful delegation of legislative power vested in the governing body [State v. Crawford (Kan., 1919) 177 Pac. 360, 2 A.L.R. 880; State ex rel. Kirchner v. University (Wash., 1957), 310 P. (2d) 261; Dawson v. Hamilton (Ky., 1958), 314 S.W. (2d) 532].

When specific state statutes are adopted by reference, the reference will be construed to include only such provisions as exist at the time of adoption of the ordinance. The term "Wisconsin statutes" is used to designate all effective acts of the most recent session of the legislature as well as unrepealed existing laws. Consequently, it is possible to refer to the Wisconsin statutes of 1959 although the acts of the 1959 legislature have not yet been printed in

bound volumes [s. 990.07; Preface, Wisconsin Statutes of 1957]. However, in order to keep current an ordinance adopting state statutes by reference, it is necessary to re-adopt the ordinance or to amend it by changing the date or numbers of the incorporated statutes every 2 years after the legislature adjourns. Unless this procedure is followed, there is always a possibility that the ordinance will conflict with state law and therefore be invalid if conformity is required.

National or state codes or standards are generally revised at regular intervals by the issuing body necessitating periodic review. In addition, such codes sometimes delegate broad authority to administrative officials to modify requirements or permit variations from the written rules. Adoption of such provisions by reference would, of course, constitute an invalid delegation of legislative power by a municipality. These deficiencies, however, may be overcome by including a provision in the ordinance that the power of the enforcing officer to permit variances shall be limited to a factual determination of whether or not the standards set forth in the incorporated material and ordinance are met by the proposed variance. [Mehlos v. Milwaukee (1914), 156 Wis. 591].

Many communities find it advantageous to adopt federal regulations by reference in their local ordinances such as those promulgated by the United States department of agriculture's bureau of animal industry governing meat inspection, and standards established by various private organizations for classification of materials and other items, such as lumber and roofing. These standards are often recognized by the industry to which they pertain as representing the most up-to-date thinking of experts in the field. If future amendments and supplements of these standards may be adopted by reference, local governing bodies would be assured that their ordinance would remain current and consistent with the requirements of other governmental units.

While it is quite well established that future legislative actions of another body may not be adopted by reference, our court has shown a propensity to relax the rule that future actions or determinations of other bodies which are not legislative in nature may not be adopted by reference. The court has said that a law may be made dependent upon the happening of a contingency consisting of the determination of some fact even if the fact is determined by private individuals or bodies, and that the state legislature may delegate any power which it may itself exercise which is not legislative in nature. [State v. Wakeen (1953), 263 Wis. 401; State ex rel Broughton v. Zimmerman (1952), 261 Wis. 398].

For example, the legislature may provide that graduation from a state institution or approved professional school is a requirement for the practice of law, dentistry, medicine and other professions [State ex rel. Kellog v. Currens (1901), 111 Wis. 451]. In State v. Wakeen, supra, the state supreme court held that there was no unconstitutional delegation of legislative power in s. 151.06 (1) of the statutes which defines drugs as:

"Articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States or official National Formulary, or any supplement to any of them intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; ..."

The court said that the power thereby delegated to the United States pharmacopoeial convention is the power to determine a fact, and that the compendia referred to are recognized as standards by the congress of the United States and the legislatures of all 48 states and published independently of the statute incorporating them. The court held that the adoption of future supplements to these compendia was valid. [In so holding the court took a

PETITION FOR ADOPTION, AMENDMENT, OR REPEAL OF A STATE ADMINISTRATIVE RULE

Print For

accordance with RCW 34.05.330, the Office of Financial Management (OFM) created this form for individuals or grou
o wish to petition a state agency or institution of higher education to adopt, amend, or repeal an administrative rule. Y
ıy use this form to submit your request. You also may contact agencies using other formats, such as a letter or email.

e agency or institution will give full consideration to your petition and will respond to you within 60 days of receiving yo
tition. For more information on the rule petition process, see Chapter 82-05 of the Washington Administrative Code (W
http://apps.leg.wa.gov/wac/default.aspx?cite=82-05.

ONTACT INFORMATION *(please type or print)*

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OMPLETING AND SENDING PETITION FORM

Check all of the boxes that apply.

Provide relevant examples.

Include suggested language for a rule, if possible.

Attach additional pages, if needed.

Send your petition to the agency with authority to adopt or administer the rule. Here is a list of agencies and their rules coordinators: http://www.leg.wa.gov/CodeReviser/Documents/RClist.htm.

IFORMATION ON RULE PETITION

gency responsible for adopting or administering the rule: DOH - PHARMACY QUALITY ASSURANCE COMM

☐ **1. NEW RULE - I am requesting the agency to adopt a new rule.**

☐ The subject (or purpose) of this rule is:

☐ The rule is needed because:

☐ The new rule would affect the following people or groups:

☐ **2. AMEND RULE - I am requesting the agency to change an existing rule.**

List rule number (WAC), if known: _____

☐ I am requesting the following change: _____

☐ This change is needed because: _____

☐ The effect of this rule change will be: _____

☐ The rule is not clearly or simply stated: _____

☒ **3. REPEAL RULE - I am requesting the agency to eliminate an existing rule.**

List rule number (WAC), if known: WAC 246-945-051, 246-945-053, WAC 246-945-053, WAC 246-945-054, WAC 246-945-055,24
WAC 246 945-056, WAC 246-945-040

(Check one or more boxes)

☐ It does not do what it was intended to do.

☐ It is no longer needed because: _____

☐ It imposes unreasonable costs: _____

☑ The agency has no authority to make this rule: Adoption of drug schedules by reference is unconstitutional

☐ It is applied differently to public and private parties: _____

☐ It conflicts with another federal, state, or local law or rule. List conflicting law or rule, if known: _____

☐ It duplicates another federal, state or local law or rule. List duplicate law or rule, if known: _____

☑ Other (please explain): The drug schedules were adpoted by reference and that process violates the Washington State Constitutiuion. Washington State does not delegate law making authority to uniform law commissi
ATTACHED

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
Olympia Washington 98504

May 26, 2021

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Sequim, WA 98382
worthingtonjw2u@hotmail.com

Re: Petition for Rulemaking

Dear John Worthington:

The Pharmacy Quality Assurance Commission (Commission) considered your Petition for Adoption, Amendment, or Repeal of a State Administrative Rule with its attachments and additional correspondence[1] (Petition) and heard your testimony on April 23, 2021, as part of its regular business meeting. The Commission denied your Petition for the reasons outlined below.

The Petition requests the Commission repeal WAC 246-945-040, -051, -053, -054, -055, and -056. In summary, you claim these rules must be repealed because the Commission has no authority to adopt these rules as "[a]doption of drug schedules by reference is unconstitutional" and that "[t]he drug schedules were adpoted adopted[sic] by reference and that process violates the Washington State Constitutiuion [sic]. Washington State does not delegate law making authority to [sic] uniform law commission."

Firstly, the Commission disagrees it has adopted the drug schedules by reference. The Petition argues the Commission has unlawfully incorporated the drug schedules by reference because the list of controlled substances originated from an international treaty and model law developed by the Uniform Law Commission. This is not accurate. While the Administrative Procedures Act (APA), chapter 34.05 RCW, does permit the Commission to incorporate material by reference (RCW 34.05.365), the controlled substance schedule rules (WAC 246-945-051, -052, -053, -054, -055, -056) do not incorporate any material by reference but instead lists each controlled substance explicitly. For example, RCW 69.50.204 and WAC 246-945-051 list Schedule I controlled substances and do not incorporate any material by reference to assist identifying what is a Schedule I controlled substance in Washington State.

[1] A copy of the documentation you submitted, and that the Commission considered, is attached to this letter.

In contrast to the controlled substance schedule rules cited above, the Petition does request the repeal of one rule (WAC 246-945-040) that does incorporate by reference certain regulations of the United States Drug Enforcement Administration (DEA). WAC 246-945-040(1) incorporates by reference Title 21 of the Code of Federal Regulations (C.F.R.) except for 21 C.F.R. §§ 1301.13, 1301.33, 1301.35-.46, 1303, 1308.41-.45, and 1316.31-.67. Title 21 of the C.F.R. contains a number of requirements related to controlled substances including, but not limited to, minimum content of controlled substance prescription, when registrants must conduct a controlled substance inventory, and disposal requirements. However, as noted above and contrary to the position taken in your Petition, the APA permits the Commission to incorporate by reference (RCW 34.05.365) and WAC 246-945-040(1) incorporates specific sections of Title 21 C.F.R. in a manner consistent with the APA.

Notwithstanding the paragraph above, during your comments to the Commission on April 23rd, you expressed a specific concern that WAC 246-945-040(1) incorporates the DEA controlled substance schedules by reference. While the Commission acknowledges this rule may have the effect of incorporating the DEA controlled substance schedules by reference (these schedules are found in 21 C.F.R. §§ 1308.11, 1308.12, 1308.13, 1308.14, and 1308.15), the Commission's rule makes clear that "[a]ny inconsistencies between 21 C.F.R. Sec. 1300 through 1321 and this [chapter 246-945 WAC] should be resolved in favor of [chapter 246-945 WAC]." Consequently, if the DEA's controlled substance schedules are inconsistent with the Commission's controlled substance schedules then the Commission's controlled substance schedules will control.

Secondly, the Commission disagrees with your assertion that it has delegated its authority to the Uniform Law Commission or the federal government. Courts have held that "[l]egislative power is nondelegable" (*State ex rel. Kirschner v. Urquhart*, 50 Wash. 2d 131, 135, 310 P.2d 261, 264 (1957)). This means statutes (or rules) that attempt to adopt future statutes, rules, or material are unconstitutional and void. For example, in *Urquhart* the court struck down a statute that adopted a standard of accreditation for medical schools that was not yet in existence. The Commission has not passed rules that attempt to adopt future statutes, rules or material of the Uniform Law Commission or the federal government.

The state legislature originally passed the Uniform Controlled Substances Act (UCSA), chapter 69.50 RCW, in 1971 and it was largely based on the Uniform Controlled Substances Act published by the National Conference of Commissioners on Uniform State Laws. All fifty states have enacted a version of this model statute. In Washington State, the legislature has amended the UCSA multiple times since its original passage including, but not limited to, adding provisions that address the recreational marijuana market, permitting electronic prescriptions, and requiring prescribers to engage in certain communications before writing a first opioid prescription for a patient. The legislature has also granted the Commission with regulatory authority under the UCSA, including rulemaking authority e.g., RCW 69.50.201 which allows the Commission to add, delete, or reschedule substances listed in the UCSA. The Commission has not used its legislatively granted authority to adopt a future version of the Uniform Law Commission's model Uniform Controlled Substances Act and therefore has not delegated its authority to the Uniform Law Commission.

In addition, the Commission has not delegated its authority to the federal government. The Commission reschedules, schedules, or deletes a controlled substance in a manner consistent with RCW 69.50.201 as interpreted in various case law (*see e.g., State v. Dougall*, 89 Wash. 2d 118, 570 P.2d 135 (1977) and *In Re Powell*, 92 Wash. 2d 882, 602 P.2d 711 (1979). As a result, the Commission does not defer to future decisions or action of the federal government in determining whether a specific controlled substance is scheduled or not in Washington. Instead, the Commission goes through its own rulemaking process to reschedule, schedule, or delete a controlled substance in Washington. As an example, the Commission recently completed a rules rewrite project that consolidated over thirty chapters of WAC into one chapter (chapter 246-945 WAC) over a two-and-a-half-year period. This included recodifying the prior controlled substance schedules that were listed in chapter 246-887 WAC. Any member of the public was encouraged to provide comments during the rulemaking process, including any comments on a decision of the Commission to schedule a controlled substance. In addition, the Commission has made scheduling decisions in the past based on input from the public. For example, on March 15, 2019, the Commission filed permanent rules (WSR 19-06-068) which, among other things, added synthetic cannabinoids, synthetic cathinones, synthetic fentanyl and synthetic opioids to Schedule I based on a rules petition received from the Office of the Attorney General's Consumer Protection Division. Finally, the Commission has made scheduling decisions before the federal government has taken similar action. For example, the Commission deleted Epidiolex from schedule V via emergency rulemaking on May 20, 2020. The DEA did not delete Epidiolex from schedule V until August 21, 2020. As the above examples illustrate, the Commission engages in its own rulemaking process in order to reschedule, schedule, or delete a controlled substance and has not delegated its authority to the federal government.

While noted as an alternative in your Petition, it is not necessary for the Commission to adopt the approach taken by the Building Code Council (Council) when the Council adopts various building codes. The legislature has statutorily permitted the incorporation of various building codes by reference (RCW 19.27.031). The Council is then statutorily required to adopt and maintain the building codes by going through the rulemaking process (RCW 19.27.074(1)(a) and Title 51 WAC). The Commission's process is distinct from the Council's approach for multiple reasons. Firstly, the Commission does not incorporate controlled substances by reference as explained above. Secondly, the Commission goes through the rulemaking process when it adds, deletes or reschedules a controlled substance as also explained above. Finally, there is reported case law that demonstrate the difficulties of incorporating a list of controlled substances by reference that the Commission has chosen to avoid (*see e.g., State v. Dougall* 89 Wash.2d 118, 570 P.2d 135 (1977)).

Although not addressed in your Petition, if the Commission took the action you proposed there would be a catastrophic impact on public health. By repealing all controlled substance schedules in rule, the Commission would be removing the increased oversight of a number of substances that either have no accepted medical use, have varied potential for abuse, lacks accepted safety data for use in treatment under medical supervision, and/or have the potential of physical or psychological dependence. At a time when Washington State is attempting to address an opioid crisis and a shortage of behavioral health services such action would place the public at risk of harm. To illustrate, the overall death rate continues to climb due to drug overdoses and has spiked due to implications of the COVID-19 pandemic. The data also shows an increasing rise in

stimulant-related overdose deaths, especially methamphetamine and fentanyl related overdoses. Since 2010, there has been a significant increase of 388% of stimulant-related overdose deaths.[2] The Commission's mission is to keep patient safety and public health at the forefront which involves evaluating broader societal implications as well as operate in a manner that is consistent with the APA. Finally, repeal of the controlled substance schedules will not fully address your concerns because the statutory controlled substance schedules based, in part, on the Uniform Law Commission's model Controlled Substances Act will still exist (RCW 69.50.204, RCW 69.50.206, RCW 69.50.208, RCW 69.50.210, and RCW 69.50.212).

If you disagree with this decision you may: (i) request review by the Joint Administrative Rules Review Committee pursuant to RCW 34.05.330(2), (ii) appeal the denial of your Petition to the Governor pursuant to RCW 34.05.330(3), or (iii) seek judicial review in superior court pursuant to RCW 34.05.570(4)(c).

This petition response was sent to your email and mailing address on May 26, 2021 using the contact information you provided. If you have any questions, you may also contact Lindsay Trant, Rules and Legislative Coordinator for the Commission at 360-236-2932 or lindsay.trant@doh.wa.gov.

Sincerely,

Tim Lynch, PharmD, MS, FABC, FASHP, Chairperson
Pharmacy Quality Assurance Commission

[2] Source: Washington State 2021-2022 Opioid and Overdose Response Plan.