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Conformity to Federal Income Tax Law, Volume I: Constitutional Authority for Automatic Federal Conformity

Assembly Revenue and Taxation Committee

CONFORMITY TO FEDERAL INCOME TAX LAW

VOLUME I

CONSTITUTIONAL AUTHORITY FOR AUTOMATIC FEDERAL CONFORMITY

SCA 14 (MILLS)

A Briefing Book
Prepared by Staff of the

ASSEMBLY REVENUE AND TAXATION COMMITTEE

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for
COMMITTEE INTERIM HEARING

October 29, 1981

Assembly
California Legislature

REVENUE AND TAXATION COMMITTEE

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PREFACE

This report is designed to provide Committee members and the public with a comprehensive background on the issue of prospective (automatic) conformity of California income tax laws with the federal Internal Revenue Code.

A discussion of the specific issues of conformity of California law with the recent federal changes made in the Economic Recovery Tax Act of 1981 will be the subject of subsequent reports.

The issue of automatic conformity has been before the Legislature for a number of years. Almost every session of the Legislature has been presented with such a proposal. In 1966 and 1968, the measures were submitted to the electorate and rejected.

There have been a number of studies and reports on the subject (see Appendix II). In 1980, the Assembly Committee on Revenue and Taxation held an interim hearing on SCA 31 (Mills) and the background briefing book for that hearing, entitled "Federal Income Tax Conformity", is still available through the Assembly Publications Office.

When SCA 14 by Senator Mills was before the Committee again in 1981, the Committee felt the need for another interim hearing on the subject, as a majority of the membership of the Committee has changed since 1980.

One of the problems encountered in preparing this briefing book was the development of data on the shifts in tax burden and revenue effects of conformity. Due to the massive changes in federal tax law enacted in August of 1981, data used in the Committee's 1980 study are obsolete. Data illustrating the tax shifts by income class which would result from conformity with the new federal law are not yet available. We are hopeful that the staff of the Franchise Tax Board will have some of this information ready for presentation to the Committee on October 29, 1981.

This briefing book was prepared by David R. Doerr of the Assembly Revenue and Taxation Committee staff.

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ISSUES

California law is currently in substantial conformance with federal income tax law although there are major areas of difference. As each federal law change is made, the Legislature revises state law only as it deems appropriate. Some state laws are enacted to suit particular state needs and have no federal counterpart.

1. Is an amendment to the Constitution needed to permit the state to conform prospectively to federal tax law?

2. Should the Legislature be given the authority to conform prospectively to federal tax law?

3. Is prospective conformity to federal tax law desirable or undesirable?

The Issue of Automatic Conformity

SCA 14

Under existing law, California has its own definitions of adjusted gross income and taxable income. In most areas, these definitions conform to comparable federal definitions. In certain key areas, such as capital gains, the two laws are quite different. California periodically reviews each federal change to see if prospective conformity is desirable. State law does not change automatically as federal law changes. Legislative Counsel has opined that a constitutional amendment would be required to permit automatic conformity to future federal changes. Two such proposed amendments were defeated by the voters in the latter 1960s.

SCA 14 (Mills) authorizes the Legislature to "simplify reporting and collecting" of personal income taxes by incorporating by reference any present or future federal income tax definitions, i.e., "federal conformity". The Legislature is authorized to make modifications to such definitions, for state tax purposes. Refer to Appendix I for text of the SCA.

What is Conformity?

"Conformity" is tax jargon for the patterning of California Personal Income Tax law after the federal internal Revenue Code. To many, the term "conformity" is synonomous with "automatic conformity", which can be achieved to a greater or lesser extent by a number of procedural approaches, three of which are examined in this paper.

California law is already largely in conformity with federal law, but not as the result of an automatic procedure. The current degree of conformity is a consequence of a determined effort by the Legislature since the mid-sixties to review federal law revisions as they occur and to make changes in comparable state codes as deemed appropriate.

This approach to conformity is known as "selective" or "piecemeal" conformity.

Selective Conformity

Although this practice has been followed since the initial enactment of the California Personal Income Tax law, it was formalized as a policy after extensive studies were conducted by the Revenue and Taxation Committees of both houses during the 1960's. Appendix II summarizes major state conformity studies of the past 20 years and their conclusions.

Under this approach, the Legislature attempts to achieve the highest degree of conformity practical and desirable, but exercises its authority to adopt federal changes which are deemed desirable for it and reject those which are deemed undesirable for various reasons. In addition, the Legislature is free to adopt special tax provisions which have no federal counterpart, when necessary, to meet the needs and best interests of California.

Automatic Conformity

There are three basic approaches to automatic conformity.

a. Adopt Federal Adjusted Gross Income (AGI). By adopting AGI, the state would be left with its own itemized or standard deductions, tax credits and tax rates.

b. Adopt Federal Taxable Income (TI). The taxable income approach goes one step further, by conforming to the federal zero bracket amount and itemized deductions. In its "pure" form, AGI or TI conformity would be total, but either approach leaves open the possibility for various adjustments to be made by the state. Of course, the more adjustments, the greater the complexity reintroduced.

c. Piggyback Approach. This is the highest degree of simplicity, as the state tax becomes a percentage (flat rate or graduated schedule) of federal tax liability. This approach is what most lay persons have in mind when they refer to "federal tax conformity".

The Chart on the following page illustrates, for the California tax, the relationship among AGI, TI, and tax liability.

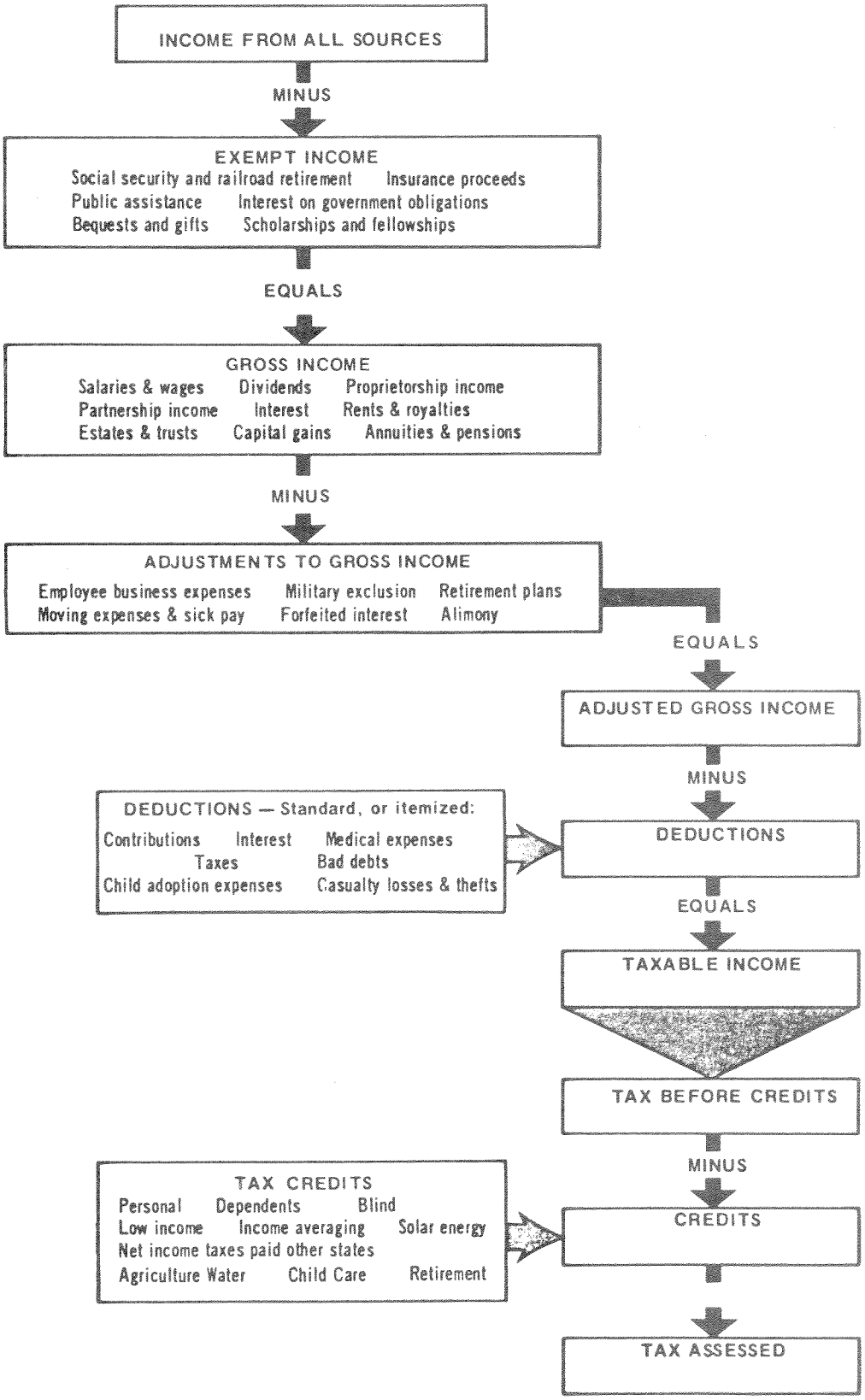
Constitutional Question

A procedural question that has lingered since 1959 is whether automatic conformity must be achieved via constitutional amendment, or may be enacted by statute alone. The question is yet to be resolved.

On October 19, 1959, the Office of Legislative Counsel issued an opinion to the effect that automatic conformity of the California law to future federal law would be an unconstitutional delegation of the state's legislative power to Congress. An updated opinion submitted September 30, 1980 came to the same conclusion: prospective conformity requires a constitutional amendment. (See Appendices III and IV, respectively.)

A countervailing opinion is held by Prof. Gary T. Schwartz of the UCLA Law School, who argues in a recent paper (Appendix V) that there is a "very good reason to believe that an open-ended conformity statute would be held constitional by the California Supreme Court", based on a

COMPONENTS OF INCOME AND TAX



review of case law, much of it since the 1959 Counsel's opinion. He states that whatever doubt still exists, however, would be cured by an appropriate amendment to the state constitution. Schwartz and Counsel do agree that conformity to federal law at a given point in time can be enacted statutorily.

All of the measures considered by this Committee in the 1979-80 session were, or were linked to, constitutional amendments.

Prior Public Votes in California

California voters have twice had the opportunity to approve automatic conformity by constitutional amendment, in 1966 and again in 1968. However, these proposals were rejected both times, and by a larger margin on the second occasion. Proposition 14 of 1966 failed by a vote of 2,536,770 to 2,709,071 (48.4% - 51.6%) and Proposition 4 of 1968 went down by a margin of 2,881,249 - 3,190,542 (47.4% - 52.6%). (Refer to Appendix VI.)

Practice in Other States

California is one of 8 of the 40 broad-based income tax states (as of October 1978) which does not refer by statute to the Internal Revenue Code as a starting point for computing its personal income tax return.

Of the remaining 32 states, 22 use federal AGI as a starting point, six others use federal taxable income as a starting point, and four use a percentage of the federal tax as a starting point. However, each of these states make adjustments from this starting point and some adjustments are substantial. This tends to offset the simplicity of using a federal starting point.

Further, during the past several years about one-third of the 32 states have "frozen" the federal law as of a specific date for their purposes, requiring legislative action for the adoption of new federal changes. The "freezing" approach is not unlike California's "selective conformity" approach, in that new federal changes are made subject to legislative review to determine their impact on tax policy, tax shifts and state revenues.

Rationale for Automatic Conformity

The main organized push for automatic conformity has been from the legal and accounting professions, which express dissatisfaction with the end product of the current "selective/piecemeal" conformity approach. Their dissatisfaction may be summarized as follows:

1. The current approach does not result in total conformity, and the differences between the two tax laws cause increased complexity and compliance costs for taxpayers and tax practioners. Total conformity would allow the taxpayer, at the extreme of piggybacking, to file an IBM card for a state tax return. Even at AGI or TI conformity, the state return could be greatly reduced in size.

2. Even when conformity is forthcoming, there is the time lag between federal action and state reaction. This is especially burdensome when it results in different cost basis under state versus federal law, for depreciation or capital gains.

3. Taxpayers pay more state taxes now than they would under total conformity, because the federal law is far more lenient in the aggregate than is current state law.

4. The current extent of non-conformity requires separate administrative procedures which entail greater administrative time and expense for the state than would be the case under total conformity.

Increased Taxpayer Simplicity: A Matter of Degree

Simplicity is the cornerstone of the case for automatic conformity. However, no one is suggesting that the federal law itself is simple. Rather, proponents of automatic conformity argue that simplification is promoted by reduced paperwork and by having to learn only one tax law, rather than two, even if that one tax law is as complicated as is the federal Internal Revenue Code.

Obviously, simplicity could be promoted just as easily by virtue of a state tax that conformed to federal gross income only, with no further deductions, exclusions, exemptions or credits. With the much lower rate structure this approach would allow, many taxpayers would still have lower taxes, although the taxes on upper-income individuals would be greatly increased. It is doubtful that such a plan would pass, despite its ultimate simplicity, because of the tax shifts and loss of various deductions.

The extent to which reduced paperwork and one tax law will simplify life for the average California taxpayer is probably limited, for the following reasons:

- One-third of California returns were already of the single page variety in the 1978 taxable year. About 60 percent of all taxpayers take the standard deduction, instead of itemizing. The compliance effort required of these taxpayers is minimal at present.

- The more esoteric differences are contained in provisions of law that generally affect relatively few taxpayers. The "typical" taxpayer is not affected. For example, the percentages of returns involving the more complex areas of income are: partnerships (4.8%), estates and trusts (1.0%), farms (1.2%), rents and royalties (10.1%), employee business expenses (8.3%), sick-pay (0.3%), IRAs (2.5%), capital gains and losses (10.8%), dividend exclusion (14.9%).

The Franchise Tax Board is currently studying a way the California income tax return can be further simplified and tied to the federal return under existing law.

Loss of State Control Over Tax Policy

The significance of this factor depends on the extent to which the income tax is considered to be an important state policy tool--i.e., for purposes of stimulating certain activities, subsidizing particular groups, or redistributing income--and not just a source of revenue. Nonetheless, the state would surrender its control over the bulk of tax policy to the U.S. Congress and the IRS.

Conformity with the present U.S. Internal Revenue Code would adopt all of the present and future features of the federal income tax structure. Are all such provisions desirable and equitable for California's economy and its taxpayers? Congress does not legislate with only California's unique interests in mind.

Conformity would also centralize income tax decision-making in Washington, D.C., and make it more difficult for the individual California taxpayer to make his or her voice heard on these matters.

State law deviates from federal law for many "equity" reasons. Some of these deviations include the adoption deduction, the military pay exclusion, and the non-taxability of unemployment compensation. Under automatic conformity, California's special deduction for military retirement would be eliminated, the adoption deduction would be scaled back,and the state would begin taxing a portion of unemployment insurance.

There are many other similar items where either a deduction would be lost or some presently exempt income would become taxable with full conformity.

To make adjustments for all these items would defeat the simplicity goal of automatic conformity.

Significant Shifts In Tax Burden Or Major Revenue Loss

In developing an automatic conformity plan, proponents have two options:

a. A plan could be developed to bring in the present level of revenue. This would result in major tax shifts and many Californians would pay increased state income taxes, while others would get major tax reductions.

b. A plan could be devised under which most taxpayers would not have a tax increase. This approach would result in a very substantial state revenue loss, in the hundreds of millions of dollars.

Some of the tax shifts that can occur under automatic conformity are:

- A shift from higher-income taxpayers to lower-income taxpayers. This shift occurs because the state tax is considerably more progressive than the federal tax for most state taxpayers.

- A shift from single to married taxpayers. This shift is due to the partial "marriage penalty" which still exists under federal law but not at the state level.

- A shift from taxpayers claiming more dependents to those claiming fewer. This shift results from substituting the $1,000 federal personal exemption for the state's dependent tax credit ($11 in 1981).

State Budget and Revenue Instability

With automatic conformity to federal income tax law, major federal law changes will have a major impact on state income tax revenues and the state budget.

According to an August 13, 1981, Wall Street Journal article (see Appendix VII), the recent federal tax reduction act has left the conformity states "facing revenue losses estimated at as much as $2.3 billion in the first year after the federal act takes effect.

Changes in federal tax law almost always are made after the adoption of the state budget and often after the Legislature has adjourned for the year. Two of the last three major tax revisions--the Tax Reform Act of 1976 and the Revenue Act of 1978--were enacted on October 4 and October 14, respectively. Both dates fall beyond the close of the state legislative session. The most recent change, the Federal Economic Tax Recovery Act was adopted on August 13, 1981, after the 1981-82 state budget was adopted.

The implications of such revenue disruptions depend on the state's fiscal condition, i.e., whether or not a surplus of adequate proportions exists at the time to preclude the state falling into a budget deficit situation, which is prohibited by the California Constitution.

States that have a large degree of conformity are constantly faced with the prospect of raising taxes or cutting expenditures to compensate for the shrunken tax base resulting from the federal action.

When the action is taken by Congress late in the calendar year, the Legislature would be faced with a special session and making some "extra-large" adjustments (either budget cuts or tax increases) because it will be impossible to make full fiscal year adjustments.

There would also be a problem for the Franchise Tax Board in printing and distributing tax forms and booklets if the Legislature had to make an income tax rate adjustment late in the year to offset the losses from federal action.

Even when a federal tax change is made on a timely basis, it will be difficult for California to make tax adjustments to bring in the same amount of revenue as planned when the budget was adopted.

For one, there will be political problems, as such adjustments may be preceived by taxpayers as tax increases, even though such rate changes are intended only to avoid a state revenue loss. In California there are additional limitations to recouping revenues lost via federal law changes, because any increase in taxes requires a 2/3 legislative vote under Proposition 13.

Another is the time frame necessary to fully figure out the impact of the myriad of federal changes on state revenues. There is presently a limited ability at the federal or state level to estimate accurately the revenue effects of major federal tax changes. This is primarily due to such factors as basic data limitations, the interaction of complex tax provisions, and the unknown "secondary" economic and behavioral effects of tax law changes. The impacts of some of the changes are simply unknown.

Additional Problems

At the Assembly Revenue and Taxation hearing on Conformity in October of 1980, Mr. Ernest L. Fraser of Long Beach, a CPA for 16 years specializing in taxation, presented the Committee with a long list of detailed problems associated with automatic conformity to federal tax law.

Among the most significant are:

1. Because of past differences in federal and state law, individuals who may have deducted costs from state law but carried them forward under federal law, would get a double deduction under automatic conformity.

2. There are problems with referencing the individual income tax to federal law and maintaining existing law with respect to bank and corporation taxes.

3. There are difficulties in computing taxes owed by non-residents of California who earn income in California. Non-resident aliens may get preferential treatment over non-resident citizens.

4. Shareholders of subchapter S corporations may be taxed twice.

5. All California carryovers (capital loss, contributions, etc.) would be completely lost.

6. The federal collapsible corporations rule could result in a harsh California tax burden.

7. Expenses of producing exempt income (interest from U.S. Government bonds) would be deductible.

8. Since state taxes are deductible from federal taxes, automatic conformity would result in the state income tax being deducted from the state income tax.

9. Some individuals who are taxable for state purposes may not file federal income tax returns.

10. The California income from estates and trusts may be different from the federal (because of adjustments), but their distributions would be taxable in the amount computed for federal purposes.

APPENDIX I

Text

of

SCA No. 14
(Mills)

AMENDED IN SENATE APRIL 27, 1981

AMENDED IN SENATE MARCH 23, 1981

Senate Constitutional Amendment No. 14

Introduced by Senators Mills, Marks, Craven, and Briggs
(Coauthor: Assemblyman Larry Stirling)

February 18, 1981

Senate Constitutional Amendment No. 14—A resolution to propose to the people of the State of California an amendment to the Constitution of the state, by adding Section 26.6 to Article XIII thereof, relating to taxation.

LEGISLATIVE COUNSEL'S DIGEST

SCA 14, as amended, Mills. Income tax.

Existing provisions of the California Constitution provide that the Legislature may impose income taxes.

This measure would authorize the Legislature to simplify the reporting and collecting of state personal income taxes by incorporating federal law into state law.

Vote: ⅔. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

Resolved by the Senate, the Assembly concurring, That the Legislature of the State of California at its 1981–82 Regular Session commencing on the first day of December, 1980, two-thirds of the members elected to each of the two houses of the Legislature voting therefor, hereby proposes to the people of the State of California that the Constitution of the state be amended by adding Section 26.6 to Article XIII, to read:

~~26.6.~~

SEC. 26.6. Notwithstanding any other provision contained in this Constitution, the Legislature may

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simplify the reporting and collecting of California personal income taxes by incorporating into state law by reference to any provision of the laws of the United States as such laws are or become effective at any time, or as such laws are amended from time to time. The Legislature may prescribe modifications or exceptions from such laws.

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APPENDIX II

Published State Studies On

Federal Conformity

APPENDIX II

PUBLISHED STATE STUDIES ON FEDERAL CONFORMITY

Year	Study	Recommendation
1961	Report of Senate Fact Finding Committee on Revenue and Taxation: Conformity of California Personal Income and Bank Corporation Franchise Taxes with the Federal Internal Revenue Code	Adopt policy that conformity be achieved wherever practicable and desirable. (Pg. 233)
1961-63	Final Report of the Assembly Interim Committee on Revenue and Taxation	Continue policy of attempting to achieve highest degree of conformity between federal and state laws as may be practical and desirable. (pg. 56)
1964	Dr. Corrine Lathrop Gilb's Report for the Assembly Interim Committee on Revenue and Taxation: Conformity of State Personal Income Tax Laws to Federal Personal Income Tax Laws	Adopt method which provides the maximum conformity for the convenience of the taxpayer consistent with needs for predictability and control over revenue by the state. (Vol. 4, No. 10, Part 3, pg. 8)
1968-69	California Advisory Commission on Tax Reform (Flournoy Commission)	No specific recommendation but opposed blind conformity as optimum objective. (Vol. I, pg. 6)
1969	Staff Report to Senate Committee on Revenue and Taxation on Bills and Constitutional Amendments Referred in 1968 to the Committee for Study	Continue policy recommended in 1961 report.
1969	Preliminary Report of the Legislative-Executive Tax Study Group	Full conformity contains "grave flaws" (pgs. 102-104)
1975	Franchise Tax Board staff report: Should California Abandon its Current Selective Conformity Policy for Automatic Conformity?	Continue policy of selective conformity while seeking simplification of state law and promoting greater tax equity (pg. 11)
1979	Final Report of the Commission on Governmental Reform (Post Commission)	Opposed full "piggybacking" but recommended "use of a modified form of piggybacking...by specific adjustments to the "adjusted gross income" reported to the U.S." (Pg. 60)

APPENDIX III

Legislative Counsel Opinion
on
Constitutionality of Automatic Conformity

October 19, 1959

STATE OF CALIFORNIA

Office of Legislative Counsel

3021 STATE CAPITOL, SACRAMENTO 14
311 STATE BUILDING, LOS ANGELES 12

Sacramento, California
October 19, 1959

Constitutional Problems Involved in Conforming California's Personal Income and Bank and Corporation Tax Laws with Federal Income Tax Law
#504

The question has been asked: that constitutional problems, if any, would confront the Legislature in re-writing California's Personal Income Tax Law (R. & T.C. Sec. 17001 and following) and Bank and Corporation Tax Law (R. & T.C. Sec. 23001 and following) to make these laws conform with the Federal income tax law (Internal Revenue Code of 1954, Subtitle A, commencing at Sec. 1)?

1. Delegation of Legislative Power

A revision of the California laws as indicated would present the problem of an unconstitutional delegation of the State's legislative power to the Congress of the United States should it provide for the automatic inclusion of prospective congressional legislation.

The State Legislature is vested with a generally nondelegable power to make laws for the State of California (see 11 Cal. Jur. 2d 481; and Calif. Const., Art. III). The California courts have looked upon this as prohibiting the Legislature from providing for the automatic incorporation by reference of the future amendments of the laws of any other jurisdiction. As the court stated in Brock v. Superior Court (1937), 9 Cal. 2d 291, 297:

> "...It is, of course, perfectly valid to adopt existing statutes, rules or regulations of Congress or another state, by reference; but the attempt to make future regulations of another jurisdiction part of the state law is generally held to be an unconstitutional delegation of legislative power."

To the same effect, see In re Burke (1923), 190 Cal. 326, 328; and 11 Cal. Jur. 2d 519.

In Palermo v. Stockton Theaters, Inc. (1948), 32 Cal. 2d 53, our State Supreme Court cited the Brock and Burke cases to the point that where a statute adopts by specific reference the law of another jurisdiction - Federal as well as State - the adopted law is incorporated in the form in which it exists at the time of reference and not as later modified. This was in regard to language in the Alien Land Law giving aliens the right to acquire property "in the manner and to the extent, and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject" (p. 58). The court stated (pp. 58-59):

> "...there is grave doubt whether our Legislature could constitutionally delegate to the treaty-making authority of the United States the right and power thus directly to control our local legislation with respect to future acts..."

None of the California cases mentioned involved tax legislation. In the Brock case, however, the court cited in support of its statement as to the invalidity of incorporating the future legislation of another jurisdiction by reference, the South Carolina case of Santee Mills, et al v. Query (1922), 115 S.E. 202, 206. The court there was concerned with the validity of a 1922 South Carolina income tax law which imposed on individuals and organizations liable for payment of the Federal income tax, a tax on income equal to 1/3 of the amount of the Federal tax. The provisions of the Federal income tax law relating to the levy, assessment and collection of such tax, "passed and approved prior to the time of the approval" of the state law, and not in conflict with the latter, together with the rules and regulations issued thereunder, were adopted and incorporated by reference as if set forth in full. It was contended that this incorporation had the effect of adopting, or attempting to adopt, future Federal income tax laws, rules and regulations, as well as those in existence on the date of the approval of the state law, and thus delegated, or attempted to delegate, to Congress a nondelegable legislative power of the South Carolina Legislature. The court held against this contention on the ground that the language of the law did not support it, and construed the law as incorporating only the provisions of the Federal law, rules and regulations in effect at

the time of the approval of the state law, stating that such incorporation is valid. However, it recognized the existence of a prohibition against the adoption of prospective Federal legislation, and indicated that if such had been the nature of the state law, it would have held it invalid.

Consistent with Santee Mills, et al v. Query is the Georgia case of Featherstone v. Norman (1930), 153 S.E. 58. There the court was concerned with a 1929 Georgia law which imposed a tax on the net income of individuals and organizations equal to 1/3 of the tax on the same net taxable income payable by them to the United States under the Federal income tax law, provision being made for excluding from the tax base any income which was taxable only by the Federal Government and for including therein certain income which only the state could tax. The court held in part that the law did not unlawfully delegate legislative power by making future Federal legislation a part of the state law, since it merely adopted an existing Federal method for determining the state tax (at p. 70).

It is stated in an annotation in 133 A.L.R. 401, entitled "Adoption by or under authority of state statute without specific enactment or re-enactment of prospective Federal legislation or Federal administrative rules as unconstitutional delegation of legislative power":

> "Although there is some conflict, 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."

Cases cited in the annotation in support of this proposition include the Brock and Santee Mills cases (133 A.L.R., at p. 403).

Also in support of the proposition are the annotations in 166 A.L.R. 516, 518 (citing the Featherstone case), and 42 A.L.R. 2d 797, 798, entitled "Constitutionality, construction, and application of provisions of state tax law for conformity with federal income tax law or administrative and judicial interpretation."

In the light of the foregoing, we consider it extremely doubtful that the California courts would sustain a revision of our Personal Income Tax and Bank and Corporation Tax Laws to make them conform to the Federal income tax law by the automatic incorporation by reference of future provisions of the Federal law.

In reaching this conclusion we have considered also the case of Alaska Steamship Co. v. Mullaney (1950 - 9th C.C.A.), 180 Fed. 2d 805, which supports a contrary view. That case involved a 1949 act of the territorial legislature of Alaska which imposed an income tax on individuals and corporations at a rate of 10% of the total Federal income tax payable for the same taxable year to the United States pursuant to the Internal Revenue Code "as now in effect or hereafter amended" and the regulations promulgated thereunder. The court stated that the incorporation by reference of the provisions of the Federal law "now in effect" could not be questioned, citing the Santee Mills, Featherstone and Burke cases (at p. 815). However, even though there was no issue before it on the matter since the Federal law had not been amended, the court added that there was no unlawful delegation of legislative power by the incorporation by reference of future changes in the Federal law. It gave as its reason for this that a major objective of the legislature in making its law conform to future changes in the Federal law was the attaining of uniformity.

Although the decision in the Mullaney case was later in time than any of the decisions that we have noted in support of the opposing view, we are unaware of anything in any California case decided since Mullaney indicating that should the question now be presented to the California courts, they will go off in the same direction as Mullaney.

2. Intergovernmental Immunity

A revision of the California Personal Income Tax Law to base the tax imposed by it upon the income subject to tax under the Federal income tax law would impinge upon the general immunity from state taxation accorded the Federal Government and its instrumentalities (see McCulloch v. The State of Maryland (1819), 4 L. Ed. 579), in the absence of a provision for the exclusion from the State's tax of interest paid on Federal bonds (see Pollock v. The Farmers' Loan & Trust Company (1895), 39 L. Ed. 759, 820-821; and 27 Am. Jur. 345-346. Such interest is now exempt from California personal income taxation (see Title 18 Cal. Adm. Code, Sec. 17130 (b)).

For similar reasons, an exclusion or exemption of the same kind should be incorporated in any revision of the corporation income tax imposed by the Bank and Corporation Tax Law (R. & T.C. Sec. 23501 and following). Such an exclusion or exemption is unnecessary, however, as to the franchise tax which that law imposes (R. & T.C. Sec. 23151 and following) in view of a distinction between a tax on income, which is the nature of the corporation income tax, and a tax measured by income, which describes the franchise tax (see Pacific Company v. Johnson (1931), 76 L. Ed. 893). The Bank and Corporation Tax Law presently provides for the inclusion of interest paid on Federal bonds in the measure of the franchise tax and for the exclusion of such interest from the corporation income tax (R. & T.C. Sec. 24272).

3. Income of Nonresident Individuals

The California Personal Income Tax Law presently imposes a tax on the taxable income of nonresident individuals which is derived from sources within this State (R. & T.C. Sec. 17041). This is in accordance with a general rule which prohibits a state from taxing the income of a nonresident individual derived from sources outside its jurisdiction (see 27 Am. Jur. 416).

Any revision of the Personal Income Tax Law to base the tax imposed by it upon the net income subject to Federal income taxation should likewise be consistent with this rule.

There is no constitutional bar to the taxation of the net income of resident individuals of this State derived from sources outside California (see Lawrence v. State Tax Commission (1931), 76 L. Ed. 1102; Guaranty Trust Company of New York v. Virginia (1938), 83 L. Ed. 16; and 130 A.L.R. 1183, 1186), and California taxes all such income accordingly (R. & T.C. Sec. 17041). To the extent, however, that taxable income derived from sources in another state is taxed by that state without the allowance of a credit for taxes paid to California, a credit may presently be taken against the latter taxes for the taxes paid the other state (R. & T.C. Sec. 18001).

4. Income of Foreign Corporations

A revision of the Bank and Corporation Tax Law to base the taxes imposed by it upon the net income of foreign corporations subject to Federal income taxation could present some constitutional problems.

In its impact on a foreign corporation which engages in both interstate and intrastate commerce, the franchise tax imposed by the law (R. & T.C. Sec. 23151) can be measured only by a fair proportion of the corporation's income attributable to business done within California (Interstate Oil Pipe Line Co. v. Stone (1948), 93 L. Ed. 1613). The law as presently drafted is consistent with this principle (R. & T.C. Secs. 23040, 23151 and 25101).

A franchise tax cannot be imposed on a foreign corporation engaged exclusively in interstate commerce, even though measured only by its net income from sources within the state, since such a tax represents an unconstitutional burden on interstate commerce (Spector Motor Service, Inc. v. O'Connor (1951), 95 L. Ed. 573).

In its application to a foreign corporation engaged exclusively in interstate commerce, the corporation income tax imposed by the law (R. & T.C. Sec. 23501) must be nondiscriminatory and may relate only to properly apportioned net income from activities within California (West Publishing Company v. McColgan (1946), 27 Cal. 2d 705, affd. 90 L. Ed. 1603; Northwestern States Portland Cement Company v. Minnesota, and Williams v. Stockham Valves and Fittings, Inc. (1959), 3 L. Ed. 2d Adv., 421).

Since the decision in the two cases last cited, Congress has enacted legislation limiting a state's right to tax the income of a foreign corporation arising from interstate commerce. This is Public Law 86-272 (Senate 2524, signed by the President on September 14, 1959). Generally speaking, it prohibits a state from imposing a net income tax on income derived from activities within the state by a foreign corporation engaged in interstate commerce if such activities consist only of the solicitation by salesmen of orders for sales of tangible personal property, and the "orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State..." This limitation must be borne in mind in the drafting of any revision of the California Bank and Corporation Tax Law to establish conformity with the Federal income tax law through the use of the Federal tax base.

5. Income of Domestic Corporations

As in the case of resident individuals, there is no constitutional bar to the taxation of the net income of a domestic corporation derived from sources outside California other than in interstate commerce (see Lawrence v. State Tax Commission (1931), 76 L. Ed. 1102; Guaranty Trust Company of New York v. Virginia (1938), 83 L. Ed. 16; 27 Am. Jur. 412; and 130 A.L.R. 1183, 1186). Nevertheless, the corporation income tax imposed by the Bank and Corporation Tax Law is currently levied only on net income derived from sources within this State (R. & T.C. Sec. 23501).

The courts have not, to our knowledge, been squarely presented with the issue of whether a state may tax the net income of a domestic corporation derived in interstate commerce from sources outside the state. The United States District Court in Piedmont & N. Ry. Co. v. Query (1932), 56 Fed 2d 172, 176, by way of dictum, expressed doubt that such a tax would be constitutionally valid, on the ground that it would, in effect, tax property beyond the state's jurisdiction, and thus violate due process. There is, on the other hand, substantial basis for a position to the contrary (see Matson Navigation Company v. State Board of Equalization (1936), 80 L. Ed. 791, rehearing den. 80 L. Ed. 1011; United States Glue Company v. Town of Oak Creek (1918), 247 L. Ed. 1135; and 27 Am. Jur. 322-323).

It appears that, as in the case of a foreign corporation, a franchise tax cannot be imposed on a domestic corporation engaged exclusively in interstate commerce, even though measured only by its net income from sources within the state, since such a tax represents an unconstitutional burden on interstate commerce (see Spector Motor Service, Inc. v. O'Connor (1951), 95 L. Ed. 573); Philadelphia and Southern Mail Steamship Company v. Pennsylvania (1886), 30 L. Ed. 1200, 1204; and 27 Am. Jur. 322-323).

6. Retroactive Reduction of Taxes

There are some provisions in the Federal income tax law which, if reflected in any federal tax base employed for California tax purposes, could present a problem in respect to taxes for which liability may have accrued prior to the enactment of the legislation providing for the use of such base. Such a provision, for example, is that found in Section 172 of the Internal Revenue Code of 1954, relating to the deduction for net operating losses, which permits the

carrying back of such a loss to each of the three taxable years preceding the year in which it occurs, and carrying it forward to each of the five years following. Insofar as this provision might apply so as to cause a reduction in any California taxes that may have previously vested in the State, there could be a violation of Section 31 of Article IV of the State Constitution, which prohibits the Legislature from making gifts of public money for private purposes (see Estate of Stanford v. Widber (1899), 126 Cal. 112; and Allen v. Franchise Tax Board (1952), 39 Cal. 2d 109).

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APPENDIX IV

Legislative Counsel Opinion
on
Constitutionality of Automatic Conformity

September 30, 1980

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Sacramento, California

September 30, 1980

Honorable Wadie P. Deddeh
2013 State Capitol

Income Tax Laws - #15514

Dear Mr. Deddeh:

QUESTION

Does the Legislature have power, by statute, to incorporate federal law by reference into California's Personal Income Tax Law?

OPINION

The Legislature has power, by statute, to incorporate existing federal law by reference into California's Personal Income Tax Law. However, the Legislature may not incorporate future federal laws into California's income tax structure.

ANALYSIS

This question raises the possibility of an improper delegation of legislative power.

The cases hold that the Legislature is vested with a generally nondelegable power to make laws for the State of California (see, for example, 13 Cal. Jur. 3d, Const. Law, Sec. 104, p. 198, et seq.; and Sec. 3, Art. III, Sec. 1, Art. IV, Cal. Const.), and the courts have held that the Legislature is generally prohibited from providing for the automatic incorporation by reference of the future amendments of the laws of any other jurisdiction. As the court stated, in Brock v. Superior Court, 9 Cal. 2d 291, 297:

> ". . . It is, of course, perfectly valid to adopt existing statutes, rules or regulations of Congress or another state, by reference; but the attempt to make future regulations of another jurisdiction part of the state law is generally held to be an unconstitutional delegation of legislative power." (Emphasis added.)

In the cases, it was frequently stressed that the delegation of legislative power to others would be upheld if the discretion of the administrative officers charged with administering the laws were controlled and guided by adequate rules or standards prescribed therefor (see, for example, Tarpey v. McClure, 190 Cal. 593, 600). However, more recent cases indicate that the need is usually not for "standards" but for "safeguards" to protect those affected by administrative action (Kugler v. Yocum, 69 Cal. 2d 371, 381, 382).

Moreover, whether the incorporation of future federal laws into this state's Personal Income Tax Law would involve an invalid delegation of legislative power must be determined under the terms of California's Constitution (see Sandstrom v. Cal. Horse Racing Board, 31 Cal. 2d 401, 412), and California's Constitution has been under a gradual process of revision since 1966 (see Prop. 1-a, Ballot Pamphlet, Gen. Elec., Tuesday, Nov. 8, 1966).

Much of the task of recommending to the Legislature the necessary changes in the Constitution was delegated to the Constitution Revision Commission, which was created pursuant to an Assembly concurrent resolution in 1963 (Res. Ch. 181, Stats. 1963). In its report to the Joint Committee on Legislative Organization on February 15, 1966, on the proposed revision of seven articles of the California Constitution, the commission stated as follows, at page 24, with respect to the delegation of legislative power under the proposed new constitutional provisions:

> ". . . The word 'provide' used in the sense 'The Legislature may provide' ... indicates a power which may be delegated. On the other hand the word 'prescribe,' used in the sense that something 'shall be prescribed' ... indicates a power which may not be delegated."

We think that the courts would give considerable weight to the meaning accorded to "provide" and "prescribe" by the Constitution Revision Commission in construing the new provisions of California's Constitution (see Van Arsdale v. Hollinger, 68 Cal. 2d 245, 249; Isaacson v. City of Oakland, 263 Cal. App. 2d 414, 421). The constitutions of none of those states which presently incorporate current and future federal income tax law by reference require the Legislatures of the respective states to "prescribe" income tax laws.

The Constitution Revision Commission was terminated, effective March 4, 1974 (Joint Rules Committee Resolution No. 57, 1973-74 Reg. Sess.), and a new group was formed to study the revision of Article XIII of the State Constitution, the article which deals primarily with tax matters. This group, call the "Constitutional Revision Task Force on Article XIII," did not have the same status as the Constitution Revision Commission, in that the task force was not created pursuant to resolution or other official legislative action. However, the report of the task force was printed as an Appendix to the Senate Daily Journal for May 14, 1974, and in the Assembly Journal of May 16, 1974, commencing at page 13237, to express "the intent of the drafters of this revision and of the Legislature in adopting it" (at page 13238 of the Assembly Journal).

On page 13272 of the Assembly Journal, the task force proposed the following language with respect to income taxes in subdivision (a) of a new Section 26 of Article XIII of the State Constitution:

> "(a) Taxes on or measured by income may be imposed on persons, corporations or other entities as prescribed by law."* (Emphasis added.)

On the same page of the Assembly Journal, the task force provided the following comment:

> "Sections 26(a) and 26(b) are intended to consolidate existing Section 11 (which authorizes the Legislature to impose income taxes) with the pertinent portion of existing Section 1 3/4 which exempts interest from State and local bonds from income taxes."

Thus, unlike the Constitution Revision Commission, the task force did not speak of the distinctions to be drawn between "provide" and "prescribe." Instead, the task force merely stated that it was intended to "consolidate"--but not necessarily change--an existing constitutional provision.

The language in subdivision (a) of Section 26, as set forth above, was subsequently approved by the voters without change as a part of Proposition 8 on the ballot for the General Election held on November 5, 1974. However, the precise meaning of the former constitutional provision on income taxes still remains somewhat obscure.

From the time of the adoption of the Constitution in 1879 until its repeal in 1974, former Section 11 of Article XIII provided as follows:

> "SEC. 11. Income taxes may be assessed to and collected from persons, corporations, joint-stock associations, or companies resident or doing business in this State, or any one or more of them, in such cases and amounts, and in such manner, as shall be prescribed by law." (With emphasis again being added.)

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* The same material is contained in the Appendix to the Senate Daily Journal for May 14, 1974, which was printed as a separate publication.

The above provision was not interpreted by the courts to determine whether the Legislature could delegate the power to impose an income tax. However, we do note that constitutional amendments were twice placed upon the ballot to accomplish that purpose and were defeated each time (Prop. 14, Ballot Pamphlet, Gen. Elec., Nov. 8, 1966; Prop. 4, Ballot Pamphlet, Gen. Elec., Nov. 5, 1968).

With respect to the provision regarding income taxes then before the convention which convened in Sacramento on September 8, 1878, some of the delegates seemed aware of the general rule that the Legislature would have inherent power to impose an income tax, even without a constitutional authorization therefor, while others were not so sure that a constitutional authorization would be unnecessary (see Debates and Proceedings of the Constitutional Convention of the State of California, Vol. II, at pp. 946, 947; see also Delaney v. Lowery, 25 Cal. 2d 561, 568; and Roth Drug, Inc. v. Johnson, 13 Cal. App. 2d 720, 739, 740, for a discussion of the Legislature's inherent power to tax).

The convention did not reach the issue of whether a distinction was intended between "provide" and "prescribe," as used in the income tax provision.

However, cases construing other constitutional provisions decided prior to the time the Constitutional Convention met in 1878 held that "prescribed" indicated a nondelegable legislative power (see Exline v. Smith, 5 Cal. 112, 113; see also People v. Provines, 34 Cal. 520, 526), and it would generally be presumed that the framers of the Constitution intended to use "prescribed" in this restricted sense (see Emery v. San Francisco Gas Co., 28 Cal. 345, 360). It has been held that the courts will look to other sections of the Constitution in which a word is used in order to determine its meaning in the section at issue (Miller v. Dunn, 72 Cal. 462, 466).

Moreover, after the Constitution of 1879 was adopted and prior to the commencement of the constitutional revision in 1966, the courts continued to make a distinction between "provide" and "prescribe" in constitutional provisions (see People v. Johnson, 95 Cal. 471, 474, 475; Slavich v. Walsh, 82 Cal. App. 2d 228, 232-235).

Therefore, whether or not it was necessary to insert an authorization into the Constitution of 1879 to enable the Legislature to impose an income tax, the Constitutional Convention saw fit to insert such a provision. With respect to the original provision and the new provision drafted by the Constitutional Revision Task Force on Article XIII, we think it is the duty of the courts to give effect to these provisions, if reasonably possible (Smith v. State Board of Control, 215 Cal. 421, 429). Moreover, since the provisions of the Constitution are mandatory and prohibitory (Sec. 26, Art. I, Cal. Const.), it has been stated that when the Constitution prescribes a course to be followed, all statutes must be consonant therewith (see County of El Dorado v. Meiss, 100 Cal. 268, 274; Allen v. State Board of Equalization, 43 Cal. App. 2d 90, 93).

Therefore, it will be the duty of the courts to construe a provision authorizing an income tax, as "prescribed," rather than as "provided," by law, and, as noted earlier, these two terms are intended to have a distinct meaning in the Constitution of 1879 and in at least those portions of the newer Constitution drafted by the Constitution Revision Commission. We think it would be difficult for the courts to give these terms a different meaning in another part of the Constitution even though the latter part was drafted by the Constitutional Revision Task Force on Article XIII. This is especially true where, as here, both drafting groups merely made recommendations to the Legislature on proposed constitutional revisions, and the Legislature would be presumed to know the meaning placed upon "provide" and "prescribe" by the earlier drafting commission (see Rosenberg v. Bump, 43 Cal. App. 376, 394).

On this basis, it is our opinion that the same interpretation will be placed upon "prescribed," as used in subdivision (a) of Section 26 of Article XIII, as is placed upon that term in the Constitution of 1879 and in the earlier revised portions of the newer Constitution. Under this interpretation, income tax laws enacted pursuant to this provision would have to be "prescribed" by the Legislature and could not be generally delegated to Congress with respect to future changes in federal laws.

Therefore, with respect to the specific question presented, we think that the Legislature has power, by statute, to incorporate existing federal tax laws into

California's Personal Income Tax Law. However, since the Legislature must "prescribe" this state's income tax laws, the Legislature could not incorporate future changes in federal statutes. Morever, we think it would be necessary to amend the Constitution to implement a program to incorporate future federal laws into the Personal Income Tax Law.

Very truly yours,

Bion M. Gregory
Legislative Counsel

By
Christopher J. Wei
Deputy Legislative Counsel

CJW:jm

APPENDIX V

Report on
Income Tax Conformity and "Piggybacking"
Under the California Constitution,
by
Prof. Gary T. Schwartz, UCLA Law School,
April 9, 1980

REPORT ON INCOME TAX CONFORMITY AND "PIGGYBACKING" UNDER THE CALIFORNIA CONSTITUTION

Professor Gary T. Schwartz
UCLA Law School
April 9, 1980

TABLE OF CONTENTS

INTRODUCTION

In this Report I consider two related questions: Whether it would be constitutional for California to adopt a statute conforming its income tax's base to the federal tax base in an "open-ended" or "ongoing" way;* and whether it would be constitutional for Congress to accept the invitation tendered by Congress in the Federal-State Tax Collection Act of 1972, as amended. One of my conclusions will be that there is a high probability that the California Supreme Court would affirm the constitutionality of an open-ended conformity statute. However, as for participation in the federal program, I will conclude that strong arguments can be advanced both in favor of and in opposition to constitutionality, and that there is no obvious method for reliably predicting which set of arguments the California Supreme Court would find the more persuasive.

Most of this Report consists of a long exposition of the relevant case law. This exposition aspires to be as straightforward and "neutral" as possible, so that the reader can make up his own mind as to what the proper legal inferences are. To this extent, much of the Report is quite deliberately "dull." Part II consists of my own effort to utilize the law exposited in Part I in order to analyze the California constitutional questions.

The Report also makes clear that whatever constitutional

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*There is no doubt whatsoever that a California "date of enactment" conformity statute would be valid. See pp. 33-38, infra. California's constitution does not contain any New York-like prohibition against incorporation by reference. See p. 12, infra.

doubts there may be about either conformity or "piggybacking" could be cured by an appropriate amendment to the state constitution. While conformity initiatives have been defeated in California in the past, the voting has been reasonably close; and a number of states, including New York and Colorado, have been successful in amending their constitutions so as to authorize open-ended conformity.

A final point. Part II makes reference to certain policy judgments which the California Legislature could plausibly render. It should be make clear at the outset that these are judgments to which I myself would not necessarily subscribe. Were I a legislator, I do not know how I would vote on the conformity issue.

I. CASE LAW EXPOSITION

A. DELEGATION IN GENERAL: THE BANALITY OF STANDARDS AND THE POSSIBLE RELEVANCE OF "SCOPE"

The typical delegation case deals with a legislature's delegation of authority to an administrative agency which has been created by the legislature. When the federal Congress engages in such a delegation, the question arises of whether that delegation is consistent with Article I of the federal Constitution, vesting federal lawmaking authority in Congress itself. When a state legislature attempts such a delegation, the correlate question concerns the permissibility of that delegation under the state constitution.

At the federal level, the relevant legal doctrines are relatively clear. The formal rule is that Congress can delegate if, but only if, it provides the agency with meaningful standards or an "intelligible principle" for guiding agency decisionmaking. See Hampton v. United States, 276 U.S. 394, 409 (1928). In fact, however, in any number of cases the federal Supreme Court has found particular delegations constitutional even though the standards set forth by Congress are highly nebulous.

Thus such standards as "just and reasonable," Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930), "public convenience, interest, or necessity," Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933), and "unfair methods of competition," Federal Trade Comm'n v. Gratz, 253 U.S. 421 (1920), have been held sufficient to satisfy the constitutional standard. Given this pattern of court decisionmaking, scholars can fairly enough argue

that Congressional delegations to federal agencies are valid even in the absence of a clearly "intelligible" standard. See K. Davis, 1 Administrative Law Treatise 177 (2d ed. 1978).

Indeed, in all of American constitutional history, there are only two Supreme Court cases, both of them decided in the judicially aggressive year of 1935, which have found particular delegations to federal agencies to be beyond Congress's power. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), invalidated provisions of a New Deal measure authorizing the President to prohibit the shipment of "hot oil" in interstate commerce. In fact, the legislation in question did contain standards for Presidential decision-making the "intelligibility" of which seems clearly sufficient in light of both earlier and later Supreme Court decisions. For this reason, the Panama holding is presently understood either as no longer stating good law or as being severely limited to its particular facts. See K. Davis, supra, at 175.

Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935), invalidated key provisions of the National Industrial Recovery Act which had delegated to a new federal agency the authority to establish comprehensive codes of conduct governing all businesses subject to Congress's commerce clause powers. Especially since the Schecter Court was unanimous, the Court's holding must be taken somewhat seriously. In truth, the standards set forth in the Act (like the standards in Panama) seem to pass constitutional muster. What was distinctive about the Schecter delegation--and what thus distinguishes the Schecter case from other delegation cases--is the extensiveness or "scope" of the legislature's delegation. See K. Davis, supra, at 176. The federal agency was being given

sweeping powers to regulate wide-ranging aspects of the interstate economy. At least in this sense the statute did indeed involve "delegation running riot," 295 U.S. at 553 (Cardozo, J., concurring). Insofar as Schecter has not been overruled, it implicitly stands for the federal principle that the "scope" of the delegation is a variable to be taken into account in ruling on the delegation's constitutionality.

What about state constitutional doctrines on delegation? One scholar has observed that the anti-delegation rule possesses far more vitality within state constitutional law than it does at the federal level. See K. Davis, supra, at 204. This observation does not really apply to California, however. Prior to 1939, California courts frequently enough intervened to invalidate the state legislature's delegations to state administrative agencies. See, e.g., People v. Parks, 58 Cal. 624 (1881). But leading California Supreme Court opinions in 1939 and 1940 not only liberalized California delegation law, but set the stage for later and more drastic liberalizations. Jersey Maid Milk Products Co. v. Brock, 13 Cal. 2d 620, 91 P.2d 577 (1939), affirmed a state statute conferring on the state Director of Agriculture the power to designate marketing areas for the milk industry and to establish "stabilization and marketing plans" in local areas. And Ray v. Parker affirmed, against delegation challenge, additional aspects of state's anti-Depression agricultural legislation. 15 Cal. 2d 275, 101 P.2d 665 (1940). So far as I know, in the years since Jersey Maid and Ray not a single California statute delegating powers to an administrative agency has been held unconstitutional on grounds

of an insufficiency in the standards guiding the delegation. (But see Clean Air Constituency v. California State Air Resources Bd., 11 Cal. 3d 801, 523 P.2d 617, 114 Cal. Rptr. 577 (1974).) Illustrative of cases finding particular delegations permissible are Sunset Amusement Co. v. Board of Police Comm'rs, 7 Cal. 3d 64, 496 P.2d 840, 101 Cal. Rptr. 768 (1972); City and County of San Francisco v. Superior Court, 53 Cal. 2d 236, 347 P.2d 294, 1 Cal. Rptr. 158 (1959); and Stoddard v. Edelman, 4 Cal. App. 3d 544, 84 Cal. Rptr. 443, hearing denied (1970). As for the meaninglessness of the ostensible requirement that the Legislature set forth standards that provide meaningful guidance, consider Holloway v. Purcell, 35 Cal. 2d 220, 217 P.2d 665 (1950), in which the Court rejected a challenge to a state statute delegating to the Highway Commission the authority to determine the location of highways running between termini designated by the Legislature. The only standard which the statute evidently set forth as to highway location was that the Commission make use of "such terms and conditions as in [the Commission's] opinion will best subserve the public interest." One cannot imagine a "standard" more vacuous than "public interest". Surely an agency would never be given legislative instructions to ignore or subvert the public interest; and obviously the "public interest" goal is wholly nonoperational in the "guidance" it is capable of giving. Yet the Supreme Court, in a bland opinion authored by Justice Traynor, indicated that "public interest" provided a "sufficiently definite primary standard" which an administrative agency could be asked by the Legislature to "specifically apply." (For a comparable U.S. Supreme Court holding, see Avent v. United States, 266 U.S. 127 (1924).)

The effective bankruptcy of the "sufficient standard" aspect of California's traditional rule on the legality of delegations has been explicitly recognized in the California Supreme Court in its recent, path-breaking opinion in Kugler v. Yocum, which is discussed below.

B. DELEGATION BY CONGRESS OF FEDERAL LAWMAKING AUTHORITY TO THE STATES: THE RELEVANCE OF CONFORMITY AS A JUSTIFYING PRINCIPLE

In one dramatic situation, the U.S. Supreme Court has concluded that the federal interest in conformity between federal and state law can constitutionally justify a substantial delegation of federal lawmaking authority to the states. Under 18 U.S.C. § 13, any act committed on a federal territory which would violate a criminal statute of the state in which the territory lies is ipso facto a criminal offense against the United States. Section 13 (which was enacted in 1948) thus "assimilates" even criminal statutes of a state which may be enacted by the state subsequent to 1948. In United States v. Sharpnack, 355 U.S. 286 (1958), a defendant was prosecuted in 1955 for certain sexual conduct on a federal air force base in Texas which was contrary to a Texas penal statute that had been enacted in 1950. The issue the United States Supreme Court addressed was whether § 13 "is constitutional insofar as it makes applicable to a federal enclave a subsequently enacted criminal law of the state in which the enclave is situated." Id. at 286. By a 7-2 vote, the Court ruled in favor of constitutionality. The dissenting opinion, authored by Justice Douglas and concurred in by Justice Black, highlights the difficulty of the delegation issue. The Douglas dissent begins by recognizing Congress's Article I authority to regulate federal enclaves. Justice Douglas then reasoned that this authority

> call[s] for the exercise of legislative judgment; and I do not see how that requirement can be satisfied by delegating the authority to the President, the Department of the Interior, or, as in this case, to the states. . . . Congress can

> adopt as federal laws the [existing] laws of a state . . . Congress can, I think, adopt as federal law, governing an enclave, the state law governing speeding as it may from time to time be enacted. The Congress there determines what the basic policy is. Leaving the details to be filled in by a state is analogous to the scheme of delegated implementation of congressionally adopted policies with which we are familiar in the field of administrative law. But it is Congress that must determine the policy for that is the essence of lawmaking. Under the scheme now approved a State makes such federal law, applicable to the enclave, as it likes, and that law becomes federal law, for the violation of which a citizen is sent to prison. . . . Here it is a sex crime on which Congress has never legislated. Tomorrow it may be a blue law, a law governing usury, or even a law requiring segregation of the races on buses and in restaurants. . . . [An accused] is entitled to the considered judgment of Congress whether the law applied to him fits the federal policy. That is what federal lawmaking is. . . . There is some convenience in doing what the Court allows today. . . . But convenience is not material to the constitutional problem.

Id. at 297-99.

The opinion for the Court majority began by describing the legislative precursors of § 13. Earlier federal statutes had adopted as federal law for enclave purposes only those state statutes in effect at the time of the particular federal enactment. But since Congress was committed to the goal of achieving "conformity" between federal enclave law and state law, Congress was required to reenact this "assimilation" statute in 1866, 1874, 1895, 1909, 1933, 1935, and 1944. It was against the background of this experience that Congress in its 1948 legislation attempted to incorporate or assimilate even those state statutes enacted subsequent to 1948.

The Court's reasoning made clear the laudability of the

policy of "conformity" which Congress had been pursuing. It recognized that "having the power to assimilate the state law, Congress obviously has like power to renew such assimilation annually or daily in order to keep the law in the enclaves current with those in the states." Id. at 293-94. Noting Congress's "123 years of experience with the policy of conformity," the Court then concluded that

> Congress is within its constitutional powers and legislative discretion when . . . it enacts that [conformity] policy in its most complete and accurate form. Rather than being a delegation by Congress of its legislative authority to the states, it is a deliberate continuing adoption by Congress for federal enclaves of such unpre-empted offenses and punishments as shall have already been put in effect by the respective states for their own government. Congress retains power to exclude a particular state law from the assimilative effect of the Act. This procedure is a practical accommodation of the mechanics of the legislative functions of state and nation in the field of police power where it is especially appropriate to make the federal regulation of local conduct conform to that already established by the state.

Id. at 294. The Court then referred to several other federal statutes which in one way or another gave federal effect to whatever state criminal rules were in effect at the state level at the time of the statute's enactment.

A number of post-Sharpnack lower federal court opinions reveal the variety of ways in which the Sharpnack holding can authorize a seeming delegation of federal lawmaking authority to the states. Wallach v. Lieberman, 366 F.2d 254 (2d Cir. 1966), involved a personal injury which occurred in a federal post office. 40 U.S.C. § 90 stipulates that a state's workers' compensation law applies to injuries within a federal building situated

within that state. In Wallach the personal injury victim--who wished to sue his employer in tort rather than merely claiming under workers' compensation--argued that the federal statute, insofar as it incorporated the state's workers' compensation law, entailed an unconstitutional delegation to the state. The Second Circuit, relying on Sharpnack and noting the propriety of Congress's policy of seeking conformity between federal and state law on all federal properties, rejected this challenge.

United States v. Smeldome, 485 F.2d 1333 (10th Cir. 1973), affirmed 18 U.S.C. § 1955, which provides a federal penalty for anybody managing or owning "an illegal gambling business"; such a business is in turn defined as a gambling business employing a minimum number of people, in business for a minimum number of days, and in "violation of the law of a state or political subdivision in which it is conducted . . ." Smeldome involved a sports betting operation taking place in Colorado in seeming violation of a Colorado gambling statute. The defendant argued that § 1955 was unconstitutional insofar as it delegated federal lawmaking authority to the states. The Tenth Circuit, relying on Sharpnack, rejected this challenge, ruling that "[i]t is well settled in the law that Congress may adopt as federal laws the laws of a state, and such is not an unconstitutional delegation of congressional authority." Id. at 1345. In United States v. Curcio, 310 F. Supp. 351 (D. Colo. 1970), a district court also relied on a simple statement of the Sharpnack rule in affirming the constitutionality of § 892(B)(1) of the Federal Consumer Credit Protection Act, providing that if a particular extension

of credit is unenforceable under state law, this is "prima facie evidence" that the credit extension is "extortionate" and therefore in violation of federal law. Smeldome and Curcio suggest that the lower courts are giving the Sharpnack rule a rather broad interpretation, allowing it to be applied even when there has not been a convincing showing as to the federal need for or interest in conformity. However, in neither Smeldome nor Curcio did the relevant state statute in fact postdate the federal statute; and only in postdating situations is the problem of an open-ended delegation explicitly and dramatically presented.

I should make clear that federal rules of the Sharpnack sort deal only with the proper interpretation of the provisions in Article I of the U.S. Constitution, conferring lawmaking powers on Congress; the Sharpnack rule thus does not directly "apply" to California. However, both the status of the U.S. Supreme Court and the quality of its reasoning in Sharpnack suggest that the Sharpnack rule would probably be treated by California courts as an influential out-of-state precedent.

C. NON-CALIFORNIA STATE LAW ON THE DELEGATION OF STATE LAWMAKING AUTHORITY TO THE FEDERAL GOVERNMENT: A "SOFT" PROHIBITING RULE

In reading judicial opinions, one can easily enough identify a "general rule" to the effect that state legislatures may not delegate lawmaking authority to the federal government (call this "the Rule"). (See Annot., 133 A.L.R. 401 (1941), annotating Hutchins v. Mayo, 143 Fla. 707, 197 So. 495 (1940), a case which does clearly apply the Rule to a state statute professing to require labeling of local fruit according to federal standards.) The more one reads these opinions, however, the less solid one understands the Rule to be. Many of the cases--including most of the recent cases--deal with tax conformity statutes. While these cases will be treated separately in the next section, it suffices here to say that several of them reach an affirmative result on the constitutional question, and that the single opinion squarely invalidating a tax conformity statute comes from a jurisdiction whose constitution contains special language.

In recent years, many of the references to the Rule have come in sheer dicta. See e.g., State v. Reader's Digest Ass'n, 81 Wash. 2d 259, 501 P.2d 290, 301 (1972), appeal dismissed, 411 U.S. 945 (1973); State ex rel. Kirschner v. Urquhart, 50 Wash. 2d 131, 310 P.2d 261, 265 (1957); Calvert v. Capital Southwest Corp, 441 S.W.2d 247, 264 (Tax Ct. Civ. App. 1969); State v. Dumler, 221 Kan. 386, 391, 559 P.2d 798, 803 (1977). For a case that blends apparent dictum with a very limited holding applying the Rule, see State v. Williams, 119 Ariz. 595, 583 P.2d 251 (1978).

In the non-tax context, a number of the opinions announcing

the Rule likewise turn out to contain peculiar features. In 1935 the New York Court of Appeals, divided 4-3, held unconstitutional a state statute which applied to the intrastate coal industry whatever codes were developed for interstate coal by the federal National Recovery Administration. Darweger v. Staats, 267 N.Y.290, 196 N.E.61 (1935). The majority chiefly relied, however, on a particular provision in the New York state Constitution prohibiting the incorporation by reference even of "any existing law"; the purpose of this special provision, the majority indicated, is to prevent the New York legislature from misunderstanding laws that it otherwise might vote to pass. (For another New York holding resting on this special constitutional prohibition, see People v. Mazzie, 78 Misc. 2d 1014, 358 N.Y.S. 2d 307 (1974).) In Holegate Bros. Co. v. Bayshore, 331 Pa. 255, 200 A.672 (1938), a unanimous Pennsylvania Supreme Court invalidated a state statute incorporating into Pennsylvania law whatever minimum hours might be fixed by future federal NRA regulations for certain industries. The Pennsylvania Court was concerned not just with the Rule, however, but also with the inequalities which the statute's delegation would produce as among different classes of Pennsylvania employers.

In recent years, the largest number of cases dealing with the Rule have concerned state statutes rendering it a state offense for individuals to possess, without prescription, drugs that have been given certain designations by the federal Secretary of Health, Education, and Welfare, exercising authority conferred on him/her by Congressional statutes. When these state laws were enacted, most of the relevant federal statutes were already in place; the federal

Secretary had made some designations, but others were to be made by him in the future. The Supreme Courts of Nebraska, North Dakota, Georgia, and Michigan have all interpreted their states' statutes as applying only to federal law and designations already in effect when the state statutes were enacted. State v. Workman, 186 Neb. 467, 183 N.W.2d 911 (1971); State v. Julson, 202 N.W.2d 145 (N.D. 1972); People v. Urban, 45 Mich. App. 255, 206 N.W.2d 511 (1973); Johnston v. State, 227 Ga. 387, 181 S.E.2d 42 (1971). While all of these interpretations were motivated by a desire to avoid a constitutional ruling, only the Michigan opinion stated flat-out that the state statute, if not so interpreted, would be unconstitutional.

The Supreme Court of South Dakota and Washington, finding their statutes indeed open-ended, ruled them unconstitutional. These Courts were only partly concerned with the question of delegation, however. Their opinions chiefly worry about the problem of due process or "fair notice." As the South Dakota Court described the situation:

> The list of hallucinogenic drugs was constantly changing and at any given time it would be necessary to consult the regulations of the Secretary to determine whether or not a certain drug came within the prohibition of the state statute.

State v. Johnson, 84 S.D. 556, 558, 173 N.W.2d 894, 895 (1970). According to the Washington Court, "it is unreasonable to expect an average person to continually research the Federal Register to determine which drugs are controlled substances." State v. Dougall, 89 Wash. 2d 118, 570 Pac. 2d 135, 138 (1977).

Over the years, Michigan courts have been especially interested

in the Rule. In Lievense v. Michigan Unemployment Comp. Comm'n, 335 Mich. 339, 55 N.W.2d 857 (1952), the Court considered a state statute imposing certain burdens on each employer who "is liable for any federal tax" under the federal unemployment compensation program. The Court indicated that if the statute applied to prospective federal rulings on employer liability, the Michigan Act would be unconstitutional on account of the Rule. It therefore interpreted the "is liable" clause to refer only to liability existing under federal law at the time the Michigan statute was itself enacted. In Dearborn Independent, Inc., v. City of Dearborn, 331 Mich. 447, 49 N.W.2d 370 (1951), the Court considered a state statute requiring that all "official publications" of Michigan cities be published only in newspapers "which shall have been admitted by the United States Post Office Department for transmission as mail matter of the second class." The Court, though badly divided on another issue, unanimously ruled that the statute unconstitutionally violated the Rule. However, even in Michigan the Rule is less than absolute. In People v. Sell, 310 Mich. 305, 17 N.W.2d 193 (1945), a divided Supreme Court upheld a Detroit ordinance attaching a local penalty to any violation within Detroit of wartime federal price control rules. The Court relied both on the emergency created by wartime inflation and on the fact that the ordinance

> did not create new regulations and prohibitions but merely added the city's enforcement sanction to Federal laws and regulations which were already applicable to the city and its inhabitants during the emergency.

310 Mich. at 319, 17 N.W.2d at 197. For a contrary holding

on the (in)validity of such local add-ons to federal price control, see City of Cleveland v. Piskura, 145 Ohio St. 144, 60 N.E.2d 919 (1945).

As Sell suggests, there are cases upholding seeming delegations of state authority to federal lawmakers. However, these cases too must be carefully read. In James v. Walker, 141 Ky. 88, 132 S.W. 149 (1910), rehearing denied, 147 Ky. 647, 144 S.W. 744 (1912), the Kentucky Supreme Court, divided 5-2, upheld a state statute providing that officers of the State Guard in active service should receive the same pay as officers with comparable grades in the United States Army. The majority relied, however, on a specific provision in the Kentucky constitution indicating that the "organization, equipment and discipline" of the state militia shall conform "as nearly as practicable" to the rules governing United States armies. (The dissent regarded officer compensation as beyond the scope of "organization, equipment and discipline.") In Mason v. State, 12 Md. App. 655, 280 A.2d 753 (1971), a Maryland Court affirmed that state's version of the drug-designation statutes described above; the Court focused, however, on the point that future designations by the federal Secretary were adequately controlled by the standards contained in federal statutes which were already in the books at the time the Maryland statute was enacted. A Colorado statute makes it unlawful for any person to carry certain weapons if, within a stated previous period, that person has been convicted of or has served time for any "burglary, arson, or a felony involving the use of force or violence or the use of a deadly weapon, or attempt or conspiracy

to commit such offenses, under the laws of the United States of America, the State of Colorado, or another state." In People v. Tenorio, ____ Colo. ____, 590 P.2d 952 (1979), the Colorado Supreme Court saw fit to affirm the statute. The Court agreed that "only the Colorado General Assembly has the power to define crimes in Colorado," and that "a fortiori, the General Assembly cannot be delegated to any branch of another state's government or to the Congress." But the Court's assessment was that the General Assembly had indeed done an adequate job of defining "the crime here charged." According to the Court, the Assembly's intent, properly appreciated,

> was merely to delineate a category of prior crimes whose general nature, in the General Assembly's judgment, was so serious that their perpetrators could not safely be allowed to possess weapons in Colorado.

590 P.2d at 954-55.

The above review of the case law can be easily summarized. In non-California decisions, delegations of lawmaking authority from states to the federal government do seem somewhat disfavored. But the case law is shaggy, full of qualifications, and lacking in underlying basic explanation. It is very doubtful that the California Supreme Court--or indeed any California court--would attach any significant weight to this unimpressive collection of opinions. If anything, the cases strongly suggest that it is necessary to consider a particular delegation in the context of the state statute in which it is found; that is, the purpose of the particular statute may well bear on the acceptability of the delegation. If this is true, then it makes special sense to bring together those cases dealing with the propriety of state tax statutes conforming the

state's income tax base with federal income tax standards. Those cases are described in the next section.

D. NON-CALIFORNIA STATE LAW ON THE CONSTITUTIONALITY OF DELEGATING TO THE FEDERAL GOVERNMENT THE AUTHORITY TO DETERMINE STATE INCOME TAX POLICY: AN INCONCLUSIVE PATTERN

1. The Clear Efficacy of a State Constitutional Amendment

Delegation questions generally concern the proper interpretation of the state constitution; there is nothing in the federal constitution which requires separation of powers at the state level or which otherwise inhibits the state legislature from delegating. See Ohio ex rel. Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74, 79 (1930); Mann v. Powell, 333 F.Supp 1261, 1266 (N.D. Ill. 1969). There are two exceptions to this generalization, however. If a statute delegates power over a federally protected constitutional liberty--for example, the right to free speech, or the right to vote free of racial discrimination--the federal constitution can still be turned to as a protection against the possibility of delegation-caused arbitrariness. See Louisiana v. United States, 380 U.S. 145 (1965); Niemotko v. Maryland, 340 U.S. 268 (1951); Sunset Amusement Co., v. Board of Police Comm'rs 7 C.3d 64, 72-73, 496 P.2d 840, 844-45, 101 Cal. Rptr. 768, 772-73 (1972). However: the opportunity to pay less rather than more taxes is obviously lacking in federal constitutional statutes. Secondly, if lawmaking powers are conferred on private parties who in exercising those powers may well be pursuing their private economic interests, a special problem arises as to due process of law under the Fourteenth Amendment. See Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936); State Bd. v. Thrift-D-Lux Cleaners, 40 Cal. 2d 436, 254 P.2d 29 (1953). However: a delegation to Congress obviously creates no problems

in this respect.

Any argument against a state's delegating its own income tax authority to Congress is thus grounded exclusively in the state's constitution. Hence there is little doubt but that the state, by amending its constitution, can authorize the state's adoption of an open-ended conformity policy. This is shown by the experience in at least four states. The Colorado Constitution was amended in 1962 to expressly authorize the Colorado General Assembly to define that income which is subject to the state income tax by reference to federal laws "whether retrospective or prospective." Art. X, § 19. There have been no court challenges to the near-complete conformity legislation which the Colorado General Assembly proceeded to enact. (For a general "chart" of state conformity measures, see P-H State & Local Service ¶ 1002.*) When Kansas was considering a conformity statute, the Kansas Attorney General released an opinion doubting the constitutionality of an open-ended conformity statute; in response to this opinion, Kansas ratified an amendment to the state Constitution explicitly endorsing an open-ended conformity practice. Art. XI, § 11. The later Kansas statute providing for full conformity has been assumed valid. See Cordes, The Kansas Conformity Income Tax Act: Part I, 17 U. Kan. L. Rev. 147, 149 (1968). Under a 1959 amendment to the New York state Constitution, the New York legislature, in imposing any income tax,

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*What is impressive is how many states (more than 20) have adopted open-ended conformity for either personal or corporate income tax purposes.

> may define the income on, in respect to or by which such tax or taxes are imposed or measured, by reference to any provision of the laws of the United States as the same may be or become effective at any time or from time to time, and may prescribe exceptions or modifications to any such provision.

Art. 3, § 22. The later New York statute defined New York gross income as the taxpayer's "federal adjusted income as defined in the laws of the United States for the taxable year, with the modifications specified in this Section." A New York court has given effect to the obvious meaning of the state's constitutional provision by affirming an open-ended conformity enactment, Garlin v. Murphy, 51 Misc. 2d 477, 273 N.Y.S. 2d 374 (1966). A 1966 amendment to the Nebraska constitution provides that "[w]hen an income tax is adopted by the Legislature, the Legislature may adopt an income tax based on the laws of the United States." Art. VIII, § 1B. After this amendment came into effect, the Nebraska legislature exercised its powers by enacting a state income tax statute which incorporated federal statutes, rules, and regulations "as the same may be or become effective, at any time or from time to time, for the taxpayer year." In Anderson v. Tiemann, 182 Neb. 393, 155 N.W.2d 322 (1967), the constitutionality of this statute was considered by the Nebraska Supreme Court. In noteworthy dictum, the Court indicated that absent the constitutional amendment, the statute would entail an unconstitutional delegation. But since this element of constitutionality would have been found only in the Constitution of the state and since the amendment had altered the state's Constitution in this respect, the Court agreed that the statute resulted in no constitutional

violation. But the Anderson taxpayer then asserted an ingenious fallback position: that the Nebraska statute's delegation violated the "republican form of government" guarantee set forth in the enabling legislation admitting Nebraska to the United States. While regarding this as a "case of first impression," the Court concluded that the state statute was not lacking in republicanness, since the statute "does not constitute a waiver of the sovereignty of the state nor an abdication of its functions." The Court's reasoning on this point weakens the force of its delegation dictum.

2. In the Absence of Specific Constitutional Amendment

Only one state court has actually invalidated a state conformity statute on constitutional delegation grounds. A Minnesota statute provided that individual gross income for state income tax purposes "means the adjusted gross income as computed for federal tax purposes as defined in the laws of the United States for the taxable year, with the modifications specified in this Section." A federal law promulgated subsequent to this statute's amendment permitted the exclusion from income of sick pay which an employee might receive, an exclusion which would not have been otherwise allowed by Minnesota law. In invalidating the Minnesota conformity statute, the Minnesota Court discussed general delegation doctrine. Federal adjusted gross income, it argued, is

> an artificial concept created solely by Federal statute. . . . The amounts which are to be included or excluded in the determination are numerous and subject to change. Many of these

> exclusions are based on political and social rather than economic considerations. The same political and social considerations which are of significance to the Federal tax policy are not necessarily of significance to the state's tax collection scheme. . . . The basic objection [to delegation] derives from the principle that laws should be made by elected representatives of the people responsible to the electorate for their acts.

Wallace v. Commissioner of Taxation, 289 Minn. 220, 225-26, 184 N.W.2d 588, 591 (1971). It is noteworthy, however, that there is specific language in the Minnesota Constitution, alluded to by the Wallace Court in the heart of its opinion, that seemingly takes an especially strong stand against taxation delegations. According to Article X, § 1, "the power of taxation shall never be surrendered, suspended, or contracted away." The extent to which the Wallace result was influenced by this explicit language cannot be reliably ascertained.

Cheney v. St. Louis Southwestern Ry., 239 Ark. 870, 394 S.W.2d 731 (1965), dealt with a state statute which appropriated into Arkansas' income tax law--for purposes of ascertaining Arkansas's taxable share of the overall income of an interstate railroad--the allocation formulae developed (or to be developed) by the United States Interstate Commerce Commission. Insofar as the statute sought to appropriate prospective I.C.C. formulae, the Court found it an unconstitutional delegation. But what seems to be the key to the Court's holding is its (correct) perception that the I.C.C., in adopting an allocation formula, does not think about the problem of the taxation of income at all; rather, these formulae "are designated [by the I.C.C.] for use by interstate carriers [only] to assure uniformity in reporting for rate-fixing purposes." 239 Ark. at 871, 394 S.W.2d at 732. Cheney is thus by no means

a holding on the issue of tax conformity.

In at least five jurisdictions, open-ended or ongoing conformity measures of one sort or another have been judicially affirmed as against delegation challenge. The earliest holding is Underwood Typewriter Co. v. Chamberlain, 94 Conn. 47, 108 A. 154 (1919), aff'd. 254 U.S. 113 (1920). At the time Connecticut imposed an excise tax on a corporation's (apportioned) net income--that net income "upon which income such company is required to pay a tax to the United States." The company's precise argument was that Connecticut could not constitutionally compel it to disclose to state tax officials its federal tax return. In rejecting this argument, the Court discussed the delegation issue generally.

> The federal Income Tax Law . . . is a domestic statute. No delegation of legislative authority is involved in adopting its definition of net income. It is a matter of convenience to taxpayers and economy to the state not to set up a separate standard in another administrative establishment for the measurement of taxable net income. No constitutional privilege of corporations is violated by requiring the production [by the plaintiff of its] return to the collector of internal revenue.

94 Conn. at 64, 108 A. at 160-61. In appealing the state court's opinion to the United States Supreme Court, the taxpayer complained only about the apportionment aspect of the Connecticut tax. The United States Supreme Court's affirmance of the state court ruling therefore had no reason to discuss the delegation question.

Underwood Typewriter was followed in First Federal Savings

& Loan Ass'n v. Connally, 142 Conn. 483, 115 A.2d 455 (1955). The Connecticut corporation business tax imposed on certain corporations a three percent tax on net income derived from Connecticut operations. The Connecticut Act accepted the definition of gross income as set forth "in the federal corporation net income tax law enforced on the last day of the income year"; it granted exemptions to "companies exempt by federal law or by the regulations of the bureau of internal revenue from the federal corporation net income tax"; and it prescribed that in determining net income, deductions from gross income should be allowed, with certain exceptions, in accordance with federal law in effect in the particular income year. The Connecticut Court regarded all of this as

> not a delegation of legislative power but an incorporation by reference of the federal law into the state law . . . . The state legislature and not the Congress has selected net earnings as the base for determining the amount of this tax and has fixed the rate to be paid on that tax base. As a matter of convenience to the taxpayer and economy to the state, the legislature has adopted some of the standards employed in the federal corporation net income tax law.

142 Conn. at 493, 115 A.2d at 459-460.

Maryland's 1967 income tax statute provides that the basis for state income tax purposes is the adjusted gross income of the individual taxpayer under federal law, or the taxable income of a corporate taxpayer under federal law. (The Act then specifies certain variations on this income base and provides for a range of exemptions, exclusions, and deductions similar to, but not identical with, those in the Internal Revenue Code.) In Katzenberg v. Comptroller, 263 Md. 189, 282 A.2d 465 (1971), the

Maryland Supreme Court was asked to consider the constitutionality of the statute, along with a number of other issues as to the statute's proper interpretation. On the constitutional question, the Court, relying on Underwood Typewriter, succinctly held that "the state's adoption of the federal definition of income does not constitute a delegation of legislative authority." 263 Md. at 200, 282 A.2d at 470.

The language in a Pennsylvania statute suggested that the purpose of the statute was to impose not an income tax on corporations, but rather a tax on the privilege of doing business in Pennsylvania. The "excise tax" which it established was measured in terms of the corporation's net income for the year "as returned to, and as ascertained by the federal government." In rejecting the taxpayer's delegation argument, the Court found the following analysis dispositive:

> Net income as ascertained is the base upon which the tax is measured, not the tax itself. How it is fixed by the federal authorities is of no concern to the taxing officers of the Commonwealth nor to its statute. The rate of the income tax may vary, or the method of its calculation, but as a base, it is unvarying.

Commonwealth v. Warner Bros. Theaters, Inc., 345 Pa. 270, 272, 27 A.2d 62, 63 (1942). In a curious aside, however, the Court indicated that if the state's tax were an income tax rather than a corporation privilege tax, the delegation issue would become more difficult. What the explanation is for this differential in difficulty the Court's opinion does not make clear.

A New Jersey tax statute "conforms" to a particular feature of federal income tax law. Under that statute, a "Green Acre"

property tax exemption can go to landowners who are "nonprofit corporation[s] or organization[s] . . . authorized to carry out [certain] purposes and which [are] qualified for exemption from Federal Income Tax under Section 501(c)(3) of the Internal Revenue Code." As it happens, the New Jersey Constitution seemingly prohibits even the incorporation by reference of other statutes; but in one part of its opinion in Township of Princeton v. Bardin, 147 N.J. Super. 557, 371 A.2d 776 (1977), a New Jersey court found that this prohibition runs only against the incorporation of other New Jersey statutes, and hence does not apply to the incorporation by reference of a federal statute. In discussing the delegation question, the Court first approved of the general policy underlying the New Jersey measure.

> The federal statute, and the attendant regulations . . . are readily accessible to those organizations which would be interested in seeking the . . . exemption. Certainly, such applicant organizations have become familiar with [the federal statute] in their annual dealings with the Internal Revenue Service. It would, as a practical matter, be far less confusing to such applicant organizations to know that the term "nonprofit organization" means the same thing for purposes of both the federal income tax statute and our . . . Act.

147 N.J. Super. at 569, 371 A.2d at 782-83. The Court then considered and rejected the argument that the statute involved an improper delegation of lawmaking power to Congress, insofar as the statute even professed to incorporate any future changes in federal law. The Court first noted that if federal law were changed, the New Jersey Tax Commissioner had the power to issue an order temporarily "freezing" the preexisting rules, thereby giving the legislature time to reconsider the New Jersey statute's

incorporation feature. But the Court went on to rule that even without this freezing possibility, the New Jersey statute was constitutional, since "the legislature is always free to amend the Act to reflect its desire to maintain the previous language of Section 501(c)(3) for New Jersey purposes." 147 N.J. Super. at 571, 371 A.2d at 776.

I have saved until last the most articulate rejection of a delegation claim. In 1949 the legislature of the Alaskan territory enacted an income tax measure imposing a tax on individuals "equal to 10 percent of the total income tax that would be payable in the same taxable year to the United States . . . without the benefit of the deduction of the tax payable hereunder to the territory." In considering the delegation question, the Ninth Circuit first advanced this assessment:

> [E]ven if we were to hold the attempted incorporation by reference of amendments to the Internal Revenue Code to be adopted in the future were an invalid delegation, yet as of this day and hour appellant has not been affected by any such amendments, for there have been none.

Alaska Steamship Co. v. Mullaney, 180 F.2d 805, 815 (9th Cir. 1950). Yet the Court went on to recognize that given the logic of the 10 percent provision in the Alaskan Act, the Court could not avoid discussing the constitutionality of the ongoing delegation, since that delegation was essential to the logic of the legislative scheme.

> If the federal income tax requirements were changed substantially by future amendments, it would be impossible, administratively, to calculate the Alaskan income tax merely by dividing the tax shown on the federal return by 10.

Id. at 816.

The Court's discussion proceeded as follows:

> We think it is far from clear that any invalid delegation is attempted. There are of course many cases which have held attempts by a legislative body to incorporate provisions into its enactments by reference to future acts or amendments by other legislatures, to be invalid. Where it can be said that the attempt to make the local law conform to future changes elsewhere is not a mere labor-saving device for the legislature, but is undertaken in order to attempt a uniformity which itself is an important object of the proposed legislative scheme, there are a number of precedents for an approval of this sort of thing. Reciprocal and retaliatory legislation falls in this category. . . . Similarly, the efforts of the states to take advantage, in their inheritance tax laws, of the 80 percent credit provision in the federal laws relating to the Estate Tax . . . have been carried out by simple reference to the federal estate tax law. . . . Perhaps the best known instance of action by Congress encompassing within its regulation the laws of states, then or thereafter enacted, was the Conformity Act. . . . There, also, making a procedure in the common law action conform to that prevailing in the states was a prime object of the legislation.
>
> The effort of the Alaska legislature to make its territorial income tax machinery conform to the federal act, and to preserve and to continue such conformity, makes sense. It makes for convenience to the taxpayer and for simplicity of administration. . . . A similar coordination has been recommended by students of income tax problems for adoption by the states generally. Since the attainment of this uniformity was in itself a major objective of the Alaska legislature, in enacting the local law [on conformity], the Alaska legislature, which alone could make this decision, was itself acting, and was not abdicating its functions, nor, in our opinion, making an invalid delegation to Congress.

Id. at 816-17. (In a footnote, the Court went on to note that Alaska's insistence on excluding the state income tax deduction which federal law itself allows serves to "somewhat impair" the "intended administrative simplicity of the Act" insofar as it requires each taxpayer who itemizes deductions to recompute his

federal tax for purposes of making the final 10 percent calculation. Id. at 817 n. 15.)

Given the various ways in which the Mullaney Court frames the issue, it is a bit pointless to argue about whether Mullaney contains holding or merely dictum. Certainly, one can at least say that Mullaney includes a strong discussion supporting the constitutionality of an ongoing delegation. At the time of Mullaney, Alaska was, of course, a federal territory, and arguably delegations by a federal territory to the federal Congress are less troublesome than delegations to the Congress by a sovereign state. The Minnesota Supreme Court in Wallace relied on this point in distinguishing Mullaney; but the text of Mullaney does not suggest that the Ninth Circuit regarded the point as in any way relevant. Of course, in the interim since Mullaney, Alaska has become a state whose own state court possesses final authority to exposit state constitutional law; hence the Mullaney opinion merely represents the view at one time of a court whose views are no longer authoritative. After statehood, however, the Alaskan income tax was reconsidered by that state's Supreme Court. As it happened, the only disputed issue in Hickel v. Stevenson, 416 P.2d 236 (Alas. 1966), related to how the Act should be interpreted in particular circumstances. But in considering this question, the Alaskan Court indicated that the criterion for a proper interpretation was whether the interpretation would achieve the goals of the Alaskan statute as set forth in Mullaney--that is, the goals of convenience to the taxpayer and simplicity in administration. While Hickel does not contain an explicit constitutional review, by implication it endorses the Mullaney analysis.

The Maine Supreme Court has also discussed what amounts to the delegation issue in a sympathetic manner--although no precise delegation challenge was before the Court. Under the Maine income tax law, which became effective in 1969, the taxable income in Maine is computed on the basis of the taxpayer's "federal adjusted gross income as defined in the laws of the United States." The prime issue before the Tiedemann v. Johnson, 316 A.2d 359 (Me. 1974), Court was when a certain capital gain had been "realized." In this context the Court observed:

> We conclude that, by adoption of the federal adjusted gross income as the standard for "entire taxable income" of a Maine individual, the Legislature intended to resolve, a priori, semantic conflicts such as those suggested by the bare words of the statute. As evidence of this intent, the Legislature did not undertake creation of a unique or complicated income tax scheme. Nor did it provide the vast administrative machinery which would be necessary to supply the interpretation and investigative functions of the Internal Revenue Service.

316 A.2d at 364. See also the discussion of avoiding taxpayer confusion in City National Bank of Clinton v. Iowa State Tax Comm'n, 251 Ia. 603, 617, 102 N.W.2d 381, 389 (Iowa 1960).

In four jurisdictions, delegation challenges to conformity statutes have been rejected by interpreting the statute as incorporating only federal tax laws in effect at the time of the statute's enactment.

In fact, the (proposed) statute considered by the New Hampshire Supreme Court in Opinion of the Justices, 95 N.H. 540, 64 A.2d 322 (1949), was quite explicit on this point. In affirming that the legislative proposal would not violate the state constitution, the Court found that proposal's incorporation feature "will greatly facilitate the administration of the act if passed." 95 N.H. at

542, 64 A.2d at 323. There is no dictum in the case on the legality of an ongoing delegation.

In Santee Mills v. Query, 122 S.C. 158, 115 S.E. 202 (1922), the South Carolina income tax statute required persons and corporations to pay a state tax defined as one-third of their federal income tax. The Court evidently construed the statute as referring only to federal income tax law as it existed at the time the South Carolina tax statute was enacted. The tenor of the language in the Court's opinion suggests that the Court would have had difficulty with a state statute incorporating federal law in an ongoing way.

Featherstone v. Norman, 170 Ga. 370, 153 S.E. 58 (1930), dealt with a 1929 Georgia income tax measure stipulating that net income taxable by the state should be initially equated with the taxpayers net income vis-a-vis the federal government; that the tax payable to the state would ordinarily be one-third of the tax payable to the United States; but that if the taxpayer's state net income is modified either upwards or downwards pursuant to certain modifications provided for in the Georgia statute, the state tax should itself be adjusted upwards or downwards in a proportionate one-third way. The Court considered a number of objections to the Georgia statute, and rejected them all. One of the objections concerned delegation, insofar as the Act seemingly gave Congress power over the state tax matters. In rejecting this challenge, the Court interpreted the Georgia Act as

> in no way [undertaking] to make future federal legislation a part of the law of this state upon that subject. When a statute adopts a part or all of another statute, domestic or foreign, general or local, by specific and descriptive

> reference thereto, the adoption takes the statute as it exists at the time.

170 Ga. at 394, 153 S.E. at 70. Having interpreted the statute in this way, the Court concluded that the delegation objections "are without merit." The Court's opinion is not clear as to what the precise "merit" of the objection would have been had the statute explicitly provided for continuing conformity.

Thorpe v. Mahin, 43 Ill. 2d 36, 250 N.E.2d 633 (1969), dealt with the Illinois income tax conformity statute, passed in 1969. The statute provided that Illinois net income "is computed for individuals by taking the adjusted gross income from the federal income tax return," with certain adjustments, deductions and exemptions provided for in the state statute. Also, § 102, the "construction" section of the state statute, specified that

> any term used in this Act shall have the same meaning as when used in a comparable context in the United States Income Tax Revenue Code of 1954 and other provisions of the statutes of the United States relating to federal income taxes as such Code and statutes are in effect on the date of enactment of this Act.

In considering the delegation challenge to the Illinois Act, the Court focused on § 102; noting that § 102 limited itself to federal law "in effect at the date of enactment" of the Illinois Act, the Court found this section entirely constitutional as an incorporation-by-reference. But the Court also noted that "there is some scholarly opinion, as well as case law from other jurisdictions, that the legislature could adopt a statute providing that future modifications of the Code would have consequences in the meaning and application of the Act." 43 Ill. 2d. at 49, 250 A.2d at 640. It is unclear whether the Court's "date of

enactment" interpretation for § 102 carries over to the statute's conforming reference to federal adjusted gross income. The Court seems to assume that it does; but that latter provision's explicit reference to the taxpayer's actual "federal income tax return" makes such an interpretation difficult.

Whatever the general advantages of interpreting statutes to avoid constitutional questions, the particular interpretations in Santee Mills, Featherstone, and Thorpe seem misguided. As for Thorpe, see the discussion in the paragraph above. In Santee Mills and Featherstone, the "one-third" provision of the state statute seems inconsistent with a ruling that would not allow the taxpayer simply to consult his federal tax return for the particular year in making his one-third calculation. (Compare the Ninth Circuit's evaluation in Mullaney.) For practical reasons of this sort, it may be that the "date of enactment" holding in Featherstone has since been ignored in Georgia. See Head v. McKenney, 61 Ga. App. 552, 556, 6 S.E.2d 405, 407 (1939), in which the Court, in quoting from Featherstone, interestingly edits out its "date of enactment" language, and then describes the Georgia tax assessment process as follows:

> The State Revenue Commission, in assessing the tax against McKenney, merely adopted the Federal method of calculating his net income under the Federal statute as the State's method of accomplishing that result, and properly assessed the tax due to the State as one-third of the amount which he had paid to the United States. Such adoption was not a delegation to the Federal authorities of the State's power to tax.

E. CALIFORNIA LAW ON THE DELEGATION OF STATE LAWMAKING AUTHORITY TO THE FEDERAL GOVERNMENT: A THIN BUT NOT UNINTERESTING RECORD

On the issue of the legality of delegations from the state legislature to the federal government, negative language can be found in two early California Supreme Court decisions. In the 1930's, however, there is a state Court of Appeal holding which supported a delegation. In the 1940's, the Supreme Court again used language unfriendly to a delegation; but a 1960's Supreme Court opinion gave emphatic application to a delegating statute without explicitly discussing the constitutional question. There is also an interesting inheritance tax statutory precedent.

1. Of the two early Supreme Court opinions, the first is In the Matter of Burke, 190 Cal. 326, 212 P. 193 (1923). Subsequent to Congress's enactment of the Volstead Act on prohibition, California voters approved by referendum the Wright Act, which professed to incorporate into California law all of the pertinent penal provisions of the Volstead Act. In Burke, the California Supreme Court's chief holding was that nothing in the California constitution prohibited what amounted to an incorporation-by-reference. The particular assertion was made that the Wright Act was invalid on grounds that it professed to include into California law any amendments to the Volstead Act which Congress might enact in the future. The Court responded to this assertion by saying:

> It may be conceded that this provision [of the Wright Act] is not valid, although we do not decide it, since it is not involved. The only effect of putting that provision into the statute would be, at most, that the provision itself would be void, leaving the remainder of the Act valid. It is not such a component part of the Act itself as would be necessary to require us to hold that it invalidated the entire Act.

190 Cal. at 328, 121 P. at 194. [71]

Brock v. Superior Court, 9 Cal. 2d 291, 71 P.2d 209 (1937), dealt with provisions of California's 1930's agricultural legislation, which incorporated large chunks of the federal government's Agricultural Adjustment Act. The Supreme Court, having affirmed the California legislation in other respects, reviewed the section of the California statute which professed to adopt into California law every regulation "heretofore or hereafter made" by the federal Secretary of Agriculture, "when and insofar as within the standard specified in and for this Act." On the "heretofore" matter, the Court concluded that the state statute was "perfectly valid" insofar as it merely adopted existing federal law. The Court continued: "But the attempt to make future regulations of another jurisdiction part of the state law is generally held to be an unconstitutional delegation of legislative powers." As documentation, the Court merely referred to Burke, a South Carolina opinion (Santee Mills, see p. 30), and a law review note. The Court then reasoned on as follows: "We do not believe it appropriate to consider whether [this section] of the Act constitutes an unlawful delegation of power in this respect, for the reason that this section is not involved in the proceedings herein." (This was because under the California statute future federal regulations were to be given effect in California only if the California Agriculture Director held hearings and rendered a finding that any new federal regulation was consistent with California policy.) "The decisions upholding the so-called retaliatory license or tax measures, in which some foreign law is the contingency on which they become operative, are ample

authority for the present legislation." 9 C.2d at 298, 71 P.2d at 213.

By my reading, neither the language in Burke nor that in Brock adds up to very much. At most, the language contains dictum rather than holding. And perhaps even the "dictum" appellation is excessive. Given the context of the full sentence in which it appears, the "concession" in Burke seeks to be merely a concession arguendo--an assumption for the sake of argument. And the Brock language does not even profess to be as an expression of the Brock Court's own view; rather, it merely entails that Court's description of what a limited number of other authorities had previously said.

2. Intervening between Burke and Brock is the Court of Appeal decision in In Re Lasswell, 1 Cal. App. 2d 183, 36 P.2d 678 (1934). Lasswell dealt with provisions of California's Industrial Recovery Act incorporating the federal codes of regulation developed or to be developed by the federal N.R.A. The statute declared as its policy that "the State of California [should] cooperate with and assist the national government in promoting the rehabilitation of trade in industry and eliminating unfair competitive practices. . . ." The federal program applied to businesses operating in interstate commerce; the California law applied, in a complementary way, to that intrastate commerce which the federal legislation did not cover. A Court of Appeal affirmed the California statute against the delegation challenge.

> We have before us state and federal acts, both of which recognize a nation-wide business collapse and its resultant trail of human misery. Both state

> and nation are attempting to rehabilitate the interchange of produce. . . . The incidental objection that the delegation of code prescription to the President of the United States on the ground that the state of California is a sovereign state and the President is in this state a foreign official does not greatly impress us. The correlative rights of state and nation are of great importance, but we are a nation not an alliance of foreign states, and our President is not a foreign potentate. . . . If ever there could occur a state of facts justifying, even demanding, co-operative effort between the state and the nation, as provided for in the law under consideration here, we have it in the principle underlying this case. The disease is but one and the patient is but one; how logical that the curative agents must not conflict. . . . Only confusion could result if one code were fixed for produce entering interstate commerce and another code for produce entering intrastate commerce.

1 Cal. App. 2d. at 203-04, 36 P.2d at 687. Lasswell thus sets forth a dramatic holding to the effect that state delegation to federal authorities can be constitutionally justified by the need for state-federal collaboration in dealing with a particular societal problem. In this regard, Lasswell is commended in Mermin, "Cooperative Federalism" Again: State and Municipal Legislation Penalizing Violation of Existing and Future Federal Requirements: I, 57 Yale L.J. 1, 12-13 (1942).

The "authority" of the Lasswell holding should not be overstated, however. Lasswell is, of course, only a Court of Appeal opinion. Moreover, the Lasswell opinion is weakened by its failure to allude to the Supreme Court's previous discussion of the delegation issue in Burke. And other aspects of the Lasswell opinion suggest that the Lasswell Court may have insufficiently appreciated the integrity of the non-delegation doctrine. In another of its holdings, the Lasswell Court approved the statute's massive dele- delegation of authority to an administrative agency. Yet the

federal counterpart of this state delegation was held unconstitutional by the U.S. Supreme Court in Schecter.

3. The 1940's Supreme Court opinion is Palermo v. Stockton Theatres, Inc., 32 Cal. 2d 53, 195 P.2d 1 (1948). California's Alien Land Law of 1920 and 1923 prohibited aliens not qualifying for U.S. citizenship from owning or leasing land in California--unless the aliens' rights in these respects were protected by treaty. A 1911 treaty between this country and Japan entitling Japanese to own or lease land in the United States worked to trigger the Land Law's treaty proviso. Particular Japanese nationals leased land in California in 1935 for a 10-year period. In 1940, the 1911 treaty was abrogated by the United States, and the owners of the land sought to void the lease. A Court of Appeal ruled that the Alien Land Law referred to treaties only as they existed in 1920 and 1923; hence the repeal of the treaty in 1940 did not deprive the Japanese nationals of their property rights. In reaching this holding, the Court indicated--citing Brock and Burke--that there is "grave doubt whether our legislature could constitutionally delegate to the treaty-making authority of the United States" the power to determine California law "with respect to future acts."

The California Supreme Court, in affirming the Court of Appeal's holding, adopted all of that Court's opinion, including this delegation passage. 32 Cal. 2d at 60, 195 P.2d at 5. But it is clear from the paragraphs which the Supreme Court added (as a supplement) to the Court of Appeal opinion that the Supreme Court had an even stronger reason for giving the Alien Land Law a narrow interpretation. Unless that Law was construed as compatible with the particular lease, the Supreme Court would have been

required to launch a full enquiry into the constitutionality of the Alien Land Law itself, insofar as it discriminated against aliens. It was chiefly to avoid this constitutional dispute that the Court subscribed to the "static" interpretation of the Land Law recommended by the Court of Appeal. (That Court's opinion, it can be added, relied on the precedent of the federal Assimilative Crimes Act concerning federal enclaves, an Act which at the time the opinion was released applied only to state criminal laws in effect at the time the Act had been (re)enacted. But as we know, in 1948 Congress amended the Act to render its delegation open-ended in character--and this amendment was later endorsed by the U.S. Supreme Court in Sharpnack. Presently, therefore, the federal precedent works to dispel the "doubt" to which the Palermo language refers.)

4. The 1960's case is Eden Memorial Park Ass'n v. Department of Public Works, 59 Cal. 2d 412, 380 P.2d 390, 29 Cal. Rptr. 790 (1963), in which the California Supreme Court willingly applied a state statute which effectively delegated lawmaking powers to the federal government; however, in effecting this application, the Court did not explicitly discuss the statute's constitutionality.

Federal grant-in-aid programs frequently raise problems as to the relationship between the powers of state and local governments under state law and the requirements set forth by federal law for participation in the federal programs. Recognizing the potential for problems of this sort in the federal-aid highway program in the 1930's, the California Legislature enacted a statute which, as amended, now appears as § 820 of the State and Highway Code.

> State Assent to Federal Statutes, Rules and Regulations.
>
> The State of California assents to the provisions of Title 23, United States Code, as amended and supplemented [and] other Acts of Congress relative to federal aid. . . . All work done under the provisions of Title 23 or said other Acts of Congress relative to highways shall be performed as required under Acts of Congress and the rules and regulations promulgated thereunder. Laws, rules, or regulations of this state inconsistent with such laws, or rules and regulations of the United States, shall not apply to such work, to the extent of such inconsistency.

For delegation purposes, § 820 is a very strong statute. It "assents" in advance to the invalidation of any state laws or

policies which may come into conflict with a federal highway program regulation, whenever that regulation is itself promulgated. As it happens, I am advised that conflicts of this sort have been infrequent. But in the interesting Eden Park case, § 820 turned out to be decisive. Under the California Health and Safety Code (§ 8560, 8560.5), state and local agencies are forbidden from exercising eminent domain powers against cemetery property for purposes of constructing any street or highway. Yet in 1960, both federal and state highway officials determined that a cemetery area near Los Angeles was the best location for a freeway which was to be part of the federal Interstate System. Section 107 of Title 23 of the United States Code reads as follows:

> (a) In any case in which the Secretary is requested by a State to acquire lands or interests in lands . . . required by such State for right-of-way or other purposes in connection with the prosecution of any project for the construction . . . of any section of the Interstate System, the Secretary is authorized, in the name of the United States . . . to acquire, enter into, and take possession of such lands or interests in lands by purchase, donation, condemnation, or otherwise in accordance with the laws of the United States . . . if
>
> (1) the Secretary has determined either that the State is unable to acquire necessary lands or interest in lands, or is unable to acquire such lands or interest in lands with sufficient promptness; and
>
> (2) the State has agreed with the Secretary to pay, at such time as may be specified by the Secretary an amount equal to ten percent of the costs incurred by the Secretary, in acquiring such lands . . .
>
> (c) The Secretary is further authorized and directed by proper deed . . . to convey any lands or interest in lands acquired in any

> State under the provisions of this statute . . . to the State highway department of such State or such political subdivision as its laws may provide . . . .

In 1960 the California Highway Commission attempted to condemn the Eden Park property. But a state Court, relying on the statutes referred to above, enjoined this state condemnation effort. The State Highway Engineer then "requested" the federal government to condemn the property on its own pursuant to § 107. Under that section, the Secretary of Commerce proceeded to condemn the land through federal proceedings and to deed it back to the state. But state highway officials were then sued in state court to enjoin them from constructing the freeway through the cemetery property.

In its opinion the California Supreme Court first affirmed the constitutionality of the federal § 107, concluding that it "seeks a reasonable balance between local and national needs with respect to the interstate system," and that it "does protect local interests by requiring that the state request any action by the Secretary pursuant to its terms." 59 Cal. 2d at 418, 380 P.2d at 394, 29 Cal. Rptr. at 794. But at this point the Court was required to consider a second challenge: that given the state's own cemetery statutes, the State Highway Engineer had no authority under state law to "request" federal action which would result in a circumvention of those statutes. The Supreme Court seemingly agreed that the statutes could be interpreted as forbidding the Engineer from making this request. But the Court then concluded that this implied prohibition was itself overridden by § 820. That is, since § 820 intended to "abrogate inconsistent state

laws" for purposes of "planning and constructing federally assisted state highways," § 820 superseded the state law prohibition which would otherwise prevent the State Highway Engineer from requesting federal intervention, 59 Cal. 2d at 419, 380 P.2d at 394-95, 29 Cal. Rptr. at 794-95.

That the state-law provision which § 820 was allowed to override was no more than "implicit" in character weakens the drama of Eden Park; and I should note again that the Court, in applying § 820, did not explicitly consider its constitutionality. Nevertheless, the Eden Park opinion surely suggests the Supreme Court's sympathy with the California Legislature's conclusion that the maintenance of state prerogatives (as expressed in existing state laws and regulations) can properly be subordinated to the need to comply with federal norms in order to secure certain benefits available from federal sources.

It is noteworthy, by the way, that § 820 contains a useful procedural mechanism.

> Any major conflicts between the laws, rules, or regulations of this state and any such federal law, rules, and regulations which have been resolved under this Section during a calendar year shall be described in a report which the department shall submit to the Legislature no later than January 30 of the succeeding California year.

With this information collected in the annual report, the Legislature is in a position intelligently to consider how well the § 820 process of collaboration is working, and to modify or create exceptions in that section to the extent that the results it produces seem unsatisfactory.

5. Another statutory "precedent" on California-to-federal delegation can be found in the Revenue and Taxation Code. California's basic inheritance tax is described and imposed in that Code's §§ 13401-13411. Sections 13441-13443 provide for an "additional tax." According to § 13441:

> In the event that a Federal Estate Tax is payable to the United States in a case where the inheritance tax payable to this state is less than the maximum state tax credit allowed by the Federal State Tax law, a tax equal to the difference between the maximum credit and the inheritance tax payable is hereby imposed.

Section 13442 carries the logic of § 13441 to its logical extreme:

> If no inheritance tax is payable to the state in a case where a federal estate tax is payable to the United States, a tax equal to the maximum state tax credit allowed by the Federal Estate Tax law is hereby imposed.

These provisions, which date back to 1943, have been explained as follows (in R. Bock, 1980 Guidebook to California Taxes, at 359):

> The estate tax (sometimes called "pickup tax") is imposed in order to obtain for the state the maximum benefit from the federal credit for state inheritance tax. . . . The state thus collects a tax which would otherwise go to the federal government, and the total combined state and federal tax is not increased, since the additional state tax is offset by the additional credit against the federal tax.

It is clear from the logic and purpose of these provisions that the delegation it provides for is of an "ongoing" sort. Though the provisions have been part of California law since 1943, they have never been judicially challenged on grounds that they entail an impermissible delegation. Of course, the provisions are in a

way rendered invulnerable by the nature of their operation: they do not subject any California estate to even a penny of additional aggregate taxation. (For that matter, they do not result in any California estate paying even a penny less in aggregate taxation.) Under §§ 13441-43, the basic "winner" is the state of California, which receives higher tax revenues than it otherwise would receive; the basic "loser" is the federal treasury, which can receive somewhat less revenue from an individual estate than it otherwise would receive. And federal lawmaking authorities have made no effort to contest the state strategy which the California provisions manifest.

F. CALIFORNIA LAW ON THE DELEGATION OF LAWMAKING AUTHORITY FROM ONE JURISDICTION TO ANOTHER: THE JURISPRUDENCE OF KUGLER

People ex rel. Younger v. County of El Dorado, 5 C.3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971), dealt with the Tahoe Regional Planning Agency, to which the California Legislature had delegated powers to comprehensively regulate land use in the Lake Tahoe basin. In considering the constitutionality of the delegation, the California Supreme Court simply held that the "standards" in the enabling legislation were sufficient to provide guidance to the Agency in carrying out its land use responsibilities. For present purposes, what is interesting about the Agency is that it is a bi-state entity authorized by a Congressional interstate compact. The Agency's board consists of ten members, five chosen by California officials, but the other five by Nevada officials. In approving the California Legislature's delegation, the Court did not advert to the fact that a full half of the Agency's governors were representatives of another jurisdiction. But especially insofar as El Dorado can be regarded in the context of Kugler v. Yocum (see below), implicit in the silence of the El Dorado opinion is the following three-step logic: An interstate endeavor is an appropriate way--if not the only way--for dealing with the problem at hand; bi-state membership is essential to such an interstate undertaking; the nature of the problem to be solved thus justifies California's extra-jurisdictional delegation. A related point focuses on reciprocity. In return for California's conferring California lawmaking powers on Nevada officials, the Nevada legislature has agreed to lodge Nevada lawmaking authority in California officials. This further emphasizes the extent to

which the mutuality of the problem warrants a mutual solution, with the whole of the Agency's effective powers being greater than the sum of its California and Nevada parts.

Kugler v. Yocum, 69 Cal. 2d 371, 445 P.2d 303, 71 Cal. Rptr. 687 (1968), contains the most recent discussion by the California Supreme Court on the specific subject of inter-jurisdictional delegations. Indeed, given its reasoning, Kugler stands as the most important case in California law on the general question of legislative delegations of all sorts. Kugler dealt with a City of Alhambra ordinance* which provided that in all future years Alhambra firemen should be paid salaries comparable to firemen salaries in the City of Los Angeles and the County of Los Angeles.

In understanding the reasoning of the Kugler majority, it is useful to begin with the position taken by the Kugler dissent. Justice Burke, joined by Justice McComb, would have found an invalid delegation, insofar as the ordinance

> would strip from Alhambra's city council its discretion to determine one end of the wage scale (the minimum), and delegate that discretion to the governing bodies of two outside public agencies which are entirely without responsibility to the City of Alhambra, its employees, voters, or taxpayers. This seems to me to offend democratic principles in addition to the basic requirements of the City's charter.

69 C.2d at 385, 445 P.2d at 312, 71 Cal. Rptr. at 696.

The majority's reasoning can be broken down into several

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*I simplify here somewhat. The ordinance was a proposed initiative which had received the needed number of signatures but which the City had refused to place on the ballot on grounds of the alleged illegality of its delegation.

points.

(1) What the anti-delegation doctrine really requires is that the lawmakers "effectively resolve the truly fundamental issues." In many cases, such "resolution" will take the form of "standards" set forth by the legislature to guide decisions rendered by others. But in other cases, the "fundamental issues" can be resolved even without any standard setting.

(2) What <u>is</u> the fundamental issue? To a large extent, this depends on how the legislature chooses to perceive or interpret the problem at hand. The Alhambra lawmakers had implicitly designated as "fundamental" the "issue" of parity between Alhambra wages and Los Angeles wages. So long as this <u>can</u> be regarded as the fundamental issue, then Alhambra's lawmakers have indeed decided it, and later events in Los Angeles City and County which actually determine particular wage levels can be regarded as mere matters of application.

(3) Alhambra's designation of parity as the fundamental issue is quite reasonable. Alhambra lawmakers may recognize that they will be unable to recruit firemen if their wages are lower than those in Los Angeles. Also, Alhambra officials may appreciate that Los Angeles officials may "possess a superior ability" to review firemen wages in other jurisdictions and to engage in the research needed for an appropriate salary determination.

(4) Delegation doctrine should take into account the "practical necessities" of governmental processes. For example, smaller communities like Alhambra face serious problems in gathering the technical information appropriate for the formulating of proper wage scales.

(5) What the delegation doctrine calls for is not "standards" as such but rather "safeguards." And an enlightened delegation doctrine is primarily concerned with "the degree of protection against arbitrariness." "If an external private or governmental body is involved in the application of the legislative scheme, it must be an agency that the legislature can expect will reasonably perform its function." 69 Cal. 2d at 382, 445 P.2d at 310, 71 Cal. Rptr. at 694. Alhambra lawmakers can reasonably assume that Los Angeles City and County have no interest in paying their firemen excessive or unnecessarily high wages. This assumption provides the necessary "safeguard" and the assurance of "reasonable performance."

(6) The Court's general delegation philosophy is set forth in an eloquent concluding paragraph.

> Doctrinaire legal concepts should not be invoked to impede the reasonable exercise of legislative power properly designed to frustrate abuse. Only in the event of a total abdication of that power through failure either to render basic policy decisions or to assure that they are implemented as made will this Court intrude on legislative enactment because it is an "unlawful delegation," and then only to preserve the representative character of the process of reaching legislative decision.

69 Cal. 2d at 384, 445 P.2d at 311, 71 Cal. Rptr. at 695.

While Kugler itself dealt with a local ordinance, its discussion of the delegation problem operates at a very general level; it is clear, therefore, that Kugler principles apply to delegations by the state legislature as well as delegations by local governments. For a case so holding, see Martin v. County of Contra Costa, 8 Cal. App. 3d 856, 87 Cal. Rptr. 886 (1970). In

Martin a state statute provided that employees of the Municipal Court in Contra Costs (for whose salaries the state is responsible) receive the same remuneration as the County chooses to pay its own employees in comparable positions. The Court of Appeal, applying Kugler, concluded that the statute was plainly constitutional. The Court interpreted the Martin statute as contemplating regular review of the implementation of the statute by the Legislature. 8 Cal. App. 3d at 862, 87 Cal. Rptr. at 890. This review afforded a "safeguard" in the Kugler sense.

Given the level of generality of Kugler's discussion of the delegation question, there should be no question but that Kugler applied, at least in a general way, to delegations by the state to federal officials. This is proven rather conclusively by an example of a lawful delegation which the Kugler opinion volunteers:

> If [a California] statute provides that salaries are to be adjusted to future changes in the cost of living, the legislature must designate a body, such as the United States Department of Labor, which may be expected to reasonably perform the function of ascertaining the cost of living.

69 Cal. 2d at 382, 445 P.2d at 310, 71 Cal. Rptr. at 694.

II. ANALYSIS

A. THE EXTENT OF THE DELEGATION

Any choice by the California Legislature to adopt a general rule of complete open-ended conformity, or to participate in the Federal-State Tax Collection Act (codified at 26 U.S.C. §§ 6361-65), would entail a very substantial delegation. First of all, either choice would involve a decision to conform the state's income tax to federal income tax norms. At least four sorts of decisions ordinarily go into the calculation of taxable income.

The first set of decisions rests on what can be called pure tax logic. An example: if long-term capital gains merit special tax treatment, this is partly because inflation would otherwise overstate the taxpayer's true gain, and partly because without special treatment a gain that has materialized over a considerable period of time would be unfairly and excessively taxed in one year only. While federal law provides that one year of ownership of capital gain for special long-term treatment, California lawmakers have concluded that only five years of ownership merits full long-term treatment (Revenue & Taxation Code § 18162.5). California's opportunity to render its own decisions on pure tax matters of this sort would be eliminated if it opted for complete conformity.*

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*I use existing California tax rules to illustrate the differences between U.S. and California tax perspectives. Using existing rules as illustrations is, however, an imperfect enterprise. After all, existing California rules could be overridden by a mere incorporation-by-reference (not just by an open-ended delegation). Conversely, even in an open-ended conformity regime, existing California rules could be protected by attaching specific modifications to the conformity rule. See page 64, infra.

Tax rules are often designed to either stimulate or moderate the general economy. Thus the special treatment of capital gains may also be intended to encourage the process of capital formation. The state perspective on the control of the general economy may well be different from that of the federal perspective. (Indeed, the economic literature emphasizes that macroeconomic planning is best or at least most frequently undertaken at the national level.) If a state does accept complete conformity, it would be depriving itself of the opportunity of influencing macroeconomic policy by way of any state income tax rules it might enact or amend.

Many income tax rules amount to so-called "tax expenditures." That is, rules on credits, deductions, and the non-taxability of forms of income may well be intended by the Legislature to serve as subsidies to various classes of persons and to various forms of activities; these subsidies are often designed to achieve a certain allocative effect. Thus the solar energy credit introduced into California law in 1976 and then revised in 1977 and 1978 (Revenue & Taxation Code §§ 17052.5, 17055) is obviously intended to encourage property owners' investment in solar energy projects. The charitable contribution deduction in both state (Revenue & Taxation Code § 17214) and federal law is evidently designed, at least in part, to encourage donations to approved charities. However, California's maximum for charitable contributions (20% of adjusted gross income) (Revenue & Taxation Code § 17215) is much less than the federal 50% maximum; California has thus chosen to place meaningful limits on the extent of its subsidy to

charitable giving. California's opportunity to make up its own mind on matters of this sort would be eliminated by a complete conformity policy.

Finally, income tax law is designed to achieve the goal of equity among taxpayers--"horizontal equity," to use standard tax parlance. The renters' credit provided for in California law (Revenue & Taxation Code § 17053.5) can easily be understood in equity terms. Whatever the justifications may be for allowing income tax deductions for property taxes and interest payments, the truth remains that these deductions provide homeowners with enormous tax benefits. The renters' credit is designed to at least alleviate the inequality between owners and renters that the tax rules otherwise engender. California's opportunity to render equity judgments of this sort would be expunged were it to elect full conformity.

To be sure, the state could attach certain "modifications" even to an open-ended conformity statute; and the federal Act recognizes state interests in a limited number of areas where it was obvious to Congress that the state's perspective differs from the federal perspective. But limited exceptions of this sort apart, modifications and open-ended conformity would require state lawmakers to abandon the enterprise of state income-tax policymaking. The "social" as well as the "economic" aspects of this policymaking were referred to in Wallace in invalidating Minnesota's conformity statute.

Even if the state does decide to conform or to participate in the federal program, however, important state prerogatives

respecting tax policy would be preserved. Under piggybacking, whichever of the § 6362(a)(2) options it elects, the participating state would retain full authority to set the general level of the state income tax burden. The extent of this burden is one of the most important features of income tax policymaking. Also, by choosing option § 6362(a)(2)(A) rather than § 6362(a)(2)(B), the state would retain full authority over the state income tax rate structure. If the state does retain this power, then it reserves for itself the authority to determine the progressivity of the state income tax--that is, the extent to which the tax attempts to achieve the so-called goal of "vertical equity." And under conformity without piggybacking, the statute obviously retains full control both over tax burden and over progressivity.

In these respects, however, California presently stands in a rather special situation, given the pendency of Proposition 9. In the absence of Proposition 9, the above comments on the preservation of state authority over tax burden and rate structure are accurate. If Proposition 9 passes, however, the California Constitution would prevent the California Legislature from raising any tax rate above 50 percent of what that rate is now. Under Proposition 9, therefore, the only power the state Legislature would retain over the level of tax burden is the power to reduce that burden to less than 50 percent of its present level; and the Legislature could affect the progressivity of the state income tax only by reducing particular rates to less than 50 percent of their current levels--not by raising any rates to above that point. Proposition 9, by vastly curtailing the discretion which

the state Legislature would otherwise possess under the federal Act, correspondingly enhances the extent to which the adoption of conformity would work a state-to-federal delegation.

(In another way, however, Proposition 9 diminishes the delegation. By reducing tax rates to no more than 50 percent of their present levels, Proposition 9 would proportionately reduce the monetary effects of all tax rules on includability and deductability, decision-making power over which the Act would exclusively assign to the federal government. By depriving these rules of at least half of their practical impact, Proposition 9 would to some extent mollify the delegation objection.)

Discussed above is the extent to which a decision in favor of full conformity would delegate state lawmaking powers. But if California chooses not only to conform but also to participate in the federal program, this latter choice would seemingly enhance the delegation in a dramatic way. For under the Act, administration of the income tax would become exclusively (or almost exclusively) a federal responsibility. In the first instance, the basic responsibility for auditing taxpayer returns would rest with the federal government. (Note, however, the observation by Professor Stoltz that, while a "cursory reading of the statute might result in the . . . conclusion that the law prohibits supplemental state audit activity," this reading is "mistaken"; "it is clear from the legislative history that Congress did not intend to prohibit supplemental state auditing efforts. Thus a state with a high level of audit activity could continue such

activity as a supplement to the federal effort." See Stoltz & Purdy, Federal Collection of State Income Taxes, 1977 Duke L.J. 61, 109. However, even under Stoltz's view of the Act, any state auditing would be wholly "supplemental" or advisory in nature.)

Under the Act all decisions as to whether to initiate enforcement proceedings would evidently be rendered by federal officials. All tax litigation, either initiated by the government or by the taxpayer in seeking a refund, would take place in federal court rather than in state court. Section 6361(b). Federal officials, and those officials alone, would have the power and responsibility "to represent state interests" in all administrative and judicial proceedings. Section 6361(d)(1)(a). In securing enforcement, only those civil and criminal penalties provided for by federal law could be resorted to. Section 6361(a). Any penalties which state law might profess to provide for taxpayer violations of the state tax would be regarded as an impermissible form of "double jeopardy." Section 6362(f)(6).

The federalization of the administration of the state income tax which these various provisions would affect suggests that a state's decision to participate in the federal program would amount to a colossal delegation of a sort unprecedented (so far as I know) in American federal history. Not only state legislative power, but state executive and judicial power, would all be transferred to the federal government. (Note, however, that the special constitutional rules on the delegation of state judicial power all pertain to statutes which remand seemingly judicial matters to administrative agencies for primary decisionmaking.

Under the federal Act, matters which are presently decided by the state judiciary would be submitted instead to the judiciary of the federal government. There is thus no abandonment of the taxpayer's right to a judicial decision--the right which those special rules seek to vindicate. While the delegation of state judicial powers to the federal government should certainly "count" in assessing the extent and the implications of the overall delegation, it does not seem to raise any independent delegation question.)

The above paragraphs have attempted to evaluate the character of the delegation which full conformity or piggybacking would constitute. But enormous benefits would also result from decisions to conform or to piggyback.* Many of those benefits would accrue to individual taxpayers. Under conformity, taxpayers would secure welcome advantages in terms of the reduced time (or monetary cost) involved in preparing state income tax returns. And in addition to tax preparation savings, the process of tax planning would also be simplified, insofar as this planning would now need to reckon with only one set of income tax rules.

State government also would reap substantial savings. A conformity policy would greatly reduce that administrative burden on the state bureaucracy which is presently engendered by the differential between state and federal tax rules. Moreover, given the provisions in the federal Act as amended, participation in the Act would enable the state to achieve further savings by way of

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*These benefits are well described in the general literature on conformity, and I describe them only briefly here.

the elimination of the costly state personal income tax administrative apparatus.

Benefits would also be achieved by way of conserving the resources of the state Legislature itself. Since the Legislature has in the past recognized the obvious advantages of conformity, substantial amounts of legislative effort have been expended in reviewing changes in federal income tax law and in determining which of those changes the state, in the name of conformity, should choose to adopt. Adoption of an open-ended conformity rule would liberate the state Legislature from this burden on its energies.

B. THE CONSTITUTIONALITY OF THE DELEGATION

In circumstances of this sort, where a delegation achieves enormous benefits but also deprives the state of important authority, how should the California analyst think about the constitutional question?

My basic assumption here is that Kugler v. Yokum is the relevant judicial authority. While Kugler immediately deals with a municipal ordinance, the Kugler discussion of delegation is deliberately couched at a level of generality which makes it seemingly relevant to delegations of every sort. That Kugler principles apply to delegations by the state is thus obvious enough from the Kugler opinion itself, and has since been verified by Martin. Those Kugler principles are explicitly concerned with the problem of inter-jurisdictional delegations; and an example which the Kugler opinion explicitly advances (a state statute giving effect to future changes in the cost of living as determined by the federal Department of Labor) makes it sufficiently clear that Kugler can be applied to delegations from the state to the federal government. To this extent Kugler takes precedence over the language in Burke and Brock--language which was, after all, no more than dictum (if that), and which was challenged from an early date by the strong Court of Appeal holding in Lasswell. In any event, the Rule that state delegations to the federal government are per se invalid seems to be exactly the kind of "doctrinaire" delegation concept which the Kugler opinion inveighs against.

Assuming that Kugler applies, what results does it suggest?

Here there are two alternatives to consider: an open-ended conformity statute; and participation in the federal program. Here the important initial point is that each of these alternatives seems to comply with the Kugler criteria for a valid delegation. Kugler allows the legislative body to determine what the "fundamental issue" is and then endorses whatever delegations result from the legislature's resolution of that issue. In reviewing both the general advantages of conformity and the additional advantages of piggybacking, the California Legislature could reasonably conclude that the "fundamental issue" for personal income tax purposes is whether the state should approve of conformity and accept the federal invitation--whether the multiple advantages of conformity justify the reduction in state authority. In Kugler itself, the Court agreed that Alhambra could characterize the "fundamental issue" in terms of whether the advantages of compensation parity outweighed the corresponding loss of city discretion. Especially if the Legislature's vote rests on the basis of an adequate deliberation (a good legislative record would be helpful in this regard), the Legislature will have rendered decision on the fundamental issue and to that extent discharged its Kugler obligations.

Kugler does suggest that a legislature's resolution of the fundamental issue must meet minimum standards of reasonableness or responsibility. But certainly the advantages of conformity and also of piggybacking are substantial enough to confirm the plausibility of a legislative decision which seeks to obtain them. Kugler requires that if an "external governmental body" is implicated

in a legislative scheme, the legislature must be able to expect that this body "will reasonably perform its function." Certainly the Legislature could possess this expectation vis-a-vis the federal government. If Alhambra can reasonably assume that Los Angeles City and County will not pay their firemen excessively, so California can reasonably assume that federal authorities have no incentive either to develop oppressive income or deduction rules or to foolishly fritter away the income tax base.* If Alhambra can recognize the greater information-gathering resources of Los Angeles City and County, so the California Legislature could reasonably place confidence in the general income-tax sophistication of Congress and the Internal Revenue Service.

As noted in Part I-D, there are a number of judicial decisions upholding open-ended state tax conformity statutes. These decisions validated conformity because of the benefits they perceived conformity as achieving: "convenience to the taxpayer" and "economy to the state" (or "simplicity of administration"). The recognition of these benefits in this cluster of cases provides support for the Kugler idea that the Legislature, if it votes in favor of open-ended conformity, will have rendered a responsible judgment on the fundamental issue. (The only complication is found in Mullaney's suggestion that "labor saving" on the part of the Legislature should not count as a legitimate benefit. On this complication, see the discussion of Sharpnack below.) As for the

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*Compare Cheney, p. 22, in which a state legislature sought to utilize--for income tax purposes--a formula worked out by the I.C.C. for quite different rate regulation purposes.

elimination of state administrative costs which would result if the state were to agree to piggybacking, implicit in Streets and Highways Code § 820 and in the Supreme Court's Eden Park opinion is the idea that it may well be sensible for the state to forsake some of its prerogatives in order to secure the benefits available from federal programs.

The United States Supreme Court's decision in Sharpnack reinforces the Kugler argument in favor of open-ended conformity. Sharpnack holds, in line with Kugler, that the advantages of conformity or parity can justify an open-ended inter-jurisdictional delegation. In Sharpnack there had been a longstanding Congressional policy of conforming federal enclave law with the law of the state in which the enclave was located. Given all its experience with incorporation-by-reference measures, Congress could (according to the Court) reasonably take the small additional leap involved in approving an ongoing delegation. In like manner, the California Legislature has long displayed a strong interest in conforming the state's income tax laws with those of the federal government. Russell Bock's 1980 Guidebook to California Taxes is helpful in revealing the extent of that interest. The text of that Guidebook reveals that most existing California personal income tax rules do indeed conform (or at least adequately "compare") to federal tax rules. And Bock's summary of 1979 California income tax legislation (at pages 7-9) verifies that the clear majority of all the income tax measures which the Legislature enacted in a seemingly typical year were motivated by the Legislature's general concern for conformity.

The Sharpnack analogy contains one complication, however. The Congressional experience described in Sharpnack revealed an undeviating practice of past conformity. But with respect to income tax law, the California Legislature, while it has usually chosen to conform to the federal model, in any number of significant particulars has declined to conform (either by failing to act or by acting in a nonconforming way). As for this complication, however, the state Legislature is clearly entitled to reflect, in a retrospective and comprehensive way, upon the lessons of its experience. And as it considers the state's income tax in its existing whole--as it reviews the pattern of state-federal deviations which its individual decisions (or indecisions) have produced--the Legislature could plausibly conclude that the process of state lawmaking has not been successful in producing benefits commensurate with that process's taxpayer and institutional costs. If the Legislature's resulting decision to conserve on its own labor (by way of open-ended conformity) rests on a reasonable finding that its labor has not been productively expended in the past, then the goal of "labor saving"--that is, of deploying the Legislature's scarce resources to their maximum public advantage--seems commendable rather than illicit in character.

For all of these reasons, however, a Kugler analysis, reinforced by Sharpnack, seemingly supports the legality of an open-ended delegation, and even of piggybacking. There are, however, two objections to consider.

The first concerns the possibility of state legislative oversight. Oversight is certainly one form of "safeguard" for a delegation; and Kugler makes clear that safeguards are essential

to constitutionality. Under "mere" ongoing conformity, the Legislature could (and undoubtedly should) set up a formal mechanism to apprise itself of any significant changes in federal income tax law and to develop a policy analysis of each of those changes. With the help of the information and analyses which this mechanism would contribute, the Legislature would be in a good position to consider whether any modifications of its conformity policy are warranted. (See the discussion above of the report-making "safeguard" in Streets & Highways Code § 820 and of the statute in Martin.) But the situation is very different if California chooses to participate in the federal piggybacking program. As a matter of formal law, a decision by a state like California to participate would be reversible, so long as the state makes up its mind within the deadline which the federal Act stipulates. Practically speaking, however, such a decision to participate may well be irreversible. Once a state, in joining the federal program, dismantles its personal income tax bureaucracy, it would be extremely difficult for the state legislature to withdraw from the program if the legislature should undergo any change of heart. Thus a state's acceptance of the federal piggybacking invitation may well be effectively permanent in character. Kugler requires courts to consider the "practical necessities" of governmental processes. Here, a "practical" evaluation suggests that the state Legislature may have little ability to act should it later determine that a particular new federal tax rule is obnoxious to state policy or that its original decision to participate in the federal program seems no longer supportable. From a delegation perspective, all of this is disturbing.

The second objection concerns the "scope" or extensiveness of the delegation in question. Is "scope" relevant at all in delegation law? This is uncertain. The extreme breadth of the Schecter statute seemingly influenced the Schecter Court in its ruling of unconstitutionality. Yet, faced with a statute of moderate breadth in Sharpnack, the Supreme Court simply ignored the concern for scope expressed in Justice Douglas's dissenting opinion. Kugler is the fountainhead of contemporary California law, and Kugler, in stating delegation standards, pays no heed to scope. But the actual ordinance which was before the Kugler Court--dealing only with firemen compensation--was obviously rather narrow in scope. Perhaps it is best to assume that if the scope of a delegation is sufficiently extreme, then scope has at least some bearing on the constitutional question.

The scope of the delegation under an open-ended conformity statute is doubtless broad. Yet it does not seem at all extreme when compared to the federal NRA, ruled on in Schecter. Note, however, that a piggybacking delegation contains additional and distinctive elements of breadth. Piggybacking, like conformity, would transfer tax-law policymaking to the federal government; but piggybacking, unlike conformity, would also transfer near-complete authority over the administration of the state's income tax. ("Administration" in this context includes prosecutorial authority, judicial authority, and the authority to establish a schedule of sanctions and penalties.)

Even as for the transfer of tax-law policymaking, there is an additional important point to make--which is that under ongoing

conformity (but not under piggybacking) there would be a meaningful if limited opportunity for state control on the absoluteness of that transfer. As the record in other jurisdictions shows, a state like California could easily combine a general rule of ongoing conformity with at least a limited number of "modifications" which could be capable of taking strong interests into account. Modifications of this sort could, for example, enable California to adhere to its past policy on the solar energy credit, on the renter's credit, and on the low ceiling on charitable contributions.* Of course, the power to modify would also provide a legislative outlet for the ongoing policy reviews of new federal tax rules, as described at page 63. The modification feature of an open-ended conformity statute thus enables the state to qualify its delegation of policy-making power in a way that confirms the assessment that this delegation is something less than extreme. A state would possess no similar modifying ability, however, should it undertake to piggyback.

The assessment of the two objections thus leads to the following conclusions. There is very good reason to believe that an open-ended conformity statute would be held constitutional by the California Supreme Court. Open-ended conformity fully complies with the Kugler criteria, and the delegation, while much wider in scope than the delegations ruled on and described in Kugler, could be effectively safeguarded by a formalized process of legislative review, and kept under control by a legislative willingness to

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*It would be not easy--though perhaps not impossible--to handle California's differential treatment of capital gains by way of a conformity modification.

consider at least a limited number of modifications. A piggybacking decision could also be supported by Kugler. But here the "scope" of the delegation seems more extreme, insofar as it both excludes the state's power to "modify" and remits full judicial, administrative, and sanction-setting authority to the federal government. Also, a Kugler consideration of the "practical necessities" of governmental operations suggests the probable absence of the

"safeguard" of effective legislative review of the continuing correctness of the original legislative decision. In these circumstances, the only prediction that can claim to be candid is one that recognizes that the Supreme Court could easily rule either way on piggybacking--either extending Kugler to affirm the state's participation in the federal program, or interpreting Kugler narrowly and thereby invalidating that participation.

(An added uncertainty concerns the character of the "scrutiny" which the Supreme Court would give to any California decision to piggyback. For purposes of applying Kugler, should piggybacking be compared to the present California situation, or should it be compared instead to the intermediate possibility of open-ended conformity without piggybacking. The calculation of the benefits of piggybacking--as well as the calculation of the delegation detriments--importantly depends on what the basis for comparison is. Yet I find little in Kugler that offers guidance as to how this undertainty should be resolved. Of course, since no state has yet chosen to participate in the federal program, there has been no opportunity to secure any judicial views on delegation doctrine in this vexing application. By contrast, as Part I-D has shown, we do have case law on open-ended conformity statutes. While the courts' opinions have hardly been uniform, neither have they been unsympathetic to the conformity cause. Several have ruled in favor of the constitutionality of ongoing conformity; and the only contrary holding may have rested on that state's peculiarly restrictive constitutional language.)

C. CONCLUDING OBSERVATIONS

One of my conclusions, reported above, is that it is very likely that the California Supreme Court would find constitutional an open-ended tax conformity rule adopted by the state Legislature. In reaching this conclusion, I am mindful of a contrary prediction expressed in an Opinion of the Office of Legislative Counsel, dated October 19, 1959.

If I am right in recognizing the 1968 Kugler as the outstanding California authority on the delegation question, then it follows that the Legislative Counsel's 1959 Opinion has simply been superseded by later judicial developments. It also may be proper to mention that the Legislative Counsel's Opinion seems rather selective in its methodology. In discussing California law, for example, that Opinion refers to the Supreme Court's language in Brock, Burke, and Palermo; but it does not mention the strong Court of Appeal holding in Lasswell. As for out-of-state law, it refers to early opinions like Santee Mills and Featherstone, which had indicated doubts on the delegation question; but it does not mention an early case like Underwood Typewriter, which had sustained an open-ended conformity statute. The Opinion disparages the Ninth Circuit's sympathetic discussion of delegation in Mullaney on grounds that the discussion was mere dictum. Yet in referring to the California Supreme Court's more negative language in Brock, Burke, and Palermo, the Opinion fails to indicate the quite limited role which that language played in those three Court opinions. Moreover, the Opinion does not even mention the U.S. Supreme Court's Sharpnack decision, even though that decision

had been rendered within the previous year, and even though Palermo had itself recognized the relevance, as analogy, of the federal Assimilative Crimes Act.

My second conclusion is that piggybacking raises a state constitutional issue that is effectively too close to call. By suggesting at least the possibility of unconstitutionality, this conclusion warrants a bit of amplification. Assume Congress passes a statute imposing a supplement to the existing federal income tax and providing that the proceeds of this supplementary tax be distributed (in a revenue-sharing manner) back to the states according to a formula that gives priority to the state of taxpayer origin. Since both the taxing and spending features of this federal statute entail fully federal activities requiring no collaboration by the state, nothing in a state's constitution has any bearing on the program's legality. Assume now that Congress adds to that program the rule that a state becomes entitled to its share of the federal-tax supplement only if the state agrees to impose no income tax of its own--only if the state repeals, for example, any existing state laws providing for such a tax. Possibly, this Congressional scheme would "coerce" the states in a manner that is impermissible under the federal Constitution. Compare Steward Machine Co. v. Davis, 301 U.S. 548 (1937), with National League of Cities v. Usery, 426 U.S. 833 (1976), and Brown v. EPA, 431 U.S. 99 (1977). Yet since the tax in question would remain a genuinely federal tax, and since the only action which the state legislature would need to take would be to repeal its own existing tax statute (in order to secure certain external advantages), I cannot see how

the federal program, even as so revised, creates any problems under the state's constitution.

The program contemplated by the Federal-State Income Tax Collection Act possesses important elements of similarity with the programs hypothesized above. Nevertheless, under that Act the tax in question is emphatically a state tax. It is conceived of as a state tax by the entire text of the Act itself; the state retains the authority to determine the tax's overall burden and perhaps even the tax rate structure; and of course the Act gives the states full choice as to whether to participate in the program in the first place. The state thus possesses much more authority under the Act than it would possess under the revised hypothetical program; and exactly because of the extent of that authority, a state constitutional question arises as to the extent to which the state has relieved itself of other authority. There is irony in this of course--but it is irony of the sort that recurs in constitutional reasoning, especially in this complex era of Cooperative Federalism.

APPENDIX VI

Prior Ballot Issues:
Prop. 14 (Nov. 8, 1966)
Prop. 4 (Nov. 5, 1968)
Text, Legislative Counsel's Analysis and Ballot Statements

APPENDIX VI

PROPOSITION 14 ON THE NOVEMBER 8, 1966 STATEWIDE BALLOT

14	**PERSONAL INCOME TAXES.** Legislative Constitutional Amendment. Authorizes Legislature to provide for reporting and collecting California personal income taxes by reference to provisions of the laws of the United States and may prescribe exceptions and modifications thereto.	**YES** / **NO**

(This amendment proposed by Assembly Constitutional Amendment No. 18, 1965 Regular Session, does not expressly amend any existing section of the Constitution, but adds a new section thereto; therefore, the provisions thereof are printed in BLACK-FACED TYPE to indicate that they are NEW.)

PROPOSED AMENDMENT TO ARTICLE XIII

Sec. 11½. The Legislature may simplify the reporting and collection of California personal income taxes, notwithstanding any other provision of this Constitution, by reference to any provision of the laws of the United States as the same may be or become effective at any time or from time to time, and may prescribe exceptions or modifications to any such provision.

As used in this section "any provision of the laws of the United States" includes a reference to the amount of any federal tax on in respect to or measured by personal income which is computed under any provision of federal law.

General Analysis by the Legislative Counsel

A "Yes" vote on this measure is a vote to authorize the Legislature to incorporate federal laws which may be enacted in the future, as well as existing federal laws, into California's law in the reporting and collection of California personal income taxes; and to permit the amount of income tax computed under federal law to be used in reporting and collecting California personal income taxes.

A "No" vote is a vote to deny the Legislature this authority.

For further details see below.

Detailed Analysis by the Legislative Counsel

This measure, if approved by the voters, would add Section 11½ to Article XIII to permit the Legislature, in the reporting and collection of the state personal income tax, to incorporate provisions of the federal law as they may be enacted or amended in the future, as well as to incorporate existing provisions of federal law, so as to make any of those provisions apply to the reporting and collection of state income taxes. The federal law so incorporated would be made subject to exceptions or modifications, if any, that the Legislature may prescribe.

The measure would specifically permit the inclusion of a reference to the amount of any federal tax on, in respect to, or measure by, personal income which is computed under any provision of federal law. This would permit the amount of income tax computed under federal law to be used in reporting and collecting California personal income taxes.

Argument in Favor of Proposition No. 14

At last! Here is a proposal to make our income tax easier to figure out.

A YES vote on this proposition will allow the Legislature to adopt federal income tax laws as much as practical for our own state income tax purposes. This means we will be able to use the calculations made for federal tax purposes in our state tax form. We would not accept the higher federal tax rates.

Under present law we make all the additions and subtractions necessary for the federal tax form and then go through the same process all over again for the state tax return.

There are now 54 differences between the federal law and the state law—this proposal will make the two laws the same. Improved administration can be achieved without incurring additional costs as returns will be easier to check and verify. Furthermore, it will be easier to check on those who are not reporting correctly.

The vast majority of the federal income tax law and the state income tax law is the same now—but the few differences that do exist are the problem area we seek to simplify with this constitutional amendment.

We are not giving away our own power to make necessary changes in our tax laws in the future. We simply say that the present federal method of computing income is acceptable to us and should be incorporated in our state law. At any time in the future the Legislature may determine that a particular new federal law would seriously affect our state financial structure and we could reject that change. Thus our own state Legislature will retain the power to write our tax laws so they will truly reflect the economy of California and her taxpayers. Every year the Legislature wastes time and effort processing bills which make the most recent changes in federal statutes the law of California.

The State Assembly conducted a two-year study of our tax structure and this proposal is one of the recommendations they made. New York has already adopted the system and our California State Bar Association Committees have supported this action.

Vote YES for simplicity.

MILTON MARKS, Chairman
Assembly Committee on Government Organization

NICHOLAS C. PETRIS, Chairman
Assembly Committee on Revenue and Taxation

Argument Against Proposition No. 14

A "No" vote on Proposition 14 insures fiscal responsibility on the part of your elected state officials.

Proposition 14 would authorize the California Legislature—made up of your elected representatives in Sacramento—to abdicate a large part of their responsibility for enacting laws relating to the income tax you must pay to the State of California. This responsibility would be shifted to Washington, D.C., where only 38 out of 43 Members of the House of Representatives and only two of the 100 Members of the Senate are elected by Californians.

This measure would allow the Legislature to make all future federal income tax enactments an integral part of California's Personal Income Tax Law. It would reverse the normal legislative process. Under the State Constitution, as it presently reads, the Legislature may adopt existing federal laws by taking affirmative action to enact appropriate legislation. It is in this manner that California's law has been made to conform to the federal tax system in the past.

Proposition 14 would allow the State Legislature to incorporate future federal income tax laws into California's system by reference. Such federal legislation would remain a part of our State's law until positive action were taken by the Legislature to change it. If the Legislature were not in session, objectionable or unworkable laws would remain on the books until your elected officials convened and acted.

Dilution of accountability for tax legislation will not best serve California's taxpayers. Responsibility for increases in your state income tax should not be divided between Sacramento and Washington. The legislative body spending the tax dollar should be solely answerable to the electorate for levying the tax. This is the best assurance that your elected representatives will carefully balance the interests of taxpayers and the beneficiaries of state appropriations.

The California Legislature could not adopt future congressional acts by reference without an authorization similar to that contained in Assembly Constitutional Amendment No. 18. However, even without such a constitutional amendment, there is no prohibition against the incorporation by reference of existing federal income tax laws.

FRANK LANTERMAN
Member of the Assembly
47th District
California Legislature

4	PERSONAL INCOME TAXES. Legislative Constitutional Amendment. Legislature may provide for reporting and collecting California personal income taxes by reference to provisions of present or future laws of the United States and may prescribe exceptions and modifications thereto. Prohibits change in state personal income tax rates based on future changes in federal rates.	YES	
		NO	

(This amendment proposed by Senate Constitutional Amendment No. 18, 1968 Regular Session, does not expressly amend any existing section of the Constitution, but adds a new section thereto; therefore, the provisions thereof are printed in **BLACK-FACED TYPE** to indicate they are **NEW.**)

PROPOSED AMENDMENT TO ARTICLE XIII

Sec. 11¼. (a) Except as provided in subdivision (c), the Legislature may simplify the reporting and collecting of California personal income taxes, notwithstanding any other provision of this Constitution, by reference to any provision of the laws of the United States as the same may be or become effective at any time or from time to time, and may prescribe exceptions or modifications.

(b) The phrase "any provision of the laws of the United States" shall not refer to the amount of any federal tax on, in respect to, or measured by, personal income which is computed under any provision of the federal laws.

(c) The Legislature shall not enact any statute which directly or indirectly provides for a change in state personal income tax rates based upon future changes in personal income tax rates of the United States.

General Analysis by the Legislative Counsel

A "Yes" vote on this measure is a vote to authorize the Legislature to adopt, by reference, future amendments to federal laws for the purpose of reporting and collecting California personal income taxes.

A "No" vote is a vote to deny the Legislature this authority.

For further details see below.

Detailed Analysis by the Legislative Counsel

The State Constitution has been construed as preventing the Legislature, in adopting federal laws for state purposes, from adopting future amendments to federal laws.

This measure, if approved by the voters, would add Section 11¼ to Article XIII of the Constitution to permit the Legislature to incorporate provisions of the federal law as they may be enacted or amended in the future, as well as to incorporate existing provisions of federal law, so as to make those provisions apply to the reporting and collection of state income taxes. The federal law, so incorporated, would be made subject to exceptions or modifications, if any, that the Legislature might prescribe.

The measure would specifically prohibit incorporation by reference into the state law of the amount of any federal tax on, in respect to, or measured by, personal income which is computed under provision of the federal laws.

The measure would, in addition, prohibit the enactment by the Legislature of any statute providing, either directly or indirectly, for a change in the rates of the state personal income tax based on future changes in federal personal income tax rates.

Argument in Favor of Proposition No. 4

At last! Here is a proposal to make our state income tax easier to figure out.

A YES vote on this proposition will allow the Legislature to conform state income tax laws as much as practical to federal income tax laws. This would mean we could use the calculations made for federal tax purposes in filling out our state tax form. There is no reason why the burden of taxation should be made even greater by requiring California taxpayers to go through the time-consuming process of having to prepare and compute a complicated state tax form totally different from the federal form. We would not accept the higher federal tax rates. In fact, this proposal specifically prohibits an increase in our tax rates without a change in the law.

Under present law we make additions, subtractions, and computations necessary for the federal tax form and then go through an entirely different process for the state tax return. For those who hire accountants to prepare their forms, this will save money.

There are now many differences between the federal law and the state law. This proposal will ease administration and cut costs as returns will be easier to check and verify. This will simplify the state return and economize on the size of the form.

The vast majority of the sections of the federal income tax law and the state income tax law are similar now—but the few differences that do exist are the problem areas we seek to simplify with this constitutional amendment.

We are not giving away our own power to make necessary changes in our tax laws in the future. We simply say that the present federal method of computing income is acceptable to us and should be incorporated in our state law. At any time in the future the Legislature may determine that a particular new federal law would seriously affect our state financial structure and we could reject that change. Thus, our own State Legislature will retain the power to write our tax laws so they will truly fit the economy of California's taxpayers.

The California Legislature conducted a two-year study of our tax structure and this proposal is one of the recommendations that was made. A number of states have already adopted this system, and most of our professional legal and accounting societies are supporting this proposal.

Vote YES for simplicity and economy.

SENATOR MILTON MARKS,
San Francisco

SENATOR JAMES R. MILLS,
San Diego

ASSEMBLYMAN JAMES A. HAYES,
Long Beach

Argument Against Proposition No. 4

California voters should vote NO on Proposition 4 for the following reasons:

Proposition 4 benefits the rich at the expense of middle and lower income families. Under the guise of conformity, federal exemptions, which are much lower than the State's could easily be adopted resulting in a major downward shift of the tax burden from the wealthy to the middle and lower income groups. In addition, with full conformity to federal law, Proposition 4 would mean an automatic tax windfall of up to $100 for persons owning stock.

Proposition 4 discriminates against veterans and military personnel. Proposition 4 would remove the California tax law which now provides that the first $1,000 of military pay (active duty, reserve duty, and retired persons) is exempt from the state income tax. All of these citizens would lose that benefit if California conforms to federal tax laws.

Proposition 4 would mean that federal tax law would automatically become state law. Why should California taxpayers shift the responsibility for enactment of state tax laws to the federal government? Only 38 out of 435 members of the House of Representatives and only 2 of the 100 members of the Senate are elected by Californians. The practice of adopting federal law "by reference" as this measure proposes, could spread from tax laws to automatic state adoption of many other federal laws.

Californians would be giving up most of the responsibility of the state government.

Dilution of accountability for tax legislation will not best serve California's taxpayers. Responsibility for increases in your state income tax should not be divided between Sacramento and Washington. The legislative body spending the tax dollar should be solely answerable to the electorate for levying the tax. This is the best assurance that your elected representatives will carefully balance the interests of taxpayers and the beneficiaries of state appropriations.

A NO vote on Proposition 4 will protect the spendable wages of the lower income families living and working in California.

A NO vote on Proposition 4 will protect the tax right of veterans and military personnel living and working in California.

A NO vote on Proposition 4 will assure all Californians that our tax laws will be made by California legislators, not by elected representatives from other states.

We do not see how this proposal will do anything for the ordinary taxpayer. Its implications are too serious to be put into our Constitution. I urge all Californians to vote NO on Proposition 4.

RICHARD J. DOLWIG
California State Senator
12th Senate District

JOHN J. MILLER
California State Assemblyman
17th Assembly District

APPENDIX VII

Article

Wall Street Journal

August 13, 1981

8 THE WALL STREET JOURNAL, Thursday, August 13, 1981

Reagan's Tax Cuts Leave States in a Bind Because of Links With Federal Formulas

A WALL STREET JOURNAL *News Roundup*

Passage of President Reagan's tax-cut program has tossed additional burdens on state governments that already are scrambling to deal with reductions in federal aid.

Because most states have linked at least part of their tax formulas to the federal government's, the sweeping tax cuts enacted by Congress have left the state governments facing revenue losses estimated at as much as $2.3 billion in the first year after the federal act takes effect.

"There's no question that the federal government has put us in a bind," said Lt. Gov. James Green of North Carolina.

New federal depreciation schedules and incentives for savers are expected to cause the biggest drains on state revenue. To a lesser extent, immediate cuts in personal income taxes, and the indexing to take effect in 1985, also are expected to diminish state funds. Already, some states have proposed laws severing the links between state and federal tax formulas.

The cuts in corporate income taxes that will follow the faster depreciation write-offs in the federal bill will cost the states an estimated $2 billion in the first year, according to the National Governors Association.

Of the 45 states with corporate income taxes, 35 use federal definitions of taxable income, while 26 automatically adopt federal depreciation schedules.

Losses for the States

One liberal tax-research group, Citizens for Tax Justice, has estimated that 25 states, including populous New York, New Jersey, Ohio, Pennsylvania and Illinois, stand to lose more than $15 billion over the next six years because of the faster depreciation rates.

Losses to individual states have been estimated at as much as $45 million to $60 million in the first year for Massachusetts, $15 million for Kentucky, $33 million for Florida, $12 million for North Carolina, $170 million for Minnesota, $30 million to $35 million for Georgia, $7 million for Kansas and $70 million to $100 million for Pennsylvania.

"States must move quickly to amend their laws where necessary and must be steadfast against corporate pressures for conformity if they are to avoid even more severe cutbacks in state services or increased state and local taxes on working people," the tax group said.

Based on an earlier version of the federal tax bill, Ohio's Department of Taxation several months ago estimated the state would lose $18 million in tax revenue in fiscal 1982 and $50 million in fiscal 1983. Those loss estimates were based on Ohio adopting the federal changes in depreciation schedules as well as the change in the tax on married couples when both spouses work, says Richard A. Levin, director of research for the

Rift in Ohio

The change in the federal depreciation schedule has created a rift in the Ohio legislature, with the state house pushing for continuance of the old federal standards for state tax purposes and the senate arguing that the state "should be moving in the same direction as Congress," Mr. Levin said.

But some other states, notably California, won't be affected significantly by the new federal depreciation rules. California has its own business tax code, which isn't linked to the federal formula. "We didn't make that mistake," Gov. Edmund G. Brown Jr. said.

West Virginia, which depends primarily on business and occupation taxes for revenue rather than the corporate income tax, will see an "almost insignificant" reduction in its revenue, said Herschel Rose, tax commissioner.

One major tax break for savers also could make deep inroads in state coffers. The tax-exempt "All-Savers" certificates could drive up interest rates on competing state and municipal notes and bonds.

Individuals are acquiring about half the dollar value of new municipal bonds and notes, according to John E. Petersen, director of the Government Finance Research Center, the research arm of the Municipal Finance Officers Association. The threatened loss of half, or $10 billion, of that private market would push up tax-exempt rates one percentage point, and that could cost the state and local governments about $620 million a year in extra interest costs, he estimated. The National Governors Association estimated that cost at $300 million for the states.

"There aren't a whole lot of taxable transactions when somebody puts money in the bank," said Ken Cory, California state treasurer. The state borrows several hundred million dollars a year, he said, but "we're more worried about general interest rates than the All-Savers plan."

Ohio's budget director, William D. Kelp, said the All-Savers certificates will have little effect in states like Ohio, which he said sells most of its bonds to insurance companies and other institutions.

In New York, Michael J. DelGiudice, Gov. Hugh Carey's director of policy management, said New York's borrowing plans will be affected "somewhat" by the competition from All-Savers certificates, but he said the state hasn't decided what change will be made.

He estimated that the entire package of federal cuts in the tax bill would cost New York $30 million in the current fiscal year, ending next March 31, $100 million in fiscal 1983, and "upwards of $200 million" each year after that.

Richard A. Levin, director of researc for the Ohio Department of Taxation, sa indexing, which adjusts personal income ta rates to offset inflation, won't affect th state, because Ohio's income tax is based federal adjusted gross income. Indexi changes the amount of tax on income, n the amount of income itself, Mr. Levin said

One change that will decrease the state tax bite, Mr. Levin said, is the reduced ta a married couple will pay when bo spouses are employed.

Under that law, a couple will be allowe to deduct 5% of the income of the spou with the lower income in 1982 and will be a lowed to deduct 10% of that income in 19 Mr. Levin said Ohio estimates it will lo $13 million in its fiscal year ending July 3 1983, and $27 million in fiscal 1984 because the law.

But 16 states actually will gain from t tax cuts because they allow deductions federal tax payments. The smaller dedu tions of federal taxes will leave resident with more income for the states to tax.

The three states that "piggyback," base their taxes on taxpayer's federal liabi ities, may abandon that system, adju the "piggyback" rate to allow for the fe eral cuts, or cut spending. Nebraska Ta Commissioner Fred Herrington says that " we didn't do anything, we'd run out money," but the state probably won't aban don piggybacking. "It saves too muc money and it's too convenient," he said.

Few Expect Tax Increases

While some state officials are supportin legislation to soften the effects of the federa tax cuts, few say they will increase taxes.

"This governor just won't raise taxes," New York's Mr. DelGiudice said. "We'l make up for the losses in spending cuts."

And while many state officials are dis mayed at finding their own budgets carriec along on the tide of Mr. Reagan's tax cuts many seem optimistic that if the new fed eral tax policies succeed in stimulating the economy, the states will benefit.

"In California, we have a lot of defense contractors and we should do fairly well" if increased military spending injects more money into the state economy, Mr. Cory said.

"We obviously can absorb these reductions if we have a resurgence in the economy," said Pennsylvania's Robert C. Wilburn, Secretary of Budget and Administration. "That's the big question."