

CHAPTER FOURTEEN

ADOPTION BY REFERENCE; LEGISLATIVE CLASSIFICATIONS

1. ADOPTION BY REFERENCE
 2. LEGISLATIVE CLASSIFICATIONS
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This chapter discusses two special problems the drafter encounters when drafting bills. The first of these problems is the adoption of statutes by reference. When should a bill **adopt** another statute **by reference**? What is the best way to do this?

The second of the problems involves finding a classification that includes only the group of persons, cities, counties, activities, etc., that are to be covered in a bill without violating federal or state constitutional provisions.

1. ADOPTION BY REFERENCE.

A bill can adopt by reference all or a part of an existing law.

a. Adopting by Reference.

There are a number of reasons for adopting another statute by reference. One reason is to reduce the length of the bill. For example, by adopting the Administrative Procedures Act by reference and making it apply to the bill being drafted, it becomes unnecessary to provide a similar, detailed procedure in the bill.

Another reason for adopting a statute by reference is to provide a uniform procedure for many similar cases. When a general procedure is adopted by reference in many different statutes, changes in the procedure for all those statutes may be made by amending only the statute setting forth the general procedure. For example, if each new bill that authorizes a vote adopts the same election procedure, elections become more uniform and the election laws become easier to administer.

On the other hand, adoption by reference has its disadvantages. When a law is adopted by reference in a new bill, the reader is forced to look to the adopted law to find out what the new bill provides. The reader thus must look at two or more different places in ORS to find out what the law is. This inconvenience is not the only disadvantage. Sometimes the adopted provision does not exactly apply to the new provision. If the adopted provisions are adjusted, the reader must apply the modifications to the adopted provisions and then apply both to the new provision. If the adopted provisions are not adjusted, a question is presented as to what extent the adopted provisions are incorporated into the bill.

There is still another difficulty with adoption by reference. Amendments may be made later to the provisions adopted (but not set forth) in the new bill without regard to the effect of those amendments on the new bill. Through the use of a numbers-referred-to search (on STAIRS or other appropriate computer program or through the series cards) those sections

can be identified. Too often drafters fail to take into consideration the effect of an amendment to the provisions adopted by reference.

Whether another statute should be adopted by reference in a new bill is a question of judgment. The drafter must weigh the advantages and disadvantages in each case. Within certain limits, legislation by reference is desirable; carried beyond those limits, it can have unfortunate consequences.

b. Effect of Adopting by Reference.

Generally speaking, the effect of an adoption of another statute by reference in a new bill is the same as though the provisions adopted had been incorporated bodily into the bill. To adopt by reference, reference is made to a particular statute (such as a provision that something be done “in the manner provided in ORS chapter 183”).

In Oregon, both general and particular references may accomplish the incorporation not only of the provisions of the law in force on the date the adopting bill becomes law but also subsequent amendments to the adopted statute. ORS 174.060 provides:

174.060. When one statute refers to another, either by general or by specific reference or designation, the reference shall extend to and include, in addition to the statute to which reference was made, amendments thereto and statutes enacted expressly in lieu thereof unless a contrary intent is expressed specifically or unless the amendment to, or statute enacted in lieu of, the statute referred to is substantially different in the nature of its essential provisions from what the statute to which reference was made was when the statute making the reference was enacted.

Because of ORS 174.060, if the bill is **not** to incorporate future amendments to the adopted statute, words should be added to the bill that disclose this intent. A reference to the ORS section followed by reference to the edition of ORS in which the version being voted upon is found may suffice; e.g., ORS 184.730 (1993 Edition). This procedure is so cumbersome, however, that it should be used sparingly. The reader not only has two places to seek the law, the places are in different editions of ORS.

The repeal of a statute adopted by a general or particular reference may create problems concerning the operation of that statute as a part of the adopting statute. In Oregon, in the case of an adoption by reference, a repeal of the adopted provisions probably would not delete those provisions from the adopting statute. As the court said in State v. Dobson, 169 Or. 546 (1942):

The general rule is that where an act adopts the whole or a portion of another statute, “the subsequent amendment or repeal of the adopted statute has no effect upon the adopting statute unless it is also repealed expressly or by necessary implication.”

ORS 174.060, indicating an intent to include subsequent amendments, changes the rule stated above by the court **only** to the extent of including subsequent **amendments**, not a repeal.

c. Adopting a Federal Law or Statute of Another State.

A distinction must be made between adoption by reference of Oregon statutes and adoption of a statute of another state or a federal statute. In adopting by reference an Oregon statute, under ORS 174.060 the adoption generally will include future amendments to the adopted statute. However, in adopting the statute of another jurisdiction (state or federal) by reference, there is a question as to whether the reference constitutionally can adopt the statute of the other jurisdiction including **future amendments**. The cases are not clear on this point. There are a number of cases holding that the attempt to adopt future amendments to a statute of another jurisdiction is an unconstitutional delegation of legislative authority. In adopting by reference a statute of another jurisdiction, the drafter must give serious consideration to this problem. Hillman v. Northern Wasco County PUD, 213 Or. 264 (1958) (overruled on other grounds, Maulding v. Clackamas County, 278 Or. 359 (1977)). The drafter should be cautious about phrases like “as amended from time to time.”

The federal Internal Revenue Code, or a specific section of the federal Internal Revenue Code, may be adopted by reference. However, unless the statute pertains to taxable income or the measurement of taxable income, the adoption will not include future amendments to the Internal Revenue Code section adopted. Section 32, Article IV, Oregon Constitution, contains an exception to the rule that the Legislative Assembly cannot divest itself of its legislative power by conferring it upon someone else. The exception, however, applies only to taxable income for income tax purposes. Seymour v. Dept. of Revenue, 311 Or. 254 (1991).

Conformity with federal regulations can be accomplished constitutionally by the method used in ORS 632.516. Seale v. McKennon, 215 Or. 562 (1959); *Suggested State Legislation* (1959), page 188, Alternate 2.

Examples of statutory provisions adopting by reference federal regulations or regulations formulated by some private national organization, such as the National Board of Fire Underwriters, are as follows:

SECTION ____. The rules adopted from time to time by the Department of ____ after it has considered changes in the federal regulations are the state rules. In no event may the state rules as adopted by the Department of ____ be more restrictive than the federal regulations.

OR

SECTION ____. The Department of ____ shall adopt the substantive provisions of the applicable code or rule issued by an appropriate agency of the federal government, together with any amendments or alterations therein that are made from time to time by the federal agency. However:

(1) Nothing in this section requires the adoption or continuance in force of a code or rule, or amendment or addition thereto, that the Department of ____ finds to be impracticable in the light of local conditions; and

(2) Nothing in this section prevents the Department of ____ from adopting any substitute or additional code or rule that it finds to be desirable in the light of local conditions to promote safety or the public welfare.

OR

SECTION _____. The Department of _____ shall adopt and enforce rules for heating installations. Rules establishing minimum safety standards and specifications may conform to standards and specifications of the Society of Automotive Engineers that are current at the time the rules are adopted.

d. Making References Specific.

When possible, references should be definite rather than indefinite. In rare cases the adoption of a statute by reference to the general area of subject matter without reference to such statute in terms of a specific section number may be desired but generally it is a practice to be avoided. Certainly, such references as “hereinbefore,” “hereinafter,” “preceding” or “following” should never be used in making references to sections. Phrases like “except where otherwise specifically provided” and “as provided in this (year) Act” and “Notwithstanding any other provision of law,” should be omitted entirely. The drafter should use a specific reference. Vague references raise constant questions as to the application of the section and cause difficulties in compiling the statute in ORS.

2. LEGISLATIVE CLASSIFICATIONS.

Class legislation is constitutional only if the class is identifiable, reasonable and natural, and the legislation treats all within the class on the basis of equality. State v. Hunter, 208 Or. 282 (1956). When class legislation is attacked, it is usually on the ground that the legislation violates the privileges and immunities clause and equal protection clause of the U.S. Constitution and the privileges and immunities clause of the Oregon Constitution. Special or local legislation is prohibited in certain cases specified in section 23, Article IV, Oregon Constitution.

a. Legislation Affecting Cities and Counties.

Cities are granted home rule by section 2, Article XI, Oregon Constitution.

City charters adopted by the voters are subject to the Constitution and criminal laws of the state. Section 2, Article XI, Oregon Constitution. The limitation implies that a city ordinance may not prescribe for particular conduct a penalty more severe than that prescribed by a state statute for the same conduct. City of Portland v. Dollarhide, 300 Or. 490, 502 (1986).

State laws of general applicability also supersede powers of a city. The Oregon Supreme Court has held, in a line of cases characterized by considerable internal conflict, that any general law applying to all in a valid class of cities prevails over a city charter or ordinance in conflict with that law, Burton v. Gibbons, 148 Or. 370 (1934); that a general law prevails only as to matters of predominantly statewide concern, State ex rel. Heinig v. Milwaukie, 231 Or. 473 (1962); and that the determination as to whether a statute prevails depends on the following:

When a statute is addressed to a concern of the state with the structure and procedures of local agencies, the statute impinges on the powers reserved by the amendments to the citizens of local communities. Such a state concern must be justified by a need to safeguard the interests of persons or entities affected by the procedures of local government.

Conversely, a general law addressed primarily to substantive social, economic or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the local community's freedom to choose its own political form. In that case, such a state law must yield those particulars necessary to preserve that freedom of local organization. La Grande/Astoria v. PERB, 281 Or. 137, 156, 576 P.2d 1204, aff'd on reh'g, 284 Or. 173 (1978).

The decisions in La Grande/Astoria v. PERB, supra, Medford Firefighters Assn. v. City of Medford, 40 Or. App. 519 (1979), City of Roseburg v. Roseburg City Firefighters, 292 Or. 266 (1981), and Denton Plastics, Inc. v. City of Portland, 105 Or. App. 302 (1991), all reflect a judicial disposition to enlarge the role of the Legislative Assembly and to diminish the role of the courts in determining what the role of city governments shall be in their relationship to the state.

Counties are granted optional home rule by section 10, Article VI, Oregon Constitution. The charter of a home rule county is required to "prescribe the organization of county government." Section 10, Article VI, Oregon Constitution.

As counties adopt home rule charters, consideration must be given to the effect of state statutes on counties having charters and county ordinances adopted under such charters. Fischer v. Miller, 228 Or. 54 (1961); 30 Op. Att'y Gen. 388 (1962); Etter, "County Home Rule in Oregon Reaches Majority," 61 Or. L. Rev. 5 (1982).

Constitutional county home rule was originally envisioned as a way for counties to avoid having to go to the Legislative Assembly to change general laws affecting county operations. While counties without charters obtain a grant of legislative power under ORS 203.035 and operate under the general laws of the state, charter counties obtain their powers from, and operate under, their charters. The Oregon courts have nevertheless treated general law counties and home rule counties the same. Caffey v. Lane County, 298 Or. 183, (1984); Multnomah Kennel Club v. Dept. of Revenue, 295 Or. 279, 284 (1983).

As a result, the primary difference at this time between a home rule county and a general law county is that a home rule county may alter its structural organization and may eliminate or change the status of county elected officers. Organizationally, a general law county may only change the number of county commissioners and change the county surveyor to an appointed position. ORS 203.035 and 204.005.

One final issue relating to county home rule is the extent to which county charters and ordinances are subject to the judicial doctrines arising out of city home rule cases. See Multnomah Kennel Club v. Dept. of Revenue, supra, in which, although the issue before the court involved county powers based on a statute and the constitutional section pertaining only to counties, the court relied on certain home rule cases involving only cities. See also Att'y Gen. Letter of Advice (OP-5849), dated July 10, 1985, in which the opinions regarding county home rule similarly relied on home rule cases involving only cities.

b. Privileges and Immunities of Citizens; Equal Protection.

It has been stated that the controlling principles that guide the courts in determining questions of alleged unconstitutional discrimination or class legislation are the same whether one invokes the equal protection clause of the Fourteenth Amendment to the Constitution of the United States or the privileges and immunities provision (section 20, Article I) of the Oregon Constitution. Plummer v. Donald M. Drake Co., 212 Or. 430 (1958); School Dist. 12 v. Wasco County, 270 Or. 622 (1974).

Although the controlling principles may be identical, it is clear that the Oregon Supreme Court in its recent decisions has adopted a different method of analyzing challenges to class legislation under section 20, Article I, Oregon Constitution, than the method used by federal courts when considering challenges to laws or regulations under the Equal Protection Clause of the Fourteenth Amendment. State v. Clark, 291 Or. 231 (1981); Hewitt v. SAIF, 294 Or. 33 (1982); Hunter v. State of Oregon, 306 Or. 529 (1988). One consequence of this change in Oregon jurisprudence may be to limit to some degree the discretion that the Legislative Assembly previously exercised when enacting legislation that provided for classification of things or persons. When drafting a bill creating classifications, the drafter must consider this recent development in Oregon law.

The privileges and immunities clauses prohibit the granting to a citizen, or class of citizens, of privileges or immunities which upon the same terms do not belong equally to all citizens. The equal protection clause of the Fourteenth Amendment to the United States Constitution prohibits as discriminatory legislation in favor of particular persons and against others in like condition. These provisions mean that not only must an Act treat all persons covered by it alike, under the same conditions, but also the **classification** of persons must be identifiable, reasonable and natural. For example, an employers' liability law that applies to employees of private corporations but not to employees of individuals and copartnerships might be held void on the ground that there is no reasonable basis for exempting employees of individuals and copartnerships. On the other hand, the same law applied only to railroads probably would be upheld because this classification is not based on the **difference of employers**, but upon a difference in the **nature of employment**.

A good summary of cases interpreting the federal equal protection clause is found in the Legislative Reference Service analysis and interpretation of the United States Constitution entitled *The Constitution of the United States of America* (1982 ed.).

The legislature is allowed wide discretion in classification. Classification will not render a state statute exercising the police power unconstitutional so long as it has a reasonable basis; its validity does not depend on scientific or marked differences in things or persons or in their relations. The classification suffices if it is practical. While a state legislature may not arbitrarily select certain individuals for the operation of its statutes, a selection is obnoxious to the equal protection clause only if it is clearly and actually arbitrary and not merely possibly so. A substantial difference, in point of harmful results, between two methods of operations, justifies a classification and the burden is on the attacking party to prove it unreasonable. There is a strong presumption that distinctions made in state

legislation are based on adequate grounds. Facts sufficient to sustain a classification that can reasonably be conceived of as having existed when the law was adopted will be assumed.

There is no doctrinaire requirement that legislation should be couched in all embracing terms. A statute exercising the police power may be confined to the occasion for its existence. The equal protection clause does not mean that all occupations that are called by the same name must be treated in the same way. The legislature is free to recognize degrees of harm; a law that hits the evil where it is most felt will not be overthrown because there are other instances to which it might have been applied. A state may do what it can to prevent what it considers an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rules laid down were made mathematically exact. Exceptions of specified classes will not render the law unconstitutional unless there is no fair reason for the law that would not equally require its extension to the excepted classes. Incidental individual inequality does not violate the Fourteenth Amendment. One who is not discriminated against cannot attack a statute because it does not go further; and if what it commands of one it commands of all others in the same class, that person cannot complain of matter that the statute does not cover.

c. Cases Where Special or Local Laws Are Prohibited.

Section 23, Article IV of the Oregon Constitution, enumerates several types of special or local laws that are prohibited. The drafter should become familiar with this section because, contrary to popular belief, not all local and special laws are invalid. The section describes 14 subjects concerning which the Legislative Assembly may not enact special or local laws. It should be noted that the Oregon Supreme Court has declared that subdivision 7 of the section, relating to “laying, opening and working on highways,” has been impliedly repealed, at least as a basis for defeating legislative appropriations for the construction of public roads. Stoppenback v. Multnomah County, 71 Or. 493, 507 (1914).

A “local law” is a law that applies to and operates exclusively upon a portion of the territory of the state and the people living therein and upon no other persons and property. A “special law” is one that is applicable only to particular individuals or things. State v. Malheur County, 185 Or. 392 (1949).

In cases where local laws are prohibited, it is possible to resort to classification. For example, notwithstanding the ban on certain regulation of courts, it is possible to divide the counties, with respect to the procedure for summoning and impaneling grand and petit juries, into three classes and make some laws apply to one class only. The selection of a standard of classification is exclusively a legislative power, the exercise of which is not subject to control by the courts. However, any classification must be natural and reasonable, not arbitrary, and must be founded upon real and substantial differences in the local situation and necessities of the class of counties to which it applies. If a classification excludes from its operation counties differing in no material particular from those included in a class, the classification cannot be upheld. Counties may be classified upon the basis of differences in population; and, if such classifications are natural and reasonable, laws applicable to a single class will be regarded as general in their character and not local or

special. Mere convenience of local communities, the financial necessities of particular counties and the conflicting views of citizens on the subject of the necessity of some particular procedure relating to summoning and impaneling jurors, would not be sufficient. An arbitrary selection cannot be justified by calling it a classification. The marks of distinction on which a classification is founded must be such as in some reasonable degree will account for or justify the restriction of the legislation.

Examples of both reasonable and arbitrary classifications can be found. A bill is general and constitutional if it applies to all counties having a population of more than 500,000, even if there is only one such county in Oregon, as long as the bill is drafted in such a way that it will apply to all other counties as rapidly as they acquire that population. A law applicable to all cities of fewer than 100,000 population was upheld in Southern Pacific v. Consolidated Freightways, 203 Or. 657 (1955).

On the other hand, in a case where special or local laws are prohibited, a great risk is run in attempting to make the bill apply to a county having a population of “not less than 64,540 and not more than 64,545,” for example. The county might as well be named, for the bill in all likelihood never could apply to any other county. In other states where special or local laws are prohibited generally, Acts providing for the government of cities having a population of “from 23,000 to 35,000” and “from 50,000 to 100,000” have been upheld. But a classification based upon a difference in population of 1,000 has been declared unconstitutional. When resorting to classification on the basis of population, the classification should be flexible. For example, the following could be used: “in every judicial district comprising but one county and having a population of more than 90,000 but less than 125,000, according to the latest federal decennial census.” To classify according to the census of 1990 or any **particular** census will make the bill local, because no other judicial district ever could come within the class even though it increased or decreased according to a later census so as to have approximately the same population. Classifications also may be made to depend upon population “according to the latest federal decennial census or an estimate or count under ORS 190.510 to 190.610, whichever is more recent.”

With all the warnings on local law, the drafter must always be aware of section 23, Article IV. When that section does not apply, a county or city may be named but such naming seems to make legislators uncomfortable because of the popular belief that all local laws are unconstitutional.