THE FIRST OF THE STUDENT articles on savings associations will examine various types of tie-in statutes and parity regulations which states have enacted to give their local savings associations the same powers as their federal counterparts. A framework for predicting the constitutional integrity of such statutes and regulations will then be established by reviewing United States Supreme Court analyses of federal statutes which, much like state parity statutes, delegate legislative power to administrative agencies. By using Ohio case law on delegation of authority, Ohio's statute which grants rule-making power to the Superintendent of Building and Loan Associations will then be analyzed as to its probable constitutionality. Finally, each type of tie-in statute and parity regulation will be viewed again to evaluate the due process safeguards provided in delegating authority.

A. The Need for Parity

Tie-in statutes and parity regulations in the savings and loan area are legislative and administrative devices designed to give state savings associations the same or similar powers possessed by federal savings associations. The reason for having parity between the state and federal savings associations is simple: competition. If federal associations are given expanded powers which enable them to offer more and better services or higher interest rates, then state savings associations will naturally be at a disadvantage in the thrift business. But there is a lack of parity because of the broad powers given by Congress to the Federal Home Loan Bank Board (FHLBB). With regulatory control over all federal savings associations, the FHLBB is not bound to conform to state laws in promulgating its regulations.

Before the advent of tie-in legislation, states had made several attempts either to eradicate or limit the powers of federal savings associations operating within their jurisdictions. Perhaps the most straightforward attack on federal savings associations was made in First Federal Savings and Loan Association v. Loomis, in which Wisconsin attempted to have legislation authorizing the

2 See cases cited at note 8 infra.
3 97 F.2d 831 (7th Cir.), constitutional question certified to the Attorney General, 305 U.S. 562, cert. granted, 305 U.S. 564 (1938), cert. dismissed on motion of petitioner, 305 U.S. 666 (1939).

Loomis was not Wisconsin's first attack on these federal associations. In Hopkins Fed. Sav. & Loan Ass'n v. Cleary, 296 U.S. 315 (1935), the state tested the constitutionality of section 5 (i) of the Home Owners' Loan Act. This section, which permitted state savings associations to convert to federal associations in spite of any contrary state law, was held
formation of federal savings associations declared unconstitutional. Wisconsin argued that Congress had invaded the powers reserved to the states in violation of the tenth amendment when it allowed for the formation of federal savings associations. The Seventh Circuit Court of Appeals rejected Wisconsin’s argument and found the statute constitutional. The decision was premised on the congressional power to create fiscal agents and to provide for the general welfare of the United States. The current view is that federal thrift institutions are legitimately regulated by Congress under the commerce clause.

California used a direct approach in its fight to protect its local savings associations from federally chartered associations. California attempted to apply the state laws which controlled the local thrift industry to federal associations operating within the state. Under the doctrine of preemption, the district court in California v. Coast Federal Savings & Loan Association held that Congress had embraced the entire field with its legislation in the area; thus state regulatory statutes were invalid as applied to federal associations. Several states have attempted the same direct control of federal associations, but these attempts have been uniformly rejected.

The final noteworthy attempt to obtain equality was made by several Illinois financial institutions, including state chartered savings associations and banks, as well as a nationally chartered bank, all of whom brought actions to force federal conformity with local branching laws in Lyons to be void under the tenth amendment as an infringement upon the powers reserved to the states. Id. at 336.


As in Hopkins, the constitutional basis of Wisconsin’s claim was that the formation of federal savings associations was unconstitutional under the tenth amendment. 97 F.2d at 844 (Sparks, J., dissenting).

U.S. Const. art. I, § 8, cl. 1. The Court cited Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921), which held congressional formation of Federal Land Banks and Joint Stockland Banks to be constitutional.


Winter, 1978] Project 505

Savings & Loan Association v. FHLBB. The local associations in Lyons attacked a FHLBB decision which permitted federal associations to establish branches in Illinois, although local associations were not permitted to branch under state law. This suit was premised, in part, on equal protection and due process grounds. The district court was unable to find a basis for an equal protection claim, pointing to the fact that the two types of savings associations were under the control of two different regulatory agencies. The court stated that

state banks and state savings and loan associations may not complain of a competitive advantage accorded federal savings and loan associations by a separate and distinct regulatory body. State associations are free either to press their legislature into according them a comparable right, or to become federal associations.

The court held that the local savings associations had sufficient input into the FHLBB's decision-making process and thus due process was not denied.

The failure of these attempts to force federal conformity with local laws controlling the thrift industry resulted in state associations being placed at the mercy of federal statutory law and FHLBB regulation. The only alternative left for state chartered associations was to seek legislative changes; they could either ask Congress to limit the powers of federal associations or pressure the local legislatures to increase their own. The more logical and perhaps the easiest alternative was to seek legislative reform at the local level. This resulted in the various tie-in statutes and parity regulatory powers given to local administrative agencies.

B. Jurisdiction of the FHLBB

An examination of state statutes will reveal that local savings associations are given the power to become members of their regional federal home loan bank. In exercising this power, the state associations

12 377 F. Supp. at 20. The court based its opinion on Abilene National Bank v. Dolley, 228 U.S. 1 (1913), which rejected a similar competitive disadvantage argument made by a national bank with reference to state bank power.

The court also rejected an equal protection claim by national banks. The different treatment was found justified since the two entities are different types of institutions. 377 F. Supp. at 20-21.
subject themselves to the rules and regulations of the FHLBB\textsuperscript{16} and become members of the Federal Home Loan Bank System. (Only federal savings associations are members of the Federal Savings and Loan System.) The FHLBB has authority to promulgate rules and regulations to control Federal Home Loan Bank members\textsuperscript{17} as well as authority to regulate all federal savings associations.\textsuperscript{18} The regulations promulgated under these two different statutory grants of power are mutually exclusive,\textsuperscript{19} in that members of the Federal Home Loan Bank System are not subject to the regulations covering the Federal Savings and Loan System.\textsuperscript{20}

The FHLBB regulations that apply to members of the Federal Home Loan Bank System and thus to state chartered association members, are not detailed and normally do not infringe on state law. The various regulations involve liquidity, reporting, examination, flood insurance on mortgaged properties, and nondiscrimination.\textsuperscript{21} By comparing these regulations with those of the Federal Savings and Loan System, which provide in detail the power exercisable by the federal associations,\textsuperscript{22} one can easily see why parity regulations and tie-in statutes are necessary.

\section{II. The Parity Scheme in the States}

Only eight states have chosen not to use tie-in statutes or parity regulations to make their local savings associations competitive with federal savings associations.\textsuperscript{23} The remaining forty-two states have tied into federal law. Statutes that have accomplished this federal-state parity have done so in a variety of ways. The purpose of this section will be to classify, as far as possible, this assortment of statutes and to indicate some common characteristics. With this goal in mind, the statutes have been placed into five major categories. These will be denominated (1) completely automatic statutes, (2) automatic with post limitation statutes, (3) prior consent

\textsuperscript{16} Id. § 1444 (b).
\textsuperscript{17} Id. §§ 1437 (a), 1444 (b).
\textsuperscript{20} The opposite is not true. Federal savings associations are required to be members of the Federal Home Loan Bank System; thus they are subject to Federal Home Loan Bank regulations. Home Owners' Loan Act of 1933, § 5 (f), 12 U.S.C. § 1464 (f) (1970).
\textsuperscript{21} 12 C.F.R. §§ 523.11, 523.15, 523.20, 523.29, and 528.2-528.7 (1977).
\textsuperscript{22} See, e.g., 12 C.F.R. §§ 545.6, 545.8-3 (1977), which provide in detail the types of loans which federal savings associations may make.
\textsuperscript{23} Alaska, Delaware, Indiana, Massachusetts, Michigan, New Hampshire, New York, and Vermont have not adopted any tie-in statutes. It should be noted that many states have passed tie-in legislation within the last two years. For this reason, current legislation should be examined very carefully in these eight states before any conclusive statements are made concerning tie-in legislation.
statutes, (4) one-at-a-time statutes, and (5) miscellaneous statutes. In addition, it should be noted that there are nine states with more than one statute, each covering a different grant of federal power. Because the individual statutes of these states will still be placed in the above classifications, a state may appear in more than one category.

A. Classification of the Statutes

The completely automatic statute is a direct legislative grant of federal power to state savings associations. The powers given under this type of statute are automatically conferred upon the local associations, i.e., the powers are given without the approval of and many times in spite of the state regulatory agency which controls the local savings association. The majority of these statutes are only partial tie-in statutes, in that local associations are given only the select powers expressly designated by the statute. For example, Washington has two completely automatic statutes. The first grants the local savings associations the same investment powers as federal savings associations. The second gives the local association the ability to make the same realty-secured loans as can be made by federal associations. There are nine other states which have this partial grant of power given through the use of the completely automatic statute.24

24 North Carolina, Minnesota, Idaho, Iowa, Maine, West Virginia, Nevada, Colorado, and Texas have at least two tie-in statutes, each providing for a different method of tie-in relative to the area covered by the individual statute.

25 WASH. REV. CODE ANN. § 33.24.190 (1961). This section states: "Notwithstanding any provision of this title, an association may invest its funds in any loan or purchase which is permitted to a federal savings and loan association doing business in this state."

26 WASH. REV. CODE ANN. § 33.24.100 (Supp. 1976). This section states in pertinent part:

An association may invest its funds in loans secured by first mortgages in improved real estate, subject to the following conditions and restrictions: . . .

(4) Notwithstanding the provisions of this section, an association may make any loan which is permitted to a federal savings and loan association doing business in this state.

Like many statutes in this area, subsection 33.24.100 (4) is difficult to interpret. A literal reading of the subsection would give the state association the same lending powers as federal associations. However, the subsection is a part of the section concerning real estate mortgage loans only. For this reason, the author is forced to assume that state associations in Washington are given only the same lending powers as federal associations in the real estate lending area, to be sure a more expansive interpretation is possible.

27 ALA. CODE tit. 5, § 16-52 (1975) (granting federal loan, investment and contract powers to state savings association); COLO. REV. STAT. §§ 11-41-112(e), 11-14-114(I)(i), 11-41-119 (4) (1973 & Cum. Supp. 1976) (giving through tie-in legislation the powers for local associations to act as trustees for pension plans, to invest in corporate stock, and to make the same loans that federal associations can make); IDAHO CODE § 26-1934 (1977) (automatic grant of federal loan and investment powers); ME. REV. STAT. tit. 9-B., §§ 722(3), 732(10) (Pamphlet 1977) (allowing the same type of savings accounts and deposits, and removal of restrictions on loan size limitations); MINN. STAT. ANN. § 51A.02 (21) (Cum. Supp. 1978) (allowing service organizations of local savings associations to exercise the same powers as federal service organizations); N.C. GEN. STAT. § 54-33.3(5) (Cum. Supp. 1977) (giving state service corporations the same powers with respect to their data processing activities as enjoyed by federal service corporations as of July 1, 1977; additional
A more comprehensive use of the completely automatic statute is found in three states which use this type of statute to give their state savings associations all powers possessed by federal associations. Arizona grants to its insured savings associations all powers granted to federal associations doing business within the state, subject only to limitations of state law. Nevada and Iowa have this same type of statute. The total incorporation of federal law through the use of a completely automatic statute in essence results in turning the state savings associations into federal associations.

The second grouping, automatic statutes with post limitations, is really only a variation of the first group. These statutes automatically confer federal powers upon state savings associations, but with one additional feature. Any powers given in this manner are expressly subject to any subsequent regulations promulgated by the state agency controlling the savings association industry. Normally this after-the-fact power enables the agency either to modify or to remove completely the power granted by the tie-in statute. An example of this type of legislation is the Wyoming statute which provides:

(b) Guaranty capital savings and loan associations shall have all powers authorized by the federal home loan bank for federal savings powers must be approved by the corresponding regulatory agency); N.D. CENT. CODE § 7-02-14 (1975) (loan and investment powers); TEX. REV. CIV. STAT. ANN. art. 852a, §§ 5.04, 5.16, 6.20 (1964 & Cum. Supp. 1978) (loan and investment powers and power to raise capital); W. VA. CODE §§ 31-6-42, 31-6-43 (1975) (loan and investment powers and the same powers in the issuance of savings accounts).

Subsection two of this section goes on to provide:
When more permissive lending and investment privileges and provisions regarding payment of interest to savers or savings account holders, establishment of savings accounts, the acceptance of which has been approved by the Nevada Supervisory and the Federal Savings and Loan Insurance Corporation or other powers, privileges, immunities and exceptions are extended to federally chartered associations, the same shall be extended to every federally insured association or corporation licensed under the provisions of this chapter.

This second subsection conflicts with the first subsection, in that it restricts the kinds of powers given to state associations in the first subsection. Perhaps the most logical interpretation of the two subsections is to read the second subsection as an exception to or a limitation on the first subsection.

Note that the Iowa Code also contains another tie-in statute. IOWA CODE ANN. § 534.31 (West Cum. Supp. 1977-78). This latter statute allows a state association to operate under the federal regulations as to deposits and interest and to exercise other "such powers" granted to federal associations as long as similar rules and regulations have been adopted by the supervisor of savings and loan associations. This section goes on to provide specifically that it is not meant to restrict the powers already granted to the state associations and thus should not be read to restrict in any way the tie-in powers granted under § 534.31.
and loan associations including authority to lend eighty percent (80%) of the value of improved real estate upon which secured loans shall be made as security provided that the state examiner by rule or regulation may restrict or limit such authority in the manner and to the extent he deems necessary.\textsuperscript{31}

Illinois,\textsuperscript{32} Utah,\textsuperscript{33} Pennsylvania,\textsuperscript{34} and Tennessee\textsuperscript{35} have statutes similar to Wyoming's in that these states also grant local associations all the federal powers\textsuperscript{36} subject to the local agency regulation. In addition, this type of statute is being used to tie into specific federal powers, such as loan and investment powers.\textsuperscript{37}

The prior consent statute is unique in that it requires an association to ask permission of the state regulatory authority to engage in activities permitted by the FHLBB for federal savings associations. The Hawaii statute, for example, provides that any insured state chartered institution that is a member of the Federal Home Loan Bank System "shall have, with the prior consent of the bank examiner, all rights, privileges, benefits and immunities" possessed by local federal institutions.\textsuperscript{38} The wording of the Hawaii statute seems to contemplate that each savings association will ask permission to exercise a power already granted to the federal associations and that permission will be granted or denied on a case-by-case basis. South Dakota also uses this type of statute to tie into federal savings associations' loan and investment powers.\textsuperscript{39}

\textsuperscript{31} Wyo. Stat. § 13-7-102 (b) (Interim Supp. 1977).
\textsuperscript{33} Utah Code Ann. § 7-13-74 (1953).
\textsuperscript{34} Public Act No. 1977-33, § 1, 1977 Pa. Legis. Serv. 138 (Purdon) (to be codified as Pa. Stat. Ann., tit. 7, § 6020-10 (a) (22) (Purdon)).
\textsuperscript{36} Note that the Pennsylvania tie-in statute is also limited by any other statutes which may be in conflict with the Pennsylvania tie-in statute. Instead of the repealer as found in most statutes, the Pennsylvania tie-in statute states that "[a]ssociations shall have all powers granted to Federal savings and loan associations except as limited or prohibited by this act." Public Act No. 1977-33, § 1, 1977 Pa. Legis. Serv. 138 (Purdon) (to be codified as Pa. Stat. Ann., tit. 7, § 6020-101 (a) (22) (Purdon)) (emphasis added).
\textsuperscript{39} S.D. Compiled Laws Ann. § 52-8-24 (Supp. 1977). Other states with tie-in statutes of this type are Minnesota and Colorado. See Colo. Rev. Stat. §§ 11-41-114(1)(h), 11-41-114 (l) (i), 11-42-111 (14) (1973) (granting federal investment powers and granting the same dividend rights as federal associations); Minn. Stat. Ann. § 51A.53 (1970). A word of caution about Colorado's tie-in statutes: the Colorado tie-in scheme is more fragmented than any other state's. There are at least nine separate sections and subsections which tie into federal law. In addition, § 11-41-114 (l) (i) is an extremely complex tie-in statute. This section is a "completely automatic" statute, as far as investments in the "capital stock, obligations, or other securities of any corporation." However, if a desired
The fourth type of statute, the one-at-a-time, is the most common. States choosing this type of statute have delegated the task of obtaining parity to the state administrative agency which controls state savings associations. This administrative agency promulgates parity regulations which give state associations federal powers in a step-by-step manner. The Ohio statute falls into this category and provides in pertinent part:

Notwithstanding any provision in Chapters 1151., 1153., 1155., and 1157. of the Revised Code, if federal savings and loan associations organized under the "Home Owners' Loan Act of 1933", 48 Stat. 128, 12 U.S.C. 1461, and amendments thereto, the home offices of which are located in this state, shall possess a right, power, privilege, or benefit by virtue of statute, rule, or regulation, or judicial decision or will possess such right, power, privilege, or benefit by virtue of a rule or regulation issued but not effective, which right, power, privilege, or benefit is not possessed by a building and loan association organized under the laws of this state, the superintendent of building and loan associations may, by regulation, authorize building and loan associations organized under the laws of this state to exercise such right, power, privilege, or benefit. 40

In addition to Ohio, twenty-five other states use this type of statute to tie into federal laws. 41

40 OHIO REV. CODE ANN. § 1155.18 (Page 1968).
41 ARK. STAT. ANN. § 67-1858 (Cum. Supp. 1977) (allowing the granting of concessions or premiums on the opening of a savings account, allowing the same legal relationship between savings account holders and savings associations as under federal law, allowing the same method of interest and dividend payment, allowing the use of the same business practices and allowing the same investment and loan powers); CAL. FIN. CODE § 5500.5 (West Cum. Supp. 1978) (all powers); COLO. REV. STAT. §§ 11-41-119 (4), 11-42-125 (2), 11-42-125 (8) (1973 & Cum. Supp. 1976) (investment and savings account powers); CONN. GEN. STAT. ANN. § 36-178g (West Cum. Supp. 1978) (all powers); FLA. STAT. ANN. § 665.215 (West Cum. Supp. 1978) (all powers) (Note that the Florida statute begins with the words "as regulated by the department." The author's interpretation is that it is necessary for a departmental regulation to be issued before a tie-in power can be used by a local association. An equally sound argument could be made, however, that the section is a completely automatic statute which automatically grants the federal powers, but is subject to department regulation, i.e., a prior consent statute); GA. CODE ANN. § 41A-302 (1974) (all powers); IDAHO CODE § 26-1934 (1977) (all powers, except for loan and investment powers which are automatically granted); IOWA CODE ANN. § 534.19 (18) (West Cum. Supp. 1977-78) (federal rules as to deposits and interest); KAN. STAT. § 17-5601 (Cum. Supp. 1977) (all powers); KY. REV. STAT. ANN. § 289.705 (Baldwin 1971) (same powers as to loans, savings accounts, deposits, and dividend and interest payments); LA. REV. STAT. ANN. § 6:902 (B) (West Cum. Supp. 1977) (all powers); ME. REV. STAT. tit. 9-B., § 416 (Pamphlet 1977) (all powers); MD. ANN. CODE art. 23, § 161Z (Cum. Supp. 1977) (investment powers); MISS. CODE ANN. § 81-12-49 (r) (Cum. Supp. 1977) (all powers); MO, ANN, STAT. § 369.299 (2) (Vernon Cum. Supp. 1978) (all powers); MONT. [Vol. 11:3]
The difference between the one-at-a-time statute and the completely automatic statute may be illusory. Under a one-at-a-time statute, the agency controlling savings associations in a state could easily adopt a regulation that would result in the state associations being automatically granted federal powers. In New Jersey, this is essentially what was done. The statute in New Jersey permits the Commissioner of Banking to grant the same loan and investment powers to the state associations as are granted to federal associations.\footnote{NJ. STAT. ANN. § 17:12B-152 (West Cum. Supp. 1977).} The commissioner's response was the following regulation:

An insured association, subject to the limitations and provisions of this Subchapter, may make any loan or investment which is permitted to be made by a Federal savings and loan association by Federal law or under rules and regulations promulgated by the Federal Home Loan Bank Board under the authority of Section 5 of "Home Owners' Loan Act of 1933," as amended and supplemented or as the same may in the future be amended and supplemented.\footnote{NJ. STAT. ANN. § 17:12B-152 (West Cum. Supp. 1977).}

The combination of the statute and regulation results in the automatic adoption of certain federal loan and investment powers. It is doubtful that this was the intent of the New Jersey legislature when it passed the statutes in question. However, other states' agencies may want to follow the Banking Commissioner of New Jersey's lead and avoid burdensome parity regulations.

The final "miscellaneous" category contains two state statutes which do not fit into any other classification. Nebraska is unique in accomplishing parity through a yearly legislative enactment which grants the local savings associations all powers granted to federal associations in the last year.\footnote{NEB. REV. STAT. § 8-355 (1977).} Wisconsin defines the limitations placed on a federal association's ability to make property improvement loans as the allowable boundaries for activities of local savings associations.\footnote{WIS. STAT. ANN. § 215.20 (21) (West. Cum. Supp. 1977-78).}
B. Common Characteristics of Tie-in Legislation

In examining each state's tie-in statute certain characteristics can be found regardless of category. Of these, three are the most common and deserve examination. One characteristic is that many state statutes require that state chartered savings associations be insured or hold membership in the Federal Home Loan Bank System, or both, to be eligible for these increased powers. This restriction is highly desirable and both requirements should be added to all tie-in legislation which deals with savings associations. The insurance requirement is a protection for the public, so that depositors' accounts will be protected against inexperienced investing by local associations with newly acquired loan and investment powers. The federal home loan bank membership seems to be a fair requirement to maintain parity since federal associations must be members of that system.

Several states, including Ohio, limit local associations to those powers given federal associations operating within the state. Again the limitation is necessary to insure parity between the institutions within a state. The benefits of parity would not be served by granting a local association a power not exercisable by the federal association next door.

The final characteristic of most tie-in statutes is the inclusion of a clause, usually the preamble, which states that the statute is granting the associations powers in spite of any other provision of state law. This phrase results in the implicit repeal of any section of state law which tries to limit the powers granted by the tie-in statute. The use of such phrases may pose serious constitutional delegation problems when a state agency may by regulation modify or repeal another state statute.

47 See note 20 supra.
49 For example, federal associations in Maine, Rhode Island, New Hampshire, Massachusetts, Vermont and Connecticut are now permitted to issue interest bearing savings accounts on which withdrawal can be made by negotiable instruments (NOW accounts). 12 C.F.R. § 545.4-1 (3) (1977). Under the Wyoming tie-in statute, state savings association are allowed "all" powers authorized by the FHLBB for federal associations. WYO. STAT. § 13-7-102 (b) (Interim. Supp. 1977). Under this statute, state savings associations in Wyoming could offer NOW accounts to its customers.
50 See, e.g., the Washington statute at note 26 supra.
51 A New Mexico unreported decision, San Juan Say. & Loan Ass'n v. Campbell, No. 76-364 (D.C. County of San Juan Oct. 12, 1976), has dealt with this exact issue and stated that a state regulatory agency could not issue a parity regulation which was in direct conflict with a state statute. Under New Mexico's tie-in statute which provides for a one-at-a-time
III. SUPREME COURT GUIDELINES FOR DELEGATION

Indeed, the constitutionality of delegating legislative power to administrative agencies is an issue at the heart of tie-in statutes and parity regulations formulated for savings associations. This section will explore United States Supreme Court guidelines for delegating such authority within constitutional limits.

A. Background of Non-delegation

The Superintendent of Building and Loan Associations in Ohio is empowered by Ohio Revised Code section 1155.1852 to issue regulations authorizing the state's building and loan associations to exercise rights and privileges enjoyed by federal savings and loan associations which have their home offices in Ohio and were organized under the "Home Owners' Loan Act of 1933."53 Whether this delegation of legislative power to an adoption of federal powers through parity regulations, the superintendent of savings and loans issued Regulation 73-2. This regulation allowed the creation of branches within 100 miles of the parent association, which was the same branching policy as that of federal savings associations. A New Mexico statute provided for the creation of branches only within 50 miles of the parent. 1967 N.M. LAWS ch. 61, § 17, as amended by 1973 N.M. LAWS ch. 189, § 2. The district court, faced with a challenge to the granting of permission to a savings association to form a branch outside the 50 mile limit, interpreted the tie-in statute not to permit the promulgation of a regulation which conflicted with a specific state statute and thus held the granting of permission to establish a branch outside the 50 mile limit to be void and of no effect. The case was appealed but the appeal was dismissed on stipulation of the parties. No. 2768 (N.M. Ct. App., Mar. 24, 1977). The dismissal was due to legislative action which permitted branches within 100 miles of the parent and thus rendered the case moot. 1977 N.M. LAWS ch. 38 (to be codified in N.M. STAT. ANN. § 48-15-61).

52 OHIO REV. CODE ANN. § 1155.18 (Page 1968), states:
Notwithstanding any provision in Chapters 1151., 1153., 1155., and 1157. of the Revised Code, if federal savings and loan associations organized under the Home Owners' Loan Act of 1933, 48 Stat. 128, 12 U.S.C. 1461, and amendments thereto, the home offices of which are located in this state, shall possess a right, power, privilege, or benefit by virtue of statute, rule, or regulation, or judicial decision or will possess such right, power, privilege, or benefit by virtue of a rule or regulation issued but not effective, which right, power, privilege, or benefit is not possessed by a building and loan association organized under the laws of this state, the superintendent of building and loan associations may, by regulation, authorize building and loan associations organized under the laws of this state to exercise such right, power, privilege, or benefit. A regulation so adopted and promulgated by the superintendent shall become effective on the date of its issuance but if such regulation is issued by the superintendent in anticipation of a federal rule or regulation which has been issued but has not then become effective, the effective date of the superintendent's regulation shall be the later date on which the federal rule or regulation becomes effective, provided that if such regulation adopted and promulgated by the superintendent is not enacted into law within thirty months from the date such regulation is issued by the superintendent, such regulation shall thereupon no longer be of any force or effect. The superintendent of building and loan associations may upon thirty days' written notice to domestic building and loan associations revoke any regulation issued by virtue of the authority of this section.

The United States Supreme Court has frequently addressed the constitutionality of delegating congressional power. Because the development and status of the federal law is similar to that of many state parity statutes, the evolution of the federal non-delegation doctrine, discussed below, may well forecast the direction of the non-delegation doctrine in Ohio and other states.

The Constitution's vesting of all legislative powers in Congress has historically been interpreted broadly. The first Supreme Court case dealing with delegation of authority was The Brig Aurora v. United States. Although the Court did not directly decide the delegation issue, it did imply that delegation would be valid in cases involving determinations of fact. Some eighty years later, in Field v. Clark, the Court again stated that the President was only "ascertaining fact" rather than exercising legislative power in determining when a tariff statute was to take effect. The "non-delegation doctrine," or the prohibition against delegating legislative authority to executive (including administrative) and judicial bodies, was based upon the principle of representative government, "that the legislature cannot delegate the power to make laws to any other body or authority." This non-delegation doctrine works within the separation of powers doctrine to allow the branches of government to operate without dominating each other. Because delegation was not discussed at the

---

55 Presently 41 of the states in the U.S. possess parity legislation involving savings associations, which is similar to Ohio Revised Code section 1155.18.
57 U.S. Const. art. I, § 1.
58 11 U.S. (7 Cranch) 382 (1813).
59 Id. at 386, 388.
60 143 U.S. 649, 692-93 (1892); this case involved the Chief Executive and the adjustment of tariffs. The Court stated, "That Congress cannot delegate legislative power . . . is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."
Constitutional Convention, the Court shaped the history of the non-delegation doctrine through its early decisions.

B. The "Standards" Approach

In moving away from the ascertainment of facts approach, the Court attempted to limit the delegation of congressional authority through an analytical technique known as "filling-up-the-details." This approach, introduced in United States v. Grimaud, conferred upon administrators a power to "fill up the details" in the general statute in order to carry the legislative policy into effect. The Grimaud Court confirmed that the rule-making function may be delegated, provided it is made to operate within limits. This decision, along with Buttfield v. Stranahan, marked the first step toward the modern requirement that a statute must articulate standards, without which administrative rules might be struck down as an unlawful delegation of authority. It was under this "standard test" that the Court recognized that legislative powers could be delegated to administrative agencies, as long as the legislative body was the primary legislator and the administrative agency, the secondary one.

Some of the standards the Supreme Court has upheld as sufficient include "just and reasonable," "[acting] as public convenience, interest, or necessity requires," and "being generally fair and equitable." The Court

---

63 The only discussion of delegation was a motion by Madison that the President be given power "to execute such other powers... as may from time to time be delegated by the national Legislature." This was dismissed as unnecessary. 1 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION of 1787, 67 (1966). See 1 DAVIS TREATISE, supra note 54, at § 2.02 (1958).
64 See Field v. Clark, 143 U.S. 649 (1892); The Brig Aurora, 11 U.S. (7 Cranch) 382 (1813).
65 220 U.S. 506 (1911).
67 See also Jaffe, supra note 54, at 567-68.
68 192 U.S. 470 (1904) (invoking the setting of a minimum quality standard for imported tea). However, there is some discussion as to whether Chief Justice White was stating the modern requirement of a standard, since the word "standard" was also applicable to the "standard of tea." Jaffe, supra note 54, at 566.
69 See generally B. SCHWARTZ, supra note 54, at § 12.
70 Tagg Bros. & Moorehead v. United States, 280 U.S. 420, 431, (1930) (upholding a tariff set by the Secretary of Agriculture, limiting the commission that persons could charge to buy and sell livestock in the Omaha stockyards).
in *J. W. Hampton, Jr., & Co. v. United States*, indicated that administrative officials, in exercising discretion, must be guided by an "intelligible principle." The Court acknowledged that to invalidate transfers of lawmaking authority to administrative officials would deprive the federal government of an effective means of exercising its powers.

In 1935, the Supreme Court in *Panama Refining Co. v. Ryan*, held that the National Industrial Recovery Act unlawfully delegated legislative authority to the President. Section 9(c) of the Act empowered the President to regulate the transportation in interstate commerce of what was commonly known as "hot-oil" (oil produced in excess of the amount permitted by state law). However, Congress failed to state under what circumstances the President could prohibit these shipments. This failure, in the court's opinion, constituted a delegation of legislative power without adequate standards or guidelines.

Congressional delegation to a public authority has been invalidated only once by the Court since the *Panama* decision. In *A. L. A. Schecter Poultry Corp. v. United States*, the Court again struck down a legislative delegation to the President. At issue in *Schecter* was section 3 of the National Industrial Recovery Act which authorized the President to approve codes of fair competition to govern trades and industries. This case involved what has been termed "the most sweeping congressional delegation of all time" because regulations invoked by the President were given the force and effect to license broadcasting stations; the criterion involved was the same as that in *Federal Radio Commission*.

---

72 *Yakus v. United States*, 321 U.S. 414, 423 (1944), upholding price fixing by an administrator. The Court found that the Emergency Price Control Act of 1942 set the limits of the Administrator's permissible action; the Act provided that (1) prices were to be fixed to effectuate the policy of the Acts, (2) prices were to be "fair and equitable", (3) "due consideration, so far as practicable," was to be given to prevailing prices during the designated base period, and (4) adjustments were to be made to compensate for factors affecting prices. For a discussion of delegation of legislative power involving price controls, see Comment, *The Constitutionality of the Delegation of Legislative Power to Control Prices, Rents, Wages and Salaries: Economic Stabilization Act of 1970*, 48 CHI.-KENT L. REV. 279 (1971).

73 276 U.S. 394 (1928).

74 Id. at 409.

75 Id. at 407-08.

76 293 U.S. 388 (1935).

77 Judge Cardozo dissented, finding an adequate standard in section 1 of the Act, which states that: "It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups...."

78 See 1 *DAVIS TREATISE*, supra note 54, at § 2.01.


80 1 *DAVIS TREATISE*, supra note 54, at § 2.06.
of law. The statute went so far as to make violations of such presidential edicts punishable as crimes.

Since the *Panama* and *Schecter* cases, the Supreme Court has upheld every congressional delegation of power to a governmental authority. However, delegations to private individuals and delegations involving criminal determinations have been struck. The Supreme Court's attitude toward the delegation issue is apparent in a number of later cases. Challenged in *Lichter v. United States* was a law which authorized administrative officers to recover profits from war contracts they deemed excessive. Although the statute did not define the term "excessive profits," it was held to articulate a sufficient standard. Similarly, the Attorney General's authority to grant or deny bail to aliens was upheld in *Carlson v. Landon*. The Act grants the Attorney General discretionary power to continue an alien in custody, release him under bond, or place him on conditional parole pending determination of his deportability. The Court stated that this wide range of discretion was warranted by the varied circumstances which must be considered in deporting aliens. The Court further stated that a clear national policy regarding the deportation of aliens set a standard which sufficiently limited executive judgment. The Court's struggle to infer "standards" in the Internal Security Act has been criticized as reducing the standards requirement to an "empty form" which does not restrict congres-sional delegation in any meaningful way.

A third post World War II case, *Fahey v. Mallonee*, upheld the Federal Home Loan Bank Board's power to issue regulations concerning

---

81 Id.

82 See generally Carter v. Carter Coal Co., 298 U.S. 238 (1936), in which the delegation to producers and miners, of the power to regulate miners' wages and hours was characterized as delegation in its most radical form, i.e., to private parties whose interests might be adverse to interests of others in the same business. See also, Liebmann, Delegation to Private Parties in American Constitutional Law, 50 Ind. L.J. 650 (1975); Jaffe, Law Making by Private Groups, 51 Harv. L. Rev. 201 (1937); Note, 37 Colum. L. Rev. 447 (1937). As to delegations involving criminal determinations, see Helvering v. Mitchell, 303 U.S. 391 (1938). But see Wright v. SEC, 112 F.2d 89 (2d Cir. 1940), where an administrative penalty was upheld. For a discussion of the distinction between guilt and administrative penalties, see 1 Davis TREATISE, supra note 54, at § 2.13.

83 334 U.S. 742 (1948). See B. Schwartz, supra note 54, at § 16.


86 Internal Security Act of 1950, § 23, 64 Stat. 1010 (repealed 1952); 1 Davis TREATISE, supra note 54, at § 2.04.

87 See 1 Davis TREATISE, supra note 54, at § 2.04.

88 342 U.S. at 542-44.

89 B. Schwartz, supra note 54, at § 13.

90 332 U.S. 245 (1947).
when a conservator or receiver might be appointed to take charge of a failing federal savings association. The District Court for Southern California, ruling that this was an unlawful delegation of legislative authority, stated that no intelligible principle or standard had been advanced by Congress.\(^1\) Reversing, the Supreme Court based its approval of the delegation not on the existence of such a standard but on the grounds that the regulations involved were regulatory in nature and not penal.\(^2\) Furthermore, Professor Kenneth Davis, in his *Administrative Law Treatise*, makes this comment on the Court's rationale in *Fahey*:

> when Congress fails to state a standard or intelligible principle, the deficiency — if it is a deficiency — may be corrected by administrative regulations. The holding in the *Fahey* case is a clear-cut denial of the proposition that Congress must state a standard, a general policy, or an intelligible principle.\(^3\)

In *Fahey*, the complaint had charged that the chairman and conservator had seized the failing institution without due process of law because, in accordance with rules and regulations issued by the Board, a hearing had taken place after the conservator took possession of the institution, rather than before. The Court's failure to recognize a due process violation in *Fahey* sounded a death knell for the non-delegation doctrine.\(^4\) Only five years earlier, in *Panama and Schecter*, the Court had found actions which were regulatory in nature to be unconstitutional delegations of legislative authority. Then in *Fahey* the Court examined an adjudicatory-type action, traditionally subject to more procedural safeguards than are regulatory matters,\(^5\) and found that the delegation was constitutional despite lack of prior notice and a hearing. Given this difference in types of actions considered in *Panama and Schecter* and then in *Fahey*, the *Fahey* decision must be viewed as a giant step away from the non-delegation doctrine.

**C. The “Rule of Reason” Approach**

More recent cases upholding the delegation of legislative authority have employed what is called the “rule of reason,” or the search for

---


\(^3\) 1 *Davis Treatise*, supra note 54, at § 2.04.

\(^4\) See infra note 103.

\(^5\) See, e.g., 1 *Davis Treatise*, supra note 54, at § 2.11. See also Rankin-Thoman v. Caldwell, 42 Ohio St. 2d 436, 329 N.E.2d 686 (1975), for an analysis of the distinction between adjudicatory or quasi-judicial and rule-making or quasi-legislative functions as it pertains to the right to appeal under both situations, pursuant to Ohio Rev. Code Ann. §§ 119.01-13 (Page 1978), which comprises the Administrative Procedure Act in Ohio.
safeguards, approach. In 1963, the Supreme Court in *Arizona v. California* upheld a statute allowing the Secretary of the Interior to choose among "recognized methods of apportionment or to devise reasonable methods of his own" in apportioning the waters of the Colorado River. Likewise, in *Amalgamated Meat Cutters v. Connally*, the D. C. Circuit Court upheld the President's discretionary power under the Economic Stabilization Act of 1970 to issue regulations in order to stabilize rents, salaries, and wages. These powers were similar to those delegated by the Emergency Price Control Act of 1942 and upheld in *Yakus v. United States*; however, unlike the statute involved in *Yakus*, which contained some standards for the use of discretion, the Economic Stabilization Act granted to the President the above mentioned powers with minimal standards. Professor Bernard Schwartz, in commenting on the *Connally* decision, noted in his text on administrative law, "If ever there was a delegation without standards, this was it." The court relied on *Yakus* to justify the delegation on the grounds that the standards were inherent in the authority to stabilize prices and wages.

In 1969, Professor Davis summarized the status of the non-delegation doctrine by stating:

The non-delegation doctrine is almost a complete failure. It has not prevented the delegation of legislative power. Nor has it accomplished its later purpose of assuring that delegated power will be guided by meaningful standards. More importantly, it has failed to provide needed protection against unnecessary and uncontrolled discretionary power. The time has come for the courts to acknowledge that the non-delegation doctrine is unsatisfactory and to invent better ways to protect against arbitrary administrative power.

But this was not to be. In 1974, in *National Cable Television Association, Inc. v. United States*, the Court acknowledged that a legislative grant of power to the Federal Communications Commission to regulate fee-setting by community antenna televisions systems resembled the revenue-seeking role

---

96 1 DAVIS TREATISE, supra note 54, at § 2.04 (Supp. 1965).
98 Id. at 593.
100 321 U.S. 414 (1944).
101 B. SCHWARTZ, supra note 54, at § 18.
102 Id.
of the House Appropriations Committee. The Court recognized that such a role could pose serious constitutional problems regarding delegation of legislative power. However, the majority avoided the problem by stating that the statute should be construed "narrowly as authorizing not a 'tax' but a 'fee'."\(^\text{103}\) In so doing, the phrase "value to the recipient," which was embodied in the statute, was articulated as the appropriate standard by which the Commission's power would be measured. Professor James Freedman, commenting on this case, stated that:

\[\text{[b]y relying upon Schecter to confine the statutory language ...,, the Court sought to bring the case within the delegation principle and to warn Congress that if it intended to delegate the power to levy taxes to an administrative agency, it should do so explicitly and with full awareness that such a decision would raise serious constitutional questions.}^{106}\]

Following National Cable, in 1976, the Court in Federal Energy Administration v. Algonquin SNG, Inc.\(^\text{107}\) upheld the President's power to adjust imports to protect national security.\(^\text{108}\) However, the opinion was a narrow one expressly limited to the factual setting of imposing license fees by the President pursuant to section 232(b) of the Trade Expansion Act. In addition, the Court rejected as ill founded the conclusion that any action taken by the President relating to imports was also authorized by the decision. The inference was clear that under other facts, such delegation might be viewed as improper.\(^\text{109}\)

D. The Future of the Delegation Doctrine

On that basis, Professor Freedman has speculated that even if the non-delegation doctrine is making a comeback, the revival of this doctrine must go beyond "the doctrine's traditional teaching that Congress must state meaningful statutory standards for the exercise of delegated legislative

\[^{103}\text{415 U.S. at 341.}\]
\[^{106}\text{Freedman, supra note 56, at 321.}\]
\[^{107}\text{426 U.S. 548 (1976).}\]
\[^{108}\text{Section 232 (b) of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 (b) (1970 & Supp. V 1975), delegated this power to the President.}\]
\[^{109}\text{It is apparent that the Court does not want to extinguish totally the non-delegation doctrine. Freedman, supra note 56, at 335-36. (The opinion of the court in National Cable, by relying on Schecter, might even suggest a revival of this doctrine.) See also California Banker's Ass'n v. Schultz, 416 U.S. 21, 90-91 (1974) (Douglas, J., dissenting); United States v. Robel, 389 U.S. 258, 272-73 (1967) (Brennan, J., concurring); Arizona v. California, 373 U.S. at 626 (Harlan, J., with Stewart and Douglas, J.J., dissenting). But see National Cable, 415 U.S. 336 wherein Mr. Justice Marshall strongly criticizes the resurrection of the delegation doctrine; United States v. Gurrola-Garcia, 547 F.2d 1075 (9th Cir. 1976) (in which the court allowed broad congressional delegation to the President of control concerning the export/import of arms).}\]
Whenever a court concludes that the Framers regarded the proper exercise of a specific legislative power as closely dependent upon the unique institutional competence of Congress, the non-delegation doctrine would prohibit Congress from delegating that power to another. In these circumstances, the act of delegation would so alter the manner of the power's exercise that the resulting arrangement would no longer be compatible with the Framers' reasons for vesting the power in an institution whose character and nature are defined in the special ways — of political responsiveness and broad-based diversity — that those of Congress are. The informing principle of institutional competence as a guide to the constitutionality of the delegation of legislative power thus focuses on the tension between the nature of the particular power delegated and the character of the particular institution chosen to exercise it.\textsuperscript{111}

If the non-delegation doctrine is not revived along the lines suggested by Professor Freedman or those established in \textit{Panama}\textsuperscript{112} and \textit{Schecter};\textsuperscript{113} then the need for administrative standards becomes paramount. In view of this, and recognizing the fact that delegations to administrative agencies are necessary,\textsuperscript{114} Professor Davis suggests that the non-delegation doctrine can be altered to provide for those standards as safeguards. In explaining this view Professor Davis states that, "[t]he key should no longer be statutory words; it should be the protections the administrators in fact provide, irrespective of what the statutes say or fail to say."\textsuperscript{115} This would assure that the non-delegation doctrine's purpose of "protecting against unnecessary and uncontrolled discretionary power"\textsuperscript{116} would be effectuated. Once it is decided that it is necessary to delegate certain powers, Professor Davis states that:

\begin{quote}
[t]he courts should develop a requirement that as far as practicable administrators must structure their discretionary power through appropriate safeguards and must confine and guide their discretionary power through standards, principles, and rules.\textsuperscript{117}
\end{quote}

Some courts have already begun to develop this requirement. The D. C. Circuit Court requires administrative officers to clarify standards

\textsuperscript{110} Freedman, \textit{supra} note 56, at 336.
\textsuperscript{111} Id.
\textsuperscript{112} 293 U.S. 388 (1935).
\textsuperscript{113} 295 U.S. 495 (1935).
\textsuperscript{114} See Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940), where it was recognized that without delegation the exercise of legislative power might become a futility.
\textsuperscript{115} Davis, \textit{A New Approach}, \textit{supra} note 103.
\textsuperscript{116} Id.
\textsuperscript{117} Davis \textit{Text}, \textit{supra} note 54, at § 2.10. See the Administrative Procedure Act, 5 U.S.C. §§ 551-59 (1976), as to the present procedure and safeguards.
which guide their exercise of discretionary power.\textsuperscript{118} In so doing, the court noted, "[w]e stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts."\textsuperscript{119} It is evident that delegated legislative power will be subject to safeguards in this "new era," whether they are masked in the form of a revamped non-delegation doctrine or in the form of administrative standards.

IV. OHIO'S APPROACH TO DELEGATED AUTHORITY

To determine whether the rule-making power given to the Superintendent of the Building and Loan Associations under Ohio Revised Code section 1155.18\textsuperscript{120} constitutes an unlawful delegation of authority, it is necessary to trace the delegation of authority doctrine in Ohio. In so doing, the validity of this legislative grant will be questioned on two levels: (1) Does the statute set adequate standards for the exercise of delegated power? and (2) Do any procedural safeguards control the Superintendent's rule-making power?\textsuperscript{121}

The Ohio Constitution vests legislative power in the General Assembly,\textsuperscript{122} just as the U.S. Constitution vests such power in Congress.\textsuperscript{123} Therefore, the Ohio Superintendent of Building & Loan Associations may be challenged on state constitutional grounds for exercising power properly belonging to the state legislature, just as federal administrators have been challenged for improperly exercising congressional authority. For the purpose of this discussion, the development of decisional law relating to legislative delegations in Ohio will be divided into three categories: (1) early cases including those which led to the standards rationale; (2) cases which formulated the standards test; and (3) cases which are the most relevant to analyze section 1155.18 within the context of necessary standards and delegation of authority.

A. Pre-Standards Cases

In \textit{Cincinnati, W. & Z. R.R. Co. v. Commissioners},\textsuperscript{124} the Ohio Supreme Court upheld a statute which authorized county commissioners to approve the issuance of bonds in order to pay for capital stock to which

\begin{itemize}
  \item \textsuperscript{118} Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971).
  \item \textsuperscript{119} \textit{Id.} at 597.
  \item \textsuperscript{120} \textit{See} \textit{OHIO REV. CODE ANN.} § 1155.18 (Page 1968); \textit{supra} note 52 for text of statute.
  \item \textsuperscript{121} \textit{See} \textit{Davis, A New Approach, supra} note 103.
  \item \textsuperscript{122} \textit{OHIO CONST.} art. II, § 1. Often the Ohio delegation statutes have also been challenged on the following Ohio constitutional provisions: art. II, § 26, which states that "all laws, of a general nature, shall have a uniform operation throughout the state"; art. X, § 1, county home rule provision; art. XVIII, § 2, municipal home rule provision.
  \item \textsuperscript{123} \textit{See} \textit{U.S. CONST.} art. I, § 1.
  \item \textsuperscript{124} \textit{1 Ohio St. 77} (1852).
\end{itemize}
the commissioners had subscribed. Justice Ranney, writing for the court, distinguished between the power to make law, which may never be delegated, and the administrative power to execute law, which may be delegated. The court found that approving the bond issuance was merely executing a law.\textsuperscript{125} The case has been widely cited, even by the U.S. Supreme Court in the \textit{Panama} decision.\textsuperscript{126}

Similarly, the Ohio Supreme Court in \textit{Fassig v. State ex rel. Turner}\textsuperscript{127} upheld the power of an administrative body, the forerunner of the Workmen's Compensation Board, to ascertain certain facts and apply the law to those facts. In rejecting arguments that the board had exercised judicial authority, the court relied on the Ohio common law principle that "a statute may leave to non-judicial officers the power to declare the existence of facts . . . ."\textsuperscript{128} The court also noted that this law was enacted pursuant to a police power.\textsuperscript{129} The quoted language in \textit{Fassig} is similar to that used earlier in \textit{Green v. Civil Service Commission},\textsuperscript{130} upholding the Civil Service Commission's power to adopt, amend and suspend rules. The court suggested that the Civil Service Commission merely ascertained whether facts before it met statutory requirements. Both \textit{Green} and \textit{Fassig} employed what has been described as the fact-finding rationale. Under that approach, the delegation of authority will survive constitutional challenge if the executive or administrative body simply determines whether certain facts exist which trigger application of a statute.\textsuperscript{131}

Although the fact-finding rationale provided a simple test for judging

\textsuperscript{125} \textit{Id.} at 90.

\textsuperscript{126} 293 U.S. 388 (1935). The U.S. Supreme Court, in discussing \textit{Field v. Clark}, 143 U.S. 649 (1892), cited \textit{Cincinnati, W. and Z R.R. Co.} stating:

\begin{quote}
The Ohio Supreme Court referred with approval to the distinction pointed out by the Supreme Court . . . between "the delegation power to make the law, which necessarily involves a discretion as to its execution, to be exercised under and in pursuance of the law."
\end{quote}

293 U.S. at 426. Justice Ranney concluded this statement by suggesting that "The first can not be done; to the latter no valid objection can be made." 1 Ohio St. at 88-89. \textit{See also}, 1 \textit{Cooper, State Administrative Law} 31-328 (1965). Cooper labels this distinction as the true test. \textit{Id.} at 48.

\textsuperscript{127} 95 Ohio St. 232, 116 N.E. 104 (1917).

\textsuperscript{128} \textit{Id.} at 246, 116 N.E. at 108.

\textsuperscript{129} \textit{See} cases cited \textit{infra} at notes 137 and 141, wherein this police power distinction becomes apparent.

\textsuperscript{130} 90 Ohio St. 252, 107 N.E. 531 (1914).

\textsuperscript{131} These later cases have likewise involved the fact-finding rationale; Belden v. Union Cent. Life Ins. Co., 143 Ohio St. 329, N.E.2d 629, \textit{appeal dismissed}, 323 U.S. 674 (1944) (stating that the legislature may clothe administrative officers with the power to ascertain whether certain facts exist); Strain v. Southerton, 75 Ohio App. 435, 62 N.E.2d 633 (1945), \textit{aff'd}, 148 Ohio St. 153, 74 N.E.2d 69 (1947) (statute fixing procedure whereby the administrative agency was to prescribe minimum wages).
the propriety of administrative delegation, Ohio courts continued to find additional reasons for upholding delegation. A classic example is *Yee Bow v. City of Cleveland*,[132] in which the Ohio Supreme Court upheld a health commissioner’s power to ascertain whether the sanitary and drainage arrangements in a laundry were sufficient to protect the public health. The court employed not only a fact-finding rationale, but also stressed the agency’s role in protecting public health and noted that arbitrary agency action could be remedied by a reviewing court.[133] It is apparent that even at this stage the court was struggling to uphold the delegation of power to an administrative agency in the belief that delegation is necessary in order that the exertion of legislative power does not become a futility.[134] It was this struggle which prompted Ohio courts to adopt the standards test.

**B. Standards Test in Ohio**

After the U.S. Supreme decisions in *Panama*,[135] and *Schecter*,[136] a dispute over the power of the Public Utilities Commission to prescribe safety regulations for motor transportation companies gave the Ohio Supreme Court an opportunity to apply a limited standards test to a challenge based on the Ohio Constitution.[137] The court in *Matz v. J. L. Curtis Cartage Co.*[138] stated:

> It has been generally held that a legislative body in conferring such power should lay down definite rules of guidance in restricting or limiting the exercise of such official action; but an exception to the rule is recognized in certain cases where the establishment of such criteria would be impossible or impracticable, or would result in rendering the enforcement of a police regulation nugatory or ineffective.

Although the court was not faced with defining standards, it did note in dictum that “it is essential to the validity of such rules and regulations that they be reasonable and neither arbitrary nor discriminatory nor in conflict with the law.”[139] In adopting the standards test, the court excepted situations where the establishment of criteria would be impossible and/or impractical and where definite guidelines would undermine a police power regulation.

The police power exception to the standards test has been upheld on

---

[133] See notes 137 and 141 infra. Statutes delegating police powers, (i.e., dealing with health, safety, morals and general welfare) have been excepted from the standards analysis.
[138] Id. at 278-79, 7 N.E.2d at 224.
[139] Id. at 286, 7 N.E.2d at 227.
numerous occasions\textsuperscript{140} and is well settled law in Ohio. Illustrative is \textit{Weber v. Board of Health},\textsuperscript{141} in which the Ohio Supreme Court scrutinized a resolution by the Butler County Board of Health, which made it unlawful to transport, deliver or deposit collected garbage to feed animals. Although the statute did not propose any guidelines or standards, the court, citing \textit{Matz}, held:

As a general rule a law which confers discretion on an executive officer or board without establishing any standards for guidance is a delegation of legislative power and unconstitutional; but when the discretion to be exercised relates to a police regulation for the protection of the public morals, health, safety or general welfare, and it is impossible or impracticable to provide such standards, and to do so would defeat the legislative object sought to be accomplished, legislation conferring such discretion may be valid and constitutional without such restrictions and limitations.\textsuperscript{142}

Although this part of the Board's action was upheld, the court rejected a second resolution which authorized the Health Commissioner to approve a collection system without further Board review. The court concluded that this delegation to the Health Commissioner constituted "legislation upon the part of the Board"\textsuperscript{143} and that the Commissioner's power went "far beyond the exercise of a proper administrative rule-making power."\textsuperscript{144}

C. \textit{Standards Test Applied to Section 1155.18}

It is at least arguable that Ohio Revised Code section 1155.18 similarly confers powers on the Superintendent of Building and Loan Associations, allowing him discretion without sufficient standards to guide his actions. Therefore, a closer examination of this statute and the status of the standards test in Ohio is in order.

Section 1155.18 allows the Superintendent to promulgate regulations which authorize a building and loan association, organized under the laws of Ohio, to exercise the same right, power, privilege, or benefit that a federal savings and loan association whose home offices are located in this state might exercise by statute, judicial decision, rule or regulation.\textsuperscript{145}

That is, the Superintendent has open-ended discretion to issue any rules and

\textsuperscript{141} 148 Ohio St. 389, 74 N.E.2d 331 (1941).
\textsuperscript{142} Id. at 397, 74 N.E.2d at 336.
\textsuperscript{143} Id. at 398, 74 N.E.2d at 336.
\textsuperscript{144} Id. at 400, 74 N.E.2d at 337.
regulations he sees fit. The only limitation is that any benefit he confers must be one possessed by a federal savings and loan association which has its home office in this state.

Interwoven with the standards rationale are a number of tests which measure the validity of such delegation. The Court of Appeals of Franklin County, in State ex rel. Eichenberger v. Neff, noted that a statute which delegates authority must be complete on its face, leaving only execution for the administrator's discretion. In distinguishing between making and executing the laws, the Franklin County court echoed the analysis of Justice Ranney some 122 years earlier in the Cincinnati Railroad decision.

A good example of such "complete" legislation is the air pollution control statute upheld by the Ashtabula County Court of Appeals in State v. Acme Scrap Iron & Metal. The statute, which allows the Director of Environmental Protection to adopt air pollution control regulations, had been rejected by the lower court as an unconstitutional delegation of legislative authority. Reversing, the court of appeals stated that the statutory standards for the director's rule-making were explicit and precise. Furthermore, the court noted that the legislation presented "an interwoven statutory scheme in which the power of the director to adopt regulations is carefully circumscribed, both substantively and procedurally."

The interwoven statutory scheme of Ohio Revised Code section 3704.03, which was approved by the court, reads in pertinent part:

The director of environmental protection may:

(D) Adopt, modify, and repeal regulations for the prevention, control, and abatement of air pollution from all sources throughout the state, prescribing ambient air quality standards for the state as a whole or for various areas of the state. In adopting, amending, modifying, or repealing such regulations the director shall hear and give consideration to evidence relating to:

(1) The character and degree of any injury to human health or welfare, plant or animal life, or property, or any unreasonable interference with the comfortable enjoyment of life or property as the result of air pollution;

147 See text accompanying notes 124-26 supra.
151 49 Ohio App. 2d at 374, 361 N.E.2d at 253.
(2) Conditions calculated to result from compliance with such standards and their relation to benefits to the people of the state to be derived from such compliance;

(3) The quantity and characteristics of air contaminants and the frequency and duration of their presence in the ambient air;

(4) Topography, prevailing wind directions and velocities, physical conditions and other factors which may or may [sic] combine to affect air pollution.

Further, Ohio Revised Code section 3704.04 provides that the adoption, modification and repeal of regulations shall be in accordance with the Administrative Procedure Act. By contrast, section 1155.18 gives the Superintendent of Savings Associations not one factor or guideline to consider when issuing regulations. It might safely be said that the standards accompanying section 1155.18 are not such that they "[define] the policy of the law and [contain] sufficient criteria and standards to guide the administrative officer or tribunal in the exercise of its limited discretion." This is the standards test established by the Ohio Supreme Court in State ex rel. Selected Properties, Inc. v. Gottfried.

In two closely related areas, Ohio courts have struck down legislation which delegated adjudicatory authority to an administrative agency either to impose criminal penalties or to infringe on private property without procedural safeguards. Although these situations are distinguishable from the situation presented by section 1155.18, the cases are worthy of brief examination.

The defendant in State v. Prairan challenged Ohio Revised Code section 1541.11, which empowered the state's Division of Parks, Department of National Resources to promulgate and enforce rules and regulations to control watercraft upon reservoir waters in accordance with the Administrative Procedure Act. The defendant was criminally charged with violating a number of rules adopted pursuant to this section and faced a fine of not

---

154 Id.
155 80 Ohio Law Abs. 484, 159 N.E.2d 829 (Licking County C.P. 1958). For further decisions involving a statute which confers upon an administrative authority the power to enact penal provisions, see: State ex rel. Allen v. Ferguson, 155 Ohio St. 26, 97 N.E.2d 660 (1951) (in which the court refused to rule on a statute which delegate to a commission the power to issue rules and regulations which, if violated, were punishable as misdemeanors by fine); Pollak Steel Co. v. Tax Commission, 21 Ohio Op. 217 (Hamilton County C.P. 1941), rev'd on other grounds, 70 Ohio App. 322, 41 N.E.2d 428 (1942) (striking a statute which gave the Tax Commission the discretionary power to assess penalties without guidelines or procedural due process protections for the assessed corporation).
less than ten nor more than one hundred dollars as defined by Revised Code section 1541.99. The Common Pleas Court of Licking County, in determining that this legislation was an unconstitutional delegation of authority, stated: "the Legislature leaves to the discretion of the Division of State Parks, and to the whim of subordinate officials, the determination of what conduct on the inland waters of this State will constitute a crime to which the penalty will be applied."\(^{157}\) To emphasize its point, the court examined a parallel situation and queried: "Could the Legislature confer upon the Department of Highways the power to determine what conduct on the part of motorists in Ohio constitutes various traffic offenses?" The court's answer was conclusive: "[o]bviously not."\(^ {158}\)

The Findlay Municipal Court in *State v. Wallace*\(^ {159}\) also struck down the delegation of an adjudicatory-type power. In that case, the challenged statute\(^ {160}\) authorized the Chief of the Division of Oil and Gas to plug any well incapable of producing oil or gas in commercial quantities and to impose penalties on the owners of such uncapped wells. In holding the statute unconstitutional, the court stated that the Chief of the Division of Oil and Gas was "vested with unlimited authority at his discretion without the requisite guideline, yardstick or other measuring device . . . ."\(^ {161}\) Similarly, in *Department of Education v. Board of Education*,\(^ {162}\) the court struck down a state statute\(^ {163}\) empowering the Superintendent of Public Instruction, upon the recommendation of an advisory board appointed by him, to classify, charter and revoke the charter of high schools which he felt failed to meet the standards prescribed by the State Department of Education. This school-by-school adjudicatory-type examination, was found by the court to lack any standards of guidance and, as such, to be an unconstitutional delegation of legislative authority.

\(^{157}\) 80 Ohio Law Abs. at 487, 159 N.E.2d at 832.

\(^{158}\) Id. Pursuant to this decision, the Ohio General Assembly repealed the statute.

\(^{159}\) 40 Ohio Misc. 29, 318 N.E.2d 883 (Hancock County Mun. Ct. 1974).


\(^{161}\) 40 Ohio Misc. at 31-32, 318 N.E.2d at 885. In State v. Wallace, 52 Ohio App. 2d. 264, 270, 369 N.E.2d 781, 784 (1976), a second action which involved the same defendant and adjudicatory-type determination as that considered by Findlay Municipal Court, the Court of Appeals for Putnam County reversed a trial court's dismissal of a complaint against Mr. Wallace because as applied to those facts, the statute "does not constitute legislation objectionable under the constitution or otherwise for ambiguity, vagueness or uncertainty." In explaining the earlier Findlay Municipal Court's rationale in declaring this statute unconstitutional, the Court of Appeals stated that the authority exercised by the Chief was solely that prescribed by statute; therefore the issue was whether the statute was vague and/or ambiguous and not whether it constituted an unlawful delegation of authority.


Although section 1155.18, on its face, does not contain penal or adjudicatory provisions, it is conceivable that a rule or regulation issued by the Ohio Superintendent pursuant to the federal framework might contain a penal provision or confer adjudicatory authority on the Superintendent. In either situation, a strong argument could be made that section 1155.18 was then unconstitutional as applied.\footnote{For a further example of conferred adjudicatory type power, see State ex rel. Selected Properties, Inc. v. Gottfried, 163 Ohio St. 469, 127 N.E.2d 371 (1955). \textit{But see} Fahey v. Mallonee, 332 U.S. 245 (1947) wherein the Court upheld a semi-adjudicatory type situation involving the Federal Home Loan Bank Board.}

The Ohio Supreme Court's most recent decision involving a challenge to rule-making authority came in \textit{State v. Schreckengost},\footnote{30 Ohio St. 2d 30, 282 N.E.2d 50 (1972). See also Provens v. Ohio Real Estate Comm'n, 45 Ohio App. 2d 45, 341 N.E.2d 329 (1975), in which the Court of Appeals for Franklin County noted that the legislature had established guidelines in conferring adjudicatory-type licensing authority upon the Ohio Real Estate Commission. Concurring with the result, Whiteside, J., found that the statute (\textit{Ohio Rev. Code Ann. \textsection 119.01-13}) constitutes an unlawful delegation of legislative authority.} in which the court upheld a statute which allows the Division of Parks and Recreation to "make and enforce such rules and regulations, including the appointment and government of park and patrol officers."\footnote{\textit{Ohio Rev. Code Ann. \textsection 1531.08 (Page Supp. 1977).}} The statute specifies that these rules and regulations be made in accordance with the Administrative Procedure Act.\footnote{\textit{Ohio Rev. Code Ann. \textsection 4735.07 (Page 1977)}.} In upholding this delegation of power, the court stated that the statute was to be read \textit{in pari materia} with section 1541.03 which states that state park lands and waters shall be under the control and management of the Division of Parks and Recreation. The court further stressed that the rules and regulations were to be adopted pursuant to the procedural requirements of the Administrative Procedure Act.\footnote{\textit{Ohio Rev. Code Ann. \textsection 1541.09 (Page 1964)}.} Because of these safeguards, the court reasoned, articulated standards are not necessary.

Likewise, in 1970, the Ohio Supreme Court in \textit{State v. Switzer}\footnote{22 Ohio St. 2d 47, 257 N.E.2d 908 (1970).} upheld a statute which allows the Chief of the Division of Wildlife to vary the minimum length which fish must attain to be kept without penalty.\footnote{\textit{Ohio Rev. Code Ann. \textsection 119.01-.13 (Page 1978).}} The court stated that liberal construction has generally been given to statutes which serve the public welfare and "that the control over fish and game is a proper subject for delegation of legislative power."\footnote{22 Ohio St. 2d at 51, N.E.2d at 911.}

In conclusion, although Ohio Revised Code section 1155.18 might be attacked as an unconstitutional delegation of legislative authority under a
“completeness” or standards theory, success is doubtful. Admittedly, the statute is not complete on its face in the sense that the Superintendent has virtually open-ended discretion to issue rules and regulations. Neither does the statute “define the policy of the law and contain sufficient criteria and standards to guide the administrative officer . . . in the exercise of [his] limited discretion.”

Nevertheless, these deficiencies need not mandate that a court find that the statute lacks adequate safeguards or standards. Because the statute on its face neither specifies penalties nor confers adjudicatory-type authority on the Superintendent, these grounds, used successfully to challenge Ohio enabling statutes in the past, cannot be invoked. Further, the highest and most recent authority on the subject, State v. Schreckengost, has upheld rule-making authority granted in a statute similar to section 1155.18. Even if a challenger should argue successfully that section 1155.18 failed to set down adequate standards to control administrative discretion, he would still have to overcome the authority of Matz v. Cartage Co., which was affirmed in Schreckengost, that wide discretion is permissible in administering police regulations for the protection of the public morals, health, safety, or general welfare. That section 1155.18 is a police regulation is clear.

D. Section 1155.18 and Procedural Due Process

This is not to say that section 1155.18 is impregnable. Although its lack of standards may be justified by its police function, a stronger constitutional failing may be its lack of effective procedural safeguards. It will be shown that the current statutory scheme enables the Superintendent of Building and Loan Associations to promulgate rules and regulations with few or no procedural requirements.

The Ohio Administrative Procedure Act provides for the necessary notice and hearing requirements normally afforded when a rule or regulation

---

172 See text accompanying notes 145-64 supra.
173 See text accompanying notes 145-53 supra.
174 See 163 Ohio St. at 470, 127 N.E.2d at 372.
176 30 Ohio St. 2d 30, 282 N.E.2d 50 (1972).
177 See 132 Ohio St. 271, 7 N.E.2d 220 (1937).
178 See generally Noble State Bank v. Haskell, 219 U.S. 104 (1911), where it was stated that the police power extends to all great public needs and includes the enforcement of commercial conditions such as the protection of bank deposits and checks drawn against them; Leonard v. State, 100 Ohio St. 456, 127 N.E. 464 (1919), police power applies to health, safety, protection or general welfare.
179 OHIO REV. CODE ANN. §§ 119.01-.13 (Page 1978).
is to be issued by an administrative authority.\(^{180}\) However, in order to come within the purview of the Procedure Act, the rule must be “adopted, promulgated, and enforced by any agency.”\(^{181}\) The definition of “agency” appears in section 119.01(A) of the Procedure Act, and each governmental entity which is considered an agency under this section must promulgate rules in compliance with section 119.01-.13 procedures. The Superintendent is specifically excepted under the section 119.01 definition of agency, which states:

Sections 119.01 to 119.13 of the Revised Code do not apply to the . . . Superintendent of building and loan associations under section 1155.18 of the Revised Code . . . .\(^{182}\)

This specific exception allows the Superintendent to issue rules and regulations without the safeguards afforded by the Procedure Act.\(^{183}\) The one procedure with which the Superintendent must comply is the filing requirement of section 111.15 (B) which specifies that he file two certified copies of any rule he promulgates with both the Secretary of State and the Director of the Legislative Reference Bureau. Such rules are to become effective on the tenth day after filing.\(^{184}\)

That the Superintendent of Building and Loan Associations and his rules are subject to this requirement is clear. “Agency” is defined in section 111.15(a)(2) as any governmental entity of the state including any board, department, or division. The Building and Loan Association unit, as a division operating within the Department of Commerce,\(^{185}\) falls within this definition. Furthermore, section 111.15 (A) (1) defines rule as “any rule, regulation, by law, or standard having a general and uniform operation adopted by an agency . . . .” When these two sections are read together, it can be seen that any rule issued by the Superintendent of Building and Loan Associations pursuant to section 1155.18 would have to comply with section 111.15 filing procedure described above. However, the filing

\(^{180}\) See generally OHIO REV. CODE ANN. § 1125.06 (Page Supp. 1976), which states that the Superintendent of Banks must promulgate rules and regulations in accordance with § 119.01-.13.

\(^{181}\) OHIO REV. CODE ANN. § 119.01 (C) (Page 1978) (emphasis added).

\(^{182}\) Id. § 119.01 (A).

\(^{183}\) OHIO REV. CODE §§ 119.01-.13 provides for: notice of hearing, date, time and place of hearing, adjudication hearing, the right to appeal from orders adopted by an agency, representation by counsel, all as part of the procedural scheme.


\(^{185}\) This structure was created pursuant to OHIO REV. CODE ANN. § 121.07-.08 (Page 1978).
requirement is the only procedure with which the Superintendent must comply when promulgating a rule or regulation pursuant to section 1155.18.\(^{186}\)

Nonetheless, there are a number of safeguards inherent in section 1155.18. First, the Ohio Superintendent of Building and Loan Associations can only issue rules that give to the state associations privileges already possessed by the federal associations. This procedure operates as an indirect safeguard since any rule adopted by the Ohio Superintendent must at one time have been enacted pursuant to the federal Administrative Procedure Act.\(^{187}\) The second inherent safeguard is that any regulation promulgated by the Ohio Superintendent has a maximum life span of thirty months if it is not then enacted into law. That is, if the rule promulgated by the Superintendent is not enacted into law within thirty months, the state rule or regulation shall "thereupon no longer be of any force or effect."\(^{188}\) Although this thirty-month limitation appears to limit the period during which the regulation is effective, there is nothing on the face of the law to prevent the Superintendent from promulgating the same regulation ad infinitum after the original regulation has expired. In this way, a state regulation could enjoy perpetual life.

In a number of cases, Ohio courts have upheld the delegation of rule-making power to an administrative authority, but in so doing have specifically noted that the rules could only be promulgated in accordance with the Ohio Administrative Procedure Act.\(^{189}\) The Ohio Supreme Court in *State v. Schreckengost*,\(^{190}\) quoting from *State v. Switzer*,\(^{191}\) determined that since the rule-making authority was to be accomplished only pursuant to the procedural requirements of the Act, specific standards were not necessary. It follows that since rules promulgated pursuant to section 1155.18 do not have to be adopted in accordance with these procedural requirements, the statute must set forth definite standards. Since section 1155.18 does not contain adequate standards, neither of these requirements is met. Because section 1155.18 does not include adequate safeguards and rules promulgated pursuant to the statute can be enacted without procedural due process, an Ohio court might view the statute as an unconstitutional delegation of authority.


\(^{190}\) 30 Ohio St. 2d 30, 282 N.E.2d 50 (1972).

\(^{191}\) 22 Ohio St. 2d 47, 257 N.E.2d 908 (1970).
The simple solution would be for the General Assembly to mandate that any rules or regulations adopted pursuant to section 1155.18 be promulgated in accordance with the Administrative Procedure Act. The building and loan industry, backed by the Superintendent, insists that section 1155.18 must be specifically excepted from the procedural requirements in order to expedite much needed law.192 What the industry ignores, however, is that a statutory provision could be made for enacting emergency regulations without observing the Act's procedural requirements. Such emergency provisions are already found in sections 119.03(F) and 111.15.193 In this way most regulations would be enacted in accordance with procedural safeguards, although emergency regulations could take effect immediately.

If the constitutionality of section 1155.18 and the rules adopted pursuant to it were challenged today on a procedural theory, Ohio courts would likely find that the General Assembly had unlawfully delegated its authority to the Superintendent of Building and Loan Associations. Reasoning from Ohio common law, a court would be justified in stressing not only that the statute fails to state any standards by which the administrator is guided, but also that regulation could be adopted pursuant to the statute without affording minimal procedural safeguards. Because the complexities of modern business enterprises demand informed, flexible rule-making by specialized administrative agencies,104 it is reasonable to argue that specific guidelines should not be imposed on rule-makers by statute. However, this is not to say that the rule-makers should operate without safeguards. The constitutional integrity of the delegation authorized by section 1155.18 should be protected by legislating procedural protections into the rule-making process as already provided in the Administrative Procedure Act.195

IV. ADMINISTRATIVE PROCEDURE AND CONSTITUTIONALITY OF THE FIVE TYPES OF TIE-IN STATUTES

As can be seen from the analysis of Ohio and federal law on constitutionality of the delegation of legislative authority, the courts have upheld the delegation of authority if there are procedural safeguards.196

192 This statement was confirmed during a telephone conversation with Philip Cramer, Executive Vice President of the Ohio League of Savings Associations.
194 This fact was recognized as early as 1940; see supra note 114 and accompanying text.
This final portion of the article will examine the general procedural safeguards available in the five categories of tie-in statutes discussed earlier. Based on the administrative procedure generally in force in the various states, the type of statute and the constitutional analysis previously discussed, the author will briefly analyze the constitutionality of the five classifications.

A. Automatic and Automatic with Post Limitations Statutes

On the state level, there are no real procedural safeguards built into the completely automatic and the automatic with post limitations type statutes. As discussed previously, these statutes result in the adoption of federal power without the input of any state administrative agency or of the state legislature, except, of course, legislative participation in the initial tie-in statute.\textsuperscript{197} The practical result of these two types of statutes is that the state legislature is delegating its control of state savings associations to the FHLBB. As FHLBB regulations are promulgated and become effective, they are automatically made part of state law through the applicable tie-in statutes. The only procedural safeguards available for the rules and regulations adopted under this type of tie-in statute are at the federal level.

The FHLBB, in adopting regulations which define the powers of federal savings associations, is subject to the Administrative Procedure Act of 1946 (APA).\textsuperscript{198} Section 4 of the APA\textsuperscript{199} sets forth the procedure for adopting administrative rules. This section requires publication of a general notice of the proposed rule in the federal register, stating:

\begin{enumerate}
\item the time, place and nature of the proceedings;
\item reference to the legal authority allowing for adoption of the rule; and
\item the terms of the rule or a description of the subjects and issues involved.\textsuperscript{200}
\end{enumerate}

This would seem to give local savings associations and other interested parties who deal with state associations and are affected by a proposed rule sufficient notice of possible changes in the state savings association law and a chance to influence these changes. However, there are exceptions to the general rule-making procedures. Notice need not be given on interpretive rules and where for good cause the notice is "impractical, unnecessary or contrary to the public interest."\textsuperscript{201} The practical result is that these exceptions undermine the rule and in many cases a notice or hearing on a proposed

\textsuperscript{197} See text accompanying notes 25-37 supra.
\textsuperscript{199} Id. § 553.
\textsuperscript{200} Id. § 553 (b).
\textsuperscript{201} Id. § 553 (A) & (B).
rule is avoided. As a result, states with completely automatic statutes and automatic with post limitation statutes are expanding their local associations' powers without any actual input from savings associations or other interested parties into the rule-making procedure. The state chartered associations themselves may have powers added or subtracted without procedural due process.

Even if the FHLBB followed section 4 rule-making procedures, as a practical matter a state association's effect on the rule-making procedure of a federal agency seems highly speculative. The end result is federal control of state chartered associations with few, if any, procedural due process safeguards. The constitutionality of these two categories of statutes is questionable. Because of the lack of procedural due process in adopting regulations on the state level, a good argument could be made that the state legislature has delegated too much power.

B. Prior Consent Statutes

Prior consent statutes do require at a minimum the approval of a state administrator before additional powers are given to state chartered associations. Of course, states with prior consent statutes are protected by the federal administrative procedures as discussed in the proceeding paragraphs. The real question in these states is whether the agency or administrator, in giving his consent to the exercise of an increased federal power by a state association, is subject to any administrative procedures on the state level. The statutes of Hawaii and South Dakota will be used as examples in this category.

In Hawaii, the prior consent tie-in statute requires the bank examiner to consent to the exercise of federal powers by state associations. The issue is whether the bank examiner is subject to Hawaii's Administrative Procedure Act when he gives this prior consent. Since the bank examiner is expressly subject to the procedure act in Hawaii when he promulgates rules and regulations, the narrower issue becomes whether the giving of prior consent is a rule as defined in Hawaii's Administrative Procedure Act.

Rule is defined by the procedure act in pertinent part as: "each agency's statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the

---

202 See Warren, supra note 196, for an excellent discussion of the notice requirements and the distinction between legislative and interpretative rules.
204 Id. ch. 91.
205 Id. § 401-18.
organization, procedure, or practice requirement of any agency.\textsuperscript{206} The
giving of prior consent would seem to fit into the definition of "rule" since it is in essence a "statement of general or particular applicability" and it "implements law," \textit{i.e.}, federal law on the state level. For this reason, the bank examiner is forced to follow the procedure act when consenting to the exercise of federal power by any state association.

Note further that the language of the Hawaii statute allows the examiner to give a blanket grant of all federal powers to any savings association meeting the criteria of the statute. As a result, the commissioner is able to grant all future federal powers by promulgating one rule. In essence, the end product of the statute could present the same problem as in the completely automatic statute, \textit{i.e.}, as new federal powers are granted to state associations there are no procedural safeguards protecting the local associations or other interested parties. Thus, the same unconstitutional delegation of legislative authority and due process problem arises again. In Hawaii, the problem could be remedied by the bank examiner only granting federal powers to state associations on a rule-by-rule basis and while following the local administrative procedure act. This method would solve the due process problem and thus would substantially weaken any unconstitutional delegation arguments.

The South Dakota prior consent statute requires the initial approval of the savings and loan board before federal loan and investment powers can be exercised by state chartered associations.\textsuperscript{207} South Dakota, like Hawaii, has a comprehensive administrative procedure act. Again the problem revolves around whether or not the giving of prior approval is a rule as defined in the South Dakota act.

"Rule" is in pertinent part defined by South Dakota's procedure act as "each agency statement of general applicability that implements, interprets, or prescribes law, policy, procedure, or practice requirements of any agency."\textsuperscript{208} Again, the approval in question would seem to implement law, but there is one important difference in that the definition requires that the statement be of general applicability, while the Hawaii statute covers only statements of particular applicability. The tie-in statute in South Dakota seems to contemplate the request and approval of federal powers to each savings association on an individual basis. If granted individually, then the approval would not have general applicability and would not be a rule as defined in the statute. The result is that the savings and loan board could easily sidestep the requirements of the procedure act in South Dakota.

\textsuperscript{206} Id. § 91-1 (4).
\textsuperscript{207} S.D. COMPIL. LAWS ANN. § 52-8-24 (Supp. 1977).
\textsuperscript{208} Id. § 1-26-1 (7) (1974 & Supp. 1977).
Another possible way to avoid the procedural requirement in both Hawaii and South Dakota is to classify requests by savings associations as requests for declaratory rules. Both the Hawaii and the South Dakota definitions of rule exclude declaratory rules, which are edicts issued by an agency to determine the applicability of any statutory provision or any rule or order of the agency to the applicant. The result of such a classification would thus enable the state agency to avoid the procedural safeguard for “rules” provided in the administrative procedure acts.

In general, prior consent statutes are subject to at least one extra administrative step in granting state associations federal powers. The problem with this type of statute, as shown by the discussion of the South Dakota and Hawaii statutes, is the doubtful applicability of the state administrative procedure acts to this prior approval. In essence, without the administrative safeguards, the statutes are open to attack on due process grounds.

C. One-At-A-Time Statutes

The fourth and largest category, i.e., the one-at-a-time statutes, generally provides procedural safeguards for the adoption of federal powers. Nineteen of the states in this category have administrative procedure acts which apply to the state agency responsible for the promulgation of parity regulations. In Virginia, the State Corporation Commission is exempt from the Virginia procedure act but does have its own procedures to follow in promulgating rules and regulations. Ohio also exempts the promulgation of parity

210 S.D. COMPiled LAws ANN. § 1-26-7 (b) (1974).

Maine is similar to Virginia in that it has a general administrative procedure act, but the agency which regulates the savings industry is exempt from the general act and has its own procedure. Me. Rev. Stat. tit. 9-B, ch. 25 (West Pamplet 1977).
regulations from the state Administrative Procedure Act. Missouri and Mississippi have both procedure acts and extra statutory procedures which govern the procedure in adopting parity regulations. The Kansas and New Mexico statutes are not subject to those states' procedure acts but do have procedures for adopting parity regulations.

These states, with the possible exception of Ohio, meet the constitutional requirements for procedural due process in the adoption of parity legislation. Depending on the state and its law with regard to unconstitutionality delegation of legislature authority, it appears that these statutes would be constitutional.

D. Miscellaneous Statutes

Nebraska avoided all procedural due process arguments and delegation problems by using a yearly enactment which grants all state savings associations the powers already possessed by federal associations. Since the legislature enacts the tie-in itself, there are no delegation problems and since it is granting only powers already possessed by federal associations and not future powers, there are no due process problems. Everyone interested has the opportunity of input into the legislation as it is passed, through his representative and by lobbying. For that reason, Nebraska's statute appears to be the most constitutionally sound of all the tie-in statutes discussed.

V. Conclusion

The proliferation of state tie-in statutes and their direct effects on savings associations underscores the necessity of understanding the operation of these statutes. Savings associations in forty-two states have powers equal to the federal associations in the areas covered by their state tie-in statute. As savings associations begin to exercise these new powers, other financial institutions and consumers who are in some way affected will begin to question the validity of the tie-in statutes and parity regulations. States

215 See text accompanying notes 182-83 supra.
which tie in federal law without the requisite procedural safeguards may encounter serious constitutional due process and delegation problems. To insure that these statutes and regulations will be upheld, not only in the financial world, but also in other areas of law where a tie-in to federal law would be advantageous, the various state legislatures should provide for adequate procedures which would guarantee that all interested parties have notice and an opportunity to be heard before the promulgation and adoption of any federal powers on the state level.