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Unconstitutionality of a referendum on fair housing legislation ... (1963)

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SUMMARY

Unconstitutionality of a referendum on fair housing legislation in Rhode Island.

Francis B. Kenney, Jr.

The General Assembly of the State of Rhode Island is not constitutionally empowered to effectuate a state-wide referendum with respect to the issue of fair housing under our present Constitution.

Article 4, Section 1

"This Constitution shall be the supreme law of the State, and any law inconsistent therewith shall be void."

Article 4, Section 2

"The legislative power, under this Constitution, shall be vested in two houses, the one to be called the senate, the other the house of representatives; and both together the general assembly."

The State Constitution has no provision for the initiative. Its only relation to referendum is Amendment XXXI. Under this provision, the General Assembly is not empowered to incur an obligation of more than fifty thousand dollars in the absence of war, insurrection, or invasion, without a popular vote.

Since the Constitution contains no general reference to referendum, it may contain no remote reference to referendum concerning fair housing.

The attached detailed letter to Msgr. Geoghegan supports this thesis.
July 31, 1963

The Right Reverend Msgr. Arthur T. Geoghegan
135 Governor Street
Providence, Rhode Island

Monsignor:

One of the key matters touched upon in the meeting of Citizens United, July 17, 1963 at the home of Mrs. Miller was the legal question whether the General Assembly of the State of Rhode Island is constitutionally empowered to effectuate a state-wide referendum to determine whether fair housing shall become a part of the state of Rhode Island.

In my opinion the General Assembly is not so empowered.

Article IV of the Constitution of the State of Rhode Island sections (1) and (2) provide:

"Constitution supreme. - This Constitution shall be the supreme law of the state, and any law inconsistent therewith shall be void.

"Power in general assembly - Enactment and style of laws. - The legislative power, under this Constitution, shall be vested in two houses, the one to be called the senate, the other the house of representatives; and both together the general assembly."

In State v. Copeland 3 R.I. 33 (1854) defendant was convicted of selling liquor between July 1, 1853 and March 18, 1854 contrary to a prohibitory statute passed at the January session 1853. Section 19 of the act provided:

"The legal voters in the several towns, may, at the annual election in April next, vote upon the question of repealing this act," and, proceeding to provide for the manner of returning and counting the votes at the next May session, provides further, that "in the event of a majority of such ballots being cast in favor of the repeal of the act, the same shall be limited in its operation, and have no effect after the tenth day from and after the rising of the General Assembly at said May session."

"In this case, therefore, the first eighteen sections of the act must, for any objection now made, be deemed to have been in force from the time of their enactment by the General Assembly in January, 1853, and as if the 19th section had not been added thereto."
"The provisions of the 19th section might as well have been made in the object of a distinct and separate act. Had they been embodied in such an act, there could be no difficulty in determining the effect.

"It would be simply an act to repeal an existing act, which could be passed by the General Assembly alone. If passed in any other mode, or by any other body than that prescribed by the constitution, it would be simply void, and would not affect the act which it was designed to repeal.

"We are therefore all of opinion that for any objection now made, or for anything contained in the said 19th section, the said act is constitutional and valid."

When the Court mentions separating the valid parts of the act from the invalid parts it must have implied that the attempted delegation of legislative power to the voters would have been invalid if attempt to apply were made.

In 76 ALR 1053 - 1063 the following annotation is headed "Constitutionality of Referendum."

The following is quoted from said annotation.

"In the majority of the cases in which the court had before it, the validity of general statutes which left to the determination of the people of the whole state whether or not such statutes should become effective as laws, the decision is against the validity of the statute."

Just before the annotation, the following case is printed:


"Dunn, Ch. J., delivered the opinion of the Court:

"Upon leave given, a petition was filed at the April term by Charles M. Thomson, a resident, citizen, and taxpayer of the county of Cook, praying for a writ of mandamus commanding the jury commissioners of the county of Cook to prepare the jury list and perform all duties in connection therewith, and to place male persons only on such jury list. The respondents demurred to the petition, and the cause has been submitted on the petition, demurrer, and briefs of the parties and their oral arguments."
The Fifty-Sixth General Assembly passed a bill for an act to amend section 2 of "An Act to authorize judges of courts of record to appoint jury commissioners and prescribing their powers and duties," approved June 15, 1887, as amended (Laws of 1929, p. 538), and a bill for an act to amend sections 1 and 4 of "An Act concerning jurors, and to repeal certain Acts therein named," approved February 11, 1894 (Laws of 1929, p. 539). These bills were approved by the Governor on June 14 and June 17, 1929, respectively. Each act contained this provision: "This Act shall not be in force unless the question of its adoption has been submitted to the legal voters of this State and approved by a majority of all the votes cast upon the proposition. Such question shall be submitted to such legal voters at the general election to be held on Tuesday next after the first Monday of November, A.D. 1930." Each act further provided that, "if a majority of the legal voters of this State voting upon said proposition vote in favor of this Act it shall thereby and thereupon be in force and effect in this State." Both acts were submitted at the election specified, and a majority of the votes cast on the proposition was in each case in favor of the act. The issue presented is the constitutionality of these two acts. The petitioner contends: (1) That the General Assembly has no constitutional power to provide for jury service by women; (2) that the bills in question were attempted delegations of legislative power, contrary to established principles of law and to the limitations of the Constitution. In view of the conclusion we have reached on the latter contention, it will be unnecessary to consider the former.

"Thus all the legislative power inherent in the people of the state of Illinois has been vested in the General Assembly, except in those cases in which the power has by express limitation or necessary implication been withheld. Since it alone has the power, the General Assembly has also the duty, and upon it alone rests the full responsibility, of legislation. This power it may not delegate to any other officers or persons or groups of persons, or even to the whole body of the people, or to a majority of the voters of the state voting at a general election or at a special election. The Constitution has made no general provision for a referendum of any act of the General Assembly to a vote of the people of the whole state to determine whether or not that act shall become a law. By section 5 of article 11 of the Constitution it is provided that no act of the General Assembly authorizing or creating corporations or associations with banking powers, nor amendments thereto, shall go into effect or in any manner be in force, unless the same shall be submitted to a vote of the people at the general election next succeeding the passage of the same, and be approved by a majority of all the votes cast at such election for or against such law. By the amendment
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of the Constitution which became section 34 of article 4 of the Constitution, it was provided that no law based on that amendment affecting the municipal government of the city of Chicago should take effect until such law should be consented to by a majority of the legal voters of the city voting on the question at any election, general, municipal, or special. In cases of this kind, the General Assembly was not only permitted, but was required, to submit its action by a referendum to the people of the city or the state, and its acts in such cases could not go into effect or in any manner be in force until the required majority of voters had consented.

"Independent of any written Constitution, John Locke wrote in 1689: "The legislature cannot transfer the power of making laws to any other hands, for, it being but a delegated power from the people, they who have it cannot pass it over to others... Legislative action neither must, nor can, transfer the power of making laws to anybody else or place it anywhere but where the people have." Two treaties of Government, p. 276. This is the general rule of constitutional law sustained by the weight of judicial decisions, though not without the exception of some cases which hold that the Legislature may pass a general act making its becoming a law expressly dependent upon its approval by a majority of voters on a referendum to the people of the whole state. In this state it is held that, to sustain an act whose constitutionality is drawn in question, it must appear to have been complete when it came from the Legislature. Arms v. Ayer, 192 Ill. 601, 61 N.E. 851, 58 L.R.A. 277 85 Am. St. Rep. 357; Sheldon v. Hoyne, 261 Ill. 222, 103 N.E. 1021. Therefore the first primary election law was held invalid because, among other reasons, of the provision in section 6 that the county central committee of each party should determine whether the county officers should be nominated at the primary election by the voter or by delegates chosen at such election, and also whether the candidates should be nominated by a majority or plurality vote, thus delegating to county central committees legislative authority to determine what the substantial features of the law should be. People v. Board of Election Com'rs. 221 Ill. 11, 77 N.E. 321, 5 Ann. Cas. 562. For a like reason, among others, the second primary election law, which conferred on the county central committees of political parties powers to designate and establish delegate districts and made the entire act dependent for its operation upon the action of such committees, was held unconstitutional and void in Rouse v. Thompson, 228 Ill. 522, 81 N.E. 1109. A statute which is incomplete in declaring what constitutes a violation of its provisions but authorizes a public officer or an administrative or executive board to determine that question, is invalid as delegating legislative power to the officer or board. Sheldon v. Hoyne, supra;
Board of Administration v. Miles, 278 Ill. 174, 115 N.E. 841;
Kenyon v. Moore, 287 Ill. 233, 122 N.E. 548; Schaezelein v.
122; Hewitt v. State Board of Medical Examiners, 148 Cal. 590,
750. The cases which have been cited are illustrations of the generally
recognized rule of law that legislative power may not be delegated.
In none of them was there a referendum to the people of the state, and
therefore in none of them did the precise state of facts in this case
exist.

"The exact question in this case was considered by the Supreme
Court of Ohio in Cincinnati, Wilmington & Zanesville Railroad Co.
v. Clinton County Com'rs, 1 Ohio St., 77; by the New York Court of
v. Kennedy, 207 N.Y. 533, 101 N.E. 442, 446, Ann. Cas. 1914C,
616; and by the Supreme Court of California in Ex parte Wall, 48 Cal.
315, 17 Am. Rep. 425. The Supreme Court of Ohio said: "That the
General Assembly cannot surrender any portion of the legislative
authority with which it is invested, or authorize its exercise by any
other person or body, is a proposition too clear for argument, and
is denied by no one. This inability arises no less from the general
principle applicable to every delegated power requiring knowledge,
discretion, and rectitude in its exercise, than from the positive
provisions of the constitution itself. The people, in whom it resided,
have voluntarily relinquished its exercise, and have positively ordained
that it shall be vested in the General Assembly. It can only be
reclaimed by them, by an amendment or abolition of the constitution,
for which they alone are competent. To allow the General Assembly
to cast it back upon them would be to subvert the constitution and
change its distribution of powers, without their action or consent.
The checks, balances, and safeguards of that instrument are intended
no less for the protection and safety of the minority than the majority:
hence, while it continues in force, every citizen has a right to demand
that his civil conduct shall only be regulated by the association wisdom,
intelligence and integrity of the whole representation of the State."

"In Barto v. Himrod, supra, it appeared that the Legislature had
adopted an enactment entitled, "an act establishing free schools through-
out the state, ; and had provided by one of the sections, "The electors
shall determine by ballot at the annual election to be held in November
next whether this act shall or shall not become a law." The enactment
was state-wide in its effect, and did not purport to be a law when it
left the Legislature, but was submitted to the electors. It was merely
a legislative proposition for a statute to be passed on by the people,
and it was held that this was an unconstitutional attempt by the Legislature to delegate its powers, and that, even if by the terms of the act it had been declared to be a law, to take effect in case it should receive a majority of the votes, it would nevertheless have been invalid, because the results of a popular vote upon the expediency of the law was not such a future event that a statute could be made to take effect upon it according to the meaning and intent of the Constitution. In People v. Kennedy, supra, the same court stated: "The proposition that by our Constitution general powers of legislation are conferred exclusively upon the Legislature, and that this body may not escape its duties and responsibilities by delegating such legislative powers to the people at large, must be regarded as so thoroughly established that it needs no discussion." The court, referring to the case of Barto v. Himrod, supra, stated: "Starting with and fully accepting the elementary proposition involved in and declared that the doctrine of that case should not be pushed beyond the question there involved and that the Legislature may pass a statute which is a completed law affecting or conferring rights upon a restricted locality but to become operative only in the event of an affirmative vote by the people of such locality."

In Ex parte Wall, supra, the court said: "To say that the legislators may deem a law to be expedient, provided the people shall deem it expedient, is to suggest an abandonment of the legislative function by those to whose wisdom and patriotism the Constitution has intrusted the prerogative of determining whether a law is or is not expedient. ... A statute to take effect upon a subsequent event, when it comes from the hands of the Legislature, must be a law in praesenti to take effect in futuro. On the question of the expediency of the law, the Legislature must exercise its own judgment definitely and finally. If it can be made to take effect on the occurrence of an event, the Legislature must declare the law expedient if the event shall happen, but inexpedient if it shall not happen. They can appeal to no other man or men to judge for them in relation to its present or future propriety or necessity; they must exercise that power themselves, and thus perform the duty imposed upon by the Constitution. But in case of a law to take effect if it shall be approved by a popular vote, no event affecting the expediency of the law is expected to happen. The expediency of wisdom of the law, abstractly considered, does not depend on a vote of the people. If it is unwise before the vote is taken, it is equally unwise afterward. The Legislature has no more right to refer such a question to the whole people than to a single individual."

"Where an enactment of the General Assembly, approved by the Governor, provided for its submission to a vote of the people as to
whether it should become a law or not, it was held that this provision was void and the vote of the people pursuant thereto without legal effect, and that the enactment became a law when it passed the two houses and was approved by the Governor. Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487; State v. Beneke, 9 Iowa, 203.

"In Opinions of the justices, 160 Mass. 586, 36 N. E. 488, 23 L. R. A. 113, the justices of the Supreme Judicial Court of Massachusetts were required to give their opinion to the House of Representatives upon the question: "Is it constitutional, in an act granting to women the right to vote in town and city elections, to provide such act shall take effect throughout the commonwealth upon its acceptance by a majority vote of the voters of the whole commonwealth?" Five of the judges answered this question in the negative united in an opinion in which they used the following language: "It is true that a general law can be passed by the legislature, to take effect upon the happening of a subsequent event. Whether this subsequent event can be the adoption of the law by a vote of the people has occasioned some differences of opinion, but the weight of authority is that a general law cannot be made to take effect in this manner. Whether such legislation is submitted to the people as a proposal for a law, to be voted upon by them, and to become a law if they approve it, or, as a law, to take effect if they vote to approve it, the substance of the transaction is that the legislative department declines to take the responsibility of passing the law; but the law has force, if at all, in consequence of the votes of the people. They, ultimately, are the legislators. It seems to us that by the constitution the state and the house of representatives have been made the legislative department of the government, and that there has not been reserved to the people any direct part in legislation."

The cases of Brawner v. Supervisors of Elections, 141 Md. 586, 119 A. 250, and State v. Hayes, 61 N. H. 264, are other decisions that, the people of the state having delegated to the Legislature the power of making its laws, that body cannot redelegate to the people themselves the power and authority thus conferred upon it by making the validity of a statute affecting the whole state dependent upon a vote of the people. In Locke's Appeal, 72 Pa. 508, 13 Am. Rep. 716, it is said that, if the Legislature can delegate the lawmaking power to a majority of the voters, it can also confer such power upon the minority; and in Matter of Borough of West Philadelphia, 5 Watts & S. (Pa.) 283, it was said: "Under a well-balanced constitution, the legislature can no more delegate its proper function than can the judiciary."

"An act of the Legislature need not go into effect immediately on its passage, and, indeed, under the Constitution, it cannot take effect until
the 1st day of July next after its passage, unless in case of emergency, to be expressed in the act, the General Assembly shall by a vote of two-thirds of all the members elected to each house otherwise direct. The Legislature may direct when an act shall take effect, and it may direct that it shall take effect upon the happening of a certain contingency or future event, and the nature of the contingency or future event is immaterial if it is legal. A favorable vote of the people of the state is not, however, such a contingency or future event, as was held in Barto v. Himrod, supra.

"While the cases of Cincinnati, Wilmington & Zanesville Railroad Co. v. Clinton County Com'rs, supra, and People v. Kennedy, supra, hold as so thoroughly established as to need no discussion that general powers of legislation are conferred exclusively upon the Legislature, and that this body may not escape its duties and responsibilities by delegating such legislative powers to the people at large, it is equally well established that an act of the Legislature is not unconstitutional because by its terms it is to take effect only after it shall have been approved by the vote of the people of the locality affected."

"The two parts of the act, the one providing for a jury list of electors of both sexes and the other providing for the submission of the proposition to the voters, cannot be separated and the former held good and the latter invalid, as was done by the Supreme Court of Iowa in Santo v. State, supra, and State v. Beneke, supra. The general Assembly did not pass a law declaring that women should be jurors. It abdicated its authority for the time being, and passed the responsibility on to the people. It made an effort to accomplish a single purpose in a particular way, and, the way having been found inadequate and unconstitutional, the court has no right to disregard the condition annexed to the act and declare the act valid in spite of the failure of the condition. There is no reason to suppose the General Assembly would have passed the bill with the provision for a referendum omitted.

"We hold that, under the Constitution of Illinois, the General Assembly is the sole depository of the legislative power of the state; that it has no power to delegate its general legislative power, and may not refer a general act of legislation to a vote of the people of the state to decide whether it shall have effect as a law except where the Constitution requires such reference; that the rule against the delegation of legislative power is not violated by vesting in municipal corporations certain powers of legislation on subjects of purely local concern connected with their municipal affairs, nor by local option laws, the application of which to particular localities is made dependent upon their adoption by the voters of such localities, and that the act of
June 14, 1929, to amend section 2 of an act to authorize judges of courts of record to appoint jury commissioners, and prescribing their powers and duties, is an unconstitutional delegation of legislative powers, and had no effect to change the Jury Commissioners Act or to authorize the selection of women as jurors.

"The writ of mandamus will issue as prayed.

"Writ awarded."

Of course, amendments to the State Constitution itself would modify the rule either by Article XIII "Of Amendments" or by constitutional convention in re. Constitutional Convention 55 R.I. 56, 178A 433 (1935). Since the second method of amendment, much simpler than the first, is first instituted by a majority of the General Assembly and then followed through by a popular vote, it could easily be confused with a referendum as to a piece of legislation. But the question here is that effectuating a particular kind of legislation not amending the State Constitution.

Furthermore, amendment XXXI of the State Constitution specifically forbids the General Assembly from borrowing in peace time more than Fifty Thousand Dollars ($50,000.00) without a popular vote as to each issue. This is a constitutionally authorized referendum.

In my quotation from People ex rel Thomson v. Barnett the court was careful not to invalidate legislation for a particular city, town or county i.e. local option provisions. Hence, I am sure that a statute of the Rhode Island General Assembly allowing a city or town to carry out fair housing by ordinance would be valid.

Respectfully,

FRANCIS B. KEENEY, JR.