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Kadderly v. Portland, 44 Ore. 118 (1903)

The initiative (the power to place, by petition, a statute on a ballot for citizens to accept or reject) and referendum (the power to place a statute passed by the legislature on a ballot for citizens to accept or reject) were Populist and Progressive reforms designed to place a popular check on legislatures that were viewed as overly influenced by special interests or political parties. Especially in the young western states, these mechanisms of "direct legislation" were embraced as a vehicle for a politics free from corruption and partisanship. Arguing that representative democracy had proven to be too distant from the people, proponents of the initiative and referendum sought a new kind of constitutional process that took part of the legislative power back from the elected legislature. South Dakota was the first state to adopt a state-level initiative and referendum process in 1898, but other states soon followed. By 1918, when the first wave of reform stalled out, twenty-four states had adopted the mechanisms.

Oregon was one of the early adopters of the initiative and referendum process, and it was used actively there. Early successful initiatives in Oregon, for example, included the adoption of direct election of U.S. senators, the adoption of a presidential primary system, and increasing taxes on large corporations in the state. Oregon state politics was highly fragmented, with significant populist, socialist, and other organizations competing with the Democratic Party and a splintered Republican Party, with partisan fights so severe that the legislature sometimes failed to even come into session. Populist leaders offered direct legislation as a way out of the impasse, and it proved tremendously popular with voters.

According to the referendum provision of the Oregon state constitution, voters had 90 days after the end of a legislative session to file a valid petition requiring that the bills passed in that session be subjected to a referendum vote or else those bills would take effect as law. The provision made an exception for laws that were "necessary for the immediate preservation of the public peace, health, or safety," which went into effect immediately without the 90-day waiting period.

The referendum provision had been added to the constitution by amendment. The Oregon state constitution required that proposed constitutional amendments must be passed by both legislative chambers in two consecutive legislative sessions and then must be ratified by the voters. If two or more proposals had already passed through at least one legislative session, and another proposal had already been approved by one chamber of the legislature, then no additional constitutional amendments could be proposed. In 1895, the state legislature failed to send to the voters for ratification four amendments that had been twice approved by the legislature, but it did give its own approval to a fifth proposed amendment. In 1899, the legislature gave its approval to the fifth amendment proposal and forwarded all five to the voters for ratification (all five failed to win ratification). The 1899 legislature also considered and approved yet another amendment proposal, the Initiative and Referendum Amendment, which later won a second legislature's approval and voter ratification (by an 11-1 margin).

In 1903, the legislature passed a new charter for the City of Portland. The new charter allowed the city to impose special tax assessment to fund the construction of new bridges. The legislature used the emergency provision of the constitution to put the charter into effect immediately without the 90-day waiting period, and the city quickly made use of the tax provision of the new charter.

Some residents of Portland filed suit to block the tax assessment, arguing that new city charter was constitutionally invalid because the legislature was not justified in using the emergency provision to avoid the referendum. The city responded that even if the charter reform was not emergency legislation, it did not have to wait the 90-day period before taking effect because the Initiative and Referendum Amendment was itself unconstitutional. The city contended that the amendment had not been added to the state constitution by a valid

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process and even if it had, the referendum amendment violated the state separation of powers and the republican guarantee clause of the U.S. Constitution.

The three-judge (all Republicans) state supreme court addressed both the authority of the courts to evaluate the validity of constitutional amendments and the consistency between initiative and referendum procedures and traditional constitutional institutions. Even as it asserted that the validity of constitutional amendments was a legal rather than political question and thus subject to judicial review, the Oregon court declined to stand in the way of the increasingly popular constitutional reform. The initiative and referendum did not threaten the foundations of republican government, Justice Robert Bean declared; the legislature and governor remained central institutions of the state constitutional system. The Kadderly *opinion was celebrated by initiative advocates and eased the spread of the "Oregon System" to other states, where it was embraced by legislators and judges.*

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JUSTICE BEAN, delivered the opinion of the court.

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1. At the outset the defendants are met with the contention that the question as to whether an amendment to the constitution has been regularly proposed, adopted, and ratified is for the political department of the government, not for the courts, and since the amendment in question was regularly agreed to by two successive legislatures, ratified by the electors, and recognized as valid by the legislative and executive departments, it must be so regarded by the courts. . . . Aided materially by their briefs and arguments, we have carefully examined our right to inquire into the regularity of the adoption of the proposed amendment, and are clear that its validity is a judicial and not a political question. Indeed, no authority has been cited or has come under our observation holding to the contrary, except in cases where a separate tribunal has been created, and the exclusive power to canvass and declare the results of a vote on the adoption of the amendment and to make such amendment a part of the constitution is confided to such tribunal: *Miles* v. *Bradford, Governor,* 22 Md. 170 (1864); *Worman* v. *Hagan,* 78 Md. 152, 164 (1893); *Dennett, Petitioner,* 32 Me. 508 (1851). . . .

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One of the best considered cases we have seen on the subject is that of *State ex rel.* v. *Powell,* 77 Miss. 543 (1900), which involved the right of the court to inquire whether the amendment had received the majority prescribed by the constitution as essential to its valid adoption. The court held the question a judicial one; Mr. Chief Justice WHITFIELD, in his usual clear and forcible manner, saying: "The true view is that the constitution, the organic law of the land, is paramount and supreme over Governor, legislature, and courts. When it prescribes the exact method in which an amendment shall be submitted, and defines positively the majority necessary to its adoption, these are constitutional directions, mandatory upon all departments of the government, and without strict compliance with which no amendment can be validly adopted. Whether an amendment has been validly submitted or validly adopted depends upon the fact of compliance or noncompliance with the constitutional directions as to how such amendments shall be submitted and adopted, and whether such compliance has in fact been had must, in the nature of the case, be a judicial question." . . .

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2. We pass, therefore, as we have a right and as it is our duty to do, to a consideration of the question as to whether the initiative and referendum amendment was legally adopted. The provisions of the constitution for its own amendment are mandatory, and must be strictly observed. A failure in this respect will be fatal to a proposed amendment, notwithstanding it may have been submitted to and ratified and approved by the people. The constitutional provisions are as binding upon the people as upon the legislative assembly, and the people cannot give legal effect to an amendment which was submitted in disregard of the limitations imposed by the constitution: see authorities already cited. . . . The constitution is the supreme law of the land, binding upon all, and can no more be disregarded in the manner of its own amendment than in any other respect. As long as it remains, its provisions must be observed. . . .

3. There is no question but that all the forms prescribed by the constitution were strictly and accurately observed in the proposal of the initiative and referendum amendment, and that it was properly submitted to the electors and ratified by them. The contention is that the legislature of 1899 had

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no authority to propose it, because other amendments were awaiting the action of the legislative assembly and the people. This inquiry necessarily calls for a construction of sections 1 and 2, article XVII, of the constitution, and a decision as to whether the proceedings looking to the amendment were in compliance therewith. . . .

The true meaning of section 2 is not clear. The amendments prohibited by the section are "additional amendment or amendments." The meaning of the word "additional" is, "given with or joined to some other," and embraces the idea of joining or uniting one thing to another so as to form an aggregate: Anderson's *Law Dict*.; *State* v. *Hull,* 53 Miss. 626, 645; *Brooks* v. *Whitmore,* 139 Mass. 356. If the word is used in this sense, it simply means that while one amendment is pending no other relating to the same section or subject-matter shall be proposed, but does not prohibit the proposing of amendments to other parts of the constitution. If, on the contrary, the phrase "amendment or amendments" has the same significance it bears in other parts of the same section and article, the prohibition is against amendments of any character. The frequent use of these words, and their particular relation to the subject-matter in which they are always employed, lead to the conviction that the meaning of the constitution is that, while an amendment or amendments agreed to by one legislative assembly shall be awaiting the action of a legislative assembly or the electors, no additional amendment or amendments shall be proposed to any part or clause of the constitution. The object is to prevent the people from being called to vote upon proposed amendments to the constitution except at considerable intervals. . . .

4. The question, then, is, were the amendments proposed by the legislative assemblies of 1893 and 1895 awaiting the action of a legislative assembly or the electors in 1899, when the initiative and referendum amendment was proposed? If so, the latter is invalid because the legislature did not have power to propose it. If, however, the previous amendments had lapsed because of the failure of the legislature of 1895 to submit them to the people, the initiative and referendum amendment was legally proposed, and is valid. . . . In other words, the position is that, after two successive legislatures agree to an amendment or amendments, the right to propose other amendments can be forever denied, simply by failing or neglecting to submit those already agreed upon to the people. This does not seem to us to be a reasonable interpretation of the constitution. . . . The legislature may, and does in some instances, while acting in its ordinary capacity, possess large discretionary powers, and the failure or neglect of one session to perform a duty imposed upon it would not prevent another session from discharging it. When, however, the legislature is acting as the mere agent of the people, in the performance of certain defined and prescribed duties enumerated in the constitution, it cannot exercise its powers beyond the letter of its authority, and must act within the limits of that which is delegated.

. . . . As the second section of article XVII is designed to prevent the continual agitation of the question of amending the constitution, and to restrict the power of the legislature to propose amendments within certain periods if others are pending, so the first section is intended to secure dispatch in the adoption of a proposed amendment by the two legislative assemblies, and its ratification or rejection by the people while the matter shall be fresh in the minds of all concerned. Were it otherwise, the right to propose and act upon succeeding amendments to the constitution could be successfully tied up for an indefinite period, or until an aroused public sentiment should compel some legislative assembly to submit them to the people in order to clear the way for others that might be desired.

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. . . . It is but right and proper, therefore, that the procedure provided for so important a matter as its own amendment shall be regarded as mandatory, and a limitation upon the exercise of the power. We are accordingly of the opinion that when an amendment to the constitution shall be agreed to by two legislative assemblies, it must be submitted to the electors by the one last agreeing to it, and a failure in this regard will be fatal to the amendment. . . . The section under consideration was taken from the Constitution of Indiana, and was construed in *In re Denny,* 156 Ind. 104, in accordance with the views here expressed. The question involved here, it is true, was not directly in issue there, but the opinion of the learned court is entitled to great weight and consideration, and is in harmony with the true intent and meaning of the constitution.

5. But if it be conceded that these views are not free from doubt, that of itself would be a sufficient reason for sustaining the amendment. It cannot be supposed that in the consideration of this question a court should be governed by any less strict rules than it would be required to follow in passing

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upon the constitutionality of a statute, and it has been the settled rule, ever since the opinion of Mr. Chief Justice MARSHALL in *Fletcher* v. *Peck* (1810), that "it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." The courts will never declare a legislative act or proceeding void when a substantial doubt exists in the judicial mind. . . .

6. We conclude, therefore, that the amendments proposed and adopted by the legislative assemblies of 1893 and 1895 were not awaiting the action of the legislative assembly or the electors in 1899, within the meaning of Const. Or. Art. XVII, § 2, at the time the initiative and referendum amendment was proposed; and, as a consequence, the latter was legally proposed, and is now a part of the constitution.

7. Nor do we think the amendment void because in conflict with the Constitution of the United States, Article IV, § 4, guaranteeing to every State a republican form of government. The purpose of this provision of the constitution is to protect the people of the several States against aristocratic and monarchical invasions, and against insurrections and domestic violence, and to prevent them from abolishing a republican form of government: Cooley, *Const. Lim*. (7 ed.) 45; 2 Story, *Const*. (5 ed.) § 1815. But it does not forbid them from amending or changing their constitution in any way they may see fit, so long as none of these results is accomplished. No particular style of government is designated in the constitution as republican, nor is its exact form in any way prescribed. A republican form of government is a government administered by representatives chosen or appointed by the people or by their authority. Mr. Madison says it is "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior": *The Federalist*, 302. . . . Now, the initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of the government, or substituted another in its place. The government is still divided into the legislative, executive, and judicial departments, the duties of which are discharged by representatives selected by the people.

8. Under this amendment, it is true, the people may exercise a legislative power, and may, in effect, veto or defeat bills passed and approved by the legislature and the Governor; but the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed. Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the legislature at will.

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10. This brings us to the question as to whether the legislative declaration that the Portland charter was necessary for the preservation of the public peace, health, and safety is conclusive on the courts. Under the initiative and referendum amendment, laws "necessary for the immediate preservation of the public peace, health, or safety" are excepted from its operation. As to them, the action of the legislative and executive departments is conclusive and final, so far as their enactment is concerned. No power is reserved to the people to approve or disapprove them. They are not subject to the referendum amendment, and as to them the powers of the other departments of the government derived from the constitution are unaffected. . . . So far, all are agreed. But the vital question is, what tribunal is to determine whether a law does or does not fall under this classification? Are the judgment and findings of the legislative assembly conclusive, or are they subject to review by the courts? . . .

It has always been the rule, and is now everywhere understood, that the judgment of the legislative and executive departments as to the wisdom, expediency, or necessity of any given law is conclusive on the courts, and cannot be reviewed or called in question by them. It is the duty of the courts, after a law has been enacted, to determine in a proper proceeding whether it conflicts with the fundamental law, and to construe and interpret it so as to ascertain the rights of the parties litigant. . . . The amendment excepts such laws as may be necessary for a certain purpose. The existence of such necessity is therefore a question of fact, and the authority to determine such fact must rest somewhere. The constitution does not confer it upon any tribunal. It must therefore necessarily reside with that

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department of the government which is called upon to exercise the power. It is a question of which the legislature alone must be the judge, and when it decides the fact to exist, its action is final . . . .

But, it is argued, what remedy will the people have if the legislature, either intentionally or through mistake, declares falsely or erroneously that a given law is necessary for the purposes stated? . . . The courts have no more right to distrust the legislature than it has to distrust the courts. . . . It is true that power of any kind may be abused when in unworthy hands. That, however, would not be a sufficient reason for one co-ordinate branch of the government to assign for attempting to limit the power and authority of another department. If either of the departments, in the exercise of the powers vested in it, should exercise them erroneously or wrongfully, the remedy is with the people, and must be found . . . in the ballot box. We are of the opinion, therefore, that the findings and declarations of the legislature that the act of 1903 for the incorporation of the City of Portland was necessary for the immediate preservation of the public peace, health, and safety are conclusive on the courts, and consequently the charter was not subject to the referendum power, and was in force and effect from and after its approval.

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It follows that the demurrers to the complaint were properly sustained, and the decree of the court below is affirmed.

Note: After the Oregon initiative was used to raise taxes on telephone and telegraph companies in 1906, the Pacific States Telephone and Telegraph Company raised a more direct court challenge to the constitutionality of direct democracy. Writing again for the state court, Justice Bean simply pointed to *Kadderly* as settling the issue. The case was appealed to the U.S. Supreme Court on the grounds that the Initiative and Referendum Amendment violated the republican guarantee clause of the U.S. Constitution, an issue that the *Kadderly* Court had addressed and resolved in favor of state constitution. In *Pacific States Telephone and Telegraph Company v. Oregon* (1912), the Supreme Court ducked the issue:

> . . . . The defendant company does not contend here that it could not have been required to pay a license tax. It does not assert that it was denied an opportunity to be heard as to the amount for which it was taxed, or that there was anything inhering in the tax or involved intrinsically in the law which violated any of its constitutional rights. If such questions had been raised, they would have been justiciable, and therefore would have required the calling into operation of judicial power. Instead, however, of doing any of these things, the attack on the statute here made is of a wholly different character. Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes is not on the tax as a tax, but on the state as a state. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power, assailed on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the state that it establish its right to exist as a state, republican in form.
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> As the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not, therefore, within the reach of judicial power, it follows that the case presented is not within our jurisdiction . . . .

In *Rice v. Foster*, 4 Harr. 479 (Del. 1847), Delaware Chief Justice James Booth, a Whig, had delivered a well-known critique of direct democracy, in that case holding unconstitutional the state legislature's "local option" statute allowing the people of a county to vote on whether liquor licenses would be issued for that county. That case raised the issue of whether the legislature was, in effect, delegating its constitutionally vested lawmaking power to another body, in this case the voters of a single

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county, but the Delaware court was not content to rest on the nondelegation doctrine. The legislature was not only shirking its own constitutional responsibility, it was inviting the dangers of democracy that republican government was meant to forestall.

> The powers of government in the United States are derived from the people, who are the origin and source of sovereign authority. The framers of the Constitution of the United States, and of the first constitution of this State, were men of wisdom, experience, disinterested patriotism, and versed in the science of government. They had been taught by the lessons of history, that equal and indeed greater dangers resulted from a pure democracy, than from an absolute monarchy. Each leads to despotism. Wherever the power of making laws, which is the supreme power in a State, has been exercised directly by the people under any system of polity, and not by representation, civil liberty has been overthrown. Popular rights and universal suffrage, the favorite theme of every demagogue, afford, without constitutional control or a restraining power, no security to the rights of individuals, or to the permanent peace and safety of society. In every government founded on popular will, the people, although intending to do right, are the subject of impulse and passion; and have been betrayed into acts of folly, rashness and enormity, by the flattery, deception, and influence of demagogues. A triumphant majority oppresses the minority; each contending faction, when it obtains the supremacy, tramples on the rights of the weaker: the great aim and objects of civil government are prostrated amidst tumult, violence and anarchy . . . .
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> In the convention of 1787, which formed the Constitution of the United States, the spirit of insubordination, and the tendency to a democracy in many parts of our country, were viewed as unfavorable auguries in regard both to the adoption of the constitution, and its perpetuity. The members most tenacious of republicanism, were as loud as any in declaiming against the vices of democracy. Mr. Gerry, of Massachusetts, the friend and associate of Mr. Jefferson, thought it "the worst of all political evils." The necessity of guarding against its tendencies, in order to attain stability and permanency in our government, was acknowledged by all. Even the propriety of electing by an immediate vote of the people, the first branch of the national legislature, was seriously questioned by some of the ablest members, and warmest advocates of a republican form of government. Mr. Sherman, of Connecticut, opposed it on the ground that the people were constantly liable to be misled; and he insisted that the election ought to be by the State legislatures. Mr. Gerry remarked, that "he did not like the election by the people." He said, "the evils we experience, flow from the excess of democracy; the people do not want virtue, but are the dupes of pretended patriots." Mr. Madison, although he considered "the popular election of one branch of the national legislature, as essential to every plan of free government, was an advocate for the policy of refining the popular appointments by successive filtrations." Mr. Edmund Randolph, of Virginia, observed, "that the object was to provide a cure for the evils under which the United States labored; that in tracing these evils to their origin, every man found it in the turbulence and follies of democracy; that some check, therefore, was to be sought for, against this tendency of our governments; and that a good Senate seemed most likely to answer the purpose." . . . To guard against these dangers and the evil tendencies of a democracy, our republican government was instituted by the consent of the people. The characteristic which distinguishes it from the miscalled republics of ancient and modern times, is, that none of the powers of sovereignty are exercised by the people; but all of them by separate, co-ordinate branches of government in whom those powers are vested by the constitution. These co-ordinate branches are intended to operate as balances, checks and restraints, not only upon each other, but upon the people themselves; to guard them against their own rashness, precipitancy, and misguided zeal; and to protect the minority against the injustice of the majority. . . .

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. . . . The sovereign power therefore, of this State, resides with the legislative, executive, and judicial departments. Having thus transferred the sovereign power, the people cannot resume or exercise any portion of it. To do so, would be an infraction of the constitution, and a dissolution of the government. Nor can they interfere with the exercise of any part of the sovereign power, except by petition, remonstrance, or address. They have the power to change or alter the constitution; but this can be done only in the mode prescribed by the instrument itself. The attempt to do so in any other mode is revolutionary. And although the people have the power, in conformity with its provisions, to alter the constitution; under no circumstances can they, so long as the Constitution of the United States remains the paramount law of the land, establish a democracy, or any other than a republican form of government. . . . The absurd spectacle of a governor referring it to a popular vote, whether a criminal, convicted of a capital offence, should be pardoned or executed, would be the subject of universal ridicule . . . . All will admit, that, in such cases, the people are totally incompetent to decide correctly. Equally incompetent are they to exercise with discernment and discretion, collectively, or by means of the ballot-box, the power of legislation; because, under such circumstances, passion and prejudice incapacitate them for deliberation; and the tricks of demagogues, excited feelings, party animosities, and the corrupting influences always brought to bear upon popular elections, would banish reason, reflection, and judgment. If the delegation of the legislative power of the State to the people of a county, to make laws through the medium of a ballot-box; involving in it an abandonment by the legislature, of the trust reposed in them, which they have sworn to execute with fidelity; does not seem to many persons to be destructive of the constitution, and to lead to all the dangers of a democracy, against which the founders of our government were so anxious to guard; it can be only because it is presented under the specious appearance of a profound deference and devotion to the popular will; and because its destructive tendencies are clouded and obscured by the incense of adulation offered to the majesty of the people. . . .

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