AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 7: The Republican Era—Democratic Rights/Voting/Initiatives and Referenda

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

The initiative (the power to place, by petition, a proposed statute on a ballot for citizens to accept or reject) and referendum (the power to place a statute previously 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 popular in the young Western states, these mechanisms of "direct democracy" 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. Other states soon followed. By 1918, when the first wave of reform stalled out, twenty-four states had adopted the mechanisms.

Oregon was an early adopter of the initiative and referendum process. Oregon state politics was highly fragmented, with significant Populist, Socialist and other organizations competing with the Democratic Party and a splintered Republican Party. Partisan fights were so severe that the legislature sometimes failed to even come into session. Populist leaders offered direct democracy as a way out of the impasse. Both the initiative and referendum were popular and extensively used. . Early successful initiatives in Oregon included the direct election of U.S. senators, a presidential primary system, and increasing taxes on large corporations in the state. The referendum provision of the Oregon state constitution gave voters ninety days after the end of a legislative session to file a valid petition requiring that bills passed in that session be subjected to a referendum vote or else those bills took 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 ninety-day waiting period.

The referendum provision was added to the constitution by amendment that may have violated state constitutional procedures. The Oregon state constitution required that proposed constitutional amendments be passed by both legislative chambers in two consecutive legislative sessions and then be ratified by the voters. If two or more proposed amendments 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. Oregon legislators sometimes failed to respect this limit on the number of proposed constitutional amendments in a given time period. In 1895, the state legislature failed to send to the voters for ratification four amendments that had been twice approved by the legislature, but legislators nevertheless approved a fifth proposed amendment. In 1899, the legislature approved five amendment proposals and forwarded all to the voters for ratification (all five failed to win ratification). The 1899 legislature also considered and approved a sixth amendment proposal, the Initiative and Referendum Amendment. That proposed was subsequently approved in the next legislative session and was ratified by the voters by an eleven-to-one margin. .

In 1903, the legislature passed a new charter for Portland. The new charter allowed the city to impose special tax assessments 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 ninety-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. They argued that the new city charter was constitutionally invalid because state constitution did not support the legislative decision to use the emergency provision to avoid the referendum. The city responded that even if the charter reform was not emergency legislation, the law could take effect before the ninety-day period tolled because the Initiative and Referendum Amendment was unconstitutional. The city contended that the amendment had not been added to the state constitution by the

constitutionally valid 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 state supreme court (all Republicans) addressed both the authority of the courts to evaluate the validity of constitutional amendments and the consistency between the initiative and referendum procedures and the traditional constitutional institutions. The judges asserted that the validity of constitutional amendments raised justiciable legal questions rather than non-justiciable political questions. Nevertheless, 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. His opinion maintained that 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 the initiative and referendum were embraced by legislators and judges.*

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: . . .

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One of the best considered cases we have seen on the subject is that of *State ex rel.* v. *Powell*(MS 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 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. 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* (IN 1901), 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 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 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.