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## Power of the Legislature to Amend or Repeal Direct Legislation

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The duty of the secretary of state is independent of legislative authorization. The section makes no mention whatever of action by the general assembly.<sup>35</sup> Nor can it be justifiably argued that by implication the legislature has the power to approve or disapprove the submission, for those who framed and ratified the section intended that it be independent of legislative acquiescence.<sup>36</sup> This intent would be effectively defeated<sup>37</sup> and the constitutional mandate would be unenforceable if the duty were construed to be conditioned upon such legislative action. Furthermore it would render article XV, section 4 nugatory; in effect the section would then become a mere recommendation to the general assembly. By reason of article XV, section 3 the legislature already has power to submit the question at will; the legal effect of the two sections *must* have been meant to be different. To read legislative acquiescence into article XV, section 4 would be to fly in the face of recognized rules of constitutional interpretation and the apparent will of the people as expressed in their constitution.<sup>38</sup>

H. S. H.

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### POWER OF THE LEGISLATURE TO AMEND OR REPEAL DIRECT LEGISLATION

It is a fundamental principle of our system of representative government that the legislative department has plenary power to enact laws and to amend or repeal them, subject only to the provisions of the constitution from which this power arises. During the first two decades of this century, however, the spirit of governmental reform which produced such phenomena as the Progressive Movement, resulted in the adoption in most of our western states of constitutional changes designed to reserve to the people the right to enact legislation directly, independently of

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posed upon him by constitutional provision or by statute, and he refused to act, that the writ [of mandamus] was not allowed."

35. See note 1, *supra*.

36. See notes 11 & 14, *supra*.

37. A rule of constitutional construction requires that the courts give effect to every part of the constitution. 1 Cooley, *Constitutional Limitations* (8th ed. 1927) 128 states:

"\* \* \* The courts \* \* \* must lean in favor of a construction which will render every word operative, rather than one which will make some words idle and nugatory."

38. The writer suggests that article XV, section 3 be revised to expressly place the duty upon the secretary of state with or without legislative authorization and also to provide expressly that he may be compelled by mandamus to submit the question under the periodic provision. This would obviate all possibility of litigation.

their legislative assemblies, by means of the initiative and referendum. Thus there was set up in effect a two-fold legislative structure with independent powers and the possibility of conflict between the people functioning as legislators and their representative legislatures. Because of the democratic axiom of popular sovereignty, however, legislation which proceeds immediately from the people may in a sense be considered to share the special sanction of organic law as formulated in the state constitutions. The question is then presented whether the reservation to the electorate of legislative powers prohibits representative bodies otherwise having complete legislative power from repealing or amending the "people's laws."

This question obviously can be answered only with reference to individual jurisdictions by examination of the particular constitutional provisions defining the respective powers. The construction which has been placed upon these provisions in operation, however, supports the general proposition that legislative bodies do have the plenary power, limited only by *express* constitutional restrictions, to amend or repeal any law whatever, regardless of the manner of its enactment.

The initiative amendments of the constitutions of the eighteen states which have adopted them meet this problem with provisions ranging from express authorization to absolute prohibition of the repealing power of the legislature. The issue is perhaps most clearly presented, however, in cases decided under amendments which are entirely silent on the point.<sup>1</sup> In this group of six states it has been uniformly held, whenever the question has arisen, that the legislature's power is coordinate with that reserved to the people, and that either can at any time exercise this power on any law.<sup>2</sup> A further group of four states have been aided in reaching the same conclusion by the provision that the amendment "shall not be construed to deprive any legislator from introducing any measure."<sup>3</sup> The amendment in two states expressly affirms the right.<sup>4</sup>

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1. Idaho Const. (1890) art. III, §1 (as amended 1912); Me. Const. (1876) art. XXXI (as amended 1908); Mont. Const. (1889) art. V, §1 (as amended 1906); Neb. Const. (1875) art. III, §§2, 3 (as amended 1920); Ohio Const. (1851) art. II, §§1a-g (as amended 1912); Utah Const. (1895) art. VI, §1(2) (Amendment of 1900 as amended 1930).

2. In re Opinion of Justices (1933) 132 Me. 512, 174 Atl. 853; State ex rel. Goodman v. Stewart (1920) 57 Mont. 144, 187 Pac. 641; Schreifer v. City of Auburn (1923) 110 Neb. 179, 193 N. W. 350; State ex rel. Singer v. Cartledge (1935) 129 Ohio St. 279, 195 N. E. 237, 97 A. L. R. 1040; Ohio Ops. Att'y Gen. (1923) p. 471.

3. Colo. Const. (1876) art. V, §1 (as amended 1910); Mo. Const. (1875) art. IV, §57 (as amended 1908); Ore. Const. (1859) art. IV, §1 (as amended

Of the remaining states, two place an absolute ban on such legislative action "unless otherwise provided in said initiative measure,"<sup>5</sup> while one denies the power only if the initiated law is "approved by a majority vote of the qualified electors."<sup>6</sup> Two jurisdictions require a legislative majority of "two-thirds of all the members elected to each house" to modify or repeal direct legislation<sup>7</sup> and two prescribe a two- and a three-year waiting period before this is permitted.<sup>8</sup> Decisions in these jurisdictions

1902); S. D. Const. (1889) art. III, §1 (as amended 1898); In re Senate Resol. No. 4 (1913) 54 Colo. 262, 130 Pac. 333; Clark v. Austin (Mo. 1937) 101 S. W. (2d) 977; State ex rel. Drain v. Becker (Mo. 1922) 240 S. W. 229; State ex rel. Halliburton v. Roach (1910) 230 Mo. 408, 130 S. W. 689, 139 Am. St. Rep. 639; Kadderly v. Portland (1903) 44 Ore. 118, 74 Pac. 710, 75 Pac. 222; Patton v. Withycombe (1916) 81 Ore. 210, 159 Pac. 78; State ex rel. Pierce v. Slusher (1926) 119 Ore. 141, 248 Pac. 358; State ex rel. Richards v. Whisman (1915) 36 S. D. 260, 154 N. W. 707, L. R. A. 1917 B, 1 (appeal dismissed 1916).

4. Mass. Const. (1790) Amend. XLVIII (1918) art. VI, §176; Okla. Const. (1907) art. V, §§13455, 13462.

5. Cal. Const. (1879) art. IV, §1 (amendment of 1911 as amended 1932); Mich. Const. (1909) art. V, §1 (as amended 1913); but note that the legislature is specifically empowered to amend or repeal at any subsequent session measures submitted to referendum and approved, and also to propose amendments to the people. Beneficial Loan Society v. Haight (1932) 215 Cal. 506, 11 P. (2d) 857 (Statute in irreconcilable conflict with initiated law held invalid.); People v. Wood (1928) 88 Cal. App. 621, 264 Pac. 298 (Law originally enacted by legislature, then referred to people and approved may be amended.); Ex parte Statham (1920) 31 Cal. Dec. 193, 187 Pac. 986 (When ordinance is suspended by referendum petition, city council may pass another ordinance dealing with same subject matter if not an attempt to evade the referendum and differing in essential features from the first.).

6. Ariz. Const. (1912) art. IV, pt. 1, §1(6) (as amended 1914); this applies also to laws submitted to referendum. (Previous to 1914, when this provision was added, the amendment was silent on this point, excepting the provision enabling the legislature to "enact any measure.") McBride v. Kerby (1927) 32 Ariz. 515, 260 Pac. 435 (When statute has been suspended by referendum petition, legislature may enact another on same subject matter and attach emergency clause to prevent referendum.).

7. Ark. Const. (1874) art. V, §1, amend. No. 7 (1909 as amended 1919); N. D. Const. (1889) art. II, §25 (as amended 1918); State ex rel. Truax v. Smart (1921) 48 N. D. 326, 184 N. W. 623; Boutous v. Thoresen (1926) 54 N. D. 289, 209 N. W. 558 (Statutes conflicting with initiated laws and passed by less than required majority held invalid.).

8. Nev. Const. (1864) art. XIX (amendment of 1904) §§206, 207 (3 years) (Note that laws approved on referendum may be amended only by direct vote.); Wash. Const. (1889) art. II, §1 (as amended 1912) (2 years); Tesoriere v. Dist. Ct. (1927) 50 Nev. 302, 258 Pac. 291 (Substitute measure proposed and enacted by initiative under procedure enabling legislature to propose a substitute bill to be voted on along with original initiative measure held not subject to referendum and therefore amendable after three years.); Ajax v. Gregory (1934) 177 Wash. 465, 32 P. (2d) 560 (Legislature can regulate liquor sales even though "Bone Dry" liquor law is repealed by initiative.); State v. Gibson (1922) 118 Wash. 171, 203 Pac. 390; State v. Miller (1922) 121 Wash. 153, 209 Pac. 9. (Two year provision refers to time measure is enacted and so proclaimed by governor, not to time law goes into effect.)

of course consider the circumscribed scope of legislative power, and are mainly concerned with niceties of form and procedure.<sup>9</sup> None provides authority for the view that the legislature is restricted in any way other than by explicit constitutional mandate.<sup>10</sup> Indeed such partial limitation inferentially sanctions legislative action when not expressly precluded.<sup>11</sup>

It is then universally concluded that only express constitutional limitation curtails the plenary power of representative bodies to amend or repeal at will. This provokes further consideration of whether this power ought not on grounds of policy to be restricted or withdrawn in those states which have not done so.

It is probably not yet time to attempt any final evaluation of the initiative and referendum as practical political instrumentalities. Students of political science appear to agree that the electorate has nowhere been sufficiently aroused to such radical use of these devices as would constitute a definitive test.<sup>12</sup> It is

9. The simple issue whether the legislature has this overriding repealing power has seldom been squarely presented in any of the jurisdictions above. It is ordinarily decided in the affirmative as a collateral issue and reiterated by way of dictum in subsequent cases.

10. Five cases dealing with the power of a city council to amend ordinances passed by means of local initiative procedures contain language seemingly contra to this view. Examination of these, however, shows that all five turned on express limitations in the charters of the respective cities. *Allen v. Hollingsworth* (1933) 246 Ky. 812, 56 S. W. (2d) 530; *Holland v. Cranfill* (Tex. Civ. App. 1914) 167 S. W. 308; *Stetson v. Seattle* (1913) 74 Wash. 606, 134 Pac. 494; *State ex rel. Knez v. Seattle* (1934) 176 Wash. 283, 28 P. (2d) 1020, 33 P. (2d) 905; *State ex rel. Gabbert v. MacQueen* (1918) 82 W. Va. 44, 95 S. E. 666. Compare *ex parte Statham* (1920) 31 Cal. Dec. 193, 187 Pac. 986; *In re Megnella* (1916) 133 Minn. 98, 157 N. W. 991 (when ordinance is suspended pending referendum city council may pass another ordinance on same subject matter if differing in essential features and not done to evade referendum.) *State ex rel. Singer v. Cartledge* (1935) 129 Ohio St. 279, 195 N. E. 237, 97 A. L. R. 1046. (City council of non-charter municipality may repeal ordinances adopted by local initiative.) The cases cited in footnotes 2, 3, 7 and 8 supra all either hold squarely or affirm without argument that only express constitutional limitations can curtail the amending power of the legislature.

11. Another such factor is the provision for attaching an emergency clause to legislation in order to prevent petition for referendum. By inference this supports the view that the amending power of legislatures is to be no more restricted than is expressly stated. Other provisions operate to limit the area of possible conflict by limiting the permissible subject matter of direct legislation. These vary from a large number of general and specific prohibitions in Massachusetts (Mass. Const. (1790) art. XLVIII, II, 2, §152.) to the single exception of appropriation bills in a number of states.

12. Barnett, James D., *The Operation of the Initiative, Referendum, and Recall in Oregon* (1915) c. xv; Key, V. O., Jr. and Crouch, Winston W., *The Initiative and the Referendum in California* (1939); Pollack, James K., *The Initiative and Referendum in Michigan* (Mich. Gov't. Studies No. 6, 1940) 66 ff.

possible, however, using the experience of states with roughly corresponding political, economic, and social conditions as a sort of "control experiment," to state a few tentative conclusions in general terms. It is clear, for instance, that the "parade of horrors" predicted by opponents of these measures has not yet appeared.<sup>13</sup> Nor on the other hand has direct legislation effected the realization of any discernible Utopia. It is probable that it has exercised no profound influence on the habits and attitudes of the legislatures which have had to deal with it.<sup>14</sup> Public indifference in many states, together with the inherently cumbersome procedure of the initiative and referendum, operated to confine laws enacted by the direct method to an insignificant fraction of the total volume of legislation.<sup>15</sup> It may even be that the principal long-run value of the innovation will prove to have been the education of the individual voter in public matters.<sup>16</sup>

Nevertheless, a dispassionate view of the results of forty years' experience with direct legislation shows it to have made a considerable contribution to the art of government. It is a useful instrument of positive action and by virtue of that fact at least as valuable as companion devices such as the secret ballot, the official primary, and the corrupt practices acts. There is no doubt that the people have been able to turn it to good use in enacting legislation in spite of irresponsive and recalcitrant legislatures, and its effect in enabling effective organization of public opinion has certainly influenced legislation, even where the measures submitted were rejected at the polls. "Real popular control" wrote Professor Dodd, "consists not in the people's passing upon every public question, but in their having power to pass on every question upon which public interest is sufficient to warrant such action."<sup>17</sup>

What then of the advisability of restricting legislative power to deal with direct legislation? It is urged that legislatures are

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13. Both devices in operation exhibit a markedly conservative character. The referendum in particular lends itself easily to obstructionist tactics in the legislature, while the initiative, whether from public indifference or substantial satisfaction with government has been confined largely to isolated bills representing some particular group interest and backed by that group. The governmental mechanism certainly remains in the same hands as before.

14. Barnett, *op. cit. supra*, note 12, c. xviii.

15. Faust, *Popular Sovereignty* (1942) 27 WASHINGTON U. LAW QUARTERLY 312.

16. Pollack, *op. cit. supra*, note 12, at 67; Barnett, *op. cit. supra* note 12, c. x.

17. Dodd, W. F., *Some Considerations Upon the Statewide Initiative and Referendum* (1912) 43 *Annals American Academy of Political and Social Science* 215.

controlled by pressure groups, the "interests," and that to permit them the power to intermeddle with popular legislation is to nullify it. This is theoretically possible. Experience has shown, however, that this possibility does not appear in practice.<sup>18</sup> On the contrary, representative bodies exhibit a great delicacy in approaching the "people's laws," and such action as is taken with respect to them is usually by way of technical modification looking toward more efficient operation. When there is outright repeal or amendment inconsistent with the purpose of the initiated measure, it is usually with the support and approval of newspapers and civic groups.<sup>19</sup>

Several objections are advanced to the suggestion that the legislature be deprived of this power. Generally, it is pointed out, the proposal continues the policy of attempting to solve legislative evils by progressively circumscribing the legislative department's capacity for doing harm and so limiting its ability to legislate wisely.<sup>20</sup> This is criticized as a nostalgic desire to deal with the increasingly complex economic and social conflicts of a dynamic society by returning to the forms of a primitive democracy rather than by attacking directly the problem of improving the quality of representative bodies. It is certainly true that the initiative and referendum tend to detract from the authority and dignity of legislative office and so to further legislative incompetence and irresponsibility. It is also true that directly enacted laws do not undergo the legislative sifting and hammering process, the reconciling and harmonizing of conflicting group interests, which results in laws which may be integrated into a broad legislative program. This is a valid criticism and some ground for allowing the legislature the power to adjust inconsistent and technically imperfect legislation.<sup>21</sup> That it has

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18. Barnett, *op. cit. supra* note 12, at 130.

19. The attitude toward popular legislation varies from a doctrine of absolute non-interference to regarding it as a mandate to be interpreted. Legislators incline to professing agreement with the popular feeling that such legislation ought not be tampered with, from understandable motives. Some inconsistency in action appears, however, in that a good deal has been done by way of resubmission and modification of measures.

20. Beard, Chas. A., and Shultz, Birl E., *Documents on the Initiative, Referendum, and Recall* (1912) introd. note; Bryce, James, *Modern Democracies* (1921) vol. ii, c. LXV; Hall, Arnold B., *Popular Government* (1921) c. ix; Munro, Wm. B., *The Government of the United States* (1923).

21. The history of direct legislation is not free from instances of "sugar-coated" bills, bills omitting the enacting clause, bills with conflicting provisions, etc. It is common practice, however, for the sponsors of initiative measures to engage the services of skilled draughtsmen with the result that most such statutes compare favorably with the normal legislature's product so far as technical competence is concerned. See Beard, *op. cit. note 2, supra*, introd. note.

not been a very apparent difficulty is perhaps due to the comparatively negligible number of such laws in the total bulk of legislation, as well as to the very general power to amend them when necessary.

Another argument advanced in support of the legislative amending and repealing power is the need to discourage the adoption, through the efforts of well-organized minority groups, of laws not designed to promote the general social interest.<sup>22</sup> Also the point is made that the power to amend prevents the possibility of doubt being cast on the technical validity of laws enacted in the normal manner by reason of this possible inconsistency with the body of inviolable "secondary constitutional law" which would develop by direct legislation.<sup>23</sup> If these contentions do not present any very burning issue, nevertheless they represent real values as against the seemingly theoretical gain of safeguarding against possible abuse of a power by eliminating it.

Whether the legislative departments' power should be curtailed in this respect, then, is a decision of policy. The experience of the various states indicates little weight of advantage between total or partial restriction and no restriction at all. That there has been small abuse of the power is of course no guarantee that there will not be, and it is possible that some form of limitation is a wise precaution.<sup>24</sup> The expediency of either course, however, must wait for final determination until use of the direct method of legislation produces a sufficient volume of law to render more acute whatever adverse effects it may have on the vital social interests from which all legislation springs.<sup>25</sup>

R. W. K.

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22. Compare here instances of local and state prohibition laws which proved to be unenforceable in many cases because of the unreadiness of the public at large for such measures. Hall, *op. cit. supra* note 20, at 14 remarks that a study of popular votes even on general principles shows an instability which may indicate further that even the decision of those who vote represents passing fancy rather than considered opinion.

23. A related point is of particular interest in Missouri, where, as in several other states, the procedures for statutory and constitutional initiatives exactly correspond. This results in a blurring of the distinction between organic law and ordinary legislation. Many states avoid this difficulty by requiring a greater number of signatures on petitions to initiate amendments. See Faust, *Popular Sovereignty* (1942) 27 WASHINGTON U. LAW QUARTERLY 312.

24. In this connection note the tendency for voters to use the constitutional initiative in preference to the statutory form, although this does not appear to have been misused. That constitutional amendments are less often rejected at the polls than proposed statutory measures is perhaps due in part to the greater voter participation on such issues.

25. For a suggestion following the California and Michigan practice of allowing repeal or amendment only by direct vote coupled with power of the legislature to propose changes see Note, *Should the Power of Representative Bodies in Ohio to Repeal or Amend Acts Adopted by Popular Vote be Expressly Restricted?* (1936) 4 Ohio L. Rep. 326.