

**OPINION
79-153**

March 12, 1979 (OPINION)

Honorable Vern Wagner
Speaker
House of Representatives
State Capitol

Bismarck ND 58505

Dear Mr. Speaker:

This is in response to the letter dated March 9, 1979, from Representative Eugene Nicholas, submitted with your approval, regarding Senate Bill 2280, a bill authorizing family corporation farming. Representative Nicholas states in his letter:

The House Agriculture Committee on Thursday, March 8, passed Senate Bill 2280 as amended.

The amendment is:

SECTION 8. REFERRAL) Sections 1 through 8 of this Act shall be placed on the ballot at the next regularly scheduled statewide election, or at any special election called by the governor prior thereto, for approval by the people of North Dakota. The effective date of this Act shall be postponed pending certification, by the canvassing board, of approval by the people of North Dakota.

My question is, may the Legislative Assembly refer legislative acts to the electors of the state? Also in order to change legislation enacted in this manner, would it require a two-thirds vote in future legislative sessions?

The Constitution of North Dakota provides:

Section 1. While the legislative power of this state shall be vested in a legislative assembly consisting of a Senate and a House of Representatives, the people reserve the power to propose and enact laws by the initiative, including the call for a constitutional convention; to approve or reject legislative acts, or parts thereof, by the referendum; to propose and adopt constitutional amendments by the initiative; and to recall certain elected officials. This article is self-executing and all of its provisions are mandatory. Laws may be enacted to facilitate and safeguard, but not to hamper, restrict, or impair these powers.

Section 2. A petition to initiate or to refer a measure shall be presented to the secretary of state for approval as to form. A request for approval shall be presented over the names and signatures of twenty-five or more electors as sponsors, one of whom shall be designated as chairman of the sponsoring committee. The secretary of state shall approve the petition

for circulation if it is in proper form and contains the names and addresses of the sponsors and the full text of the measure. (Session Law 1977, Chapter 613, Section 1, approved November 7, 1978, Article 105, Amendments) (Emphasis added)

This new article to the Constitution on the Initiative, Referendum and Recall became effective on January 1, 1979. (Previously Section 25 of the Constitution.) While no North Dakota court decisions exist which directly interpret this new article to the Constitution, it is considered that the fundamental principles of the Initiative and Referendum have been retained by the people in their approval and adoption of Article 105 of the amendments to the Constitution of North Dakota. Accordingly, it is considered that those general principles of law established by prior judicial determination are applicable to the present constitutional provisions regarding referendum.

In 1925, the Supreme Court held that the state Constitution ". . . is a limitation, not a grant, of power; the Legislature has full power of legislation, except as limited by that instrument and the federal Constitution." *Baird v. Burke County*, 205 N.W. 17 (N.D.). In reviewing the application of Section 25 of the Constitution, Initiative, Referendum and Recall, the Supreme Court has stated that this section "constitutes both the source and the measure of the powers therein reserved to the people" *Dawson v. Tobin*, 24 N.W.2d. 737 (N.D. 1946). The court went on to state in the Dawson case:

A constitutional provision which is positive and free from all ambiguity must be accepted. . . as it reads. The constitutional provisions reserving the powers of the initiative and referendum to the people of this state involved here are not couched in doubtful or ambiguous terms. It is stated specifically and emphatically that the people reserve the power . . . to approve or reject at the polls any measure or any item, section, part or parts of any measure enacted by the Legislature.

Under the referendum provisions of the constitution the lawmaking power of the legislature is not final but is in every instance subject to the reserved power of the people to approve or reject any measure or any item or any part of any measure. The period of its (measure) existence is indefinite and contingent upon what may be, and is, done under the power of the referendum. The people have the last word. (P. 748.)

The initiative and referendum are both phases of legislative processes, but they are wholly separate and independent powers. The constitution declares them as separate powers. The broad power reserved and vested in the people to reject laws is not limited by any other constitutional provisions. (P. 749.) (Emphasis added)

In the absence of North Dakota Supreme Court decisions on the direct question of whether or not the Legislature may exercise the power of referendum as proposed in Senate Bill 2280 as amended, it is necessary to look to the decisions in other jurisdictions.

A majority rule has been established that a state legislature may not delegate its legislative power to the people for purposes of referendum, except where the Constitution specifically permits such referral. (See 76 A.L.R. 1044) A minority of cases have held, however, that a legislature, usually in the absence of any constitutional provision for the power of referendum, may submit measures to the voters for approval. (See also 76 A.L.R. 1053, at 1058).

A leading case on the majority rule is *People ex rel. Thomson v. Barnett*, 176 N.E. 108, 76 A.L.R. 1044 (Ill. 1931). In that case, the Supreme Court of Illinois stated:

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 been withheld. This power it may not delegate to any other 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 United States Supreme Court appears to have adhered to the majority rule in its decision in *East Lake v. Forst City Enterprises*, 426 U.S. 668 (1976). This case involved the application and interpretation of the referendum provisions of the Ohio Constitution. Chief Justice Burger in the majority opinion of the Court stated:

A referendum cannot, however, be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the Legislature. Here, rather than dealing with a delegation of power, we deal with a power reserved by the people to themselves. (Page 675) (See also *James v. Valtierra*, 402 U.S. 137, Opinion by Justice Black, 1971.) (Emphasis added)

The constitutional provisions for referendum in Oregon were reviewed by that state's Supreme Court in the case of *State v. Mack*, 292 P. 306 (Or. 1930). The court held that "there can be no valid referendum of any law, except in pursuance of constitutional or statutory authority and regulation."

It is interesting to note that the original provisions for the Initiative and Referendum in the North Dakota Constitution were taken from the Oregon Constitution. *State ex rel. Linde v. Hall*, 159 N.W. 281 (N.D. 1916). Like the Oregon Constitution, the North Dakota constitutional provisions on the Initiative and Referendum have historically limited that power only to the people. Under our Constitution the only existing constitutional procedure for referral of a legislative measure to the people by the general power of the Referendum is by petition as provided for in the present Section 2 of Article 105 of the amendments to the Constitution. No provision is made, however, whereby the power of referendum is shared by the Legislature. Under our Constitution the people decide if the power

of the Referendum shall be used, and if used, to which legislative acts or parts thereof a referendum shall apply.

Where the power of the Referendum is shared by a legislature the people of other states have specifically included in their constitutions provisions which permit a referendum to be ordered by the Legislature. For example, the Supreme Court of Maine in reviewing a legislative measure carrying a referendum clause made reference to Article IV, Section 9 of the Constitution of Maine which expressly provides that "the Legislature may enact measures expressly conditioned upon the people's ratification by a referendum vote." Opinion of the Justices, Me., 231 A. 2d. 617 (1967) (See also 82 C.J.S., Statutes, Section 119).

From our review of the above-quoted provisions of the Constitution of North Dakota, the decisions of the Supreme Court of this state, the decisions of the courts of other states and the Supreme Court of the United States, it is our opinion that the power of the Referendum is reserved exclusively to the people of this state by their Constitution. It is further considered that that power is separate and independent and is not shared by the legislative branch of government. The language of Section 1 of Article 105 of the Constitution is "positive and free from all ambiguity" and "must be accepted. . . as it reads." To date, the people have chosen, as recently as November 7, 1978, to preserve the reservation of the power of the Referendum exclusively to themselves. In the Thomson case, supra, the court quoted from John Locke in his Two Treaties of Government written in 1689 at page 276:

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.

In conclusion and in direct response to the question of whether the Legislative Assembly may refer legislative acts to the voters of this state in the manner proposed by Section 8 of Senate Bill 2280 as amended, it is our opinion that the Legislature is without the constitutional power to invoke the process of the Referendum as provided in Senate Bill 2280 as that power is reserved for all purposes exclusively to the people. It being our opinion that the Legislative Assembly is without the power to exercise or invoke the power of the Referendum, it is not necessary for us to address the second question concerning the two-thirds vote requirements of the Initiative and Referendum as they may have applied to Senate Bill 2580 as amended.

It is hoped that the foregoing will be of assistance.

Sincerely,

ALLEN I. OLSON

Attorney General