

Findings



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Let the People Vote?

Why a Lottery Referendum Is Still Unconstitutional

By Lucy Holding, J.D. and William J. Brooks Jr.

In recent years, numerous lottery bills have been introduced in the North Carolina General Assembly that would enact a state lottery contingent upon a statewide voter referendum. However, to condition the enactment of a statewide legislative act on subsequent voter approval is unconstitutional not only because the North Carolina Constitution does not authorize this method of lawmaking, but also because this process amounts to an unconstitutional delegation of legislative power to the people of North Carolina.

The Constitution Limits the Use of a Referendum

Article II, Section 1 of the North Carolina Constitution specifically provides that “the legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives.”¹ The North Carolina Constitution reserves power to the voters in only limited areas: (1) the approval of certain State or local government debts;² (2) revising or amending the state Constitution;³ (3) levying of taxes by units when not a statewide tax;⁴ (4) calling a constitutional convention;⁵ (5) lending the state’s credit;⁶ and (6) paying reconstruction debts.⁷ The North Carolina Constitution reserves no other power to the voters except in these specific and limited areas.

North Carolina Supreme Court Decisions Limit a Referendum

The North Carolina Supreme Court has previously ruled that the General Assembly may not delegate legislative questions to another body or subordinate agency.⁸ The Supreme Court has held that

“legislative power vests exclusively in the General Assembly, Constitution of North Carolina, Article II, and, except as authorized by the Constitution, as in case of municipal corporations, may not be delegated.”⁹ In *Taylor v. Racing Association*, the North Carolina Supreme Court held unconstitutional a local act providing for the operation of a dog-racing track outside Morehead City because there was an unlawful delegation of legislative power to the qualified voters of the Town of Morehead City.¹⁰ In 1953, the North Carolina Supreme Court clearly stated in *Carolina-Virginia Coastal Highway*:

“Legislative power vests exclusively in the General Assembly, Constitution of North Carolina, Article II, and, except as authorized by the Constitution, as in case of municipal corporations, may not be delegated.”

The question of delegation of legislative power.—It is a settled principle of fundamental law, inherent in our constitutional separation of government into three departments and the assignment of the lawmaking function exclusively to the legislative department, that except when authorized by the Constitution . . . , the legislature may not abdicate its power to make laws or delegate its supreme legislative power to any other department or body.¹¹

In this case, the Supreme court held that the legislature cannot vest in a subordinate agency the power to apply or withhold application of the law in its absolute or unguided discretion.¹² The constitutional principle against delegation

of legislative power is thus clearly established in North Carolina.

The North Carolina Supreme Court has approved the General Assembly’s use of “local option” laws which are significantly different from statewide legislation that is conditioned upon a statewide voter referendum.¹³ “Local option” laws are passed by the legislature and operative only if approved by the voters of the affected locality. The North Carolina Supreme Court has not yet specifically decided whether the effectiveness of statewide legislation may be conditioned on a statewide vote of approval. A memorandum from the office of former Attorney General Mike Easley incorrectly suggests that because the Supreme Court has approved local option laws, it would also approve legislation subject to statewide voter approval.¹⁴ The Attorney General cites the North Carolina Supreme Court case, *Cottrell et al. v. Town of Lenoir*, to support his argument. In *Cottrell*, the Court upheld a local option law passed by the General Assembly not to take effect unless approved by a majority of the qualified voters of Lenoir.¹⁵ In upholding the local option law, the Supreme Court stated;

It is not open to question now that the Legislature may provide that a statute shall not take effect or be in force until approved by the people at an election to be held for the purpose of ascertaining their will in respect thereto. . . . “This principle underlies all ‘local option’ legislation, and is fully recognized and established in this state.”¹⁶

It is important to note that the Supreme Court was addressing a local option law in *Cottrell*, and that this case in no way stands for the proposition that the legislature may condition statewide legislation on a voter referendum.¹⁷

Judicial Authority From Other States Says No Referendum

The overwhelming weight of judicial authority clearly indicates that, except in states where the constitution expressly reserves to the people a power of decision, the function of legislating cannot be exercised by the people.¹⁸ Without a constitutional provision for a referendum, a legislature cannot pass a law which is framed for the state at large and conditioned upon acceptance by means of a voter referendum.¹⁹ This is the rule even in states which, like North Carolina, have upheld laws of the local option type.²⁰ In a majority of cases in which the states' highest courts examined the validity of general statutes conditioned upon statewide voter approval, the courts found these statutes to be unconstitutional.²¹ States including Illinois, Iowa, Maryland, Massachusetts, Mississippi, Alabama, New Hampshire, New York, Texas, California, Delaware, Missouri, Oregon, Ohio, Pennsylvania, Tennessee, Utah and Washington embrace this majority view.²²

The theory behind this prevailing doctrine is that to condition the validity of a statute upon voter approval is in effect an unconstitutional delegation of power by the state legislature to the voters of that state.²³ This legislative process is known as legislation by the people.²⁴ In an early leading case, *Barto v. Himrod et al.*, the New York Court of Appeals held unconstitutional a 1849 New York statute which contained a provision requiring the statewide voters to determine at the next election whether the act should become law.²⁵ The Court explained:

The legislative power in this state is vested by the Constitution in the Senate and Assembly. Article 3, §1. The power of passing general statutes exists exclusively in the legislative bodies... The exercise of this power by the people in other cases is not expressly and in terms prohibited by the Constitution; but it is forbidden by necessary and unavoidable implication. The Senate and Assembly are the only bodies of men clothed with the power of general legislation. They possess the entire power with the exception [set forth in the constitution]. The people reserved no part of it to themselves excepting in regard to laws creating public debt; and can therefore exercise it in no other case...

The legislature had no power to make such submission, nor had the

people the power to bind each other by acting upon it. They voluntarily surrendered that power when they adopted the Constitution. The government of this state is democratic; but it is a representative democracy, and in passing general laws the people act only through their representatives in the Legislature...

It is not denied that a valid statute may be passed, to take effect upon the happening of some future event certain or uncertain. But such a statute when it comes from the hands of the Legislature must be law in praesenti to take effect in futuro...

The event or change of circumstances on which a law may be made to take effect must be such as in the judgment of the Legislature affects the question of the expediency of the law; an event on which the expediency of the law, in the judgment of the legislature depends. On this question

“To condition the validity of a statute upon voter approval is in effect an unconstitutional delegation of power by the state legislature to the voters of that state.”

of expediency, the Legislature must exercise its own judgment definitely and finally. When a law is made to take effect upon the happening of such an event, the Legislature in effect declares the law expedient if the event should not happen; but expedient if it should happen. They appeal to no other man or men to judge for them in relation to its present or future expediency. They exercise that power themselves and then perform the duty which the constitution imposes upon them. The event on which the act was made to take effect was nothing else than the vote of the people on the identical question which the Constitution makes it the duty of the Legislature itself to decide. The Legislature has no power to make a statute dependent on such a contingency, because it would be confiding to others that legislative discretion which they are bound to exercise themselves, and which they cannot delegate or commit to any other man or men to be exercised. They have no more authority to refer such a question to the

whole people than to an individual. The people are sovereign, but their sovereignty must be exercised in the mode which they have pointed out in the Constitution. All legislative power is derived from the people; but when the people adopted the constitution, they surrendered the power of making laws to the [L]egislature, and imposed it upon that body as a duty.²⁶

These same reasons which support the rule against delegation of legislative power have been enunciated, reiterated and embraced by courts throughout this country.²⁷ For example, the Supreme Court of Mississippi accepted this doctrine holding that the Mississippi General Assembly cannot merely propose legislation and then leave it to the voters to adopt or reject.²⁸

The Supreme Court of Illinois, in reviewing an act conditioned upon a general referendum, noted that this doctrine against delegation of legislative power is supported by the English philosopher, John Locke, who wrote in the year 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.²⁹

An analysis of current North Carolina case law and an examination of the North Carolina Constitution indicate that the North Carolina Supreme Court would also follow the majority rule. As stated above, the Supreme Court has already established the general rule that legislative power vests exclusively in the General Assembly and, except as authorized in the Constitution, may not be delegated.³⁰ The North Carolina Constitution is very similar to the state constitutions of other states whose courts have already ruled in accordance with the majority rule. The North Carolina Constitution, like the constitutions of those states embracing the majority rule, vests exclusive legislative power of the State in the General Assembly, and authorizes very limited exceptions to this rule.³¹ Accordingly, the General Assembly has no power, or authority, to delegate its law making power to the people who surrendered that power to them. The people of North Carolina can only reclaim the lawmaking

power they voluntarily relinquished by an amendment or abolition to the North Carolina Constitution.

The South Carolina Precedent

This point is reaffirmed by the recent South Carolina Supreme Court ruling which said that legislative authority rests solely with the state legislature. In a case handed down on October 14, 1999, the court ruled unanimously that a portion of a bill passed by the South Carolina General Assembly calling for a statewide referendum of the people was unconstitutional.³² According to the legislation, a statewide referendum was to be held to determine whether or not to continue allowing video poker machines to pay out money.³³ The court determined that the delegation of legislative authority to the people of the state was unconstitutional stating that “Part II of Act 125 constitutes an unconstitutional attempt to delegate to the people the legislature’s power to set the policy of the state and enact laws to effectuate that policy.”³⁴ Interestingly, the sections of the North Carolina and South Carolina constitutions dealing with the delegation of legislative authority are very similar.³⁵ This, in turn, makes the ruling of South Carolina’s highest court particularly relevant to the discussion about whether or not a statewide referendum on a lottery in North Carolina is constitutional.

The South Carolina Supreme Court demonstrated that there was little room for debate on the question of constitutionality in this case. Referring to their action on this matter, the court stated that “a legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution.”³⁶ Therefore, by ruling the referendum unconstitutional, the court made it clear that the unconstitutionality of the referendum was undisputed in their view.

Neither state has language explicitly granting right of the people to pass law in a referendum. In their ruling, South Carolina’s highest court pointed out that “since the constitution does not contain a specific provision reserving to the people the power to legislate, in our opinion, Art. III, § 1 requires the legislature, not the people, to enact the general law.”³⁷ The court further stated that “we hold that the silence of the constitution on the ability of the people to enact laws by referendum does not constitute an implied grant of that right,”³⁸ clarifying that “although the legislature may delegate its authority to create rules and regulations to carry out a law, the legislature may not delegate its

power to make the law.”³⁹

The South Carolina Supreme Court’s ruling on the constitutionality of referenda and the similarity of the language delegating legislative authority in each respective state constitution, seems to indicate that a legal challenge to a state lottery contingent on the outcome of a statewide vote in North Carolina will be found unconstitutional.

It is worth noting that the state of South Carolina has implemented a lottery. However, their lottery was not enacted into law through a referendum of the people. Instead, their citizens voted in a referendum to remove a provision in their State Constitution prohibiting the state from enacting a lottery. Subsequently, the South Carolina General Assembly approved a lottery bill. This action was within the constitutional parameters allowed by the law.

The Supreme Court has already established the general rule that legislative power vests exclusively in the General Assembly and except as authorized in the Constitution may not be delegated.

The Opinion of the Former Attorney General Is Flawed

A memorandum to the office of former North Carolina Attorney General Mike Easley incorrectly asserts that Article I, Section 9 of the North Carolina Constitution authorizes the voters to enact legislation through a voter referendum.⁴⁰ Attorney General Easley relies on this faulty memo to support the opinion he later stated in a letter to the Legislature that a lottery referendum is constitutional in North Carolina.⁴¹ The Constitution of North Carolina, Article I, Section 9 (1971) provides:

Frequent Elections. For redress of grievances and for amending and strengthening the laws, elections shall be often held.⁴²

To construe this section as authorizing a voter referendum is not only contrary to the established canons of judicial construction but also inconsistent with the history of Article I, Section 9. Sections of the North Carolina Constitution must be construed in *pari materia* in determining the meaning of a particular section under consideration.⁴³ This rule of construction requires that words have the same meaning when used in different sections of the constitution. It is important to note

that Article 1, Section 12 provides:

Right of assembly and petition. The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances;⁴⁴

Since Article I, Section 9 and Section 12 must be construed in *pari materia*, the phrase “redress of grievances” must be given the same meaning in both sections. Accordingly, it follows that for “redress of grievances,” the people have a right to apply to the General Assembly through the elective process. A reading of Section 12 makes it clear that the people do not have the right to directly enact laws to redress their grievances, but must instead elect representatives or senators to the General Assembly, who in turn may address the people’s grievances.⁴⁵

If the North Carolina Constitution authorized a voter referendum process, it would clearly so state. Since 1898 twenty-seven states have adopted an initiative or referendum process by revising or amending their state constitutions to specifically delineate and authorize this process.⁴⁶ For example, Article V, Section 1 of Colorado’s Constitution provides:

The people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly.⁴⁷

The California Constitution, Article IV, Section 1 similarly specifically authorizes a referendum stating “the people reserve to themselves the powers of initiative and referendum.”⁴⁸ North Carolina has not amended its constitution to adopt the referendum. Furthermore, in 1995, the North Carolina House of Representatives defeated a proposed constitutional amendment to authorize the referendum process.

Another established rule of judicial construction is that “where a constitutional provision has received a settled judicial construction, and is afterward incorporated into a new or revised Constitution, it will be presumed to have been retained with a knowledge of the previous construction, and the courts will feel bound to adhere to it.”⁴⁹ Section 9 of our current constitution was taken almost verbatim from the 1776 North Carolina

Declaration Rights, Section 20, which was in turn adapted from the English Bill of Rights of 1689 which read in part:

...that, for redress of all grievances and for the amending, strengthening, and preserving of the laws, parliaments ought to be held frequently.⁵⁰

This section in the Bill of Rights was intended to curb abuse by the Stuart monarchs who failed to call frequent parliamentary elections in England, instead ruling by royal authority.⁵¹ The only substantive change in the 1776 Constitution was to substitute the word “parliament” for “elections.”⁵² From the history of this section, it is clear that the means given to the people to redress their grievances is to elect representatives who will amend and strengthen the laws. Section 9 does not give the people the power of referenda, but merely the power to elect representatives to the General Assembly to redress their grievances. Accordingly, North Carolina courts in reviewing the meaning of Article I, Section 9 of our current constitution will, in accordance with the canon of construction stated above and the history of Section 9, give “redress of grievances” the same meaning as in the English Bill of Rights.

Conclusion

In conclusion, it is clear that a lottery referendum is unconstitutional in North Carolina. The North Carolina Constitution does not provide for a referendum process, and vests exclusive legislative power in the General Assembly. The North Carolina Supreme Court has clearly indicated that this general rule against delegation of legislative power will not be set aside. Furthermore, analysis of other states’ case law and constitutions further suggests that the North Carolina Supreme Court would similarly find a delegation of legislative power to the North Carolina voters on a statewide issue amounts to an unconstitutional delegation of legislative power.¶

A major portion of this paper was published in April 1999, but additional text has been added to reflect more recent happenings.

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