OPEN HOUSING: SUBMISSION OF LEGISLATIVELY APPROVED ACT TO REFERENDUM HELD NOT ENJOINABLE

In *Spaulding v. Blair*[1] the Court of Appeals for the Fourth Circuit determined that the mere submission to state-wide referendum of a proposed open-housing act for final approval by the voters, under the procedure outlined in Article XVI of the Maryland Constitution, was not a violation of fourteenth amendment rights and could not be enjoined. During its 1967 session the Maryland General Assembly passed, and the Governor approved, the state's first open-housing enactment, known as Chapter 385, to take effect on June 1, 1967.[2] The Maryland Constitution provides that upon the filing of appropriate petitions with the Secretary of State "any law or part of a law capable of referendum" passed by the legislature must be presented to the people for approval or rejection at the polls.[3] When valid petitions[4] were duly filed requesting submission of Chapter 385 to a referendum on November 5, 1968, a group of Negro citizens brought a class action against the Secretary of State and various election officials for declaratory and injunctive relief to prevent placing the referendum on the ballot. Conceding the constitutionality of Chapter 385, the plaintiffs alleged that the submission of the proposed law to the electorate for approval or rejection would violate their privileges and immunities and deprive them of equal protection of the law. The defendants moved for dismissal, asserting that the case was not ripe and that the plaintiffs failed to state a claim upon which relief could be granted. The district court found that a justiciable controversy did exist since the theory of plaintiffs' suit was that mere submission of Chapter 385 to referendum was constitutionally forbidden.[5] However, the court dismissed for failure to state a meritorious claim, and the court of appeals affirmed.

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[1] 403 F.2d 862 (4th Cir. 1968).

[2] MD. ANN. CODE art. 49B, §§ 21-27 (1968).

[3] MD. CONST. art. XVI, §§ 2-4.

[4] Secretary of State v. McLean, 249 Md. 436, 239 A.2d 919 (1968).

[5] 403 F.2d at 862.

The power of referendum created by Article XVI was added to the Maryland Constitution in 1915 as a conscious modification of the principle of the principle of representative self-government.[6] The people, by reserving to themselves the right to accept or reject legislative decisions of the elected law-making body, became the final element in the legislative process. Their intervention by petition before the effective date of a statute suspends that statute;[7] it cannot "become a law or take effect until thirty days after its approval by a majority of the electors voting thereon."[8] Invoking the referendum process therefore creates a time "when the law is not a law."[9] Furthermore, rejection by referendum cannot technically constitute a repeal, for there is not yet a "law" to be repealed. Although Maryland has been able to enact minimal anti-discrimination legislation for public accommodations[10] and employment practices[11] despite the referendum provision, the state's initial attempt in the area of open-housing became embroiled in a legal struggle at the very time national policy in this field was being firmly established. The positive right to open-housing in the federal sphere is founded upon the Civil Rights Act of 1866[12] codified as section 1982 of Title 42 of the United States Code which despite its limitations has been held to bar all racial discrimination, both public and private, in the sale and rental of property;[13] upon the fourteenth amendment guarantees prohibiting state action which enforces[14] or encourages[15] private discrimination; and upon a most comprehensive measure included as Title VIII of the 1968 Civil Rights Act.[16] Maryland's Chapter 385, with its restrictive definition of "dwelling,"[17] pales in comparison to

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[6] Beall v. State, 131 Md. 669, 677, 103 A. 99, 102 (1917); *see* Everstine, *The Legislative Process in Maryland*, 10 MD. L. REV. 91, 138-54 (1949).

[7] *See* Barnes v. State *ex rel.* Pinkney, 236 Md. 564, 575, 204 A.2d 787, 793 (1964); First Continental Sav. & Loan Ass'n v. Director, 229 Md. 293, 299-304, 183 A.2d 347, 349-51 (1962).

[8] MD. CONST. art. XVI, §§ 2-4.

[9] McGinnis v. Board of Supervisors of Elections, 244 Md. 65, 69, 222 A.2d 391, 394 (1966).

[10] *See* MD. ANN. CODE art. 49B, §§ 21-27 (1968).

[11] *Id.* at §§ 17-20.

[12] Ch. 114, § 16, 16 Stat. 144.

[13] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413-14 (1968).

[14] *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

[15] *See* Reitman v. Mulkey, 387 U.S. 369 (1967).

[16] Pub. L. No. 90-284.

[17] MD. ANN. CODE art. 49B, § 21 (1968) (all buildings constructed before June 1, 1967 or for which permit was filed before that date and completion was by June 1, 1968 as well as all

the extensive federal protection currently available to Maryland citizens in the field of open-housing.

Since federal law already provides comprehensive protection, the question arises as to whether the separate states nonetheless have an affirmative duty to enact supporting legislation or to prevent repeal of existing legislation. This dispute frequently crystalizes in the context of a referendum attempt. Although the California Supreme Court has "grave doubts" as to the constitutionality of a proposed amendment to the state constitution which would have effectively repealed two existing open-housing laws and significantly impeded new legislation in the field, it refused to enjoin the referendum, preferring to pass on the question after the vote rather than "interfere with the power of the people to propose laws and amendments to the Constitution, and to adopt or reject the same at the polls."[18] When the amendment was approved by a wide margin,[19] the court promptly struck it down in *Mulkey v. Reitman*[20] as involving state action infringing upon the fourteenth amendment by encouraging discrimination in real property transactions. In *Otey v. Common Council of City of Milwaukee*,[21] however, the federal district court was less hesitant to act before the people had voted, and a referendum on a resolution to prevent any legislation on open-housing for a two-year period was enjoined. Emphasizing the tense social atmosphere,[22] the court could see no adequate reason to allow a referendum. The proposed resolution was deemed unconstitutional on its face, [23] as the court felt that it would significantly involve the city in private discrimination violative of the fourteenth amendment by giving statutory assurance of non-interference.[24] Disregarding any reference to state action or the fourteenth amendment, another federal district court in *Holmes v. Leadbetter*[25] enjoined a

condominiums, cooperatives, and owner-occupied dwellings containing fewer than twelve units were exempt).

[18] Lewis v. Jordan, Sacramento No. 7549 (Cal. Sup. Ct. 1964).

[19] CALIFORNIA SECRETARY OF STATE, STATEMENT OF THE VOTE AT GENERAL ELECTION, Nov. 3, 1964, at 25 (1964) (4,526,460 for; 2,395,747 against).

[20] 50 Cal. Rptr. 881, 413 P.2d 825 (1966), *aff'd*, 387 U.S. 369 (1967).

[21] 281 F. Supp. 264 (E.D. Wis. 1968).

[22] *Id.* at 277-79.

[23] *Id.* at 274 (a legislature cannot by statute irrevocably withdraw a topic from the scope of future legislation) & 275.

[24] *Id.* at 273.

[25] No. 31343 (E.D. Mich., Aug. 16, 1968); *contra*, Holland v. Board of Elections (decided

referendum aimed at repeal of an existing municipal open-housing ordinance by holding that simple repeal in this area would not be a routine rescission and return to the status quo. Rather, repeal would constitute an invitation to discriminate by apparently making legal what had been proscribed. Since federal and local protection had already been established by case and statute, existence of open-housing was no longer a question for public vote. The referendum, even if construed as nothing more than a poll, was "repugnant and offensive."[26] Although the result of a referendum may be voided as a deprivation of guaranteed rights,[27] and the referendum itself may be enjoined if the suggested law is unconstitutional on its face[28] or the attempted repeal of existing law could be construed as encouraging unconstitutional behavior,[29] no decision as yet has dealt with the question posed in *Spaulding v. Blair*: whether a referendum should be enjoined when it is proposed not to derogate guaranteed rights, stifle future legislation or repeal present statutes, but only to determine whether a *new* law admittedly constitutional, will be enacted. The Court of Appeals for the Fourth Circuit decided that such a referendum should not be enjoined.

In *Spaulding v. Blair*, despite the plaintiffs' characterization of the referendum as an attempt to encourage discrimination by the repeal of an existing law,[30] the court chose to review the submission of Chapter 385 to the electorate presenting an opportunity for a possible "decision of the voters to forego the adoption of supporting legislation for the open-housing principle," which could in no way diminish the rights of any individual or group guaranteed under federal provisions.[31] There could be no contention that the referendum constituted a repeal of anti-discrimination legislation, for by the terms of the state constitution no such law has yet taken effect. Furthermore, even if eventual rejection at the polls could be

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Feb. 7, 1968; petition for cert. filed May 7, 1968) (Ohio Supreme Court denied an appeal from a lower court decision dismissing a challenge to the constitutionality of a city-wide referendum that would nullify an existing fair-housing ordinance).

[26] No. 31343 at 12.

[27] See note 20 *supra*.

[28] *See* 281 F. Supp. 264 (E.D. Wis. 1968); Ellis v. Mayor and City Council, 234 F. Supp. 945 (D. Md. 1964), *aff'd*, 352 F.2d 123 (4th Cir. 1965).

[29] See notes 20, 25 *supra*.

[30] *See* 403 F.2d at 864.

[31] *Id.* at 865.

denominated a repeal, repealer alone was not deemed forbidden by the fourteenth amendment.[32] Citing *Reitman*[33] to reinforce the plaintiffs' admission that the state had no affirmative obligation to enact open-housing,[34] the court rejected plaintiffs' further reliance on that case by carefully noting that, as distinguished from *Reitman*, *Spaulding* involved no attempt to bar future legislation or to secure a state constitutional right to discriminate—actions which would impermissibly involve the state in the encouragement or authorization of private discrimination.[35] Rather, the holding of the referendum would be neutral, giving solace or support to neither side.[36] Just as the vote of a member of the General Assembly against Chapter 385 or the Governor's possible veto could not have been enjoined as a denial of equal protection to plaintiffs, so also the power of referendum was immune as an integral and constitutional feature of the state's legislative process.[37] Considerations of the federal system dictated that "to the extent that the states do not significantly involve themselves in deprivations of fundamental rights" their legislative processes should remain exempt from federal court restraints.[38] Since the proposed law, if approved by the voters, would be constitutional[39] and if rejected would in no way diminish plaintiffs' civil rights,[40] the mere submission of Chapter 385 to referendum could not abridge constitutionally-guaranteed rights and could not be enjoined.[41]

Spaulding v. Blair concludes that a "neutral" referendum procedure, one which may be invoked to challenge *any* legislative enactment, may be constitutionally used to defeat proposed open-housing legislation. That belief has apparently not been challenged by the Supreme Court's recent decision in *Hunter v. Erickson*[42] striking down an amendment to an Ohio city charter which suspended a 1964 open-housing ordinance and provided that the 1964 ordinance and

[32] *Id.* at 864-65.
[33] *Id.* at 864 n.4.
[34] *Id.* at 864.
[35] *Id.*
[36] *Id.* at 865.
[37] *Id.* at 863-65.
[38] *Id.* at 865.
[39] *Id.* at 864.
[40] *Id.* at 865.
[41] *Id.*
[42] 37 U.S.L.W. 4091 (U.S. Jan. 20, 1969).

any future ordinance regulating the sale or lease of real property "on the basis of race, color, religion, national origin or ancestry" must be subjected to referendum for approval by a majority of the voters before such ordinances could become effective.[43] The Court held that the charter amendment denied equal protection of the law by requiring a referendum in this area alone since it became "substantially more difficult" for persons seeking open-housing legislation to find success than for those who sought other ordinances dealing with the real property market.[44] Under the standard thus enunciated Maryland's Article XVI, which imposes no special burden upon anti-discrimination legislation, would appear unobjectionable. Furthermore, the *Spaulding* referendum procedure, unlike the constitutional amendment involved in *Reitman v. Mulkey*,[45] was not shown to have been created with the "intent"[46] of encouraging racial discrimination or making open-housing legislation difficult to enact.[47] On the other hand, there remains the possibility that the *Reitman-Hunter* majority could reverse *Spaulding* by focusing upon "the reality" of the Maryland referendum procedure's "impact."[48] Voiding the referendum process because of the practical disadvantage which it imposes upon minority groups seeking protective laws, however, would be tantamount to requiring that minority groups not be subjected to political processes and hurdles which are normally incident to legislative enactment. If carried to its logical extension, such a rationale might be used to impose an affirmative duty on the states to enact legislation favorable to minority groups who are politically incompetent to enact legislation for themselves;[49] and such analysis clearly would go far beyond the Court's holdings in *Reitman* and *Hunter*. Thus, since the Court is apparently not inclined to hold that the mere repeal of open-housing legislation in itself constitutes a denial of equal pro-

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[43] *Id.* at 4091.

[44] *Id.* at 4092.

[45] 387 U.S. 369 (1967).

[46] *Id.* at 376. In their dissent to *Reitman*, Justices Harlan and Stewart, who concurred in *Hunter*, indicated that it was unsubstantiated, as well as irrelevant, that Proposition 14 may have been enacted with the intent of encouraging racial discrimination. *Id.* at 390-91.

[47] See note 6 *supra* and accompanying text.

[48] *See* Hunter v. Erickson, 37 U.S.L.W. 4091, 4093 (U.S. Jan. 20, 1969). *But see Id.* at 4093-94 (concurring opinion).

[49] *Cf.* Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 55, 73.

tection,[50] the Fourth Circuit's decision in *Spaulding* will likely not be overturned.

[50] *See* Hunter v. Erickson, 37 U.S.L.W. 4091, 4092 n.5 (U.S. Jan. 20, 1969); Reitman v. Mulkey, 387 U.S. 369, 376 (1967). *But see* Ranjel v. Lansing, 37 U.S.L.W. 2407 (W.D. Mich., Jan. 8, 1969); Holmes v. Leadbetter, No. 31343 (E.D. Mich., Aug. 16, 1968).