UIC Law Review

Volume 6 | Issue 2 Article 6

Spring 1973

People ex rel. Ogilvie v. Lewis, a Procedure for the Enactment of Anticipatory Legislation in Illinois, 6 J. Marshall J. of Prac. & Proc. 347 (1973)

Louis Xiques

NOTES AND RECENT DECISIONS

PEOPLE EX REL. OGILVIE V. LEWIS, A PROCEDURE FOR THE ENACTMENT OF ANTICIPATORY LEGISLATION IN ILLINOIS

INTRODUCTION

The idea of revising the organic instrument of a state is peculiarly American.[1] The doctrine of Popular Sovereignty[2] had a strong appeal to the inhabitants of the Colonies in the latter half of the 18th Century. The people were sovereign;[3] it followed that they could make a constitution[4] and revise or amend the document already adopted.[5]

Any constitutional revision, however, whether by amendment or convention, has always presented difficulties which naturally arise from a change in a state's most basic legal foundation.[6] The enactment of legislation in anticipation of the removal of constitutional limitations has long been a particularly troublesome area.[7] The interim between the adoption and the effective date of a superseding constitution or constitutional amendment has typically created a conflict for the legislature.

---

[1] Changes were made in the English constitution by act of Parliament and there was no distinction in form between organic and statutory legislation. And though the Colonists were familiar with the English system, they chose not to follow it. Consequently, there developed an idea that was peculiarly American — the idea that an instrument of government should make provision for its orderly amendment. Martig, *Amending the Constitution, Article Five; The Keystone of the Arch*, 35 MICH. L. REV. 1253 (1937).

[2] *See* BARKER, SOCIAL CONTRACT, ESSAYS BY LOCKE, HUME, AND ROUSSEAU (1968); RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 623-32 (10th ed. 1964); Laski, *The Theory of Popular Sovereignty*, 17 MICH. L. REV. 201 (1919).

[3] *See* Declaration of Independence, July 4, 1776; MENTOR, FEDERALIST PAPERS (8th ed. 1961) Nos. 28, 39, 59.

[4] U.S. CONST. Preamb.; ILL. CONST. Preamb. (1970); ILL. CONST. Preamb. (1870); ILL. CONST. Preamb. (1848); ILL. CONST. Preamb. (1818); Luther v. Borden, 48 U.S. (7 How.) 1, 46 (1849); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

[5] U.S. CONST. art. V; ILL. CONST. art. XIV, §§ 1, 2 (1970); ILL. CONST. art. XIV, §§ 1, 2 (1870); ILL. CONST. art. XII, §§ 1, 2 (1848); ILL. CONST. art. VII, § 1 (1818). See ORFIELD, AMENDING THE FEDERAL CONSTITUTION (1942).

[6] *See* Goodwin, *How Should the Illinois Constitution Be Amended?*, 9 ILL. L. REV. 601 (1915); Kopp, *The Illinois Constitution: An Orientation*, 17 DE PAUL L. REV. 480 (1968); Lavery, *Revising a Constitution*, 15 ILL. L. REV. 437 (1921); Price, *Urbanism and a New State Constitution*, 17 DE PAUL L. REV. 532 (1968); Witwer, *The Shape of the Illinois Constitution*, 17 DE PAUL L. REV. 467 (1968).

[7] The earliest American case on the subject of anticipatory legislation is Pratt v. Allen, 13 Conn. 119 (1839). In that case the Connecticut Supreme Court upheld the constitutionality of legislation enacted in anticipation of a proposed amendment to the Connecticut Constitution. The court's lengthy discussion of the merits of anticipatory legislation, however, was *dictum*

Although a general assembly is bound by the limiting provisions under the old constitution until the new one becomes effective,[8] it also, in order to insure an orderly transition, is faced with the task of enacting legislation which will become effective immediately after the new constitution or constitutional amendment goes into full force.[9] Thus, while practical considerations warrant the enactment of anticipatory legislation, binding constitutional limitations inhibit the power of the legislature to effectively enact for the future.

Specifically, the controversy with respect to anticipatory legislation has centered around the fact that though enacted to become law only after the invalidating constitutional provisions have been removed, such legislation is nonetheless unconstitutional under the constitution in effect at the time the legislature undertakes to act. The power of a general assembly to override present constitutional limitations in anticipation of their removal has been the subject of much conflicting law. Though most of the jurisdictions which have considered the question accord on the fact that anticipatory legislation is both proper and necessary, the cases on the subject are inconsistent with respect to the procedure which must be followed by the legislature to insure the constitutionality of such anticipatory enactments.[10]

PEOPLE EX REL. OGILVIE V. LEWIS, A QUESTION OF FIRST IMPRESSION IN ILLINOIS

Although the need for a comprehensive constitutional revision had become apparent to the majority of the Illinois electorate in the latter part of 1968,[11] the adoption of the 1970 Consti-

since the case held that the Act in question would have been valid under the constitution in effect at the time of its passage without the necessity for an amendment thereto.

[8] Unlike the Federal Constitution, state constitutions operate as limitations upon the lawmaking powers possessed by state legislatures. In Railroad Co. v. County of Otoe, 83 U.S. (16 Wall.) 667, 672-73 (1872) the Court stated:

> It is true that, in construing the Federal Constitution, Congress must be held to have only those powers which are granted expressly or by necessary implication, but the opposite rule is the one to be applied to the construction of a State Constitution. The legislature of a state may exercise all powers which are properly legislative, unless they are forbidden by the State or National Constitution.

[9] In People *ex rel.* Ogilvie v. Lewis, 49 Ill. 2d 476, 483-84, 274 N.E.2d 87, 92 (1971) the Illinois Supreme Court stated:

> Such legislation is necessary in some cases to supplement new constitutional provisions which are not self-executing and in other cases to insure an orderly and efficient transition from the old to the new constitution and a continuity in the operation of government.

[10] The disharmony relates to the point in time at which anticipatory legislation may be constitutionally enacted. While some courts are of the opinion that such legislation is valid no matter when enacted, others have held that anticipatory legislation is valid only if enacted after the proposed constitutional revisions have been formally ratified. See cases collected under 171 A.L.R. 1075 (statute anticipating constitutional amendment).

[11] After the early 1960s, the cumulative effects of generations of effort

tution created problems never before faced by the Illinois judiciary. The recent case of *People ex rel. Ogilvie v. Lewis*,[12] raised the question of the validity of anticipatory legislation in Illinois for the first time.[13] In *Ogilvie*, the constitutionality of the Transportation Bond Act,[14] an act passed by the General Assembly in anticipation of the already ratified but not yet effective 1970 Constitution, was challenged on the ground that the Act violated certain provisions of the 1870 Constitution, in effect at the time the Bond Act was passed by the General Assembly. In upholding the constitutionality of the Transportation Bond Act under the 1970 Constitution, the Illinois Supreme Court delineated the procedural guidelines to be followed by the General Assembly in the enactment of anticipatory legislation. Under the *Ogilvie* doctrine, anticipatory legislation will be tested under the old constitution unless the new constitution has been ratified at the time the General Assembly undertakes to act.[15]

Facts in Ogilvie

The Illinois Constitution of 1970 was adopted by the Sixth Illinois Constitutional Convention[16] on September 3, 1970. It

led to demands for a convention which would undertake the modernization of the 1870 Constitution.

In 1965, the General Assembly created the Constitution Study Commission charged to determine whether a new constitution or only a partial revision was needed. The Commission ultimately recommended a convention. The call was put to public referendum by a unanimous Senate and near-unanimous House.

In 1968, the non-partisan, civic Illinois Committee for a Constitutional Convention effectively coordinated the support of dozens of organizations. The convention won the support of the State's major news media, both major political parties, virtually all public office incumbents, as well as their challengers, and scores of organizations and individuals.

The 1870 Constitution was in itself perhaps the strongest force behind voter approval of the convention in November 1968. Nearly a century of experience provided one clear and simple conclusion — that a new constitution was needed desperately. The old one was too rigid and detailed. The state was forced increasingly to seek ways around its unworkable Constitution which became a system of evasions, circumventions and at times downright violations of clear mandates of the basic law.

Sixty percent of all voters in the 1968 general election voted in favor of the convention. The 2.9 million favorable vote was the greatest ever given any proposition or candidate in Illinois history. It was an overwhelming mandate for comprehensive constitutional reform.

On December 15, 1970, at a special election held for that purpose, the proposed constitution was ratified by the people by a vote of 1,122,425 to 838,168. Witwer, *Introduction to the 1970 Illinois Constitution.* S.H.A. CONST. art. I at *xiii to xx.*

[12] 49 Ill. 2d 476, 274 N.E.2d 87 (1971).

[13] The constitutionality of anticipatory legislation had not before been questioned in Illinois for the practical reason that the 1848 and 1870 Constitutions became effective very shortly after their ratification by the people. People *ex rel.* Ogilvie v. Lewis, 49 Ill. 2d 476, 482, 274 N.E.2d 87, 92 (1971). The 1848 Constitution was ratified on March 6, 1848 and became effective on the first day of April of that year. The 1870 Constitution was ratified on July 2, 1870 and became effective on August 8, 1870. *See* ILL. CONST. Adoption Schedule (1870); ILL. CONST. Adoption Schedule (1848).

[14] ILL. REV. STAT. ch. 127, § 701 *et seq.* (1971).

[15] 49 Ill. 2d 476, 483, 274 N.E.2d 87, 92 (1971).

[16] The Sixth Illinois Constitutional Convention consisted of 116 mem-

was ratified by the people on December 15 of the same year, and became generally effective[17] on July 1, 1971.[18] The Transportation Bond Act was enacted by the 77th General Assembly on June 28, 1971, three days *before* the 1970 Constitution became *effective,* but *after* its *ratification* by the people of this State. The anticipatory nature of the Act was apparent from its Preamble:

> An Act in anticipation of the effective date of the Illinois Constitution of 1970 and to implement, in part, Article XIII, Section 7 of the Constitution.[19]

The Act further provided:

> This Act having been passed in anticipation of the effective date of the Illinois Constitution of 1970 and to implement, in fact, Article XIII, Section 7 of the Illinois Constitution of 1970, shall go into full force and effect upon July 1, 1971 or upon the date when the Governor signs this Act into law if such signing occurs after July 1, 1971.[20]

The Act was approved by the governor and thereupon became law on July 2, 1971, one day after the 1970 Constitution became effective. Pursuant to the provisions of the Act,[21] Richard B. Ogilvie, then Governor of Illinois, determined that a number of the transportation bonds should be sold at the earliest possible time and directed John W. Lewis, then Secretary of State, to prepare advertisements for purchase bids as provided by the Act.[22] Lewis refused to comply on the ground that there were serious questions concerning the validity of the Transportation Bond Act under the constitutions of both the United States and the State of Illinois.[23] Governor Ogilvie, as petitioner, filed an original action in the Illinois Supreme Court[24] seeking a writ of mandamus[25] directing Secretary Lewis, respondent, to take all necessary action as directed by petitioner in connection with the issuance and sale of bonds as authorized by the Transportation Bond Act.[26] Among other contentions made but not

---

bers, two elected from each of the fifty-eight Senatorial Districts in the State.

[17] ILL. CONST. transition schedule (1970).

[18] ILL. CONST. adoption schedule (1970).

[19] Transportation Bond Act, Preamble, ILL. REV. STAT. ch. 127, § 701 *et seq.* (1971). ILL. CONST. art. XIII, § 7 provides:

> Public transportation is an essential public purpose for which public funds may be expended. The General Assembly by law may provide for, aid, and assist public transportation, including the granting of public funds or credit to any corporation or public authority authorized to provide public transportation within the State.

[20] ILL. REV. STAT. ch. 127, § 712 (1971).

[21] *Id.* § 704.

[22] *Id.*

[23] 49 Ill. 2d 476, 478, 274 N.E.2d 87, 92 (1971).

[24] Pursuant to ILL. SUP. CT. R. 381(a) (1971).

[25] ILL. REV. STAT. ch. 87 (1971).

[26] 49 Ill. 2d 476, 478, 274 N.E.2d 87, 92 (1971).

commented upon here,[27] Respondent Lewis set forth the argument that the constitutionality of the Act should be determined under the 1870 Constitution, in effect at the time the Act was passed by the General Assembly, and not under the 1970 Constitution, in effect at the time the Act became law.[28] As stated by the court:

> The underlying issue is whether the legislature has power to enact legislation to anticipate and be tested by an already ratified but not yet effective constitution even though the legislation possibly may not have been valid if tested by the constitution in effect at the time of its passage.[29]

Although a question of first impression in Illinois,[30] anticipatory legislation had long been a source of disharmony among the state courts, which had expressed conflicting opinions with respect to the procedure by which the legislature could constitutionally anticipate the removal of limitations upon its lawmaking power. While a number of jurisdictions struck down anticipatory legislation as an unconstitutional expansion of legislative power,[31] others placed virtually no restrictions upon its enactment.[32] There being no recognized authority on the subject, the law with respect to anticipatory legislation lingered in a state of conflicting and often confusing opinions for almost a century.[33] When, in 1925, the United States Supreme Court handed down

---

[27] Respondent made a total of seven arguments urging the unconstitutionality of the Transportation Bond Act. While only one is commented upon here, it should be noted that the following contentions were also made:

1 — That the Act did not set forth the specific purposes of the law as required by art. IX, § 9(b) of the 1970 Constitution, and that it appropriated public funds for a non-public purpose in violation of art. VIII, § 1(a) of the 1970 Constitution.

2 — That the Act was not confined to one subject and was therefore violative of art. IV, § 8(d) of the 1970 Constitution.

3 — That the Act did not set forth the manner of repayment of the transportation bonds and therefore violated art. IX, § 9(b) of the 1970 Constitution.[6]

4 — That the Act constituted a continuing appropriation and that as such it violated art. IV, § 8(d), and art. VIII, § 2(b) of the 1970 Constitution.

5 — That the Act provided for an unconstitutional delegation of legislative authority to the governor.

6 — That the Act was invalid in that it was vague and indefinite.

The court considered all of the above stated arguments and found them to be without merit.

[28] 49 Ill. 2d 476, 482, 274 N.E.2d 87, 92 (1971).

[29] *Id.*

[30] Note 13 *supra.*

[31] Etchison Drilling Co. v. Flournoy, 131 La. 442, 59 So. 867 (1912); *In re* Opinion of the Justices, 237 A.2d 400 (Me. 1968); *In re* Opinion of the Justices, 137 Me. 350, 19 A.2d 53 (1941); *In re* Opinion of the Justices, 132 Me. 519, 174 A. 845 (1933); Watson v. Miller, 55 Tex. 289 (1881).

[32] Alabam's Freight Co. v. Hunt, 29 Ariz. 419, 242 P. 658 (1926); Pratt v. Allen, 13 Conn. 119 (1839); Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967); *In re* Thaxton, 78 N.M. 668, 437 P.2d 129 (1968); Application of Oklahoma Industrial Finance Authority, 360 P.2d 720 (Okla. 1961); State v. Hecker, 109 Ore. 520, 221 P. 808 (1923).

[33] See cases collected under 171 A.L.R. 1075; 16 Am. Jur. 2d, Constitu-

its decision in *Druggan v. Anderson*,[34] uniformity seemed at hand.

DRUGGAN AND ITS LEGACY, A TALE OF CONFUSION

In *Druggan v. Anderson*, the petitioner was imprisoned for contempt for disobeying a temporary injunction issued under Section 22 of Title II of the National Prohibition Act,[35] an act passed by the Congress in anticipation of the *already ratified but not yet effective* eighteenth amendment to the United States Constitution. From an order dismissing his petition for a writ of habeas corpus he appealed to the United States Supreme Court. Petitioner argued that since the eighteenth amendment had not gone into effect at the time of the passage of the Act in question, Congress lacked the constitutional authority to enact it.[36] The argument was flatly rejected. In upholding the constitutionality of the Act, Mr. Justice Holmes stated:

> The grant of power to Congress is a present grant . . . no reason has been suggested why the Constitution may not give Congress a present power to enact laws intended to carry out constitutional provisions for the future when the time comes for them to take effect.[37]

Having resolved the question of law presented in the case,[38] however, the Court added by way of dictum:

> Indeed it would be going far to say that while the fate of the Amendment was uncertain Congress could not have passed a law in aid of it, conditioned upon the ratification taking place.[39]

The dictum proved to be unfortunate, for while the case became precedent on the subject of anticipatory legislation, it was later interpreted by a number of courts as authority for the proposition that anticipatory legislation was valid no matter when enacted.

In *Application of Oklahoma Industrial Finance Authority*,[40] the Oklahoma Supreme Court, citing *Druggan* as authority, upheld legislation enacted in anticipation of a *not yet ratified* amendment to the Oklahoma Constitution. Therein the court stated:

> We therefore hold that there is no constitutional inhibition forbidding the enactment of an enabling act to become effective

tional Law § 180; 16 C.J.S., Constitutional Law § 47.

[34] 269 U.S. 36 (1925).

[35] Act of Oct. 28, 1919 ch. 85, § 22, 41 Stat. 314.

[36] 269 U.S. 36, 38 (1925).

[37] *Id.* at 39.

[38] The question of law in *Druggan* was whether Congress had the power to enact legislation in anticipation of an *already ratified* but not yet effective amendment to the United States Constitution, such legislation to take effect only after the enabling amendment became effective.

[39] 269 U.S. 36, 39 (1925).

[40] 360 P.2d 720 (Okla. 1961).

> at a future date *when and if* a proposed constitutional amendment is adopted.[41]

Again in *Henson v. Georgia Industrial Realty Company,*[42] the Georgia Supreme Court, also relying on *Druggan,* upheld legislation enacted in anticipation of a proposed but *not yet ratified* amendment to the Georgia Constitution. The same result obtained in *In re Thaxton*[43] and in a number of other cases[44] which, under the authority of the *Druggan* dictum, sanctioned the legislature's disregard of effective constitutional limitations on its lawmaking power. Though the holding in *Druggan* stood only for the proposition that anticipatory legislation was permissible when enacted *after* the enabling constitutional provisions had been *ratified,*[45] whatever uniformity that decision could have afforded the state courts was obviated by its dictum. Instead of settling the controversy, *Druggan* merely cumulated it; for after that decision the law with respect to anticipatory legislation remained as obscure as it had been in the past.

Procedural and Constitutional Aspects Of Anticipatory Legislation

Although the power of a general assembly to legislatively anticipate a future event or contingency has been held to be beyond question,[46] the courts have differed with respect to the procedure by which legislative *power* could be constitutionally anticipated to create a valid law.

Since the discordance specifically relates to the point in time at which anticipatory legislation may be enacted,[47] the opinions on the subject may be divided into two categories: those that distinguish between *pre* and *post* ratification anticipatory legislation,[48]

---

[41] *Id.* at 723 (emphasis added).

[42] 220 Ga. 857, 142 S.E.2d 219 (1965).

[43] 78 N.M. 668, 437 P.2d 129 (1968).

[44] Alabam's Freight Co. v. Hunt, 29 Ariz. 419, 242 P. 658 (1926); Busch v. Turner, 26 Cal. 2d 817, 161 P.2d 456 (1945); Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967); Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970) (*dictum*).

[45] Inasmuch as the act in *Druggan* was passed by the Congress after the eighteenth amendment had been duly ratified by the states, any utterances by the Court with respect to *pre* ratification anticipatory legislation would be at best judicial *dictum.*

[46] Firemen's Benevolent Ass'n v. City Council, 168 Cal. App. 2d 765, 336 P.2d 273 (1959); City of Miami Beach v. Lansburgh, 218 So. 2d 519 (Fla. 1969); Telford v. City of Gainesville, 208 Ga. 56, 65 S.E.2d 246 (1951); People v. Barnett, 344 Ill. 62, 176 N.E. 108 (1931); Eisele v. Morton Park District, 122 Ill. App. 2d 226, 258 N.E.2d 127 (1970); People v. Kearse, 56 Misc. 2d 586, 289 N.Y.S.2d 346 (1968); County School Board v. Town of Herndon, 194 Va. 810, 75 S.E.2d 474 (1953).

[47] Note 10 *supra.*

[48] Neisel v. Moran, 80 Fla. 98, 85 So. 346 (1919); Terrebonne Parish Sch. Bd. v. St. Mary Parish Sch. Bd., 242 La. 667, 138 So. 2d 104 (1962) (*dictum*); Peck v. City of New Orleans, 199 La. 76, 5 So. 2d 508 (1941) (*dictum*); Peck v. Tugwell, 199 La. 125, 5 So. 2d 524 (1941) (*dictum*); Etchison Drilling Co. v. Flournoy, 131 La. 442, 59 So. 867 (1912); *In re*

and those that do not.[49] The latter type may be said to follow the position taken by the dictum in *Druggan,* while the former may be said to follow *Druggan's* decisive utterance.

The view taken by courts which do not distinguish between the times at which anticipatory legislation is enacted has been that legislation, which is unauthorized under an effective constitution but enacted in anticipation of the removal of constitutional limitations, is valid no matter when enacted; provided that such legislation becomes effective only after the constitutional limitations have been removed.[50] In *Alabam's Freight Co. v. Hunt,*[51] a suit challenging the validity of the then newly enacted Workmen's Compensation Act,[52] the contention was made that since at the time of the passage of the Act in question the Arizona Legislature lacked the power under the state constitution to pass such a bill, it could not enact a valid law on the subject which would become effective upon the adoption of a *not yet ratified* constitutional amendment removing the limitations.[53] In upholding the validity of the Act in question, the Arizona Supreme Court cited the dictum in *Druggan* and went on to say:

> In Druggan v. Anderson . . . the Court says:
>
> 'Indeed, it would be going far to say that while the *fate of the amendment was uncertain* Congress could not have passed a law in aid of it, conditioned upon the ratification taking place.'
>
> We are of the opinion that the Legislature may pass an act to take effect only upon the adoption of a constitutional amendment authorizing it, and that its constitutionality is to be tested by the Constitution as it is at the time the law takes effect, and not as when it was passed.[54]

The rationale of the court appears to have been that the constitutionality of a statute must be determined under the con-

---

Opinion of the Justices, 237 A.2d 400 (Me. 1968); *In re* Opinion of the Justices, 137 Me. 350, 19 A.2d 53 (1941); *In re* Opinion of the Justices, 132 Me. 519, 174 A. 845 (1933); City of Gaylord v. Beckett, 378 Mich. 273, 144 N.W.2d 460 (1966); Watson v. Miller, 55 Tex. 289 (1881).

[49] *In re* Opinion of the Justices, 227 Ala. 296, 149 So. 781 (1933); *In re* Opinion of the Justices, 227 Ala. 291, 149 So. 776 (1933); Alabam's Freight Co. v. Hunt, 29 Ariz. 419, 242 P. 658 (1926); Busch v. Turner, 26 Cal. 2d 817, 161 P.2d 456 (1945); Pratt v. Allen, 13 Conn. 119 (1839); Henson v. Georgia Industrial Realty Co., 220 Ga. 857, 142 S.E.2d 219 (1965); Coguenham v. Avoca Drainage Dist., 130 La. 323, 57 So. 989 (1912); State *ex rel.* State Building Commission v. Smith, 335 Mo. 840, 74 S.W.2d 27 (1934); Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967); Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970); *In re* Thaxton, 78 N.M. 668, 437 P.2d 129 (1968); Application of Oklahoma Industrial Finance Authority, 360 P.2d 720 (Okla. 1961); State v. Hecker, 109 Ore. 520, 221 P. 808 (1923); State v. Rathie, 101 Ore. 339, 199 P. 169 (1921); Libby v. Olcott, 66 Ore. 124, 134 P. 13 (1913); Galveston, B.&C. Narrow-Gauge R. Co. v. Gross, 47 Tex. 428 (1877).

[50] Note 49 *supra.*

[51] 29 Ariz. 419, 242 P. 658 (1926).

[52] H.B. No. 227, Session Laws of 1925.

[53] 29 Ariz. 419, 422, 242 P. 658-59 (1926).

[54] *Id.*

stitution in effect at the time the statute became law, and not under the one in force at the time the act was passed by the legislature. Although the argument seems logical on its face, the reasoning begs the question, for it ignores the fundamental premise that an operative constitution is a binding limitation upon the *power* to legislate.[55] Absent this power, an enactment is invalid *ab initio;* it is a nullity from its inception precisely because the legislature lacked the power to enact it.[56] Moreover, a superseding constitution, or an amendment to an existing one, does not have retroactive effect; it does not give validity to legislation a general assembly initially lacked the power to enact.[57] Given these criteria, the only logical inference that can be drawn is that the determination of constitutionality must not be premised upon the time when a statute purports to become effective, but rather upon the power of the legislative body to lawfully legislate at the time it undertakes to act.[58] While the enactment of legislation to take effect only upon the happening of some future event or contingency has been held to be a proper exercise of legislative discretion;[59] in each case the legislation was constitutional when passed. The upholding of unconstitutional enactments, however, dependent for their legality solely upon as uncertain an event as the electoral ratification of a proposed constitutional revision,[60] represents a substantial departure from traditional concepts of constitutional law. For even though the legislative powers possessed by a state legislature are as broad and comprehensive as are necessary to accomplish the legitimate

[55] Railroad Company v. County of Otoe, 83 U.S. (16 Wall.) 667 (1872); Methodist Hospital of Sacramento v. Saylor, 5 Cal. 3d 685, 97 Cal. Rptr. 1, 488 P.2d 161 (1971); Monington v. Turner, 251 So. 2d 872 (Fla. 1971); North Shore Post No. 21 of American Legion v. Korzen, 38 Ill. 2d 231, 230 N.E.2d 833 (1967); Wall v. Harrison, 201 Kan. 600, 443 P.2d 266 (1968); Joint Legislative Committee of Legislature v. Strain, 263 La. 488, 268 So. 2d 629 (1972); Young v. City of Ann Arbor, 267 Mich. 241, 255 N.W. 579 (1934); Dennis v. Sears, Roebuck & Co., 223 Tenn. 415, 446 S.W.2d 260 (1969).

[56] Chicago, Ind. & L. Ry. v. Hackett, 228 U.S. 559, 566 (1913); Norton v. Shelby County, 118 U.S. 425, 442 (1886); *Ex parte* Royall, 117 U.S. 241, 248 (1886).

[57] Porto Rico Brokerage Co. v. United States, 71 F.2d 469 (1934); Fleming v. Hance, 153 Cal. 162, 94 P. 620 (1908); People v. Frencavage, 233 Mich. 369, 206 N.W. 567 (1925); Trustees of Phillips Exeter Academy v. Exeter, 90 N.H. 472, 27 A.2d 569 (1940); Robert Realty Co. v. City of Orange, 103 N.J.L. 711, 139 A. 54 (1927); Ursuline Academy v. Board of Tax Appeals, 141 Ohio St. 563, 49 N.E.2d 674 (1943).

[58] Holley v. Adams, 238 So. 2d 401 (Fla. 1970); City of Atlanta v. Gower, 216 Ga. 368, 116 S.E.2d 738 (1960); Grasso v. Kucharski, 93 Ill. App. 2d 233, 236 N.E.2d 262 (1968); Boeing Company v. State, 74 Wash. 2d 82, 442 P.2d 970 (1968); State *ex rel.* Commissioners of Public Lands v. Anderson, 56 Wis. 2d 666, 203 N.W.2d 84 (1973).

[59] Note 46 *supra.*

[60] In Illinois, out of six proposed constitutions two were rejected by the electorate. Out of thirty-six proposed amendments to the 1870 Constitution, twenty-one were rejected by the people.

purposes of government,[61] such lawmaking powers are effectively inhibited by the restraints which the people have imposed by way of constitutional limitation.[62] Not until the people have ratified the proposed changes to the constitution may the legislature enact legislation which is beyond its present constitutional authority.[63]

An alternative solution to the problem has been taken by a number of jurisdictions by the imposition of procedural safeguards for the enactment of anticipatory legislation. The view taken by these courts has been that anticipatory legislation is within the lawmaking power of a general assembly only if enacted after the proposed constitutional revisions have been formally ratified and are therefore *certain* to become effective.[64]

THE ILLINOIS VIEW, A SECOND CHANCE AT UNIFORMITY

The Illinois Supreme Court adopted this alternative position in *Ogilvie,* holding that the Transportation Bond Act, enacted after the 1970 Constitution had been ratified, was to have its constitutionality determined under the new charter.[65] The court distinguished between anticipatory legislation enacted prior to ratification of an enabling constitutional provision and legislation enacted after ratification but before the enabling provision became effective.[66] In the court's opinion, enactment under the latter circumstances was within the plenary lawmaking power of the General Assembly unless anticipatory legislation, as such, is specifically prohibited by the constitution.[67] The procedural distinction is well founded. Both the 1870 and 1970 Constitutions vested the power to legislate in the Illinois General Assembly.[68] Since this power is plenary,[69] the General Assembly may validly legislate on any subject so long as it is not prohibited from doing so by either the Federal or state Constitutions.[70] Where that

[61] Sun Insurance Office, Limited v. Clay, 133 So. 2d 735 (Fla. 1961); Department of Public Works and Buildings v. McNeal, 33 Ill. 2d 248, 211 N.E.2d 266 (1965); Buras v. Orleans Parish Democratic Executive Committee, 248 La. 203, 177 So. 2d 576 (1965); Moses Lake School Dist. No. 161 v. Big Bend Community College, 81 Wash. 2d 551, 503 P.2d 86 (1972).

[62] Kilpatrick v. Superior Court, 105 Ariz. 413, 466 P.2d 18 (1970); Thompson v. Talmadge, 201 Ga. 867, 41 S.E.2d 883 (1947); Young v. City of Ann Arbor, 267 Mich. 241, 255 N.W. 579 (1934); Thomas v. Kingsley, 85 N.J. Super. 357, 204 A.2d 724 (1964); Dean v. Paolicelli, 194 Va. 219, 72 S.E.2d 506 (1952).

[63] For an excellent discussion of the subject see Justice Souris' dissenting opinion in Gaylord v. Beckett, 378 Mich. 273, 144 N.W.2d 460 (1966).

[64] Note 48 *supra.*

[65] 49 Ill. 2d 476, 484, 274 N.E.2d 87, 93 (1971).

[66] *Id.* at 483, 274 N.E.2d at 93 (1971).

[67] *Id.*

[68] ILL. CONST. art. IV, § 1 (1970); ILL. CONST. art. IV, § 1 (1870).

[69] North Shore Post No. 21 of American Legion v. Korzen, 38 Ill. 2d 231, 230 N.E.2d 853 (1967); People v. Chicago Transit Authority, 392 Ill. 77, 64 N.E.2d 4 (1945); People v. City of Chicago, 349 Ill. 304, 182 N.E. 419 (1932).

[70] Droste v. Kerner, 34 Ill. 2d 495, 217 N.E.2d 73 (1966); Locust Grove

prohibition is removed, however, either by constitutional amendment or superseding constitution, it follows that the General Assembly may thereafter constitutionally legislate on the previously prohibited subject matter. Given these criteria, the question remains as to whether the General Assembly may anticipate the removal of constitutional limitations and enact a valid law to take effect only upon the removal of such limitations. The Illinois Supreme Court, consistent with the decisive utterance in *Druggan,* answered the question affirmatively, holding that so long as anticipatory legislation is not *per se* unconstitutional, the General Assembly may, by virtue of its plenary lawmaking power, enact legislation to anticipate the removal of constitutional prohibitions *where such removal had already been authorized by the people and was thus certain to become effective in due time.*[71] The rationale for this statement is that since a constitution is the unfettered creation of the people,[72] only the people may effect the removal of constitutional limitations upon the General Assembly's power to legislate. Where the enabling constitutional revision has not yet been ratified by the people, it is axiomatic that the General Assembly lacks the constitutional capacity to legislate upon the subject-matter and the legislation cannot constitutionally stand, since legislative enactments must be judged in the light of the power possessed by the legislature at the time it undertakes to act.[73]

The holding in *Ogilvie* marks an effective and appropriate solution to the conflict created by the period of transition between an old and a new constitution. While recognizing the practical necessity for enacting anticipatory legislation in order to insure an efficient transition between the two,[74] the *Ogilvie* solution also provides a workable procedure for the enactment of anticipatory legislation which is consistent with intrinsic principles of constitutional law. The acknowledgment of the fact that popular ratification of a proposed constitution is indispensable to invest the legislature with the power to anticipate future constitutional guidelines is consistent with the principle that the power to legislate stems solely from the electorate;[75] for the peo-

Cemetery Ass'n of Philo v. Rose, 16 Ill. 2d 132, 156 N.E.2d 577 (1959); People *ex rel.* City of Chicago v. Barnett, 373 Ill. 393, 26 N.E.2d 478 (1940); Taylorville Sanitary Dist. v. Winslow, 317 Ill. 25, 147 N.E. 401 (1925).

[71] 49 Ill. 2d 476, 483-84, 274 N.E.2d 87, 92 (1971).

[72] McCulloch v. Maryland, 21 U.S. (4 Wheat.) 316, 403-04 (1819); Hagler v. Small, 307 Ill. 460, 138 N.E. 849 (1923); City of Chicago v. Chicago Ball Club, 196 Ill. 54, 63 N.E. 695 (1902); City of Beardstown v. City of Virginia, 76 Ill. 34 (1875); 1 COOLEY, CONSTITUTIONAL LIMITATIONS, 353-54 (8th ed. 1927); SCHWARTZ, AMERICAN CONSTITUTIONAL LAW, 10-11 (1955).

[73] Note 58 *supra.*

[74] Note 9 *supra.*

[75] ILL. CONST. art. IV, § 1 provides:

ple alone have the alternative of accepting or rejecting the document upon which the power to govern finds its genesis.[76] In an area too long governed by uncertainty and controversy, *Ogilvie* provides a practical procedure by which the Illinois General Assembly may insure the constitutionality of enactments intended to take effect upon the effective date of superseding constitutional provisions. The holding becomes particularly important in light of the more liberal provisions relating to amendment and constitutional revision under the 1970 Constitution.[77] For although it is unlikely that the 1970 Constitution will be substantially revised in the foreseeable future, questions relating to anticipatory legislation are likely to arise as a result of the more flexible provisions relating to constitutional amendment under the new charter.

CONCLUSION

In *Ogilvie,* the Illinois Supreme Court faced the questions raised by the enactment of anticipatory legislation for the first time. The court held that the passage of legislation in anticipation of the removal of constitutional limitations was within the plenary lawmaking power of the General Assembly, provided the enabling constitutional provisions had been previously ratified by the electorate and were therefore certain to become effective.

In sanctioning the enactment of anticipatory legislation in Illinois, *Ogilvie* delineates the procedure which must be adhered to by the General Assembly in order to insure that the legislation will meet the tests of constitutionality in the courts. Legislative procedure in the enactment of anticipatory legislation in Illinois becomes, under *Ogilvie,* a determinative factor in the success or failure of such legislation to accomplish its intended purposes.

The decision represents an effective attempt by the court to reconcile the conflict created between binding constitutional limitations upon the lawmaking power of the General Assembly and the necessity for enacting anticipatory legislation in order to insure an effective transition between an old and a new constitution. Hopefully, *Ogilvie* will be instrumental in marking an end to the confusion which has attended the enactment of anticipatory legislation in other states for so many years.

Louis Xiques

The legislative power is vested in a General Assembly consisting of a Senate and a House of Representatives elected by the electors from 59 Legislative Districts.

See also ILL. CONST. art. IV, § 1 (1870); ILL. CONST. art. III, § 1 (1848); ILL. CONST. art. II, § 1 (1818).

[76] McCulloch v. Maryland, 21 U.S. (4 Wheat.) 316, 404 (1819).

[77] ILL. CONST. art. XIV (1970). *Compare* ILL. CONST. art. XIV (1870).