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RICHARD S. COHEN
ATTORNEY GENERAL

STEPHEN L. DIAMOND
JOHN S. GLEASON
JOHN M. R. PATERSON
ROBERT J. STOLT
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

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Honorable Weston R. Sherburne
House of Representatives
State House
Augusta, Maine 04333

Dear Representative Sherburne:

You have requested an opinion from this office concerning the constitutionality of L.D. 1788. Legislative Document 1788 proposes to amend the statutes governing the Maine Milk Commission ("Commission") so that actions taken by the Commission to create new marketing areas, or to expand existing ones, would be subject to approval by popular vote in affected municipalities.1/ L.D. 1788 raises the problem of possible discrimination as between persons living in different areas of the State, as well as the question of whether the Commission's orders can properly be submitted to local vote for their effectuation. While we conclude that L.D. 1788 does not violate the United States or Maine Constitutions, we should advise you that we consider this a very close question, and our conclusion is therefore by no means free from doubt.

Where a suspect classification is not at issue, the Equal Protection Clauses of the Federal and State Constitutions, U.S. Const., art. XIV; Me. Const., art. I, § 6-A, prohibit legislatures from making laws which will result in discrimination between

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1/ We note certain technical problems with the specific provisions of L.D. 1788. For example, it is unclear from the bill whether the vote of a majority of the voters in the proposed marketing areas as a whole (if a new area) is necessary to ratify the Commission's actions or only whether each town included within the area may approve or disapprove the Commission's order. In addition, in the unlikely event that the Commission's proposed order were to include an unorganized area of the State (and we take no position on the question of whether the Commission has the power so to extend its jurisdiction, see 5 M.R.S.A. § 2951(5), L.D. 1788 fails to outline a procedure for the ratification of such order by the inhabitants of such an area.

similarly situated persons without a rational basis related to the purpose of the law. E.g., State v. Rush, 324 A.2d 748 (Me. 1974) and cases cited therein; A.H.S. v. Mahoney, 169 Me. 391 (1965). The issue presented by L.D. 1788, then, is whether it will result in discrimination between similarly situated persons without a reasonable basis related to the purpose of the legislation.

Three possible situations may result from the local votes proposed by L.D. 1788:[2/]

(1) milk price regulation will be extended throughout the State;

(2) milk price regulation will remain in effect only in those areas which were regulated as of January 1, 1979;

(3) milk price regulation will be extended to some, but not all, of the areas unregulated as of January 1, 1979.

Clearly, only situations 2 and 3 constitute cases of discriminatory effect as between similarly situated persons. The question presented by these sitautions is whether a local vote is a sufficiently rational basis for these differences to render the scheme created by L.D. 1788 constitutional. In order to resolve that issue, we must examine the theoretical limits of the local option approach. Because there is very little guidance from the cases and other authorities in this area, we shall rely largely on a theoretical approach.

The primary constitutional issue in cases analyzing local option measures is whether the local option procedure impermissibly delegates legislative authority. As a general matter, local option provisions have survived constitutional attack on grounds of improper delegation on the basis that the legislature has submitted for local approval a complete law which is either fully effectuated in the locality, or not, by the local vote. See, e.g., Gannett v. Cook, 61 N.W. 2d 703 (Ia. 1953). Where, on the other hand, the legislature has actually turned over to a locality the authority to determine the applicability of certain specific parts of a general statute (e.g., where localities have been allowed to set boundary lines), the cases generally state that an improper delegation has been made.

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2/ In each case, we assume that the Commission has acted to extend its regulatory jurisdiction to the entire state, subject to the ratification procedure established in L.D. 1788.

See Young v. DeHerolf, 182 A. 676 (Pa. 1936); Gannett v. Cook, supra. The procedure to be established by L.D. 1788 does not appear to violate the delegation principles described above because it does not give discretion to the localities to effectuate specific portions of the milk regulation statute but merely conditicns the general effect of that law in a given area on a favorable vote by its inhabitants.

A more important aspect of the local option cases is that they lack any discussion, from the standpoint of equal protection, of the distinctions which will, in almost every case, arise from a local option procedure. Implicit in these cases, however, and more explicit in some, see In re O'Brien, 75 P. 196 (Mont. 1904), is the notion that there are limits on the legislature's use of a local option procedure to implement a given scheme. The great majority of cases in which the use of local options has been upheld deal with areas in which a state legislature may legitimately act, but which are also matters of genuinely local concern. The best example is liquor regulation. Local option approaches to the regulation of liquor have been commonly upheld as constitutionally valid. See, Ohio ex rel. Lloyd v. Dollinson, 199 U.S. 445, 24 S.Ct. 703 (1904); Rippey v. Texas, 193 U.S. 504, 24 S.Ct. 516 (1904). Yet, liquor regulation by local option, like any statute submitted to local vote, may lead to a result in which certain areas of a state are regulated while other areas, possibly adjacent, are not. Plainly, such a scheme is discriminatory in effect, but, in approving such discrimination without analysis, the courts have never suggested a rationale for such a result.

A rationale which explains the cases and makes sense from a theoretical standpoint is that, where a legislative scheme will function and serve its more general ends by being administered on a local level, it may be made subject to local approval for its effect. Distinctions among local areas which result from such votes are constitutionally acceptable on the grounds that such distinctions have a rational basis: the exercise of local will on a matter of local concern. See, e.g., State v. The Fantastic Fair, 158 Me. 450 (1961). Applying this theory to the liquor regulation situation lends support to the proposed theory. As a matter of administration, regulation of liquor sales is easily handled on a local basis, especially where the question is merely whether or not it is to be sold in a given locality. Additionally, the end presumably sought by such a scheme from the state point of view - generally to limit the availability of liquor - is not defeated by leaving the regulation to local option while the interest in local control is also advanced. It is also clear that

whether or not liquor will be sold in a given community is genuinely a matter of local concern. It goes to the question of the type of community involved and affects the safety of transportation in and around the community and the efficiency of law enforcement. Thus, it makes sense to allow local regulation based on a local vote. A similar analysis can be applied to the issues of zoning and Sunday sales, both of which schemes have been made subject to local option. See Gannett v. Cook, supra (zoning); State v. The Fantastic Fair, supra (Sunday sales).

Under our analysis, limits would exist on the use of local options. Where a matter as to which a legislature has power to act is primarily one of statewide or nonlocal concern and, perhaps more importantly, where the purposes of such a scheme would not be advanced by submitting it to local option, the legislature would arguably lack the constitutional authority to precondition the applicability of the scheme in a given area on a local vote. It might also be noted that, where a scheme requires statewide consistency and systemization in order to achieve its purposes, the adoption by the legislature of local option means to achieve that purpose, but which does not in fact advance the purpose, may invalidate, on due process grounds, the entire scheme and not just the inappropriate method. Cases in which the legislature is determined to have the right to regulate as a matter of due process suggest that, where the means selected by the legislature are so unrelated to the ends as not to advance them, the scheme may be void under principles both of equal protection and due process. Nebbia v. New York, 291 U.S. 502 (1934).

What is suggested, therefore, is a rule which is in effect a spectrum. The extent to which a matter is local in nature, can be easily administered locally, and has a purpose which can be advanced by the use of local option determines whether it may be made subject to local option. We must therefore analyze the purposes and administration of milk price regulation in order to determine whether the legislature may properly submit further regulation to local option under the rule suggested herein.

We must first determine the underlying purpose of the proposed statute. The statute creating the Maine Milk Commission and setting out its powers and duties (7 M.R.S.A. §§ 2951-60) establishes a coherent and systematic scheme for regulating milk prices within this State in order to ensure that there is always a sufficient supply of this important and unique product. See 7 M.R.S.A. § 2954(2); Maine Milk Commission v. Cumberland Farms Northern, Inc., 160 Me. 366 (1964). An important part of that scheme is the process whereby the Commission creates market areas, corresponding to "natural

market areas," which constitute independent markets. 7 M.R.S.A. § 2951(5); Maine Milk Commission Order #79-25 (November 26, 1979). Such areas are subject to minimum prices set by the Commission. See 7 M.R.S.A. § 2954(5); Opinion of the Attorney General, May 9, 1978. At this time, there are 48[3/] such areas covering most of the populated portions of the State, but it is clear that the Commission statute contemplates the possibility of statewide market areas. Opinion of the Attorney General, May 9, 1978. The effect of L.D. 1788 would be to "freeze" the regulated areas as of January 1, 1979.[4/] Any further extension of regulated prices would be subject to ratification by the voters of the affected municipalities.

Under the analysis we have set forth, the question which a court would have to consider in ruling on the constitutionality of L.D. 1788 is whether the Legislature might legitimately determine that the purposes underlying milk prices regulation pursuant to the existing statute would be furthered by making additional regulation subject to local ratification, and whether further regulation would have a genuinely local impact. It should be noted that courts generally defer to the Legislature's factual determinations if they are reasonable and not arbitrary. See, e.g., Maine State Housing Authority v. Depositors Trust Co., 278 A.2d 699 (Me. 1971). Thus, a court could find that the Legislature had legitimately determined that further milk regulation would have a significant local impact, and that the scheme in place as of the 1930's was sufficient to serve the purposes of the statute. Such a finding would justify the conclusion that L.D. 1788 is rationally related to the end of allowing currently unregulated localities to determine for themselves this matter of local import.

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3/ We understand that 47 of these areas have been established since sometime in the 1930's. Market No. 48, including the towns of Buxton, Hollis, Dayton, Lyman, Waterboro, Shapleigh, Acton, Lebanon and North Berwick was established as of December 31, 1979. Maine Milk Commission Order, #79-25 November 26, 1979). Under L.D. 1788, the voters in this market would have the option of determining whether the jurisdiction of the Commission should continue to apply to them. See Section 2 of L.D. 1788.

4/ See fn. 3, supra.

Our concern stems from the possibility that, given what apparently remains the underlying purpose of the Milk Commission statute, a court could determine that the local option approach is totally unrelated to that purpose. Along these lines, it is significant that L.D. 1788 does not appear to reflect a legislative disavowal of the traditional justification for milk regulation, namely, to insure an adequate supply of milk within the State at reasonable prices. 7 M.R.S.A. § 2954(2). Even with the enactment of L.D. 1788, the extension of regulation would still require that the Commission employ criteria which are clearly related to the scheme's central purpose. The possible problem with allowing what is tantamount to a veto by local option is that it introduces a factor which appears to bear no relationship to insuring an adequate supply of milk at reasonable prices. From this perspective, it could be argued that the local option approach to further milk regulation would render the scheme irrational.

Because of the complexity of the issues involved, some of which are of a factual nature, we cannot predict with certainty whether a court would determine that the enactment of L.D. 1788 would deprive Maine's system of milk regulation of any rational basis so as to make any resulting discrimination impermissible. Furthermore, our answer must consider the general lack of authority in this area, the deference which has generally been shown by courts to local option schemes and the strong presumption of constitutionality traditionally accorded to legislative enactments, e.g., Nadeau v. State, 395 A.2d 107 (Me. 1978). All of these factors constrain us to conclude that L.D. 1788 is not unconstitutional. The Legislature should, however, be aware of the very tenuous nature of our conclusion and of the very real questions posed by L.D. 1788 in its present form. Indeed, in light of the doubt surrounding this issue, the Legislature may wish to consider alternative methods of reaching its ends which may be more clearly acceptable from a constitutional standpoint.

If you should have any further questions, please feel free to contact me.

Sincerely,

RICHARD S. COHEN
Attorney General

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