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Initiative and Referendum, Carter v. Celebrezze

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Initiative and Referendum

Carter v. Celebrezze, 63 Ohio St. 2d 326, 410 N.E.2d 1249 (1980)

AT THE BEGINNING of the twentieth century, the process of popular legislation through the use of initiative and referendum measures gained popularity in the United States. It was during this period that twelve states, including Ohio, adopted the measures of initiative and referendum.[1] Theodore Roosevelt advocated the adoption of these measures at the Ohio Constitutional Convention of 1912 where the Ohio legislature enacted provisions for the use of these methods of popular legislation.[2]

The initiative is a "political device" whereby the people may enact laws directly, rather than indirectly through their representative legislators,[3] and adopt constitutional amendments.[4] The process in Ohio briefly is this: a written petition signed by 100 electors with a summary is submitted to the Attorney General, who verifies it as fair and truthful; the verified copy of the summary and the proposed amendment are filed with the Secretary of State,[5] who designates the form of the petition;[6] the petitioner then solicits the signatures of ten percent of the electorate.[7] Each part-petition must contain "a full and correct copy of the title, and the text of the law, section or item thereof sought to be referred, or the proposed law or proposed amendment to the constitution.[8]

To facilitate the power of the people to amend the constitution through the initiative, the framers provided that the petitions "shall be presumed to be in all respects sufficient. . . . The foregoing provisions of this section shall be self-executing."[9] This section also provides "[l]aws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved."[10] The legislature has enacted sections of the Revised Code implementing the initiative process, regarding

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[1] Fordham & Leach, *The Initiative and Referendum in Ohio*, 11 OHIO ST. L.J. 495, 496 (1950).

[2] 1 OHIO CONSTITUTIONAL CONVENTION 1912, PROCEEDINGS AND DEBATES 378, 379; Fordham & Leach, *supra* note 1, at 497.

[3] Pfeifer v. Graves, 88 Ohio St. 473, 477, 104 N.E. 529, 530 (1913).

[4] OHIO CONST. art. II, § 1.

[5] OHIO REV. CODE ANN. § 3519.01 (Page Supp. 1979).

[6] OHIO REV. CODE ANN. § 3519.05 (Page Supp. 1979).

[7] OHIO CONST. art. II, § 1a.

[8] *Id.* § 1g.

[9] *Id.*

[10] *Id.*

its form, verification, duties of the Secretary of State and duties of the boards of elections.[11]

In the January term of 1980, the Ohio Supreme Court in a *per curiam opinion* denied a writ of *mandamus* which would have compelled the Secretary of State to accept part-petitions from a committee representing petitioners who had proposed a constitutional amendment relating to the establishment of congressional and state legislative districts.[12] The committee attempted to file with the Secretary of State for placement on the ballot part-petitions which contained an excess of the required ten percent of the electorate,[13] "Exhibit A" containing 84,825 signatures and "Exhibit B" containing 257,182 signatures.[14] Although both petition forms stated the full text of the proposed amendment, and all the language to be added, modified or deleted, the part-petitions entitled Exhibit A failed to reproduce within the text one phrase in section 13 of article XI which was to remain unaltered by the proposed amendment.[15]

Relators argued that this irregularity was superficial, and that additionally, the Secretary of State was procedurally incorrect in not first forwarding these part-petitions to the various boards of elections, advising relators of the insufficiency of signatures,[16] and allowing them ten days to procure sufficient signatures.[17] In a close decision, the court refuted these arguments, cautioning against nondisclosure, extolling the right of informed choice by the electorate and declaring that the part-petitions actually represented two different proposed amendments; consequently, the Secretary of State had no duties under section 1g of article II of the Ohio Constitution to forward the part-petitions to the boards of elections.[18]

Justice William B. Brown in his concurring opinion, feared the precedential effect of holding for the relators on the basis of superficial error and the policy of liberality when reviewing the initiative process.[19] He cautioned against giving the Secretary of State the discretionary authority to ignore

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[11] OHIO REV. CODE ANN. §§ 3519.04-22 (Page 1972 & Supp. 1979).

[12] Carter v. Celebrezze, 63 Ohio St. 2d 326, 410 N.E.2d 1249 (1980).

[13] *Id.* at 326-327, 410 N.E.2d at 1249. Ten percent of the electorate of the state at the time of the filing with the Secretary of State was 284,336.

[14] *Id.* at 327, 410 N.E.2d at 1249.

[15] OHIO CONST. art. II, § 1g.

[16] 63 Ohio St. at 327, 410 N.E.2d at 1250.

[17] *Id.* OHIO CONST. art. II, § 1g, grants petitioners ten additional days to file "additional signatures." This wording was interpreted in Herbert v. Mitchell, 136 Ohio St. 1, 22 N.E.2d 907 (1939) to limit the ten day grant to cases where the petitions and part-petitions are "thus/verified" according to the Constitution but where signatures were voided for other reasons.

[18] 63 Ohio St. 326, 410 N.E.2d 1249 (1980).

[19] *Id.* at 329, 410 N.E.2d at 1251 (Brown, W., concurring).

some errors and not others, and noted his preference for a guiding standard which could "be uniformly and consistently applied."[20]

Justice Dowd, writing for the dissent, charged the majority with elevating form over substance, and emphasized the provisions of the Ohio Constitution which provide that the initiative process shall be self-executing,[21] and that laws passed by the legislature may facilitate this process, but in no way limit or restrict it.[22] He pointed to the seminal decision of *Thrailkill v. Smith*[23] which declared that "it is the plain duty of the courts in construing the constitutional provisions to give them such construction as will facilitate rather than obstruct their operation."[24] Additionally, the constitution sets only minimal requirements of form for the petition which were met by the relators in the instant case: full title and text of the proposed amendment, with the caption "Be it Resolved by the People of the State of Ohio."[25] The test suggested by Justice Dowd was "whether a petitioner could have been misled by the omission in the proposed amendment."[26] In applying the test to the facts in this case, he concluded that the "omitted language is not particularly germane to the proposed amendment."[27]

In contradiction to the majority, the dissent urged that there are times when it is necessary for the Secretary of State to use his discretionary powers when reviewing errors in form.[28] The Revised Code delineates his powers and duties to "[r]eceive all initiative and referendum petitions on state questions and issues and determine and certify to the sufficiency of such petitions."[29] An opinion by the Attorney General on the subject of his powers suggests that the Secretary of State may regulate the conduct of elections in such a way as will not amplify the laws of Ohio, but will be in harmony with the intent and purpose of such laws and rulings of the courts, and opinions of the Attorney General.[30] The county boards of elections must follow his rules, regulations, and instructions.[31]

The Secretary of State has the duty to separate part-petitions by county and send them to the county boards of elections for verification of the

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[20] *Id.* at 329-330, 410 N.E.2d at 1251.
[21] OHIO CONST. art. II, § 1g.
[22] 63 Ohio St. at 331, 410 N.E.2d at 1252 (Dowd, dissenting).
[23] 106 Ohio St. 1, 138 N.E. 532 (1922).
[24] *Id.* at 5, 138 N.E. at 533.
[25] OHIO CONST. art. II, § 1g.
[26] 63 Ohio St. at 331, 410 N.E.2d at 1252 (Dowd, dissenting).
[27] *Id.*
[28] *Id.*
[29] OHIO REV. CODE ANN. § 3501.05(J).
[30] 1 OP. ATT'Y GEN. OHIO 120, 121 (1930).
[31] *Id.*

validity and sufficiency of the signatures.[32] The supreme court has held that the Secretary is not empowered to hold proceedings on the sufficiency of petitions until after they are returned from the county boards of election.[33] A subsequent decision held that the Secretary of State has the power to reject parts of petitions containing signatures not verified with an affidavit by petitioner.[34] Citing the presumptively sufficient provision of section 1g of article II, a local court of appeals described his duty as an "absolute duty . . . irrespective of whether it can be proved that in some way some or all the signatures contained in the initiative petition are invalid."[35] In a more recent opinion, the supreme court noted that any discrepancy between the language of the documents submitted to the Attorney General and the language of the text of the proposed constitutional amendment does not affect the duty of the Secretary of State to submit the proposal to the vote of the electorate if it is signed by the required ten percent.[36]

Various states have classified an official's determination of the sufficiency of a petition as judicial,[37] or as ministerial.[38] The Ohio Supreme Court has stated that although the Secretary of State in determining the sufficiency of the petition will necessarily act in a quasi-judicial capacity, the placing of the issues on the ballot is a ministerial function and not quasi-judicial in nature.[39] In its consideration of a writ of *mandamus*, which the court described as an extraordinary measure to be issued only with great caution, it was held that in an initiative petition where the summary was longer by one word than the amendment itself, the relator had failed to show that the Secretary of State abused his discretion by allowing the election, or that he usurped any quasi-judicial power.[40]

What, then, is an abuse of discretion? When the manner and method are not described in detail as to how the Secretary of State should proceed, he should exercise "fair and impartial official discretion."[41] The self-execut-

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[32] OHIO REV. CODE ANN. § 3519.15 (Page Supp. 1979).

[33] McCrehen v. Brown, 108 Ohio St. 454, 141 N.E. 69 (1923).

[34] 136 Ohio St. 1, 22 N.E.2d 907 (1939). *See also* Tulley v. Brown, 31 Ohio St. 2d 188, 190, 287 N.E.2d 630, 631 (1972) (stating that there is no duty on the part of the Secretary of State to transmit improperly verified part-petitions to boards of elections).

[35] Durrell v. Brown, 29 Ohio App. 2d 133, 141, 279 N.E.2d 624, 629 (1971).

[36] Schwartz v. Brown, 32 Ohio St. 2d 4, 288 N.E.2d 821 (1972).

[37] Coyte v. King, 11 N.J. Misc. 777, 168 A. 158 (1933); El Paso v. Tuck, 282 S.W.2d 764 (Tex. Ct. App. 1955), *cert. denied*, 352 U.S. 828 (1956).

[38] Halliburton v. Roach, 230 Mo. 408, 130 S.W. 689 (1910).

[39] O'Grady v. Brown, 48 Ohio St. 2d 17, 20, 356 N.E.2d 296, 298 (1976).

[40] Williams v. Brown, 52 Ohio St. 2d 13, 368 N.E.2d 838 (1977).

[41] Hunt v. Hildebrandt, 93 Ohio St. 1, 12, 112 N.E. 138, 141 (1915), *aff'd* 241 U.S. 565 (1916).

ing mandate of the constitution must be obeyed, but when there is doubt, it must be "resolved by the application of the same ordinary intelligence of men that is applied to the solution of everyday problems of life."[42] From the majority opinion of the instant case, it is clear that the court has still not come to terms with the issue of whether the Secretary of State has any discretionary powers, what those powers are, what constitutes an abuse of discretion, or the appropriate test for abuse of discretion when the Secretary of State must pass on the required formality and sufficiency of the petitions.

As noted, Justice Dowd suggested the test of whether a petitioner could be misled by the omission or error in the proposed amendment.[43] In addressing the issue of the fatality of errors on the ballot, the court in *Thrailkill* suggested the test of whether "the matter printed upon the ballot . . . would in fact mislead, or deceive, or defraud the voters."[44] In yet another challenge to the form of the text printed on the ballot for a proposed constitutional amendment, the court indicated that the test should be whether the omissions will "interfere with a full and fair expression of the voters' choice."[45] Mentioning both of these tests, the most recent supreme court decision on the issue of omissions and errors applied the *Thrailkill* test, whether the errors would mislead, deceive or defraud the voters.[46] One may presume that this is still the test used by the court, although this is not at all clear from the majority opinion in *Celebrezze*.

On their face, the part-petitions in the instant case comply with all the constitutional mandates. However, the Secretary of State treated them as two separate petitions, neither meeting the ten percent requirement because of the omission of some language of an amendment intended to remain intact. The majority denied that this was an exercise of the discretionary power of the Secretary of State by endorsing the separate petitions theory.

The majority failed, however, to note a portion of the holding of *Greenland v. Fulton*,[47] a case upon which it relied in its opinion. The submission of a proposed amendment to the constitution requires "substantial compliance" with the provisions of article II, sections 1a *et. seq.*[48] Other authority indicates that the intent and purpose of these provisions should not be defeated by technical construction, but "[o]n the contrary, if the

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[42] 93 Ohio St. at 13, 112 N.E. at 141.
[43] 63 Ohio St. at 331, 410 N.E.2d at 1252 (Dowd, dissenting).
[44] 106 Ohio St. at 11, 138 N.E. at 535.
[45] Foreman v. Brown, 10 Ohio St. 2d 139, 151, 226 N.E.2d 116, 124 (1967).
[46] Williams v. Brown, 52 Ohio St. 2d at 19, 368 N.E.2d at 842.
[47] Greenlund v. Fulton, 99 Ohio St. 168, 124 N.E. 172 (1919).
[48] *Id.*

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language is sufficiently plain to disclose that intent and purpose, then such construction must obtain as will give full force and effect thereto, even though it be attached with some difficulties."[49] The *Thrailkill* court echoed this policy of liberal construction of the constitutional provisions to facilitate the process of legislation by the electorate: "the presence of those provisions in the Constitution clearly points the way toward liberality . . . . The substantial thing is the expressed desire for the submission of the proposal."[50] Speaking for the court, Chief Justice Marshall also cautioned against exalting form over substance in decisions where the people's right to petition their government is at issue: "The structure of the ballot and the instrumentalities whereby that desire is communicated to the secretary of state constitute *formalities.* It is more consonant with modern judicial thought to pay less regard to those formalities and technicalities of procedure and to have *greater regard to substance.*"[51] It is also difficult to reconcile the decision of the instant case with *Schwartz v. Brown,*[52] where this court denied a writ of *mandamus* to stop the vote by the electorate on the initiated proposal for a state income tax. The petitions were not found deficient even though the part-petitions, newspapers and printed ballots made no reference to the clause in the Attorney General's summary regarding the effective date.[53] The court held that the discrepancy did not affect the duty of the Secretary of State to submit the proposal to a vote by the electorate. The court noted the wording of section 1g of article II, which creates a presumption that the petition be considered sufficient.[54]

It is also difficult to reconcile the instant decision with the later case of *Williams v. Brown*[55] where the court denied a writ of *mandamus* to prevent a state election on an initiated proposal to amend the Constitution. There the summary was juxtaposed on the ballot with the text of the proposed amendment, the summary differed from that on the initiative petition, the words "Be It Resolved by the People of the State of Ohio" did not appear on the ballot, and the summary was longer than the proposed amendment.[56] The alleged errors were described as harmless technical defects, and the ballot passed the test because it did not tend to confuse or deceive.[57]

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[49] 93 Ohio St. at 9, 112 N.E. at 140.
[50] 106 Ohio St. at 5-6, 138 N.E. at 533.
[51] *Id.* at 6, 138 N.E. 533-534 (emphasis added).
[52] 32 Ohio St. 2d 4, 288 N.E.2d 821 (1972).
[53] *Id.*
[54] *Id.* at 10, 288 N.E.2d at 825.
[55] 52 Ohio St. 2d 13, 368 N.E.2d 838 (1977).
[56] *Id.* at 18, 368 N.E.2d 842.
[57] *Id.* at 20, 368 N.E.2d 843.

In view of the self-executing provision of these sections in the constitution creating the right of the initiative petition, the constitutional provision that the petitions are presumptively sufficient, and the history of the liberal construction of these provisions, facilitate the intent and purpose of the initiative process, one would reason that the latter two decisions by this court were more correctly decided. The closing statement of *Williams v. Brown* illustrates these principles:

> The people having expressly reserved to themselves the right of the initiative, it is not the function of this court to interfere with that right and disenfranchise the voters on the basis of some mere technical irregularities which will not interfere with that right and disenfranchise the voters on the choice.[58]

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[58] *Id.*