

SUPREME COURT OF SIERRA

Syllabus

IN RE: SR-03-01

Argued May 1, 2019-May 17, 2019. Decided May 29, 2019

Held:

1. A justiciable question has been presented where a party alleges that the legislature has, through malfeasance, incompetence, or simple mathematical error, clearly violated an unambiguous constitutional provision related to something as simple as the number or percentage of votes needed for passage of a measure. (p. 2-8)
2. As a matter of interpretation of the Sierra Constitution, “two-thirds of the membership...concurring,” means two-thirds of the total membership of the assembly voting in favor, not two-thirds of a quorum or two-thirds of those casting yea or nay votes. (p. 8-11)
3. In keeping with long standing precedent, the only way to offer an amendment to the Constitution or trigger a constitutional convention is through the methods enumerated in Article XVIII of the Sierra Constitution. (p. 11-12)
4. The convention has not been constitutionally triggered and shall not go on. (p. 12)

SHOCKULAR, J. delivered the opinion for a unanimous Court.

I. HISTORY OF THE CASE

On April 30, 2019, SR-03-01 received four yea votes, two nay votes, and one present vote. SR-03-01 called for a Constitutional Convention in the state of Sierra. The vote was recorded as successful, and suit was brought the next day, arguing that the vote does not meet the basic requirements for triggering a constitutional convention under Article XVIII, Section 2 of the Sierra Constitution, and that the assembly cannot trigger a convention by any other method.

Respondent, in turn, argues that this is a nonjusticiable political question and that, if it is not, that the vote breakdown met the two-thirds standard anyway, because a vote of present should not count against the two-thirds requirement, and that the legislature can call a convention through other methods.

II. JUSTICIABILITY

We first examine the threshold question of justiciability, namely whether the question before us is a nonjusticiable political question. Both petitioner and respondent cite to perhaps the leading federal case on the political question doctrine, *Baker v. Carr* 369 U.S. 186 (1962), claiming that it supports their argument.

Neither litigant explored the precedent related to the political question doctrine in the state of Sierra, however, which is the most relevant precedent. As this is a state case applying a provision of the state constitution, the Supreme Court's precedents, which relate to the United States Constitution, are not binding. Because the case cannot be decided without an examination of state law and precedent in this area, we now do so.

It is well established that controversies revolving around "policy choices and value determinations...committed for to resolution" of the other branches are cases that invoke the political question doctrine. *See, e.g., Japan Whaling Assn. v. American Cetacean Soc.* 478 U.S. 221 (1986).

"Nevertheless, it is well established that it is a judicial function to interpret the law, including the Constitution, and, when appropriately presented in a case or controversy, to declare when an act of the Legislature or the executive is beyond the constitutional authority vested in those branches." *Schabarum v. California*

Legislature, 60 Cal. App. 4th 1205 (1998), *quoting INS v. Chadha*, 462 U.S. 919, 941-942 (1983).

We have in the past, on several occasions, determined that ruling on the procedural correctness of constitutional amendments and conventions or lack thereof are not political questions.

In *Livermore v. Waite*, 102 Cal. 113 (1896), we noted that “[t]he power of the legislature to initiate any change in the [constitution]...is to be strictly construed under the limitations by which it had been conferred” by the state Constitution. *Id.*, at 117-118.

We held that since calling a constitutional convention and passing constitutional amendments were powers specifically delegated to the legislature, the powers granted were strictly limited to those terms of the grant. We noted that the “legislature is not authorized to assume the function of a constitutional convention” by using the constitutional provision for amending the constitution. We found that amending the Constitution and revising the Constitution were two distinct processes, and that it was appropriate for us to determine if the wrong process was used by the legislature and strike down constitutional amendments if so.

In *McFadden v. Jordan*, 32 Cal.2d 330 (1948), we struck down a major constitutional initiative measure supported by the legislature because it was a revision rather than an amendment, and thus was an inappropriate exercise of legislative authority. Specifically, the legislature attempted to add 21,000 words to the Sierra Constitution, which at the time was 55,000 words long. The “initiative” would have substantially changed or eliminated 15 of the 25 sections in the state constitution. *Id.*, at 345. Because of the “far reaching and multifarious substance of the measure,” we held that the initiative was “revisory rather than amendatory in nature.” *Id.*, at 332. If the legislature

wished to make a widely sweeping change like this, we held that it would need to be through the process of a constitutional convention.

While Courts grant significant deference to the other branches on political matters, a challenge to the constitutionality of an action is inherently a judicial question, not a political one, and neither “the Legislature, the executive, nor both acting in concert can...deprive the courts of jurisdiction to decide questions of constitutionality.” *Schabarum*, at 1215. Additionally, “the [political question] doctrine must be cautiously invoked, and the mere fact that a case touches on the political process does not necessarily create a political question beyond courts’ jurisdiction. *Nixon v. Herndon*, 273 U.S. 536, 540 (1927).

While we are not bound by the Supreme Court’s ruling in *Baker*, we find it instructive. In that case, the Court laid out a six factor test for determining whether courts should avoid questions as political. The political question doctrine might be invoked if there was:

- 1.) A textual constitutional commitment on the matter to another branch of government;
- 2.) A lack of judicially discoverable and manageable standards for resolving the issue;
- 3.) A need for an initial policy determination before addressing the matter that courts would not be able to reach;
- 4.) A situation in which independent court action would violate the separation of powers framework;
- 5.) An unusual need to strictly adhere to a previous political decision; or
- 6.) A possibility that clashing statements on an issue by multiple branches of government would cause embarrassment. *Baker*, at 217.

We do not believe that factors 2, 3, 5, or 6 are at all relevant in this case. Standards for resolving the issue are

easily discoverable, as it would take a simple matter of the interpretation of language and basic math. No policy determination is necessary, as we are ruling not on whether a constitutional convention is wise or necessary, but on the question of whether the legislature had the number of votes necessary to trigger the convention.

We find that the more relevant factors also would not preclude us from answering the question. The text of Article XVIII, Section 2 of the Sierra Constitution clearly commits the right to *call* a Constitutional convention to the legislature and the people, and implies the sole right to decide whether one is necessary to that branch and the people, but does not reserve to them the determination of the number of votes or procedure needed to do so, which is plainly stated in the Constitution.

As noted *supra*, it is the job of the judiciary to resolve questions of constitutionality. There is no separation of powers issue with a court telling the legislature it has not followed an unambiguous constitutional provision. It also does not entail a lack of respect for the legislature within the meaning of *Baker*.

If it did, every “judicial resolution of a constitutional challenge to a [legislative] enactment would be impermissible. [The assembly] often explicitly considers whether bills violate constitutional provisions. Because [the assembly] is bound by the Constitution, its enactment of any law is predicated at least implicitly on a judgment that the law is constitutional...Yet such [legislative] consideration of constitutional questions does not foreclose subsequent judicial scrutiny of the laws’ constitutionality. On the contrary, this Court has the duty to review the constitutionality of [legislative] enactments.” *United States v. Munoz-Flores*, 495, U.S. 385, 390-391 (1990).

“Our system of governance requires that [courts] on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts’ avoiding their constitutional responsibility.” *Powell v. McCormack*, 395 U.S. 486, 549 (1969).

Where the Court has found political questions exist, those cases are distinguishable. In *Coleman v. Miller*, 307 U.S. 433 (1939), the Supreme Court determined that whether too much time had passed between the offering and ratification by the state of Kansas of a proposed federal constitutional amendment was a political question left to Congress. In so determining, the Court cited “the lack of satisfactory criteria for a judicial determination” as a dominant consideration in deciding whether a question was political. *Id.*, at 454-455.

The Court in that case was asked whether it was appropriate for the judiciary to invent what a “reasonable period” within which ratification must happen in the event that Congress does not provide such a limitation. They determined that there was no satisfactory criteria for them to determine what a “reasonable” period was, and that it was therefore to be avoided as a political question.

In the instant case, that issue is not present. There is a clear, satisfactory criteria for us to look to, that being the clear and unambiguous language of the Constitution related to the pertinent question. The decision “of the question presented requires no more than an interpretation of the Constitution. Such a decision falls squarely within the traditional role of the...judiciary...” *AFL v. Eu*, 36 Cal. 3d 687, 699 (1984), quoting *Dyer v. Blair*, 390 F. Supp. 1291, 1301 (N.D. Ill. 1975).¹

¹ The opinion, written by future Supreme Court Justice John Paul Stevens, interpreted Article V of the US Constitution.

Since the decision in *Baker*, the Supreme Court has only twice found that a case presented a nonjusticiable political question. *Zivotofsky v. Secretary of State*, 571 F.3d 1227, 1236-1237 (D.C. Cir. 2009).

In *Gilligan v. Morgan*, 413 U.S. 1 (1973), the Court found that a nonjusticiable political question was presented in the form of the judiciary being asked to impose regulations on the Ohio National Guard in response to the deaths at Kent State University in 1970. The Court found that the discipline and training of the National Guard was explicitly reserved to Congress by Article I, § 8, cl. 16 of the United States Constitution.

In *Nixon v. United States*, 506 U.S. 224 (1993), the Court found that judicial review of impeachment proceedings in the Senate was not proper, as the power of impeachment is explicitly textually committed to Congress by the Constitution.

These cases are dissimilar to the instant case, as they considered matters that were clearly reserved to Congress, and that were ambiguous or vague.

At oral argument in this case, counsel for respondent was asked a hypothetical question. The situation posed was one in which the Speaker of the Assembly was the sole counter and determiner of votes and procedure within the assembly.

In the hypothetical, there was a vote with six assemblypersons voting against and only one (the Speaker) in favor. The Speaker, using his authority, announced that the vote has passed 4-3 and is sent to the Governor's desk, where the Governor signed it. We asked counsel for the respondent if this could be judicially challenged, or if it is a political question. Counsel for the respondent chose not to respond.

A reading of the Sierra Constitution that would leave the people of Sierra without a check against a runaway legislature that chooses to ignore unambiguous constitutional provisions is untenable, especially when it flies in the face of the clear language of the Constitution and precedent.

We see the question presented to us here as one based solely on an unambiguous Constitutional provision, not a vague or indeterminable legislative or other rule. We are not asked to decide whether an *internal procedure* of the legislature is valid, but whether the clear *constitutional* requirements were properly followed by the legislature. To whatever extent there is a legislative rule, that rule cannot overrule a constitutional provision. We hold that a justiciable question has been presented where a party alleges that the legislature has, through malfeasance, incompetence, or simple mathematical error, clearly violated an unambiguous constitutional provision, especially if the provision is related to something as simple as the number or percentage of votes needed for passage of a measure.

Put simply, if the Constitution says that five votes are needed to pass something, the legislature does not have the right to unilaterally say that four is five without the check of judicial review. To hold otherwise would mean that any sections of the Constitution requiring supermajorities or absolute majorities as a protection are without force, as a simple majority could just determine that they have been fulfilled regardless of what the actual vote total indicated.

III. THE TWO-THIRDS REQUIREMENT

Justiciability being determined, we now move onto the merits, where we must determine if four yea votes, two nay votes, and one present vote is sufficient to trigger a

state constitutional convention. It is indisputable that if this was a question of a federal constitutional amendment, the vote breakdown would be sufficient.

Article V of the United States Constitution reads, in pertinent part, “[t]he Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution.” As counsel for respondent notes, there is clear historical precedent that this does not require an absolute supermajority, but a voting supermajority.

Specifically, at the time the Twelfth Amendment of the United States Constitution made its way through the Senate, there were 34 Senators. 22 votes in favor, 10 voted against, and two did not vote. If it was based on 34 Senators, 22 yeas would not have been enough to pass the Senate, but if it was based on 32 Senators (those voting), it would be. The Senate determined that the amendment had reached the necessary two-thirds threshold, following the common law rule that an absolute majority or supermajority is not required unless it’s specifically stated otherwise.²

In *Missouri Pacific Ry. Co. v. Kansas*, 248 U.S. 276 (1919), the Supreme Court explicitly stated that under the United States Constitution veto overrides need only two-thirds of a quorum, rather than two thirds of the entire house, to succeed. They also specifically explained that the same is the case for amendments passing. They cited to several state Supreme Court cases holding the same, but noted the exception of the Minnesota Supreme Court in the case of *Minnesota ex rel. Eastland v. Gould*, 31 Minn. 189 (1883), in which the Minnesota Supreme Court held that “while a majority of the members of each house constitute a quorum, *no law*, however unimportant, can be passed without the votes of a majority in each

² “[a] ‘majority without further qualification usu[ally] means a simple majority.” Black’s Law Dict. (9th Ed. 2009) p. 1040, col. 2.)

branch of the legislature of *all the members elected to that branch.*” *Id.* (emphasis in original).

Indeed, in *State ex. Rel. Peterson v. Hoppe*, 194 Minn. 186 (1935), the Minnesota court noted that “the [United States] Supreme Court distinguishes between those cases where the requirement is two-thirds majority of the members of the House and where, as under [Minnesota’s] constitution, the requirement is a majority of ‘all the members elected to the House.’”³ *Id.* at 196.

Counsel for respondent claims that Article V of the United States Constitution is analogous to Article XVIII, Section 2 of the Sierra Constitution, which reads, in pertinent part, “[t]he Legislature...two-thirds **of the membership** of each house concurring, may submit at a general election the question whether to call a convention to revise the Constitution.” (emphasis added). They claim that the word “membership” in Article XVIII is analogous with the word “houses” in Article V. We disagree.⁴

Our task here is simply to determine whether the words “of the membership” modify Article XVIII, Section 2 and require an absolute supermajority rather than a supermajority of members voting yea and nay in order to trigger a constitutional convention.

This is a simple task, as not only is the text clear, but it has always been understood that an absolute supermajority or majority is needed based on the modification created by the words “of the membership” in the state of Sierra.⁵ Even before the current Constitution

³ In the case, the Minnesota Supreme Court held that in interpreting a clause that said “members” but not “members elected,” vacancies would not be included, but an absolute majority of those currently in seat would be.

⁴ We especially find the respondent’s reading of the clause impossible. If the word “membership” in Article XVIII were indeed analogous for the word “houses” in Article V, it would mean that Article XVIII could be read as “two-thirds of the houses of each house concurring...” We find this unlikely.

⁵ See, eg, Vermeule, Adrian, Absolute Voting Rules (August 2005). ; U Chicago Law & Economics, Olin Working Paper No. 257. (noting the difference between the US Constitution, which requires a majority of those voting and present to approve a law and the Sierra Constitution, which requires a

was in place, this absolute majority rule existed. There were several attempts to call for a constitutional convention before one was finally successful in 1878. In both 1857 and 1859, more votes were cast in favor of calling for a constitutional convention than against, but both votes failed because they did not have a majority of the total votes cast.⁶

Further, there is extensive precedent on this and similar constructions. In *San Francisco v. Hazen*, 5 Cal. 169 (1855), we held that the words “no ordinance or resolution shall be passed except by a majority of *all the members elected*,” meant not a majority of the quorum, but of all members of the San Francisco Council. (emphasis added.) See also: *Pimental v. San Francisco*, 21 Cal. 351 (1863); *McCracken v. San Francisco*, 16 Cal. 591 (1860);

We see no reason to meddle with how things have been understood and practiced since this state joined the union. Accordingly, we hold that Article XVIII does require an absolute supermajority, and that the assembly’s four votes did not meet this threshold.

IV. OTHER WAYS TO CALL A CONVENTION

The final question we must address is whether the assembly can call a state constitutional amendment by any method other than that outlined in the state Constitution.

In *Livermore v. Waite*, we explained that the constitution “can be neither revised nor amended except in the manner

majority “of all elected members.” AB-1419 There are also practical examples on a regular basis in the legislature. AB-1458 in the 2017-2018 term, needing a 2/3rds vote, failed despite 53 ayes and 17 nays, because 10 assemblypeople did not vote. Despite receiving 75% of the votes cast in favor, 53 votes was 66.25% of the total number of assemblypeople, meaning it fell one vote short of passage. See also: AB-1419 (2017-18), AB-1478 (2017-18), AB-1836 (2017-2018), AB-2167 (2017-2018), AB-2558 (2017-2018).

⁶ See Carl Brent Swisher, *Motivation and Political Technique in the California Constitutional Convention, 1878-79* (New York: Da Capo Press, 1969), p. 17.

prescribed by itself,” and that the power conferred by the document to the legislature “must be strictly construed.” *Id.*, at 425-426.

In *McFadden v. Jordan*, we reaffirmed this, stating that “[t]he only method provided in the Constitution by which it can be revised is set forth in section 2 of article XVIII.” *Id.*, at 332.⁷

In keeping with this precedent, we hold that there is no way for the assembly to call a convention other than the manner prescribed by the Constitution.

V. CONCLUSION

It is not the Court’s job to opine on whether a constitutional convention is desirable or necessary in the state of Sierra, and we do not do so today.

We are asked only whether two-thirds of the *voting* members of the assembly is sufficient to trigger a constitutional convention. After deciding that the simple interpretation of a clearly written constitutional clause is not a political question and is indeed a core function of the judiciary, we hold that assembly needed a two-thirds or greater vote of the *entire* assembly in order to trigger a constitutional convention, as required by an unambiguous clause in the Sierra Constitution. Additionally, there is no other way within the Constitution to trigger a Constitutional convention. Therefore, we hold that the convention has not been constitutionally triggered and shall not go on.

It is so ordered.

⁷ Our case law draws a distinction between “amending” and “revising” the Constitution, the latter of which requires a constitutional convention.