Amendment 1 Lawsuit Explained
By David Fowler, FACT President

If you have not heard, a lawsuit has been filed *in federal court* to have the vote on Amendment 1 declared invalid as a violation of the state constitution. The plaintiffs think the Amendment was invalidly adopted because votes were counted toward its passage even if the voter did not cast a vote in the governor's election. The following will explain how vacuous that argument is and what I expect will be the course of proceedings. I don't think the plaintiffs will prevail.

The Argument

The argument is that the following provision in the state constitution requires only votes cast in the gubernatorial election to be counted in deciding if a state constitutional amendment is adopted:

> "[I]t shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people at the next general election in which a governor is to be chosen. And if the people shall approve and ratify such amendment or amendments by a majority of all the citizens of the state voting for governor, voting in their favor, such amendment or amendments shall become a part of this Constitution."

The Argument's Validity

This argument is wholly without merit for the following reasons.

Any analysis must begin with the fact that the state constitution begins with the clear statement that all power is "in the people" (Article 1, section 1; and we'll talk at a later time about the theological implications of that statement), and that it is the "people" who have "an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper."

You will note that the beginning of the document, which should legally frame the interpretation of all that follows, puts power to "alter" or "reform" the constitution in the hands of "the people," not in "the majority of all the citizens of the state voting for governor," a subset of all the people.

As a matter of legal interpretation, a document should be interpreted as a whole and each provision read in the context of all other provisions. Had the people who wrote Article 1 thought the power *over the constitution* rested only in the hands of those who voted in the governor's race, then they certainly knew how to say it that way. (NOTE: The 1870 constitution referred to voting for "representatives," but the word was changed to "governor" in 1953; however, because the sentence structure remained the same as in 1870, the analysis proceeds as a reflection of "Framers" since the concept was theirs.) They didn't. And that becomes important later as we look at the absurdities that could result based on how people might vote in elections.

Secondly, as a logical matter, the Framers of our constitution would not have meant to put power over the constitution in the hands of all the "people" and then a few paragraphs later put that power only in the hands of those voting for governor (formerly "representatives). No doubt the people who wrote Article 1 did not intend to potentially disenfranchise themselves when it came to controlling the one, overarching, fundamental law governing themselves—the state constitution.

In fact, the constitutional sentence in question begins with "if *the people* shall approve" the amendment. It is *the people*, not some potentially small percentage of the people who vote in the governor's race, who control their constitution. If the Framers wanted only the votes cast in a certain election to control, they would not have begun the sentence that way. For example, they would have said, "if a majority of all the citizens of the state voting for governor shall approve" the amendment. The "people," not the majority of those voting for governor, are to "approve" amendments.

Nor did the Framers probably intend to force themselves to vote in an election if they didn't want to just so they could vote on an amendment to their constitution. Back then a man might have shot the person who told him he couldn't vote on what he wanted to vote on without having to vote on something he didn't want to vote on!

Lastly, there is the huge problem of giving the provision the plaintiffs rely on a construction that is internally logical, a problem which exposes the fact that their position is one born more from hysteria than logic. To read the language for the amendment the way the plaintiffs want, an amendment could conceivably pass if it did not get a majority of the votes of all the people voting on the amendment!

This anomalous result surely would have been envisioned by our Framers, because they had to know that "the people" might want to vote on the amendment and not vote for a governor. Before you say, "that's not true and we need to read the constitution otherwise," ask yourself if you've ever not voted for a candidate, particularly if he or she was running unopposed. Would you want someone to tell you that you couldn't then vote on a constitutional amendment? I doubt it.

So, if you only count the votes of those who voted for governor to determine if an amendment passed, a majority of those voters might be for an amendment, but they might also be a minority of the total votes cast on the amendment. For example:

Votes for governor	100,000
Those voting for governor who voted for Amendment	51,000
Those voting for governor who voted against Amendment	49,000
Total votes for Amendment	51,000
Total votes against Amendment	60,000

With the plaintiffs' interpretation, the amendment would pass because it got 51% of the votes cast by those voting in the governor's election, even though it only got 46% of the total votes on the amendment.

In other words, the plaintiffs must think our Founders, obviously trying to make sure a minority of people didn't change the constitution, actually intended to write the amendment provision in such a way that a minority of voters on the amendment and a even greater minority of the overall citizenry could change the constitution! If that's what the plaintiffs think our Founders meant in 1870, then they must think they were pretty stupid.

Procedurally:

You'll note that the plaintiffs filed in *federal* court over an issue of interpretation of a *state* constitution, not in state court. In my opinion, they think they have a better chance of getting Amendment 1 enjoined during the course of litigation by a judge appointed for life than by state judges elected by the people. Remember, trial judges are still elected by the people, and if state appellate judges want to face a real retention ballot fight, then let them enjoin the vote of the people on an abortion issue and see what happens!

Anyway, back to the law. The heart of the case has to rest on how to interpret the state constitutional provision I've just analyzed. However, to my knowledge no state court has ever interpreted that provision, presumably because no one else had the gall or guts to argue that our constitution's Framers intended to allow a minority vote of the people to ratify a constitutional amendment.

But, be that as it may, because that provision has never been interpreted, the federal courts are not really the place to be if you really think you have a good case involving a state constitutional provision. That is because of the U.S. Supreme Court-created "abstention doctrine."

That doctrine is as follows:

> "The concept under which a federal court exercises its discretion and equitable powers and declines to decide a legal action over which it has jurisdiction pursuant to the Constitution and statutes where the state judiciary is capable of rendering a definitive ruling in the matter."

So, the federal court may well kick the case out of court, and tell them to go to the state court. Of course, the plaintiffs will appeal that action, if for no other reason than to delay things, which has to have been their hope to begin with.

But, even if the federal court doesn't kick it out, the federal judge will most likely ask the state Supreme Court to interpret the state constitution for them, as federal courts are rightly very reluctant to interpret state law where it has not previously been interpreted.

And, in that regard, I really don't think our state Supreme Court is going to read our constitution the way the plaintiffs want it read because:

- it would be irrational, illogical, and an insult to the intelligence of the Framers of our constitution to do so, and
- it might put all amendments adopted over the years in jeopardy.

As to this latter point, who knows now how the people in the gubernatorial elections have voted on amendments in the past? In fact, perhaps the constitutional amendment in 1953 changing the word “representatives” to “governor” wasn’t properly adopted either! And, figuring it out now might be impossible because those paper ballots from years ago may be long gone.

And such a recount would surely be required because one cannot assume that just because there were more overall votes for Governor than for an amendment that a majority of votes on the amendment was constitutionally sufficient. This is because there is not necessarily a correspondence between the two sets of voters.

Here is an example. Assume the following citizens are the only ones in the state who vote and this is how they vote:

Voters	Votes in governor race	Votes FOR Amendment	Votes AGAINST Amendment
Joe	Y		
Sally	Y		
Susan	Y		
Bob	Y		
Fred	Y		
Lisa	Y		
Billy	Y		
Linda	Y		
David	Y		
Sam	Y		
Alice		X	
Amanda		X	
Ted		X	
Debbie		X	
Arnold		X	
George		X	
Anne		X	
Lori		X	
Laura			X

In this case, all you would know today from prior vote totals is that it looks like more people voted in the governor’s race (10) than on the amendment (total of 9). So it would appear that there were not a lot of folks skipping the gubernatorial election just to vote on the amendment. But you can’t assume that the amendment was therefore validly adopted. Not so fast!

In the example, it turns out that none of the folks who voted for governor voted on the amendment. Based on the way we've done things in the past, we would have held the amendment adopted because it got 8 out of 9, clearly a majority, and that 8 would be more than half of the votes cast in the governor's race, which would have only required 6 votes.

But if the court were to adopt the plaintiffs' reasoning, the amendment would not have passed. It would have gotten no votes!

Based on the plaintiffs' reasoning, every amendment since 1953 might be thrown in jeopardy because it's possible there was little to no overlap between those who voted in the governor's race and those who voted on the amendments. We can't know for sure unless we get every ballot over the years and inspect them! I wonder if the lottery really passed. Hmmm.

And, of course, with the plaintiffs' interpretation you'd again be accusing our Framers of something they probably never intended—that an amendment could get over 90% of the votes and fail!

If there were ever a case for the state to seek sanctions against plaintiffs' attorneys for filing such nonsense, this would be the case. Go for it, new Attorney General Slatery!