



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### MINUTES OF THE CONSTITUTIONAL REVISION AND UPDATING COMMITTEE

FOR THE MEETING HELD  
THURSDAY, APRIL 9, 2015

#### **Call to Order:**

Chair Mulvihill called the meeting of the Constitutional Revision and Updating Committee to order at 2:30 p.m.

#### **Members Present:**

A quorum was present with committee members Mulvihill, Kurfess, Abaray, Cupp, Macon, Obhof, Readler, and Wagoner in attendance.

#### **Approval of Minutes:**

The committee approved the minutes of the December 11, 2014 meeting.

#### **Committee Discussion:**

This was the first meeting of the Constitutional Revision and Updating Committee in 2015, so the Chair recognized and welcomed the committee's two new members, Representative Cupp and Dr. Macon.

Senior Policy Advisor Steven H. Steinglass provided information about subject matter limitations on constitutional initiatives, which place restrictions on which constitutional items may be changed or added by the initiative process. He noted that Ohio is one of 16 states with direct constitutional initiatives. Few states have explicit subject matter limitations on their constitutional initiatives. Dean Steinglass found only three: Massachusetts, Mississippi, and Illinois. Examples of subject matter limitations in these states include the bill of rights, the employee and retirement system, and modifications to the initiative process.

In contrast, statutory initiatives typically have many subject matter limitations. Dean Steinglass noted that at a previous meeting Professor Bruce Cain briefly referenced a constitutional problem with subject matter limitations on initiatives. Although there has been litigation concerning the validity of subject matter limitations on constitutional initiatives, Dean Steinglass stated that the leading opinions have upheld their use.

Committee member Abaray added that another past presenter had informed the committee that, when he works with clients on potential constitutional initiatives, he consistently uses a “trump card” provision. This “trump card” provision states that, if the initiative is in conflict with other provisions of the constitution, the initiative position will always control. Ms. Abaray stated her disapproval of these “trump card” provisions, primarily because most voters will not appreciate their significance.

Ms. Abaray then asked whether it would be appropriate for the committee to recommend a restriction against “trump card” provisions in initiated amendments. Dean Steinglass stated that there is always the potential for two amendments on the same topic, and, in those situations, the one with the greater number of votes prevails.

Ms. Abaray then clarified her concern, which is that the “trump card” provision prioritizes the initiative amendment at the expense of previous amendments. Dean Steinglass believes the courts would need to decide which amendment prevails, and that they would likely try to reconcile the two provisions of the constitution. However, his initial reaction is that the second amendment would trump the first. There are other provisions in the constitution that include “trump card” provisions, including Article II, Section 34(a), which deals with minimum wage.

Chair Mulvihill commented that, as was heard in the full Commission meeting earlier in the day, when Richard Saphire presented on the report and recommendation for Article I, Section 2, there is a constitutional prohibition on the General Assembly from granting special privileges and immunities. However, he noted that Ohio has begun to see constitutional initiatives that grant special privileges to certain individuals, such as casino owners and marijuana growers. He also expressed his concern that other states have done nothing to address this problem.

Dean Steinglass commented that a subject matter limitation on privilege would certainly be possible to create. The overarching consideration, however, is whether such a provision would be good policy.

Vice-Chair Kurfess stated his belief that the limitation should go even further. He said he preferred a limitation that would state that neither by initiative nor by act of legislature could a provision be placed before voters to grant a right or privilege or protection not extended to all similarly-situated individuals or entities. He believes the legislature should not have the right to extend privilege either. Vice-Chair Kurfess stated that he would suggest an amendment that would preclude the public vote on any such granting of privileges or rights or protections.

Senator Obhof said that this suggested amendment may be problematic. If the constitution includes language that privileges a certain group, Sen. Obhof is not sure that adding “notwithstanding any other provision” would circumvent that issue. Vice-Chair Kurfess responded that an anti-privilege provision could be worded so that any measure that says “notwithstanding” would not apply. The anti-privilege provision could require two votes, one to repeal and the other to consider the substitute. Dean Steinglass suggested that pre-election review of proposed constitutional amendments might address this issue.

Committee member Wagoner then asked whether future generations would be able to remove the anti-privilege provision. Dean Steinglass replied that the provision could be removed in the future. It is problematic to have a provision that cannot be removed from the constitution.

Chair Mulvihill then focused the committee on a central issue: how to direct people to the statutory initiative process as opposed to the constitutional initiative process. He is in favor of an amendment that would not permit individuals to grant special privileges to other groups. He also agrees that there has been some co-opting of the process for private interests to enrich themselves under the cover of something that might be popular. Dean Steinglass agreed to research what other states have done to minimize privilege in the initiative process.

Committee member Readler said he understands that Ohio is one of the easiest states in which to pass a constitutional amendment. He believes this is true particularly because 34 states have no initiative process. Dean Steinglass observed that “easy” and “the most avenues” are not necessarily equivalent. The ease of the initiative process is impacted by other factors, like the culture, industry, and expectations that exist in the state.

Another subject matter limitation that Dean Steinglass mentioned revolves around the distinction between a constitutional revision and a constitutional amendment. He stated that a significant number of states do not use these terms interchangeably. In those states, a constitutional revision is a thorough, fundamental change to the constitution, whereas an amendment is a narrow, precise change. The typical pattern in these states is that the initiative process may not be used for constitutional revision, but may be used for constitutional amendments.

Ms. Abaray asked whether the committee could look through the minutes of previous meetings and find what presenter Maurice Thompson said about the “trump card” provision. She believes he may have been the speaker that used that language, and that it may be grounds for a limitation on the initiative process. Dean Steinglass stated that the “trump card” language was also in the draft “right to work” provision, provided earlier that day for consideration by the Coordinating Committee, and that he would be able to find it.

Chair Mulvihill restated his concern about individuals using the initiative process for personal gain. He said he believes that prohibiting privilege-granting initiatives may address the problems the committee set out to solve without changing the mechanics of the process with which Ohioans are familiar. He would like to explore this topic in future meetings. Mr. Wagoner agreed the topic is worth exploring.

Vice-Chair Kurfess stated that Ohioans are unlikely to approve a ballot measure that limits their own ability to amend the constitution. However, he believes voters might agree to limit a certain purpose behind amending the constitution, like granting privilege. Chair Mulvihill agreed that this type of amendment should be considered further. The committee is interested in encouraging Ohioans to use the statutory initiative process, and Chair Mulvihill believes this may be a way to achieve that goal.

Dean Steinglass noted that staff could write a memo regarding the topics on which the committee may want to take a position. He also reminded the committee that there are some technical problems in the constitution that the committee may want to address. The committee could make recommendations with respect to the clarity of the provision fairly soon.

Ms. Abaray asked whether Article I, Section 2 has any bearing on the anti-privilege provision that the committee is contemplating. Chair Mulvihill does not believe that the topics in front of this committee have any bearing on Article I, Section 2, and Dean Steinglass agreed.

Executive Director Steven C. Hollon then introduced a report by the National Conference of State Legislatures (“NCSL”). The report is titled “Initiative and Referendum in the 21st Century,” and it was created by the NCSL Initiative and Referendum Task Force. Director Hollon presented this report to the committee as a reference document. It covers topics and concerns that the committee may want to draw upon as it discusses the Ohio initiative and referendum process.

Counsel to the Commission Shari L. O’Neill then discussed the utility of the task force recommendations contained in the NCSL Report. These task force recommendations are taken from the full NCSL Report, which was provided to the committee electronically.

Ms. O’Neill listed the types of recommendations contained in the report, including:

- General recommendations regarding the initiative process
- Recommendations for involving the legislature in the initiative process
- Recommendations relating to the subject matter of initiatives
- Recommendations for improving the drafting and certification phase
- Recommendations about the signature gathering phase
- Recommendations for improving voter education
- Recommendations for requiring financial disclosure
- Recommendations for enhancing the voting process

She noted that some of these topics have already been taken up by the committee, and that she is currently reviewing statutory law and the record of the committee’s activities in order to note which of these recommendations are already part of Ohio law or have been discussed by the committee.

Ms. O’Neill noted that one possible area of interest for the committee might be “The Drafting and Certification Phase,” addressed particularly in Task Force Recommendations 4.1 and 4.4. These provisions contain procedural recommendations that impose a review process on proposed initiative language. The language would be reviewed by either the legislature or an agency in order to improve technical format and content, and would provide the opportunity for public challenge of technical matters. Ms. O’Neill believes these procedures could enhance the initiative process and might help avoid the addition of language that lacks clarity, contains drafting errors, or fails to conform to the existing format of the constitution.

Chair Mulvihill then polled the committee members about the direction of future committee meetings. Vice-Chair Kurfess said he favors a constitutional provision that protects against special rights and privileges, and asked that staff draft such a provision to see what it might look like. He stated that there should be a limitation on consideration regardless of the source of privilege. Chair Mulvihill agreed and said a draft by the staff may help facilitate future discussion. Vice-Chair Kurfess would also like to continue the discussion about discouraging constitutional amendments. He is also interested in discussing the requirement that initiatives relate to a single subject, and a requirement prohibiting statutes from becoming effective subject to a popular vote.

Dean Steinglass explained Vice-Chair Kurfess's reference, saying that Article II, Section 26 was interpreted to permit the General Assembly to approve something subject to the approval of the voters. It essentially is a plebiscite and most states, including Ohio, don't use this. Chair Mulvihill noted that that provision was not assigned to this committee.

Vice-Chair Kurfess asked whether the single subject provision applies to initiated statutes. Rep. Cupp indicated that any limitation on the General Assembly is also a limitation on initiated statutes.

Vice-Chair Kurfess then wondered whether the committee should inform the full Commission that it is interested in encouraging statutory amendments instead of constitutional amendments. The Commission may have insight into whether the committee is headed in the right direction.

Ms. Abaray asked whether the committee was close to proposing some amendments to the full Commission. Chair Mulvihill responded that the committee was not close. Ms. Abaray then suggested that gender neutral language should be included in the standard format of the constitution.

Mr. Readler commented that NCSL Task Force Recommendation 8.2, which recommends a higher vote threshold for constitutional amendments than for statutory amendments, might be one area the committee has already addressed.

Chair Mulvihill said the committee has had recommendations about streamlining the process, for example, Article II, Section 1b, which is extremely difficult to read. He said that, from a technical standpoint, the committee could work to make that section and similar sections clearer. Chair Mulvihill noted that technical changes are an easier topic for recommendations than the philosophical topics the committee has discussed previously.

Dean Steinglass asked whether the committee would be interested in addressing pre-election substantive review. He suggested that such a process would eliminate patently unconstitutional initiatives from the process. Additionally, voters in many states cannot initiate a convention, and Dean Steinglass wonders if that is missing in Ohio. He also wondered whether the single amendment rule would prevent the committee from truly modernizing the constitution because it contributes to clutter, and whether a separate ballot item must be created for every change that is proposed.

### **Adjournment:**

With no further business to come before the committee, the meeting adjourned at 4:00 p.m.

### **Attachments:**

- Notice
- Agenda
- Roll call sheet

**Approval:**

The minutes of the April 9, 2015 meeting of the Constitutional Revision and Updating Committee were approved at the May 14, 2015 meeting of the committee.

*/s/ Dennis P. Mulvihill*

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Dennis P. Mulvihill, Chair

*/s/ Charles F. Kurfess*

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Charles F. Kurfess, Vice-Chair