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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

BILL OF RIGHTS AND VOTING COMMITTEE AGENDA

DATE: Thursday, September 11, 2014

TIME: 3:00 pm *(or immediately upon conclusion of Commission meeting)*

ROOM: Statehouse Room 311

- Call to Order
- Roll Call
- Approval of July 10, 2014 Report
- Article V, Section 6 (Idiots or Insane Persons)

  Presenter:
  Shari L. O'Neill, Counsel to the Commission
  Ohio Constitutional Modernization Commission
- Article I, Section 4 (Bearing Arms; Standing Armies; Military Power)
- Adjourn

Article I - Section 4

BEARING ARMS; STANDING ARMIES; MILITARY POWER

§4 The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.

[Note: This section has not been changed since its adoption in the Ohio Constitution of 1851. At its May, 2014 meeting, the Committee voted to recommend retaining this provision in its current form. At its June, 2014 meeting, the Committee again discussed this provision but took action on it.]

Article V - Section 7

PRIMARY ELECTIONS

§7 All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law, and provision shall be made by law for a preferential vote for United States senator, but direct primaries shall not be held for the nomination of township officers or for the officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality. All delegates from this state to the national conventions of political parties shall be chosen by direct vote of the electors in a manner provided by law. Each candidate for such delegate shall state his first and second choices for the presidency, but the name of no candidate for the presidency shall be so used without his written authority.

[Note: this provision was added to the Ohio Constitution in 1912. At its June, 2014 meeting, the Committee discussed this provision, but took no action regarding it.]

Article V, Section 4

EXCLUSION FROM THE FRANCHISE

§4 The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of a felony.

[Note: this provision was added to the Constitution in 1976. It replaced a provision from the 1851 Constitution that empowered the General Assembly to exclude from the franchise, or from eligibility for public office, "any person convicted of bribery, perjury, or other

infamous crime." In its initial action on the provision, the Committee voted unanimously to retain the provision in its current form.]

Article V, Section 6

IDIOTS OR INSANE PERSONS

§6 No idiot, or insane person, shall be entitled to the privileges of an elector.

[Note: this provision was included in the Ohio Constitution of 1851.]

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO:	**Chairman Richard Saphire and Members of the Bill of Rights and Voting Committee**
CC:	**Steven C. Hollon, Executive Director**
FROM:	**Shari L. O'Neill, Counsel to the Commission**
DATE:	**August 25, 2014**
RE:	**Ohio Constitution Article V, Section 6**

The Bill of Rights and Voting Committee has submitted the following questions for analysis:

With respect to Article V, Section 6:

a. What is the historical explanation for the inclusion of the term "idiot" among the class of persons that is excluded from the franchise?

b. Does the term "idiot" have any current and officially recognized medical or psychiatric meaning? And is the term defined by statute in Ohio?

c. Does any other state explicitly disenfranchise "idiots" by constitutional provision?

d. The 1970s Modernization Commission recommended the deletion of the term "idiot" from this provision. According to the available historical record, why did this recommendation fail?

In addressing these questions, this Memorandum will cover some of the background and law surrounding this enactment and its subject matter, providing a brief discussion of relevant issues, a comparison of state constitutions, and some options for revision.

History

Ohio Const. Art. V, Section 6, provides "No idiot, or insane person, shall be entitled to the privileges of an elector."

Part of the 1851 Constitution, this provision has survived unchanged since that time. Despite the use of words like "idiot," "lunatic," and "feebleminded," in the common vernacular of the 1800s, and the fact that the discipline of psychology was in its infancy at the time, a court's description of insanity in 1843 reflects a surprisingly modern view:

> " *** [I]t should be remembered that 'insanity is a disease of the mind, which assumes as many and various forms as there are shades of difference in the human character. It exists in all imaginable varieties, and in such a manner as to render futile any attempt to give a classification of its numerous grades and degrees that would be of much service, or, under any circumstances, safe to be relied upon in judicial investigations. It is an undoubted fact, that, in determining a question of lunacy, the common sense of mankind must ultimately be relied on, and, in the decision, much assistance cannot be derived from metaphysical speculations, although a general knowledge of the faculties of the human mind, and their mode of operations, will be of great service in leading to correct conclusions.'" Shelford on Lunacy, 38, as quoted in *Clark v. State*, 12 Ohio 483 (Ohio 1843).

Throughout the 1800s, the word "idiot" did not have the same connotations as it does today.[1] The word has become an insult, suggesting someone who is wilfully foolish or uninformed. See Merriam Webster Dictionary, http://www.merriam-webster.com/dictionary/idiot (1. *usually offensive:* a person affected with extreme mental retardation; 2. a foolish or stupid person).

In 1851, however, an "idiot" was simply a person with diminished mental capacity, what later was termed "mental retardation," and what we now call "developmentally disabled." Further, the word "idiot" conveyed that it was a permanent state of mental incapacity, possibly congenital, as opposed to "mania" "dementia," or "insanity," which were regarded as potentially transient or temporary conditions.[2]

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[1] For further discussion of nineteenth century scientific and political views on the subject of disenfranchisement of the mentally incompetent, see Schriner, *The Competence Line in American Suffrage Law: A Political Analysis,* Disability Studies Quarterly, Vol. 22, No. 2, page 61; and Schriner, Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship,* 62 Ohio St. L.J. 481 (2001).

[2] The adjective "idiot," by some accounts, has been subjected to the "euphemism treadmill," a process by which a word evolves from a mere descriptor to a derogatory term. See, e.g., http://en.wikipedia.org/wiki/Mental_retardation (meaning that "whatever term is chosen for this condition, it eventually becomes perceived as an insult. The terms *mental retardation* and *mentally retarded* were invented in the middle of the 20th century to replace the previous set of terms, which were deemed to have become offensive. By the end of the 20th century, these terms themselves have come to be widely seen as disparaging, politically incorrect, and in need of replacement.")

The use of both the word "idiot" and the phrase "insane person" in Article V, Section 6, suggests that the framers wanted to communicate that the privileges of an elector would be denied both to persons with permanently diminished mental capacity, as well as to persons whose condition is or could be temporary.

In one of the few cases discussing the meaning and origin of the words "idiot" and "insane persons" in this provision, the Marion County Common Pleas Court in 1968 observed:

> "From my review of legal literature going back to 1800 it seems apparent that the common definition of the word 'idiot,' as understood in 1851 when our present Constitution was in the main adopted, meant that it refers to a person who has been without understanding from his nativity, and whom the law, therefore, presumes never likely to attain any. I am unable to find anything indicating any real change in this definition to this date. ***
>
> The words 'insane person,' however, most commonly then as well as now, refer to a person who has suffered such a deprivation of reason that he is no longer capable of understanding and acting with discretion and judgment in the ordinary affairs of life. It seems quite apparent that some persons who once had normal reason and sense faculties become permanently insane. Others lose their normal perception and reason for relatively short periods of time such as day, a week, or a month or two, and then regain their normal condition for either their entire life or for some lesser indeterminate period. During these lucid intervals such persons commonly exercise every characteristic of normality associated with all those persons who have never, even for a short period, been deprived of their normal reasoning faculties."
>
> *Baker v. Keller*, 15 Ohio Misc. 215 (Marion CP Ct. 1968). *See, also, In re South Charleston Election Contest,* 3 Ohio N.P. (N.S.) 373 (1905)(vote was discarded after court determined voter was mentally impaired from birth [or an "idiot"]).

Ohio Constitutional Revision Commission

In the 1970s, the Elections and Suffrage Committee ("the 1970s Committee") of the Ohio Constitutional Revision Commission ("Revision Commission") discussed whether to amend in order to remove the "idiot" and "insane person" references. The 1970s Committee's discussion centered both upon the words themselves, which were recognized as outdated and potentially offensive, as well as the provision's vagueness:

> "The present provision concerning mental illness and voting is unsatisfactory for several reasons. First, the constitutional language is simply a direct prohibition. The General Assembly is not expressly given the power to determine which mental conditions are such that a person should not vote, nor to establish procedures for determining who does or who does not fall into the categories. Statutory authority for the courts to deny the vote to involuntarily committed patients is nevertheless provided in section 5122.15, dealing with legal

> incompetency. But this provision carries out neither the letter nor the spirit of the constitutional prohibition. The law now tolerates the voting of some persons who may in fact be mentally incompetent. A voluntary patient who does not request a hearing before the probate court retains his civil rights, among them the right to vote. The loss of the right to vote is based upon the idea that a person in need of indeterminate hospitalization is also legally incompetent. But there are other persons whose right to vote may be challenged on the basis of insanity, either at the polls or in the case of contested election results. In these instances, there are no provisions resolving how hearings must be conducted, by whom, or even the crucial question of whether medical evidence shall be required. The lack of procedure for determining who is 'insane' or an 'idiot' could allow persons whose opinions are unpopular or whose lifestyles are disapproved to be challenged at the polls, and they may lose their right to vote without the presentation of any medical evidence whatsoever."
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> Page 2515, Ohio Constitutional Revision Commission (1970-77), Proceedings Research, Volume 5, Elections and Suffrage Committee Recommendations (hereafter cited as the "Record").

Thus, the 1970s Committee recognized two competing value systems. In one, voters alleged or believed to be mentally incompetent would be widely excluded from voting unless they can prove they have sufficient mental capacity to vote. That view emphasizes public confidence in the electoral process over the rights, needs, or desires of the individual voter. The downside of this approach is that it risks disenfranchising some persons who may, in fact, have sufficient awareness to cast a vote.

The other philosophy advocates broad enfranchisement despite the danger that some lacking even a minimal level of comprehension would be allowed to participate. In that view, the harm done by a competent voter being mistakenly excluded from voting outweighs the risk of qualifying an incompetent voter. As one treatise observes, "there is general agreement in the context of voting that the risks associated with allowing marginally incapable voters of casting a ballot are small, and the harms of excluding persons who might in fact be capable are substantial." Hurme, Appelbaum, *Defining and Assessing Capacity to Vote: the Effect of Mental Impairment on the Rights of Voters,* 38 McGeorge L.Rev. 931, 965 (2007).[3] The 1970s Committee acknowledged the broader view, stating "large scale and possibly arbitrary exclusion from voting are a greater danger to the democratic process than including some who may be mentally incompetent to vote." Nevertheless, the 1970s Committee concluded that "a person should not be denied the right to vote because he is 'incompetent,' but only if he is incompetent for the purpose of voting." The 1970s Committee recommended a revision that would allow the legislature to draft legislation excluding from the franchise persons who are "mentally incompetent for the purpose of voting" (Record at page 2516). The full Revision Commission voted to submit this recommendation to the General Assembly, specifically proposing repeal of Section 6 and replacing it with a new Section 5 that would read:

[3] Another helpful discussion of this topic is McHugh, *Idiots and Insane Persons: Electoral Exclusion and Democratic Values within the Ohio Constitution,* 76 Albany L.Rev. 2189 (2013).

> "The General Assembly shall have power to deny the privileges of an elector to any person adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency."
>
> Ohio Constitutional Revision Commission Recommendations for Amendments to the Constitution, Report No. 7, Pages 23-25. (See Attached.)

For reasons that aren't clear, this recommendation by the Revision Commission failed to gain traction in the General Assembly, and was not presented to voters for ratification. However, a review of the current research on the topic of voting rights for the mentally impaired reveals that the considerations and interests supporting the proposed change in the 1970s remain relevant today. Specifically, current knowledge regarding mental illness and cognitive impairment, modern distaste for adjectives like "idiot," and legal precedent applying equal protection and due process analysis to disenfranchising enactments, continue to provide justification for the proposed constitutional language contained in the 1970s recommendation.

Ohio Statutory Law

Although Article V, Section 6's pejorative references remain intact, in 2007 the General Assembly acted to remove all such references from the Revised Code. Thus, Am. Sub. H.B. 53, introduced and passed by the 127th General Assembly, removed all statutory references to "lunatic," "idiot," "imbecile," "drunkard," "deaf and dumb," and "insane," in 29 sections of the Revised Code, replacing them, where necessary, with more modern references, and defining "incompetent person" as "a person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person's self or property or fails to provide for the person's family or other persons for whom the person is charged by law to provide." R.C. 711.23, *inter alia.*[4]

Changing Ohio Const. Article V, Section 6, to remove the objectionable references would bring the constitutional provision into line with these statutory changes. However, this simple change would not alleviate the other potential issue as identified by the 1970s Committee, which is that the constitutional provision is a direct prohibition that does not provide guidance as to how and by whom mental incompetence is to be determined, and what level of mental incompetence would disqualify an elector.

While the Ohio Constitution lacks reference to a judicial determination of incompetence, R.C. 3503.18 does provide a process whereby a person adjudicated incompetent may be disenfranchised, providing in part:

[4]The definition of "incompetent person" does not include that the person is incapable of voting, or incapable of forming the requisite conscious thought, comprehension, analysis, preference, or opinion that would support a court's conclusion that the person should be permitted to vote. In addition, statutes directly relating to the procedure for disenfranchising the mentally incompetent--R.C. 3503.18, allowing the cancellation of voter registration, and R.C. 5122.301, addressing the civil rights of mental patients--are not among the statutes modified by Am. Sub. H.B. 53.

> "(B) At least once each month, each probate judge in this state shall file with the board of elections the names and residence addresses of all persons over eighteen years of age who have been adjudicated incompetent for the purpose of voting, as provided in section 5122.301 of the Revised Code.
> ***
> (D) Upon receiving a report required by this section, the board of elections shall promptly cancel the registration of each elector named in the report in accordance with section 3503.21 of the Revised Code. If the report contains a residence address of an elector in a county other than the county in which the board of elections is located, the director shall promptly send a copy of the report to the appropriate board of elections, which shall cancel the registration in accordance with that section."

Thus, if a probate judge adjudicates an elector is incompetent *for the purposes of voting,* and communicates this by report to the relevant board of elections, that elector's registration will be cancelled.

The probate court's authority to determine incompetence is not without limits, since R.C. 5122.301 prevents the decision to disenfranchise from being made solely on the basis of a person being hospitalized, taken into custody, or receiving mental health services:

> "No person shall be deprived of any public or private employment solely because of having been admitted to a hospital or otherwise receiving services, voluntarily or involuntarily, for a mental illness or other mental disability.
>
> Any person admitted to a hospital or otherwise taken into custody, voluntarily or involuntarily, under this chapter retains all civil rights not specifically denied in the Revised Code or removed by an adjudication of incompetence following a judicial proceeding other than a proceeding under sections 5122.11 to 5122.15 of the Revised Code.
>
> As used in this section, 'civil rights' includes, without limitation, the rights to contract, hold a professional, occupational, or motor vehicle driver's or commercial driver's license, marry or obtain a divorce, annulment, or dissolution of marriage, make a will, vote, and sue and be sued."

R.C. 5122.301 does not indicate upon what evidence the probate court should base such a decision. Nevertheless, what these two statutes clarify is that an elector having a diminished mental capacity may not be disenfranchised other than if he/she is adjudicated incompetent for purposes of voting by a probate court, and that this adjudication will not occur except in the context of that person being admitted to a hospital, receiving mental health services, or being in custody or under a guardianship as a result of a mental condition.

Voting Rights Under Federal Law

The United States Constitution does not expressly state that voting is a "right." *Rodriguez v. Popular Democratic Party,* 457 U.S. 1, 9 (1982), quoting *Minor v. Hapersett,* 88 U.S. 162, 178 (1874). Nevertheless, the U.S. Supreme Court recognizes voting as a fundamental right that the Court calls the "essence of a democratic society." *Reynolds v. Sims,* 377 U.S. 553, 555 (1964). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

As a result, federal jurisprudence has subjected voting rights cases to equal protection analysis under the Fourteenth Amendment. Removal of the right to vote is considered to be a denial of a fundamental liberty, subject to basic due process protections that ensure fundamental fairness. *Lassiter v. Dept. of Social Servs.*, 452 U.S. 18, 24 (1981). Thus, in reviewing provisions affecting the exercise of the elective franchise, courts apply the balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), by which the individual's interest in participating in the democratic process is weighed against the state's interest in ensuring that those who vote understand the act of voting. *Dunn v. Blumstein*, 405 U.S. 330 (1972). Because voting is a fundamental right, the state's interest in limiting its exercise must be compelling, and the limitations themselves must be narrowly tailored to meet that compelling interest. *See, e.g., Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008). Courts analyze such cases by asking whether a voting qualification imposes a "severe" burden on voters; if it does, the provision is strictly scrutinized. *Burdick v. Takushi*, 502 U.S. 434 (1992). If the burden is not severe, the state's interest need not be compelling, only valid, for the provision to pass constitutional review. *Id.*[5]

Addressing voting rights cases, the Sixth Circuit applies what is referred to as the "flexible standard" as stated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick, supra,* at page 434, which articulated the standard as follows:

> "A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiffs' rights.'"

As described in *Obama for America v. Husted*, 697 F. 3d 423, 429 (6th Cir. 2012), "[t]here is no 'litmus test' to separate valid from invalid voting regulations; courts must weigh the burden on

[5] In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the Court declined to extend quasi-suspect status to persons suffering from mental retardation, holding that the Equal Protection Clause does not require application of heightened scrutiny to a zoning ordinance requiring a permit for operation of a group home for the developmentally disabled. However, the elective franchise is well-established as a "fundamental right" that is subjected to heightened review, and because *City of Cleburne* did not involve voting rights, its holding is inapposite.

voters against the state's asserted justifications and 'make the hard judgment' that our adversary system demands." *citing Crawford, supra,* 553 U.S. at 190 (Stevens, J., announcing the judgment of the Court).

Like the U.S. Constitution, the Ohio Constitution does not refer to voting as a "right." In fact, Article V, Section 6, specifically uses the word "privilege," thereby suggesting that participation in the electoral process is an act permitted by the state, rather than an entitlement. Nevertheless, R.C. 5122.301 describes voting as a "civil right," and Ohio jurisprudence has followed federal constitutional law in applying strict scrutiny to state enactments that encroach upon the voting franchise. *See, e.g., State ex rel. Watson v. Hamilton Cty. Bd. of Elections,* 88 Ohio St.3d 239 (2000)(under *Burdick v. Takushi,* state election law is reviewed by weighing the character and magnitude of the burden imposed on voting rights against the state's interest justifying it, rejecting regulations that impose a severe burden that does not serve a compelling state interest); *State ex rel. Brown v. Summit Cty. Bd. of Elections*, 46 Ohio St.3d 166 (1989)(if a fundamental constitutional right is affected, government has the burden to prove the classification is necessary to promote a compelling governmental interest); *Bd. of Lucas Cty. Commrs v. Waterville Twp. Bd. of Trustees*, 171 Ohio App.3d 354, 2007-Ohio-2141 (6th Dist.)(because state statute infringed upon fundamental right to vote, compelling governmental interest was required).

In addition to federal constitutional law, several other federal laws have been found to be implicated when limiting voting rights of the mentally impaired. These include Title II of the Americans with Disabilities Act ("ADA") (42 U.S.C. 12101), the National Voting Rights Act (42 U.S.C. 1971), and Section 504 of the Rehabilitation Act (29 U.S.C. 701, *et seq.*).

Title II of the ADA provides, at section 12132:

> "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

The ADA defines a "qualified individual with a disability" as including "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." ADA, 42 U.S.C. 12131.

The National Voting Rights Act provides, at section (a)(2)(A):

"No person acting under color of law shall—

(A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote[.]"

Section 504 of the Rehabilitation Act provides, in part:

> "No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. 794(a).

In a decision now widely cited for the principle that imposition of a guardianship does not equate with mental incompetence for purposes of voting, the U.S. District Court sitting in Maine determined federal law was violated by a state's constitutional provision that served to disenfranchise all persons subject to a guardianship for mental health reasons, without a procedure allowing a court to determine whether the mental condition affected the ability to understand the act of voting. In addition to concluding that equal protection and due process are violated by such a scheme, the court in *Doe v. Rowe*, 156 F. Supp. 2d 35, 59 (D. Me. 2001), held that Section 504 of the Rehabilitation Act, and the ADA were violated:

> "By all accounts, this restriction currently applies to mentally ill persons under guardianship—at least some of whom have the capacity to vote, thereby meeting the proposed essential eligibility criteria. See *Theriault* [*v. Flynn*, 162 F.3d 46 (1st Cir. 1998)], at 50 (explaining that the ADA prohibits 'rejecting an applicant automatically as a result of his disease or its symptoms, without considering the individual's abilities'). Of course, if the State were to implement changes to Maine's voting restriction thereby limiting its application to only those who fail to meet the essential eligibility criteria, Plaintiffs' claims of ongoing ADA violations could become moot. However, State Defendants' mere suggestions for how it could bring its voting regulations into compliance with the ADA and Section 504 in the future are irrelevant."

Review of State Constitutions

A survey of other state constitutions reveals a variety of approaches to this subject. Interestingly, nine states have no constitutional provision relating to the voter's mental status: Colorado, Idaho, Illinois, Indiana, Kansas, New Hampshire, North Carolina, Pennsylvania, and Tennessee. Several of these states do have statutory schemes permitting and addressing adjudications of incompetency for voting purposes.

Eighteen states' constitutions provide that voting will only be restricted upon an adjudication of incompetency by a court or other adjudicatory authority of competent jurisdiction: Arizona, Arkansas, Delaware, Iowa, Louisiana, Maine, Massachusetts, Missouri, Montana, New Jersey, North Dakota, Oregon, Rhode Island, South Dakota, Washington, West Virginia, and Wyoming. These states' constitutional provisions apparently presume that a person is always competent to vote unless proven otherwise.

Eight states always restrict the voting franchise for mentally incompetent persons, unless or until the disability is removed or the civil right is restored: Alaska, Alabama, Florida, Georgia, Nebraska, Nevada, Utah, and Virginia. These states' constitutions suggest a presumption that persons of diminished mental capacity are never competent to vote unless they can prove otherwise.

Six states' constitutions simply restrict voting for the mentally impaired, do not provide for an adjudicatory process, and do not expressly allow voting to be restored if the disability is removed: Hawaii, Kentucky, Mississippi, Nebraska, New Mexico, and Ohio.

Five states' constitutions identify a guardianship as the determinant for disqualifying a voter: Maine, Maryland, Massachusetts, Minnesota, and Missouri. However, as discussed *supra*, Maine's federal district court rejected the mere fact of guardianship as the test for voting capacity. *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001), cited with favor in *Bell v. Marinko*, 235 F. Supp.2d 772 (N.D. Ohio 2002). Absent accompanying statutory language providing a procedure for specifically determining the mental capacity to vote, constitutional provisions basing disenfranchisement simply upon guardianship are vulnerable to attack on equal protection and other grounds. To specify that a guardianship alone is not sufficient to disqualify, Wisconsin and New Jersey constitutions provide a specific exception to disenfranchisement if the person is capable of understanding the elective process or the act of voting.

Nine constitutions expressly assign the task of regulating the voting franchise to the legislature: California, Connecticut, Maryland, Michigan, New York, Oklahoma, South Carolina, Wisconsin, and Texas (which indicates both that those adjudicated mentally incompetent can't vote, but also that the legislature may create exceptions).

Currently, only four states: Ohio, Kentucky, Mississippi, and New Mexico, use the descriptors "idiots" and "insane persons." (Note: as discussed below, Kentucky is considering removing this designation from its constitution.) Most states use the phrase "mentally incompetent." Other phrases include "mentally incapacitated," "*non compos mentis*," "mental disability," and "unsound mind."

Standing alone, Vermont's constitution indicates that only those of "quiet and peaceable behavior" are entitled to the privilege of voting.

Finally, the constitutions of some 19 states refer to voting as a "right," or an "entitlement," in their sections relating to the elective franchise for mentally incompetent persons: Delaware, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New Mexico, New York, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. By contrast, Ohio, Iowa, and Nevada in those sections refer to voting as a "privilege."

Options for Revision

The members of this Committee may wish to consider various options for changing the current constitutional provision, which reads as follows:

"No idiot, or insane person, shall be entitled to the privileges of an elector."

Option One--Adopt the Recommendation of the Ohio Constitutional Revision Commission

One option would be to adopt the prior recommendation of the Revision Commission. (See Attached.) Thus, a revised enactment would read as follows:

> "The General Assembly shall have power to deny the privileges of an elector to any person adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency."

The benefit of this option would be that its language already has been subjected to committee and commission review in the 1970s. Further, it may meet equal protection standards, would provide for legislative authority to limit enfranchisement, and does not affect current statutory law, all while eliminating the objectionable references. However, this revision was not approved by the General Assembly in the 1970s for submission to the voters, although the reason is unclear.

Option Two--Substitute "Idiot" and "Insane Person" with More Suitable Terms

Another option would be to simply remove or change the pejorative references, matching the constitutional provision with the statutory language adopted in Am. Sub. H.B. 53 (127th General Assembly). Thus, a revised enactment would read:

> "No ~~idiot, or insane~~ person who is incompetent for the purposes of voting~~,~~ shall be entitled to the privileges of an elector."

This option would keep the meaning of the original section intact, would not affect statutory law, and would eliminate the objectionable references. At the same time, however, this option does not indicate how incompetency is determined, and it does not acknowledge that statutory law addresses the specific procedure for disqualifying a mentally incompetent voter.

Option Three--Change the Terms and Add that Incompetency Must Be Adjudicated

Taking the previous option a step further, another option would eliminate the pejorative references and indicate that the determination of incompetency for purposes of voting must occur by adjudication. Thus:

> "No ~~idiot, or insane~~ person who is adjudicated incompetent for the purposes of voting~~,~~ shall be entitled to the privileges of an elector."

The benefit of this option is that it indicates incompetency is determined by adjudication, it keeps the original meaning of the section intact, and it does not affect statutory law, all while eliminating the objectionable references. However, this option does not explain that competency is directly tied to ability of the elector to understand the act of voting.

Option Four--Remove Objectionable Terms; Specify Adjudication of Incompetency for the Purposes of Voting

If the Committee wishes to cover all the bases, a revision could go one step further by eliminating the pejorative references and specifying that the determination of incompetency must be for the purposes of voting, must occur by adjudication, and must be based upon a finding that the person lacks the capacity to understand the act of voting. This option would look something like this:

> "No ~~idiot, or insane~~ person who has been adjudicated by a court of competent jurisdiction to lack the capacity to understand the act of voting~~,~~ shall be entitled to the privileges of an elector."

While this option certainly would address all possible concerns, it does not provide for the General Assembly to enact specific laws on the voting rights of the mentally impaired, and may leave room for the rejection of existing statutes as being unconstitutional.

Option Five--Give General Assembly Authority to Enact Voter Competency Laws

Another option would abandon all aspects of the current constitutional provision by directly referencing applicable statutory law and the ability of the General Assembly to enact statutes addressing the voting rights of the mentally impaired. Such an option might read:

> "The General Assembly may establish laws allowing for the rights of suffrage, registration of voters, and qualifications for the elective franchise [or disqualification of persons adjudicated incompetent for the purposes of voting]."

Under this option, the Ohio Constitution would leave regulation of voting to the General Assembly, with any argument alleging the unconstitutionality of statutory law to be based upon the U.S. Constitution.

Option Six--Eliminate All Reference to Disenfranchisement of Mentally Incompetent Persons

A final option would be to eliminate Section 6 altogether, leaving the matter to legislative enactment. Because Ohio already has a statutory scheme for disenfranchising persons found to be incompetent for the purpose of voting, removing the constitutional provision would not result in any change in current law and practice. Like the previous option, under this option any

argument of unconstitutionality of a statutory enactment would have to be based upon the U.S. Constitution.[6]

Conclusion

The subject of enfranchisement of the mentally incompetent has generated extensive scholarship and commentary. This Memorandum has briefly touched upon the relevant considerations, with a goal of providing a starting point for the Committee's discussion. I would be pleased to provide further research on any related areas of inquiry, or to respond to questions, comments, or concerns.

[6] Kentucky is considering this option. According to a legislative analyst for the Kentucky Legislative Research Commission, a 2014 bill (14 RS H.B. 70) that, if enacted, would have submitted to voters the question of whether to eliminate constitutional language disenfranchising "idiots and insane persons" died in the last session. Two new bills on the topic are anticipated for the next session. In Kentucky, the decision is tied to the controversial issue of whether to revoke the section of the constitutional provision requiring the permanent disenfranchisement of felony convicts.

OHIO CONSTITUTIONAL REVISION COMMISSION

Recommendations for Amendments to the Ohio Constitution

PART 7

ELECTIONS AND SUFFRAGE

March 15, 1975

Ohio Constitutional Revision Commission
41 South High Street
Columbus, Ohio 43215

whelmed by the collective vote of military personnel, and to protect the franchise from infiltration by transients. The Court rejected this reasoning saying that "Fencing out from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." The United States Supreme Court, in *Evans v. Cornman*, 389 U.S. 49, 90 S. Ct. 1752 (1970), held that such restrictions violated the Fourteenth Amendment equal protection clause. In 1973, a United States District Court declared Section 5 of Article V of the Ohio Constitution unconstitutional insofar as it denies a person the right to register because he lives on the grounds of a federal enclave (*Stencel v. Brown*, U.S.D.C., Southern District of Ohio, #72-331).

Rationale for Change

The Commission believes this language should be removed from the Constitution because it is unconstitutional and because the Commission agrees with the principle of an expanded franchise.

ARTICLE V

Section 6

Present Constitution

Section 6. No idiot, or insane person, shall be entitled to the privileges of an elector.

Commission Recommendation

Repeal and enact new section 5:
Section 5. The General Assembly shall have power to deny the privileges of an elector to any person adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency.

Commission Recommendation

The Commission recommends the repeal of Section 6, and enactment of a new section 5 as follows:

Section 5. THE GENERAL ASSEMBLY SHALL HAVE POWER TO DENY THE PRIVILEGES OF AN ELECTOR TO ANY PERSON ADJUDICATED MENTALLY INCOMPETENT FOR THE PURPOSE OF VOTING ONLY DURING THE PERIOD OF SUCH INCOMPETENCY.

History and Background of Section

The Ohio Constitution of 1851 contained a provision disfranchising idiots and insane persons, who were not denied the vote in the 1802 Constitution. The language of section 6, "No idiot, or insane person, shall be entitled to the privileges of an elector", is self-executing, requiring no action by the General Assembly to implement the prohibition. The terms "idiot" and "insane" are not defined in the Constitution, and their application arises from legislation and judicial determination. Although most state constitutions at one time used the words "idiot" and "insane", these have become archaic and devoid of standard meaning. Newer state constitutional provisions regarding competence to vote use terms such as "mentally incompetent."[1] Scientific progress has revealed that the myriad of mental impairments do not fall into just two groups, and even the currently acceptable terms "mentally retarded" and "mentally ill" are thought to blur the distinctions among many types and extremes of mental disabilities.

The body of legislation which has been created regarding mental illness and mental retardation has several consequences for the constitutional prohibition against idiots and insane persons voting. The Ohio Revised Code contains provisions regarding mentally ill patients in Chapters 5122., 5123., and 5125. An earlier movement to promote treatment for mental illness advocated voluntary as well as involuntary admittance procedures to encourage persons to seek help, and the 1952 Draft Act, proposed by the National Association of Mental Health, recommended the retention of all civil rights by patients, unless adjudicated incompetent and not re-

[1] E.g. Constitution of Virginia, Article II, Section 1.

stored to capacity. The Ohio statutes reflect these recommendations. Voluntary patients do not appear before the probate court for a determination of the need for hospitalization and therefore retain their civil rights. A person who is involuntarily committed appears before the court and, after a finding of the need for indeterminate hospitalization, the person is declared legally incompetent and loses such civil rights as the right to vote. As a consequence, a voluntary patient who may be severely disabled is, theoretically, able to vote. This result contravenes the intent of the constitutional prohibition of idiots and insane persons voting.

The General Assembly is not expressly given the power to determine which mental conditions are such that a person should not vote nor to establish procedures for determining who does or does not fall into the categories. A voter could be challenged at the polls on the grounds that he is an idiot or insane person. In the absence of standards to be used in making the determination, a person could be denied his right to vote without benefit of any medical testimony on his mental fitness, with the determination heavily dependent on the judge's personal opinion of what an idiot is.

Effect of Change

The Commission recognizes that the present constitutional language is antiquated and probably too broad to pass the Fourteenth Amendment equal protection and due process requirements for depriving a person of a fundamental right.[2] Therefore, the Commission recommends language that will give the General Assembly authority to create some useful standards to determine incompetency for the purpose of voting. Testimony presented to the Commission included cogent reasons why a person incompetent to serve on a jury or to drive may be competely competent to vote.

Rationale for Change

The Commission believes that the present constitutional provision is unacceptable for several reasons. The Elections and Suffrage Committee suggested, in its report to the Commission, that large scale and possibly arbitrary exclusion from voting is a greater danger to the democratic process than including in the franchise some who may be mentally incompetent. Repeal of present Section 6 and omission from the Constitution of any provision excluding persons from voting on the basis of mental incompetence was considered but rejected on the grounds that the Constitution should contain a recognition of the problem, leaving a specific solution to the General Assembly. The Commission's approach is to rewrite the provision so it will exclude only those persons who should not participate in the electoral process, and specifically to give the legislature the right to regulate the procedures for determining that one is mentally incompetent for the purpose of voting. An important factor in the Commission's decision to repeal the prohibition against idiots and insane persons voting was the testimony received from Professor Michael Kindred, a professor of law at The Ohio State University and an expert on the legal rights of mentally ill and mentally retarded persons. Professor Kindred suggested that Section 6 of Article V was probably unconstitutional under the equal protection clause of the Fourteenth Amendment to the United States Constitution and possibly unconstitutional under the due process clause of the Fourteenth Amendment. "It seems to me very clear at the present time that the provision is unacceptable. It's unacceptable because it is ambiguous, it's unacceptable because if it has any substance to it it's too broad, and it's unacceptable because the terms that it uses are basically insulting, stigmatizing terms."[3] The United States Supreme Court has begun to recognize the right to vote as a fundamental right, and restrictions on the right to vote must bear a necessary and rational relation to a compell-

[3] *Kramer v. Union Free School District No. 15*, 358 U.S. 621 (1969).

ing state interest.[4] Because the terms "idiot" and "insane" are ambiguous, it would be difficult to show how they meet the test for exclusion. In addition, it was suggested that the mentally retarded might qualify as a "suspect class", having certain relevant characteristics from birth, so that the due process clause of the Fourteenth Amendment might present another constitutional barrier to excluding them from exercising a fundamental right.

The Commission desires to preclude any wholesale exclusion from the electoral process on the basis of mental incompetence. The proposed language requires an adjudication of mental incompetence. The Commission also believes that the restoration to competency should restore the right to vote, and this restoration should be guaranteed by the Constitution. Hence, disfranchisement is limited by the words "only during the period of such incompetency."

Intent of the Commission

The Commission recommends the repeal of present Section 6 and enactment of a new Section 5 to fill the section vacated by the repeal of present Section 5 proposed earlier. The language disfranchising persons "adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency", is deemed a sufficient safeguard of the electoral process with less likelihood of excluding persons who should vote than the present prohibition of Section 6 appears to permit. The Commission believes that by placing these procedures under the auspices of the General Assembly, new attitudes regarding mental illness can be implemented and more uniform standards for determination and review will be possible than are provided under the present language.

[3]Minutes of the Ohio Constitutional Revision Commission, June 17, 1974. p. 11.
[4]*Kramer v. Union Free School District No. 15*, supra.

ARTICLE V

Section 7

Present Constitution

Section 7. All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law, and provision shall be made by law for a preferential vote for United States senator; but direct primaries shall not be held for the nomination of township officers or for the officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality. All delegates from this state to the national conventions of political parties shall be chosen by direct vote of the electors. Each candidate for such delegate shall state his first and second choices for the presidency, which preferences shall be printed upon the primary ballot below the name of such candidate, but the name of no candidate for the presidency shall be so used without his written authority.

Commission Recommendation

No recommendation.

Commission Recommendation

The Commission has no recommendation with regard to Section 7 at the present time.

History and Background of Section

A provision regarding the selection of delegates to political party conventions first appeared in the Ohio Constitution in 1912. At the 1912 Constitutional Convention, the evils of the convention method of nominating candidates were discussed. Delegates expressed their preference for direct primaries and Theodore Roosevelt, addressing the convention, advocated direct preferential primaries for the election of delegates to national nominating conventions. He referred to the use of the convention

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO: **Chairman Richard Saphire and Members of the Bill of Rights and Voting Committee**

CC: **Steven C. Hollon, Executive Director**

FROM: **Shari L. O'Neill, Counsel to the Commission**

DATE: **September 26, 2014**

RE: **Additional Options for Revising Article V, Section 6 Disenfranchisement of Mentally Incompetent Persons**

Here are some questions for the committee to consider as well as additional options in relation to a possible revision of Article V, Section 6 of the Ohio Constitution.

Article V, Section 6 currently reads:

> "No idiot, or insane person, shall be entitled to the privileges of an elector."

In considering how to formulate a new provision, the committee may want to discuss whether to include various individual elements, as suggested by the following questions:

1) Should a replacement provision include language expressly authorizing the General Assembly to enact laws relating to the disenfranchisement of mentally impaired persons?

   - Including some version of the phrase "The General Assembly has the power to enact laws," enables legislative action in the form of statutory enactments.

   - Such a phrase would allow the provision to mirror the language in Article V, Section 4 ("The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of a felony.")

2) A replacement provision would expressly exclude mentally incompetent persons from voting (or, alternately, only qualify those who are mentally competent). Should the provision be phrased so as to:

   - Deny voting "privileges" or to deny voting "rights"?

- In other words, does the committee believe voting should be termed a right, or a privilege?

- What are the "privileges of an elector"? Does that phrase have a meaning different from "voting privileges" or "voting rights"?

- Note: Article V, Section 1 refers to the "qualifications of an elector," while Article V, Section 7 references "electors," rather than "voters."

- Also, Article V, Section 4, references the "privilege of voting."

3) How should a replacement provision refer to a person who is mentally incompetent?

   - This would be a substitute for the words "idiot" and "insane person" in the current provision.

   - Examples: "mentally incompetent," "mental disability," "lacking mental capacity."

4) Should the provision clarify that only a mental disability related to voting would disqualify a voter?

   - Such a provision would indicate that the mental incompetence must be for the purpose of voting, or describes that the person "lacks ability to understand the act of voting."

5) Should the provision clarify who is authorized to determine whether a person should be disenfranchised?

   - If so, does the committee have a preference for how the court is described? Examples: by a court of competent jurisdiction, "judicially declared," or "judicially determined."

6) Should the provision indicate how disenfranchisement must occur?

   - After a "hearing," "evidentiary hearing," "adjudication"?

7) Should the provision include that the disenfranchisement only occurs during the period of mental incompetence?

   - Examples: the person continues to be disenfranchised "unless restored to voting rights," "unless civil rights restored," "unless restored to mental capacity," or "unless" or "until" "the disability is removed."

   - Indicates that the disqualification is not permanent and may be removed.

8) Should other possible statements be included?

- Right to counsel.

The right to counsel may be relevant, but is inherent in the concept of voting being a fundamental right that may not be eliminated without due process.

- Burden of proof.

The burden of proof could be (or may already be) addressed by statute and common law.

The Original Six Options

For the committee's convenience, here are the original six options proposed in the Memorandum dated August 25, 2014:

Option One--Adopt the Recommendation of the Ohio Constitutional Revision Commission

One option would be to adopt the prior recommendation of the Revision Commission. (See Attached.) Thus, a revised enactment would read as follows:

> "The General Assembly shall have power to deny the privileges of an elector to any person adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency."

The benefit of this option would be that its language already has been subjected to committee and commission review in the 1970s. Further, it may meet equal protection standards, would provide for legislative authority to limit enfranchisement, and does not affect current statutory law, all while eliminating the objectionable references. However, this revision was not approved by the General Assembly in the 1970s for submission to the voters, although the reason is unclear.

Option Two--Substitute "Idiot" and "Insane Person" with More Suitable Terms

Another option would be to simply remove or change the pejorative references, matching the constitutional provision with the statutory language adopted in Am. Sub. H.B. 53 (127th General Assembly). Thus, a revised enactment would read:

> "No ~~idiot, or insane~~ person who is incompetent for the purposes of voting~~,~~ shall be entitled to the privileges of an elector."

This option would keep the meaning of the original section intact, would not affect statutory law, and would eliminate the objectionable references. At the same time, however, this option does not indicate how incompetency is determined, and it does not acknowledge that statutory law addresses the specific procedure for disqualifying a mentally incompetent voter.

Option Three--Change the Terms and Add that Incompetency Must Be Adjudicated

Taking the previous option a step further, another option would eliminate the pejorative references and indicate that the determination of incompetency for purposes of voting must occur by adjudication. Thus:

> "No ~~idiot, or insane~~ person who is adjudicated incompetent for the purposes of voting~~,~~ shall be entitled to the privileges of an elector."

The benefit of this option is that it indicates incompetency is determined by adjudication, it keeps the original meaning of the section intact, and it does not affect statutory law, all while eliminating the objectionable references. However, this option does not explain that competency is directly tied to ability of the elector to understand the act of voting.

Option Four--Remove Objectionable Terms; Specify Adjudication of Incompetency for the Purposes of Voting

If the Committee wishes to cover all the bases, a revision could go one step further by eliminating the pejorative references and specifying that the determination of incompetency must be for the purposes of voting, must occur by adjudication, and must be based upon a finding that the person lacks the capacity to understand the act of voting. This option would look something like this:

> "No ~~idiot, or insane~~ person who has been adjudicated by a court of competent jurisdiction to lack the capacity to understand the act of voting~~,~~ shall be entitled to the privileges of an elector."

While this option certainly would address all possible concerns, it does not provide for the General Assembly to enact specific laws on the voting rights of the mentally impaired, and may leave room for the rejection of existing statutes as being unconstitutional.

Option Five--Give General Assembly Authority to Enact Voter Competency Laws

Another option would abandon all aspects of the current constitutional provision by directly referencing applicable statutory law and the ability of the General Assembly to enact statutes addressing the voting rights of the mentally impaired. Such an option might read:

> "The General Assembly may establish laws allowing for the rights of suffrage, registration of voters, and qualifications for the elective franchise [or disqualification of persons adjudicated incompetent for the purposes of voting]."

Under this option, the Ohio Constitution would leave regulation of voting to the General Assembly, with any argument alleging the unconstitutionality of statutory law to be based upon the U.S. Constitution.

Option Six--Eliminate All Reference to Disenfranchisement of Mentally Incompetent Persons

A final option would be to eliminate Section 6 altogether, leaving the matter to legislative enactment. Because Ohio already has a statutory scheme for disenfranchising persons found to be incompetent for the purpose of voting, removing the constitutional provision would not result in any change in current law and practice. Like the previous option, under this option any argument of unconstitutionality of a statutory enactment would have to be based upon the U.S. Constitution.

Five Additional Options

Option Seven--Affirms Right to Vote Unless Adjudicated Incompetent and Only During Period of Incompetence

Commissioner Karla L. Bell submits the following language as an additional option:

"Except as otherwise provided in Article V, Section 4, no elector shall be denied the right to vote unless adjudicated incompetent to vote; the disqualification so imposed shall last only during the period of incompetence."

Option Eight--Affirms Right to Vote Unless Adjudicated Incompetent by Clear and Convincing Evidence, Includes that Person Does Not Understanding Voting and Only During Period of Incompetence

Commissioner Karla L. Bell submits the following modification of Option Seven as an additional option:

"Except as otherwise provided in Article V, Section 4, no elector shall be denied the right to vote unless adjudicated incompetent to vote based on clear and convincing evidence the elector does not understand the elective system or the meaning of casting a vote. This disqualification shall last only during the period of incompetence, and the right to vote may be restored upon an adjudication the disqualified elector is competent to vote."

Option Nine--Grants General Assembly the Power to Disenfranchise Persons Adjudicated Mentally Incompetent for the Purposes of Voting Through Adjudication by Competent Court and During Period of Incompetence

Senior Policy Advisor Steven H. Steinglass submits the following option:

"The General Assembly shall have power to deny the privileges of an elector to any person adjudicated mentally incompetent for the purpose of voting by a court of competent jurisdiction but only during the period of such incompetency."

Option Ten--Grants General Assembly the Power to Disenfranchise, Alters Prior Option by Using the Active Voice

This option, provided by Commission Counsel Shari L. O'Neill, slightly modifies Steven Steinglass' version by substituting the active voice:

"The General Assembly shall have power to deny the privileges of an elector to any person that a court of competent jurisdiction adjudicates to be mentally incompetent for the purpose of voting but only during the period of such incompetency."

Option Eleven--References "Voting Rights" and "Judicially Determined" Instead of "Privileges of an Elector" and "Adjudicated"

This option, also provided by Shari O'Neill, further modifies Steven Steinglass' version by substituting the phrase "privileges of an elector" with "voting rights," as well as substituting "adjudicated … by a court of competent jurisdiction" with "judicially determined." While using the phrase "voting rights" makes sense legally and is perhaps clearer, other parts of the Ohio Constitution refer to voting as a "privilege" and voters as "electors;" thus, this change may not be possible. "Judicially determined" is more succinct and utilizes the active voice; however, the committee may wish to emphasize that the court must be "of competent jurisdiction."

"The General Assembly shall have power to deny voting rights to any person judicially determined to be mentally incompetent for the purpose of voting but only during the period of such incompetency."

MEMO

To: Professor Richard Saphire

From: Chris Smith

Date: 6/23/14

Re: Right to Bear Arms Constitutional Provisions

RIGHT TO BEAR ARMS

Alabama

§ 26 Right to Bear Arms

That every citizen has a right to bear arms in defense of himself and the state.

Alaska

Art. I, § 19 Right to Keep and Bear Arms

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State. [Amended 1994]

Arizona

Art. II, § 26 Bearing Arms

The right of the individual citizen to bear arms in defense of himself or the state shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.

Arkansas

Art. II, § 5 Right to Bear Arms

The citizens of this State shall have the right to keep and bear arms, for their common defense.

California

Art. I, § 32

The right of the People of the State of California to keep and bear arms shall not be infringed.

(a) No article, section or clause of this constitution nor law, statute or rule shall infringe a lawful person's right to buy, sell, transfer, own, possess, manufacture, carry or use arms and/or their ammunition or any other components necessary for their operation, possession or carriage.

(b) Any article, section, clause, law, statue or rule in contravention of Section 32 shall be considered null and void and without effect.

(c) It is the intent of this section to preempt all state laws and legislation and that this section occupies the field of arms related regulation in California

(d) The presence of arms during commission of an unlawful act does not provide any shield or immunity by virtue of this section to any person for the criminal or civil liability of said unlawful act.

Colorado

Art. II, § 13 Right to Bear Arms

The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.

Connecticut

Article First, § 15

Every citizen has a right to bear arms in defense of himself and the state.

Delaware

Art. I, § 20 Right to Keep and Bear Arms

A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use.

Florida

Art. §8 Right to Bear Arms

(a) The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.

(b) There shall be a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun. For the purposes of this section, "purchase" means the transfer of money or other valuable consideration to the retailer, and "handgun" means a firearm capable of being carried and used by one hand, such as a pistol or revolver. Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph.

(c) The legislature shall enact legislation implementing subsection (b) of this section, effective no later than December 31, 1991, which shall provide that anyone violating the provisions of subsection (b) shall be guilty of a felony.

(d) This restriction shall not apply to a trade in of another handgun.

History.—Am. C.S. for S.J.R. 43, 1989; adopted 1990.

Georgia

Art. I, Paragraph VIII Arms, Right to Keep and Bear

The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne.

Hawaii

Art. I, § 17 Right to Bear Arms

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

[Ren Const Con 1978 and election Nov 7, 1978].

Idaho

Art. I, § 11 Right to Keep and Bear Arms

The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony.

Illinois

Art. I, § 22 Right to Arms

Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.

Indiana

Art. I, § 32 Arms- Right to Bear

The people shall have a right to bear arms, for the defense of themselves and the State.

Iowa

Iowa currently does not have a constitutional provision for the right to bear arms. There is currently activity on a resolution in the Iowa House of Representatives (House Joint Resolution 4) to amend the Iowa Constitution to add such a provision.

Kansas

Bill of Rights, § 4 Bear Arms; Armies

The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power.

Kentucky

Art. I, § 1 Rights of Life, Liberty, Worship, Pursuit of Safety and Happiness, Free Speech, Acquiring and Protecting Property, Peaceable Assembly, Redress of Grievances, Bearing Arms

The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.

Louisiana

Art. I, § 11 Right to Keep and Bear Arms

The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction on this right shall be subject to strict scrutiny.

Acts 2012, No. 874, §1, approved Nov. 6, 2012, eff. Dec. 10, 2012.

Maine

Art. I, § 16 To Keep and Bear Arms

Every citizen has a right to keep and bear arms and this right shall never be questioned.

Maryland

Maryland has no explicit constitutional provision giving a right to bear arms. The closest provision is § 28 of the Declaration of Rights article which states the following:

That a well-regulated Militia is the proper and natural defense of a free Government.

Massachusetts

Part the First, Art. XVII

The people have a right to keep and to bear arms for the common defense. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.

Michigan

Art. I, § 6 Bearing of Arms

Every person has a right to keep and bear arms for the defense of himself and the state.

History: Const. 1963, Art. I, § 6, Eff. Jan. 1, 1964
Former Constitution**:** See Const. 1908, Art. II, § 5.

Minnesota

Minnesota has no constitutional provision for the right to bear arms.

Mississippi

Ast. III, § 12

The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons.

Missouri

Art. I, § 23 Right to Keep and Bear Arms- Exception

The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons.

Source: Const. of 1875, Art. II, § 17.
(2004) Section does not prohibit the General Assembly from enacting statutes allowing or disallowing the carrying of concealed weapons; the Concealed-Carry Act is therefore constitutional. *Brooks v. Missouri*, 128 S.W.3d 844 (Mo.banc).

Montana

Art. II, § 12 Right to Bear Arms

The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.

Nebraska

Art. I, § 1 Statement of Rights

All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed.

Nevada

Art. I, §11 Right to Bear Arms; Civil Power Supreme

1. Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes.

2. The military shall be subordinate to the civil power; No standing army shall be maintained by this State in time of peace, and in time of War, no appropriation for a standing army shall be for a longer time than two years.

[Amended in 1982. Proposed and passed by the 1979 legislature; agreed to and passed by the 1981 legislature; and approved and ratified by the people at the 1982 general election. See: Statutes of Nevada 1979, p. 1986; Statutes of Nevada 1981, p. 2083.]

New Hampshire

Art. 2a The Bearing of Arms

All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state.

New Jersey

New Jersey has no constitutional provision regarding the right to bear arms.

New Mexico

Art. II, § 6 Right to Bear Arms

No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms. (Adopted by the people November 11, 1986.)

New York

New York has no constitutional provision regarding the right to bear arms.

North Carolina

Art. I, § 39 Right to Bear Arms; Militia

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.

North Dakota

Art. I, § 1

All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

Ohio

§ 1.04 Bearing Arms; Standing Armies; Military Powers

The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.

Oklahoma

Art. I, § 26 Bearing Arms- Carrying Weapons

The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons.

Oregon

Art. I, § 27 Right to Bear Arms; Military Subordination to Civil Power

The people shall have the right to bear arms for the defense of themselves, and the State, but the Military shall be kept in strict subordination to the civil power[.]

Pennsylvania

Art. I, § 21 Right to Bear Arms

The right of the citizens to bear arms in defense of themselves and the State shall not be questioned.

Rhode Island

Art. I, § 22 Right to Bear Arms

The right of the people to keep and bear arms shall not be infringed.

South Carolina

Art. I, § 20 Right to Keep and Bear Arms; Armies; Military Power Subordinate to Civil Authority; How Soldiers Quartered

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in the manner prescribed by law. (1970 (56) 2684; 1971 (57) 315.)

South Dakota

Art. VI, § 24 Right to Bear Arms

The right of the citizens to bear arms in defense of themselves and the state shall not be denied.

Tennessee

Art. I, § 26

That the citizens of this state have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.

Texas

Art. I, § 23 Right to Keep and Bear Arms

Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime.

Utah

Art. I, § 6 Right to Bear Arms

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the Legislature from defining the lawful use of arms.

Vermont

Chapter I, Art. 16th Right to Bear Arms; Standing Armies; Military Subordinate to Civil

That the people have a right to bear arms for the defense of themselves and the State - and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power.

Virginia

Art. I, § 13 Militia; Standing Armies; Military Subordinate to Civil Power

That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

Washington

Art. I, § 24 Right to Bear Arms

The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

West Virginia

Art. 3-22 Right to Keep and Bear Arms

A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use.

Wisconsin

Art. I, § 25 Right to Bear Arms

The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose. [*1995 J.R. 27, 1997 J.R. 21, vote November 1998*].

Wyoming

Art. I, § 24 Right to Bear Arms

The right of citizens to bear arms in defense of themselves and of the state shall not be denied.

Analysis

Virtually every state constitution has a provision declaring the right to bear arms. It was a bit surprising that there are a few states that do not. Overwhelmingly, the "right to bear arms" language is tied to defense of self, family, home, etc. Many state constitutions also have provisions dealing with standing armies and declarations that military is subordinate to civil power within the right to bear arms sections.

Various states have language articulating that the legislature has the authority to regulate this constitutional right (i.e., Florida, Georgia, Kentucky, and Oklahoma). This may be a good idea for revising Ohio's provision if gun safety is a concern.

Related to the legislative authority to regulate issue is the various states that specifically outline that the right to bear arms does not give authority to people to have the right to the concealed carrying of arms (i.e., North Carolina, Missouri and Montana). It seems that these provisions

are benign to the statutory authority to enact concealed-carry legislation as so many states have passed these laws. The Missouri case of *Brooks v. Missouri*, 128 S.W.3d 844 (2004) is illustrative where the Supreme Court of Missouri upheld the state's concealed-carry law on the basis of its constitutional provision. (This case was annotated when I found its constitutional provision.) Additional research to look at various states' respective treatment of concealed-carry laws where such a specific provision is in the "right to bear arms" provision may be a good idea.

Finally, another idea may be to add language in the constitutional provision that speaks to hunting and outdoor recreational purposes (i.e., Delaware, Nebraska, Nevada and West Virginia). Various states have done this, and it is a significant use of guns and ammunition.