OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Education, Public Institutions, and Local Government Committee

Chad A. Readler, Chair
Edward L. Gilbert, Vice-chair

January 12, 2017

Ohio Statehouse
Room 017

OCMC Education, Public Institutions, and Local Government Committee

Chair	Mr. Chad Readler
Vice-chair	Mr. Edward Gilbert
	Mr. Roger Beckett
	Ms. Paula Brooks
	Sen. Bill Coley
	Rep. Robert Cupp
	Mr. Mike Curtin
	Gov. Bob Taft
	Ms. Petee Talley

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

EDUCATION, PUBLIC INSTITUTIONS, AND LOCAL GOVERNMENT COMMITTEE

THURSDAY, JANUARY 12, 2017
9:30 A.M.
OHIO STATEHOUSE ROOM 017

AGENDA

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meetings of November 10, 2016

  [Draft Minutes – attached]

IV. Presentations

- "Disability Rights and the ADA"

  Ruth Colker
  Distinguished University Professor & Heck-Faust Memorial Chair in Constitutional Law
  Moritz College of Law
  The Ohio State University

- "Institutions for the Benefit of the Insane, Blind, and Deaf and Dumb"

  Marjory Pizzuti
  President and CEO
  Goodwill Columbus
  On behalf of Ohio Association of Goodwill Industries

- "Institutions for the Benefit of the Insane, Blind, and Deaf and Dumb"

  Sue Hetrick
  Executive Director
  The Center for Disability Empowerment

V. Reports and Recommendations

- None Scheduled

VI. Committee Discussion

- Article VII, Section 1 – Institutions for the Benefit of the Insane, Blind, and Deaf and Dumb

  The chair will lead discussion to assess the sense of the committee on what position it wishes to take regarding a possible change to the Article VII provisions on the state supporting institutions for the benefit of the insane, blind, and deaf and dumb.

  [Testimony of Michael Kirkman, Executive Director, Disability Rights Ohio, on Article VII, Section 1 as presented at the September 8, 2016 meeting of the committee - attached]

  [Excerpts from "Work Matters – A Framework for States on Workforce Development for People with Disabilities" issued by the National Conference of State Legislatures' National Task Force on Workforce Development for People with Disabilities, issued December 2016 - attached]

  [Report of the Ohio Constitutional Revision Commission on Article VII, Section 1, issued June 30, 1977 – attached]

VII. Next Steps

- The chair will lead discussion regarding the next steps the committee wishes to take in preparation for upcoming meetings.

  [Planning Worksheet – attached]

VIII. Old Business

IX. New Business

X. Public Comment

XI. Adjourn

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE
EDUCATION, PUBLIC INSTITUTIONS, AND LOCAL GOVERNMENT COMMITTEE

FOR THE MEETING HELD
THURSDAY, NOVEMBER 10, 2016

Call to Order:

Chair Chad Readler called the meeting of the Education, Public Institutions, and Local Government Committee to order at 9:39 a.m.

Members Present:

A quorum was present with Chair Readler, Vice-chair Gilbert, and committee members Beckett, Cupp, Curtin, Sawyer, and Taft in attendance.

Approval of Minutes:

The minutes of the September 8, 2016 meeting were approved.

Reports and Recommendations:

Article VI, Section 5 (Loans for Higher Education)

Chair Readler recognized Shari O'Neill, counsel to the Commission, for purposes of a presentation on the report and recommendation for Article VI, Section 5. Ms. O'Neill indicated that the section expresses a policy encouraging financial support for state residents wishing to pursue higher education, specifically declaring it to be in the public interest for the state to guarantee the repayment of student loans, and authorizing laws to carry into effect such purpose.

Ms. O'Neill described that, as part of the article dedicated to education, Section 5 provides for a program to guarantee the repayment of student loans for state residents as a way of promoting the pursuit of higher education.

She said the provision was adopted by voters upon being presented as Issue 1 on the May 1965 ballot, and expresses a public policy of increasing opportunities for state residents to pursue higher education by guaranteeing higher education loans and allowing laws to be passed to

effectuate that purpose. The section also exempts state expenditures for student loan guarantees from the limitations on state spending contained in Article VIII (relating to state debt), and Article XII, Section 11 (preventing the state from issuing debt unless corresponding provision is made for levying and collecting taxes to pay the interest on the debt).

Ms. O'Neill said the provision was effectuated by statutes that first created the Ohio Student Loan Commission (OSLC), and, later, in 1993, by statutory revisions that created the Ohio Student Aid Commission (OSAC). According to the report and recommendation, the OSAC was empowered to collect loan insurance premiums, depositing them into a fund in the custody of the state treasurer to be used solely to guarantee loans and to make payments into the OSAC operating fund. The report and recommendation references an attorney general opinion indicating that the obligations incurred by OSAC are not backed by the full faith and credit of the state and, therefore, that the obligee would not have recourse to other funds of the state.

The report and recommendation elaborates that, by 1995, the changing landscape of the student loan market rendered the utility of OSAC obsolete, partly due to the success of a federal direct-lending program, and partly because private companies were offering the same service. Thus, by 1997, the OSAC was dissolved, with remaining functions and duties of OSAC being transferred to the Ohio Board of Regents.

Ms. O'Neill elaborated that the report and recommendation reviews presentations to the committee by David H. Harmon, executive director of OSLC from 1977 to 1988; and by Rae Ann Estep, executive director of the OSAC from 1995-1997. The report summarizes Mr. Harmon's presentation as giving a history of student loans in Ohio, describing how, in 1961, the General Assembly created the Ohio Higher Education Commission, whose purpose was to guarantee repayment of student loans made by banks, savings and loan companies, and credit unions. The report and recommendation further summarizes Mr. Harmon's comment that, in 1965, the federal government created its student loan program, and that the purpose of Section 5 was to allow OSLC to become the guaranteed agency under the federal loan program. The report and recommendation describes Mr. Harmon's conclusion that, with the move to the federal direct loan program, Section 5 is no longer necessary.

With regard to Ms. Estep's presentation, the report and recommendation describes that she presided over an agency of 225 employees, but that her role was primarily to oversee the dissolution of the agency due to the changes in student loan governance and administration.

Ms. O'Neill said the report and recommendation indicates the committee's acknowledgement that, as matters currently stand, Article VI, Section 5 would appear to be non-functional because it is not necessary to facilitate activities of the Ohio Department of Higher Education in relation to student loans, grants, and scholarships, to accommodate the federal student loan program, or to support private lender activity related to student loans.

The report and recommendation notes that, despite this acknowledgement, the committee's concern that future changes to the federal government's student loan programs and policies could result in Ohio and other states taking on additional responsibilities related to student loan guarantees. The report and recommendation also notes that, although the committee was

uncertain whether the provision is necessary to support programs that forgive student loan debt in order to foster the provision of needed services in underserved areas of the state, the committee was reluctant to recommend its elimination in case it could be implemented in that manner.

Ms. O'Neill stated that the report and recommendation concludes that the consensus of the committee was that the section expresses an important state public policy of encouraging higher education and helping students afford it, and so should be retained in its present form.

Chair Readler thanked Ms. O'Neill for the presentation, and asked the members of the committee for their comments. There being none, he called for a motion to issue the report and recommendation, which was provided by Representative Bob Cupp. The motion was seconded by Vice-chair Ed Gilbert, and a roll call vote was taken. The motion to issue the report and recommendation for Article VI, Section 5 passed unanimously, by a vote of seven to zero.

Article VI, Section 6 (Tuition Credits Program)

Chair Readler then asked Ms. O'Neill for a presentation on Article VI, Section 6, which supports the creation of a program allowing families to purchase tuition credits as a way of encouraging saving for higher education costs.

Ms. O'Neill described that the report and recommendation indicates Section 6 is designed to promote the pursuit of higher education by establishing in the constitution a government-sponsored program to encourage saving for post-secondary education. She said the report and recommendation summarizes the history of the section as beginning in 1989, when the General Assembly enacted Revised Code Chapter 3334, establishing a college savings program and creating the Ohio Tuition Trust Authority (OTTA), an office within the Ohio Board of Regents (now the Department of Higher Education). The OTTA was designed to operate as a qualified state tuition program within the meaning of section 529 of the federal Internal Revenue Code. The report and recommendation further describes the statutory scheme by which tuition credits may be purchased and used.

Ms. O'Neill continued that the report and recommendation indicates Section 6 was proposed to voters as Issue 3 on the November 1994 ballot as a way to "increase opportunities to the residents of the State of Ohio for higher education and to encourage Ohio families to save ahead to better afford higher education."

She said the report and recommendation further describes a presentation to the committee by Timothy Gorrell, executive director of the Ohio Tuition Trust Authority (OTTA), who expressed that his agency is part of the Department of Higher Education and is charged with responsibility for administering the tuition credits program set forth in Article VI, Section 6. The report and recommendation presents Mr. Gorrell's view that, at the time of its adoption, the section addressed a period of unsettled case law that created uncertainty as to whether similar prepaid tuition programs were exempt from federal taxation, a status that has since been resolved by the codification of Internal Revenue Code section 529. However, the report and recommendation notes that Mr. Gorrell nevertheless opined that Section 6 should be retained because one purpose

of the provision, to establish the full faith and credit backing of the state for the Guaranteed Savings Plan, remains viable.

Ms. O'Neill said the report and recommendation summarizes the committee's conclusion that, although no new Guaranteed Savings Plan account holders have been added since 2003, the fact that some accounts are still active may require the constitutional provision to be retained in its current form. The report and recommendation notes that, although the committee was reluctant to alter or repeal Article VI, Section 6, a future constitutional review panel may conclude there is no justification for retaining the section because all accounts have been paid out.

Thus, the report and recommendation concludes that Article VI, Section 6 should be retained in its current form.

The presentation on Section 6 having concluded, Chair Readler asked committee members if they had any questions or comments. Rep. Cupp asked whether Mr. Gorrell had provided information on the obligation of the state to back tuition trust accounts, to which Ms. O'Neill replied he had not. There being no further discussion, Chair Readler then entertained a motion by Mr. Gilbert to issue the report and recommendation. The motion was seconded by Senator Tom Sawyer, and a roll call vote was taken. The motion passed unanimously by a vote of seven to zero.

Ms. O'Neill indicated that the two reports and recommendations would now be presented to the Coordinating Committee for approval before being forwarded to the full Commission for its consideration.

Discussion:

Article VII, Section 1 (Institutions for the Benefit of the Insane, Blind, and Deaf and Dumb)

Chair Readler then turned the committee's attention to Article VII, relating to Public Institutions. He indicated that Section 1 of that article raises two issues. First, he said, the language used to refer to the persons being aided by public institutions is outdated and could be viewed as offensive. He said a second issue is whether there is continuing relevance for the section.

Steven C. Hollon, executive director, pointed out a memorandum being provided to the committee that discusses Section 1 as well as Sections 2 and 3 of Article VII.

Chair Readler asked Mr. Gilbert for information about a similar discussion regarding outdated language that had occurred in the Bill of Rights and Voting Committee in relation to Article V, Section 6 (Mental Capacity to Vote).

Mr. Gilbert said that is still an unresolved issue, although there is consensus that the language, which refers to "idiots and insane persons," must be changed.

Mr. Hollon noted that the report and recommendation on that section was not adopted by the Commission, but it was not because of the substitute language the committee had proposed, which was to refer to the subject persons as those lacking the "mental capacity" to vote.

Chair Readler noted that reference was not an exact fit for the language in Article VII, Section 1.

Sen. Sawyer said some of the reference derives from clinical usage and some of it derives from law, asking whether that was the fundamental problem.

Mr. Gilbert said the Bill of Rights and Voting Committee struggled with several different replacements. He said one of the primary issues was whether the probate court should be involved in the determination of whether a person has the mental capacity to vote. In regard to the discussion about Article VII, Section 1, he asked what language could replace "insane, blind, deaf and dumb." He said he is not sure the committee has had enough presentations on the question to be able to determine how to replace what all agree is outdated language.

Sen. Sawyer asked whether the committee could consult experts to see if there are separate bodies of nomenclature that might be better.

Chair Readler agreed with this proposal.

Committee member Roger Beckett asked whether there is a difference in the issue the committee is dealing with here as opposed to the voting issue. He said voting has to be resolved within the constitution because it is a right. He said, Article VII, Section 1 has more of a public policy purpose of encouraging the legislature to do something that perhaps, at the time, was not as common a thing. He said, by comparison, today the fact that institutions provide assistance and support for people with mental or physical disabilities is more understood and accepted, and less controversial.

Mr. Beckett continued, saying one option is to suggest the removal of the section. He said the General Assembly would still have the authority to continue anything it is currently doing. He said this is a more arcane topic for the constitution, adding "If we are going to try to describe in the constitution language about how modern medicine will keep up with these issues, it will be a continuing problem." He said the only possible concern is to be sure the committee is not suggesting the state should somehow limit its existing programs.

Chair Readler said his sense from testimony is that this section has never been used as authority for enacting law on this topic.

Committee member Bob Taft endorsed Mr. Beckett's comment, directing committee members to a memorandum provided by Michael Kirkman, executive director of Disability Rights Ohio at the last meeting. He said Mr. Kirkman recommended that the section be deleted because there is a strong preference for community-based treatment rather than institutional treatment.

Chair Readler noted that the committee agrees the language should go, but that rewriting the section is a challenge. He added that Sections 2 and 3 in Article VII would seem to be unnecessary.

Gov. Taft agreed, saying those two sections appear to be obsolete.

Rep. Cupp said the purpose of the sections appears to focus on who is to appoint the governance of these institutions, an issue that has been settled for a long time and is not relevant to any present procedure. He said these sections do not deal with an allocation of authority, nor with a limit on the powers of government, so they seem to be superfluous.

Mr. Gilbert said he thinks the conclusion of the Bill of Rights and Voting Committee report and recommendation on Article V, Section 6 was that the language was archaic. But, he said, he is nervous about removing Article VII, Section 1, not wanting to send a message that the state no longer fosters support for the disabled.

Chair Readler directed the committee to Mr. Kirkman's testimony, noting that under federal law there are some established constitutional rights that would impact the rights of someone in an institution.

Mr. Beckett said one of the key words that that make him less hesitant to remove the section is the word "institutions." He said the movement has been away from institutionalizing people and toward other types of programs and support. He said removing it does not mean the committee would be suggesting that support or services would be eliminated.

Representative Mike Curtin asked whether Mr. Kirkman is the only person the committee has heard from. He said he would be more comfortable if he were sure word has gone out within the disability and legal community to see if they are comfortable with removing the section.

Mr. Hollon suggested that he would contact Mr. Kirkman for names of persons who could provide additional perspective.

Rep. Cupp asked whether there might be someone associated with the Ohio State Bar Association who might identify a speaker.

Gov. Taft said Mr. Kirkman pointed out that these kinds of institutions existed before 1851, so presumably, the General Assembly has the authority to establish institutions if they see fit.

Steven H. Steinglass, senior policy advisor, noted the Ohio Constitution gives the legislature plenary power. He said this provision was a creature of its time when there was uncertainty, and was addressed to the legislature to require legislative action. He indicated the provision was considered for amendment by the Ohio Constitutional Revision Commission in the 1970s, but failed to get the requisite 2/3 vote. He indicated there was a nine-person minority report written, and, at a time when the rights of the handicapped were at the fore, there was pressure to create a constitutional right to treatment. He offered that staff would provide the committee with the 1970s Commission report.

Chair Readler said he can see the view that there is some broader right being discussed. He said his sense is there will not be broad majority support for that.

Peg Rosenfeld, elections specialist with the League of Women Voters of Ohio, who was seated in the audience, suggested a change in the wording that would say "provision" instead of "institutions." Thus, she said, "Provision shall be made for people with mental or physical disabilities." She said there may be a problem ordering the General Assembly to provide services.

Chair Readler said his general reaction is that would make this a broader basis for limitations on the legislature. But, said Ms. Rosenfeld, it gets away from the institutional requirement.

Mr. Gilbert said it is important not to remove a state obligation in favor of private sources, since, if those sources lose their funding, there would be nothing to take their place. He said he would support another presentation on that issue. He said simply taking Section 1 out sends a signal the committee may not want to send.

Chair Readler asked if the legislative members of the committee might serve on a related General Assembly committee and have some knowledge of this issue.

Sen. Sawyer said he served on a committee relating to implementing the Americans with Disabilities Act. He said the committee is in a simpler position here, to recognize need and then provide the constitutional underpinning that that would require. He cautioned that it is important not to try to legislate in the constitution by taking up language of this kind.

Gov. Taft said, reflecting on the history of the *DeRolph* litigation, he is leery of creating a constitutional right to help.[1] He said he trusts legislators to help the welfare of the public. Commenting on Sections 2 and 3, he said the state has departments to deal with these issues, suggesting that the committee should hear from those directors.

Chair Readler suggested that, at its next meeting in January, the committee can have two speakers on Section 1. He added he thinks the committee's consensus is that Sections 2 and 3 are obsolete but wonders if the committee requires a speaker.

Mr. Hollon said he is not sure there would be a speaker on Sections 2 and 3, but that staff could provide a memorandum. Chair Readler agreed a short memo on that topic would be useful.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 10:27 a.m.

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[1] *See DeRolph v. State*, 78 Ohio St.3d 193, 1997-Ohio-84, 677 N.E.2d 733 (*DeRolph I)*; *DeRolph v. State*, 89 Ohio St.3d 1, 2000-Ohio-437, 728 N.E.2d 993 *(DeRolph II)*; *DeRolph v. State*, 93 Ohio St.3d 309, 2001-Ohio-1343, 754 N.E.2d 1184 *(DeRolph III)*; and *DeRolph v. State*, 97 Ohio St.3d 434, 2002-Ohio-6750, 780 N.E.2d 529 *(DeRolph IV).*

Approval:

The minutes of the November 10, 2016 meeting of the Education, Public Institutions, and Local Government Committee were approved at the January 12, 2017 meeting of the committee.

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Chad A. Readler, Chair

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Edward L. Gilbert, Vice-chair

Disability Rights OHIO

We have the legal right of way.

"Fostering" Institutions and People with Disabilities
Presentation to the Education, Public Institutions, and Local Government Committee of the Ohio Constitutional Modernization Commission

Michael Kirkman, J.D.
Executive Director
Disability Rights Ohio

I. Introduction

The Ohio Constitution, at section 1 of Article VII, states:

> Institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the state; and be subject to such regulations as may be prescribed by the general assembly.

This section has been interpreted many times, most significantly in the case of *State ex rel. Price v Huwe*,[1] where the Ohio Supreme Court specified that the language is not self-executing. Subsequent cases have also limited the reach of the language, for example not allowing a court to order payment for private institutional care when state care is not available or adequate,[2] or to provide payments for individuals for their benefit. Reduced to its basic level, as interpreted by the state's courts, the provision provides a basis for the state to create a system of state hospitals.

In reviewing this language and its place in a modern Ohio Constitution, it is important for the Committee to have some understanding of the history of institutions and the impact, often horrific and negative, of state institutions on the lives of those involuntarily detained in them. This paper is a high level overview of how institutions for people with disabilities have evolved in the United States and Ohio, and some of the impact institutions have had on the lives of citizens with disabilities.

II. Early history

The earliest attempts to "care for" people with disabilities reflected the lack of understanding of their conditions, and often led to their living in horrible conditions. In the late 18th Century:

> [T]he lunatics [sic] were kept in gloomy, foul smelling cells and were ruled over by 'keepers' who used their whips freely. Unruly patients, when not being beaten, were regularly 'chained to rings of iron, let into the floor or wall of the cell … restrained in hand-cuffs or ankle irons," and bundled into Madd-shirts that "left the patient an impotent bundle of wrath."[3]

Individuals such as Benjamin Rush of Pennsylvania and Dorthea Dix in Massachusetts led campaigns to provide more humane "treatment" to "lunatics" and "maniac" during the period from the 1770s to the 1850s. Dix in particular was able to convince state lawmakers to increase appropriations for care for those labeled as mentally ill. As a result of those efforts, twenty states expanded their mental hospitals, and the

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Disability Rights Ohio is the federally mandated system to protect and advocate the rights of people with disabilities in Ohio. See 42 U.S.C. § 15041, 42 U.S.C. § 10801, and R.C. § 5123.60

[1] 105 Ohio St. 304, 137 N.E. 167 (1922)

[2] *In re Hamil*, 69 Ohio St.2d 97, 431 N.E.2d 317 (1982)

[3] Whitaker, Mad in America at 4 (Perseus 2004), quoting Thomas Morton, *The History of the Pennsylvania Hospital* (Times Printing House 1895)

number of people who received care there grew from 2,561 in 1840 to approximately 74,000 in 1890.[4]

Ohio had a similar experience. The General Assembly had been providing for the care and treatment of the "insane" since the early 1800's,[5] although most of the cost and responsibility for care fell to families, the church, or counties. After the passage of the 1851 language, the number of institutions grew and the population grew from 3,300 in 1880 to 10,226 by 1900.[6]

The changes reflected not just a call for hospitals but also a change in how therapy for this group was provided, to one of "moral" or "humane" treatment that had prospered in England and in parts of the United States. Such treatment was premised on small, family like settings and recreational and education programs, however, and a combination of expansive growth, blending of populations, and political patronage resulted in a steady decline in treatment outcomes.[7]

III. Eugenics and Institutions in the 20th Century

By the early 20th Century, however, this attempt to humanize treatment for those in institutions turned ugly based on the faux science of Eugenics. Fueled by plant research conducted by Gregor Mendal, American psychologist Henry H. Goddard and others quickly declared that the same natural selection could be applied to the human animal. Goddard is particularly notorious for his 1912 story of the Kallikak family (a pseudonym), in which he concluded that feeble-mindedness could be transmitted genetically.[8]

While Goddard later expressed regret for the inaccuracies in his research (indeed, it has been completely debunked) and the abuses that followed, the idea had taken hold in the scientific and political communities of the time. Numerous states passed laws mandating compulsory sterilization of "feeble-minded" people. This resulted in hundreds if not thousands of people in institutions throughout the nation being sterilized, often without their knowledge and consent.

This issue also gained legal notoriety in the case of *Buck v Bell*,[9] in which the Supreme Court of the United States denied a constitutional challenge to Virginia's compulsory sterilization law. Justice Oliver Wendell Holmes is famously quoted:

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[4] *Ibid.* p. 34

[5] Eagle and Kirkman, Ohio Mental Health Law (2d Ed. Banks-Baldwin), Section 1.11 p 41, *Rone v Fireman*, 473 F. Supp. 92(N.D. Ohio 1979)

[6] *Ibid.*

[7] Whitaker, n. 3, p. 36

[8] The Kallikak Family: A Study in the Heredity of Feeble-Mindedness (McMillan 1912) The book was also translated into German in 1914 and 1932, Die Familie Kallikak. Earnest Kraepelin, a psychiatrist known for his attempts to create a nosology or classification structure for mental illness, and Earnst Rudin, who worked closely with the National Socialists beginning in 1933, were reportedly influenced by the work. See also Smith et al. *Who Was Deborah Kallikak?*, 50 Intellectual and Developmental Disabilities 169-178.

[9] 274 U.S. 200 (1927)

> [Carrie Bell] … is the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child... Three generations of imbeciles are enough.[10]

Years later, anthropologist Steven Jay Gould would conduct an investigation into the circumstances surrounding that quote and conclud that neither Carrie Bell, her mother, nor her grandmother were imbeciles. Rather, Carrie's mother became pregnant while unwed in rural Virginia and was sent to the institution because she was pregnant.[11]

The *Buck* case also highlights a convergence of poverty, gender, and disability as hallmarks of the nation's institutional population in the early 20th Century. A similar convergence occurred largely but not exclusively in the American South with people of color.[12] These individuals involved were largely poor, many had no mental disability to speak of, but were sent to state institutions or schools because they were deaf, had other disabilities, such as epilepsy, or simply were unruly.

Ohio has its own legal chapter in this story. In *Wade v Bethesda Hospital*,[13] Judge Holland M. Gary sought immunity after being sued in federal court for ordering the sterilization of a minor who was alleged to be feeble-minded, relying on Ohio's statutes allowing the practice. Unfortunately for Judge Gary, the statues had been rescinded and the federal court denied immunity for his actions.

IV. "Almost a Revolution"[14]

Eugenics and other laws that segregated and discriminated against people with behavioral or intellectual disabilities, such as "Ugly Laws"[15] remained on the books in most states into the mid-20th Century. Other practices such as non-consensual lobotomy or electro-shock therapy (ECT) added to the list of "treatments" that were sometimes visited on individuals in the name of therapy, but ultimately proved abusive and unsupportable.

Two trends emerged in the 1960's that completely changed how institutions were viewed and used. Debate related to these trends continues in the current legal, medical, and political debate.

Psychiatry has long sought to shore up its credibility within the medical profession. The "Kraepelinian dichotomy" developed by Emil Kraepelin in early 20th

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[10] *Ibid. at* 207

[11] Gould, Carrie Buck's Daughter, 7 National History 14 (1984). See Lombardo, Three Generations, No Imbeciles: Eugenics, the Supreme Court and Buck v. Bell (Johns Hopkins 2002)

[12] Burch & Joyner, Unspeakable: The Story of Junius Wilson (North Carolina Press 2007)

[13] 337 F.Supp. 671 (1971) *aff'd on reconsideration* 356 F.Supp. 380 (S.D. 1973) Judge Gary had previously ordered other sterilizations in Muskingum County, including one involving a physically attractive feeble-minded young woman, *In re Simpson*, ___Ohio Misc.___, 180 N.E.2d 206 (Muskingum Co. P. Ct. 1962). Citing to *Buck*, the judge ordered the sterilization as incidental to his authority to institutionalize people, relying on the general equity powers of the court.

[14] Applebaum, Almost a Revolution: Mental Health Law and the Limits of Change

[15] Schwiek, The Ugly Laws: Disability in Public (New York University Press 2009) Columbus, Ohio, had one of the first such laws, passed as part of the vagrancy code in 1894.

century Germany was one such attempt at a psychiatric nosology. The American Psychiatric Association's Diagnostic and Statistical Manual (currently in version 5) sought to classify mental disease with the scientific precision that the International Statistical Classification of Diseases and Related Health Problems, or ICD, brought to physical disease. Most recently, the National Institute of Mental Health has created its own system, the Research Domain Criteria or RDoC, seeking to guide its funding towards research that will lead to new nosology based in biology.[16]

In the mid 1960's, advances in psychopharmacology allowed psychiatrists to prescribe neuroleptic or "anti-psychotic" drugs to tranquilize and mitigate the worst of many patient's symptoms. This meant that many individuals did not need to be segregated from society because of their symptoms.

Based in part on reports of the success of patients on neuroleptics, the Kennedy administration proposed a community mental health act in 1962. "The state hospital, relics from a shameful past, would be replaced by a matrix of community care, anchored in neighborhood clinics."[17] That system is still roughly in place, though it was never fully funded and funding, now a block grant, has lagged for many years.

The second trend was an onslaught of federal litigation attacking the use of state institutions on two fronts: first, unconstitutional conditions, including abuse, lack of hygiene, and lack of adequate treatment and training in the institutions; and a lack of due process, both procedural and substantive, in state laws providing for involuntary commitment. The former culminated in the U.S. Supreme Court case of *Youngberg v Romeo*,[18] which held that the 14th Amendment requires a state to provide adequate training to those who are held in state institutions to protect them from harm and address the reasons for confinement.

As to the second issue, starting with the Wisconsin case of *Lessard v Schmidt*,[19] people subject to involuntary commitment were guaranteed procedural due process rights including right to counsel in those hearings. Various other rulings established a higher evidentiary standard (clear and convincing),[20] and a requirement that the individual must present a danger of harm to self or others to justify involuntary confinement.[21] In Ohio

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[16] Director's Blog: Transforming Diagnosis, April 29 2013, www.nimh.nih.gov/about/director/2013/transforming-diagnosis.shtml

[17] Whitaker, note 1, p. 155-6

[18] 457 U.S. 307 (1982). In Ohio, the Northern District of Ohio required the state to improve conditions at the state psychiatric hospital in Lima, *Davis v Hubbard*, 506 F. Supp. 915 (N.D. Ohio 1980). Cases were filed in Ohio against Orient State School (*Barbara C. v. Moritz* No. C-2-77-887, Order and plan for relief October 19, 1981 (S.D. Ohio) and Apple Creek Developmental Center (*Sidles v. Delaney*No. C75-300A, Consent Judgment April 26, 1976, modified January 6, 1981(N.D. Ohio), resulting in rulings that provided comprehensive standards for the management of the institutions. A consent order also settled a case against the Central Ohio Psychiatric Hospital, *Doe v Hogan.*

[19] 349 F. Supp. 1078 (E.D. Wis. 1972)

[20] *Addington v Texas*, 441 U.S. 418 (1979)

[21] *O'Connor v Donaldson,* 422 U.S. 563 (1975)

these reforms followed from the case of *In re Fisher*,[22] and subsequently appeared in statute in the Mental Health Act of 1976.[23] Other cases clarified when medication could be administered without the consent of the individual, an area where "the controversy between a 'therapeutic' versus a 'rights' oriented approach to mental health policy" was particularly acrimonious.[24]

The combination of these two trends, combined with the always relentless pressure on state budgets and a lack of federal dollars for inpatient psychiatric treatment, resulted in significant depopulation of state hospitals. Without adequate funding in the community system, many individuals were unable to access treatment. Some became homeless or were imprisoned.

This situation and the different narratives describing it, remain with us today. One narrative describes the situation as a tragedy,[25] or even as "a psychiatric *Titanic.*"[26] At the same time, others recognize that the situation is less than black and white. "That deinstitutionalization has generally failed to deliver appropriate services to ex-mental patients or other persons in need of them is hardly debatable," writes Professor David Rothman, but "[t]he question is why the outcome . . . should have been so grim, and what should be done to remedy the situation."[27] And as noted by Professor Sam Bagenstos, the debate is not simply historical, as federal courts are actively involved in deciding cases under the Americans with Disabilities Act as interpreted by the U.S. Supreme Court in *Olmstead v L.C. ex rel. Zimring*[28] recognizing that unjustified institutionalization can violate the Americas with Disabilities Act.[29]

Perhaps the key difference, as pointed out by Professor Bagenstos, is that the litigation theories under the ADA are necessarily focused forward on the receipt of quality services in a home like environment. *Ball v Kasich*, filed earlier this year by Disability Rights Ohio,[30] challenges the undue segregation of people with intellectual and developmental disabilities in large state and private institutions (ICFs), but the relief requested in the case actually is focused on provision of residential and vocational services for class members in community based settings which already are in use in the state. Similar results have been achieved in other cases.[31]

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[22] 39 Ohio St.2d 71, 313 N.E.2d 851 (1974)
[23] 1976 H 244, eff. August 26, 1976. See generally, Eagle and Kirkman, Ohio Mental Health Law, Chapter 7(2d Edition, Banks-Baldwin 1990)
[24] Eagle and Kirkman, supra n. 5 p. 294. *Steele v Hamilton County Board*, 90 Ohio St.3d 176, 736 N,E,2d 10 (2000)
[25] Applebaum, *Crazy in the Streets*, Commentary, May 1987, at 34, 39
[26] E. Fuller Torrey, Out of the Shadows: Confronting America's Mental Illness Crisis 11 (1997)
[27] Rothman, The Rehabilitation of the Asylum, Am. Prospect, Sept. 21, 1991, http://prospect.org/article/rehabilitation-asylum
[28] 527 U.S. 581 (1999)
[29] Bagenstos, The Past and Future of Deinstitutionalization Litigation, 34 Cardoza L. Rev. 1 (2012)
[30] No. 2:16-cv-282, filed May 31, 2016
[31] See *Disabilities Advocates, Inc. v Paterson*, 598 F. Supp. 2d 289 (E.D.N.Y. 2009) vacated on other grounds, 675 F.3d 149 (2d Cir. 2012)

V. The Current Situation in Ohio

Against this back drop, Ohio continues to provide institutional care in state hospitals. There are six physical facilities (Athens, Heartland, Northern Ohio, Northcoast, Summit, and Twin Valley)[32] with 1,067, available beds. A portion of the facility at Twin Valley is the Moritz Forensic Center, a high security facility for individuals judged as particularly at a high risk of violence or flight. As of September 6, 2016, the total census is 1,040 patients.[33]

Significantly, of these patients, the state department estimates that 70% of admissions are "forensic" or committed as a result of a criminal court proceeding and found incompetent to stand trial or not guilty by reason of insanity. Although there is no clear data on this, it is generally assumed that the length of stay for forensic patients is longer due to stricter controls in the law and the involvement of the trial judge from the criminal case.[34] Length of stay for civil commitments average 10-12 days, with some variation between hospitals.[35]

Under the Mental Health Act of 1988, commitment to the hospital is generally initiated and is paid for by the local mental health and addiction board. These boards are considered the 'gatekeepers' of the beds.[36] Many boards operate short term "three day" emergency centers or small hospitals to control the flow into the more expensive state hospitals. Recent changes in the law favor court ordered outpatient treatment as an alternative to long term or repeated hospitalization.[37]

VI. The Growth of Self Advocacy and Concerns about Language

While some might consider it a minor point, language and particularly the labeling of people who have lived experienced with psychiatric disabilities has become a major focus in the mental health world. Those who have experienced involuntary commitment or forced treatment now regularly speak out against those practices, instead recognizing the need for community based services, peer supports, housing, and employment. The Substance Abuse Mental Health Services Administration (SAMHSA)[38] in the United States Department of Health and Human Services, which administers the mental health block grant to the states, has recognized the need to focus on recovery based services,[39] and this approach is incorporated into many of Ohio MHAS' programs.

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[32] A comprehensive description of the services provided by the Ohio Department of Mental Health and Addiction Services can be found at http://mha.ohio.gov, and the hospital system at http://mha.ohio.gov/Default.aspx?tabid=96.
[33] http://reports.mha.ohio.gov/pcs/dailycensus.pdf
[34] Eagle and Kirkman, supra note 5 at section 7.12, p. 236-8
[35] http://reports.mha.ohio.gov/pcs/losdischarged.pdf
[36] Rev. Code § 5122.10 et seq.
[37] See R.C. §§ 5122.01(B)(5), 5122.15 as amended by 130 SB 43 (2014)
[38] http://www.samhsa.gov/
[39] https://recoverymonth.gov/

VI. Conclusion

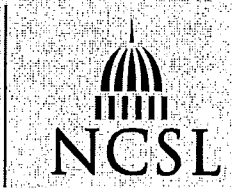
There are many reasons why the Committee may want to consider removal or modification of the language in Article V, section 1. The most apparent concern is the antiquated language, which not only is not descriptive of current clinical nomenclature or more acceptable 'people first' language, but is offensive and discriminatory. The trend in both the Revised Code and other regulatory matters is to identify people first, in other words the person first, the disability second. Advocates in this area go even farther, asking that the clinical labels not be applied to them at all.

Second, there is no real need for a separate provision of the Constitution to allow the General Assembly to perform this function, as evidenced by the provision for institutions prior to its enactment. In the politics of 1851, the height of progressive reform and the addition of therapeutic care as advocated by Dorthea Dix, such a provision certainly seemed enlightened. But the need for services, and the competition for funding, is for evidence based practices such as Assertive Community Treatment, which is proven to help individuals comply with treatment and avoid re-hospitalization. Providing funding for state institutions actually takes away from community based, integrated, and recovery based services that provide support to the many individuals who voluntarily seek treatment and contribute to society, as well as payment to private hospitals which are less costly. Provision for treatment of those in the criminal justice system is both constitutionally mandated, and inherent in the authority of the General Assembly and the State to fashion criminal laws. All of these points suggest that the section could be eliminated.

Work Matters

A Framework for States on Workforce Development for People with Disabilities

THE COUNCIL OF STATE GOVERNMENTS AND
NATIONAL CONFERENCE OF STATE LEGISLATURES



An estimated 1 in 5 Americans, nearly 56.7 million, live with a disability. While expressing an ability, desire and willingness to work in the community and contribute to the economy, many adults and youth with disabilities experience significant barriers to employment. Despite progress made since the passage of the *Americans with Disabilities Act, or ADA, of 1990* and comparable equal opportunity and nondiscrimination laws passed by most states, people with disabilities still experience unemployment rates far above the national average, and the percentage of people with disabilities participating in our workforce is far below the rate for people without disabilities. According to the July 2016 Employment Status of the Civilian Population by Sex, Age, and Disability Status (not seasonally adjusted) table published by the U.S. Department of Labor's Bureau of Labor Statistics, only 19.8 percent of people with disabilities participate in the workforce compared to 68.7 percent without disabilities, and the unemployment rate for people with disabilities is 8.7 percent, compared to 4.6 percent for people without disabilities.

Consequently, individuals with disabilities continue to experience poverty and economic insecurity in substantial numbers and disproportionately compared to individuals without disabilities. The 2014 American Community Survey indicates that 28.2 percent of non-institutionalized people with disabilities age 18–64 fall below the poverty line, compared to 13 percent of people without disabilities age 18–64. In 2013, non-institutionalized people with disabilities age 21–64 had average annual earnings of $38,300, earning on average $5,000 dollars less per year than their peers without disabilities.

Common sense as well as evidence suggests that employment is the most direct and cost-effective means to empower individuals with disabilities to achieve independence, economic self-sufficiency, and a sense of dignity and self-worth. Individuals with disabilities bring valuable skills to the workforce and represent an untapped segment of the labor pool for public, private and nonprofit sector employment. As noted in the National Governors Association report, *A Better Bottom Line: Employing People With Disabilities, Blueprint for Governors* (2012–2013 Chair's Initiative), the percentage of the U.S. population with a disability is expected to double in the next two decades. States will need to address future employment demands by a growing population with disabilities as more military veterans with disabilities enter the civilian workforce and others "age" into disability and work beyond traditional retirement age. Through policy efforts that attend to a rapidly changing workforce, states have an opportunity to identify, train and attract skilled workers with disabilities, benefitting the business community and employees alike.

How is disability defined?

The term "disability" is defined in state and federal legislation and in demographic surveys in various ways, depending on the context and purposes of the legislation or survey. For purposes of federal disability nondiscrimination laws, such as the Americans with Disabilities Act, the term "disability" means, with respect to an individual: (1) a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.

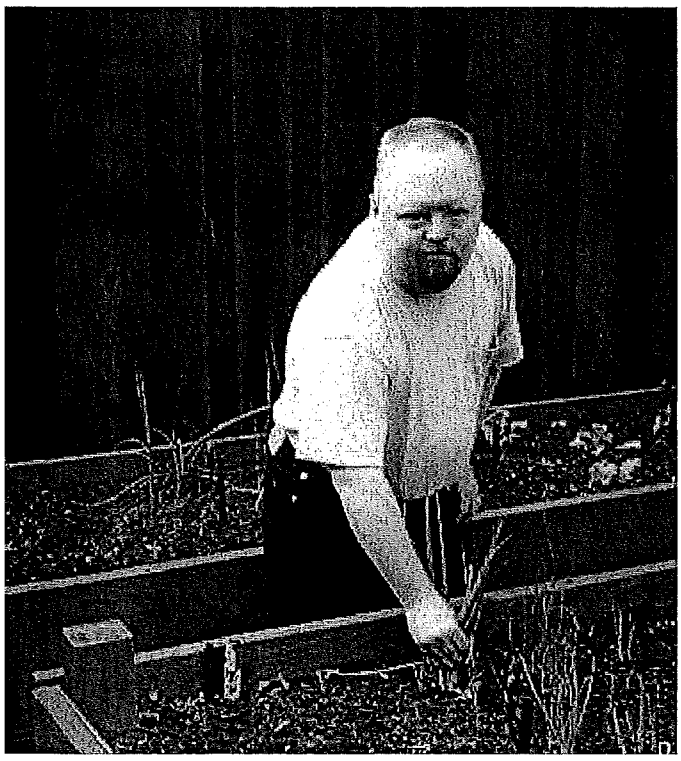
Realizing that businesses might be missing a unique opportunity to improve their bottom line and that states are interested in growing their economies, state policymakers are adopting a multifaceted approach to supporting the preparation, recruitment, hiring, retention and advancement of individuals with disabilities. This approach includes strategies to support and incentivize private-sector employers, increase disability inclusion in state government employment, and support individuals with disabilities as entrepreneurs.

In sum, people with disabilities are a key factor in states' ability to build strong, inclusive workforces that translate into economic success. While state policy efforts to support increased disability employment have made an impact, many individuals with disabilities remain unemployed or under-employed. Moving the needle on this critical workforce issue will require strong public policy at the state level that systematically addresses a number of key areas.

Guiding Principles

Disability is a natural part of the human experience that in no way diminishes one's right to fully participate in all aspects of community life.
As such, state disability policy should consider support of the following four goals:

- Equal opportunity, including treating people with disabilities as individuals, making assessments based on facts, objective evidence and science, and providing effective and meaningful experiences in the most integrated setting appropriate.
- Full participation in society, including enagement of people with disabilities in relevant decision-making at the individual and systems levels, self-determination, self-advocacy and informed choice.
- Economic self-sufficiency, including employment-related services and supports, financial literacy, entrepreneurship and work incentives.
- Independent living, including skills development and long-term services and supports.



Disability can develop at any point during an individual's lifetime and have varying impacts.
As such, state agencies should ensure service delivery is relevant at all ages, is inclusive of all types of disabilities, and maximizes the strengths and abilities of the individual. States should also consider providing a centralized systems navigation process so that people with disabilities and their families have a place to ask questions and get answers about rights, responsibilities, services and supports.

Successful disability policy embraces the "nothing about us without us" principle.
Individuals with disabilities, alongside families, advocates and champions from agencies, education, business and communities, should be engaged throughout the policymaking process at all levels. This includes increasing the actual participation of people with disabilities at the highest levels of state government.

People with disabilities are underutilized in our workforce and frequently experience social and economic disadvantage.
There is strong rationale for including people with disabilities in public policy efforts targeting other under-represented groups like veterans, women and minorities.

People with disabilities have valuable and unique contributions to make.
State disability employment initiatives have the best chance at success when employers are motivated to hire people with disabilities not because they have to or because it's the right thing to do, but because they recognize that disability inclusion helps boost the bottom line through increased innovation, creativity and productivity.

Overarching Policy Themes of the National Task Force

State policymakers should consider:

» Leading by example and "walk the talk"—ensuring that state agencies become model employers and use state financial resources to support model employers in the private sector. This includes requiring state contractors to proactively employ people with disabilities, offering financial incentives to businesses to hire persons with disabilities and providing ongoing supports to businesses to help them retain employees who may acquire disabilities.

» Including external and internal focus on disability awareness, including disability etiquette, in all state government policies, programs, practices and disability employment initiatives.

» Adopting robust reporting efforts, including establishing performance goals, metrics for measurement and data collection processes, to help inform policymaking. States also should consider developing strategies to encourage individuals with disabilities to self-identify and voluntarily disclose disability status to employers and service providers.

» Increasing coordination, blending and braiding of services and funding across agencies and levels of government to ensure successful employment of people with disabilities. Policy should be designed to eliminate service delivery silos and facilitate cooperation and coordination across all relevant state agencies and systems.

» Requiring accountability from the highest levels of government. States can identify high-level officials or departments responsible for providing oversight on policy implementation and reporting, as well as addressing the concerns of people with disabilities.

» Including *universal design* principles, which seek to ensure accessibility and usability to the greatest extent possible for all people, in the earliest development phases of all state government policies, programs and practices, rather than retrofitting the policy after the fact.

Policy In-Depth: Universal Design

What is Universal Design? Universal design, or UD, is a set of accessibility and usability principles guiding physical space, product, technology and programmatic design. UD seeks to guarantee access and usability for all individuals regardless of age or ability. UD also goes beyond the accessibility movement and barrier-free design initiatives by emphasizing the aesthetic side of design and ensuring that accessibility and useability principles are incorporated at the earliest stages of the design process.

Why implement UD principles? While the application of UD principles promises to increase accessibility and community inclusion for people with disabilities, it has the potential to positively impact the quality of life of all people.

Examples of UD in Action:

Curb Cuts—Ramps built into sidewalks, typically at intersections, allow wheelchair users and other individuals with mobility needs to easily transition from sidewalk to street-level in order to cross streets safely and efficiently. Parents with strollers and people riding skateboards and bicycles also benefit from curb cuts.

Voice-Activated Smartphone Controls—Many smartphone and computer operating systems now include voice-activated virtual assistants that can perform various tasks and improve the usability of these devices for blind users and individuals with limited dexterity. Individuals without disabilities have also found voice-activated controls to be a beneficial design element and they are often a major selling point in product marketing materials.

» Identify low hanging fruit—policy and program efforts that have significant impact and are relatively easy to implement, including (but not limited to):

- Identifying existing state programs and systems that can be easily adapted to include people with disabilities;
- Adopting best practices and lessons learned from similar state initiatives targeting other underserved populations to inform initiatives for people with disabilities;
- Extending diversity and inclusion (affirmative action) policies applicable to race, national origin and gender to include disability for state agencies and businesses contracting with state government; and
- Using existing mentorship models to connect business champions supporting disability employment with employers interested in beginning disability hiring initiatives.

Photo courtesy of Positive Exposure and Resp[illegible]ility USA

Policy Options Identified by the National Task Force

The work of the National Task Force culminated in the development of a policy framework states can use to address workforce development barriers for people with disabilities. What follows is a thematic overview of the policy options developed by the subcommittees, organized into five categories: Laying the Groundwork, Preparing for Work, Getting to and Accessing Work Opportunities, Staying at Work, and Supporting Self-Employment and Entrepreneurship.

Laying the Groundwork

1 States are encouraged to be model employers of people with disabilities, enacting policies that increase disability inclusion in the civil-sector workforce and serving as an example for private-sector employers to follow.

2 States can build capacity of private- and nonprofit-sector employers to engage in disability inclusion efforts. States can adopt policies that incentivize hiring of workers with disabilities and provide financial supports and technical assistance.

3 States are encouraged to have an external and internal focus on disability awareness, including disability etiquette. In developing awareness around disabilities, the focus should be cross-disability and include both visible and hidden disabilities.

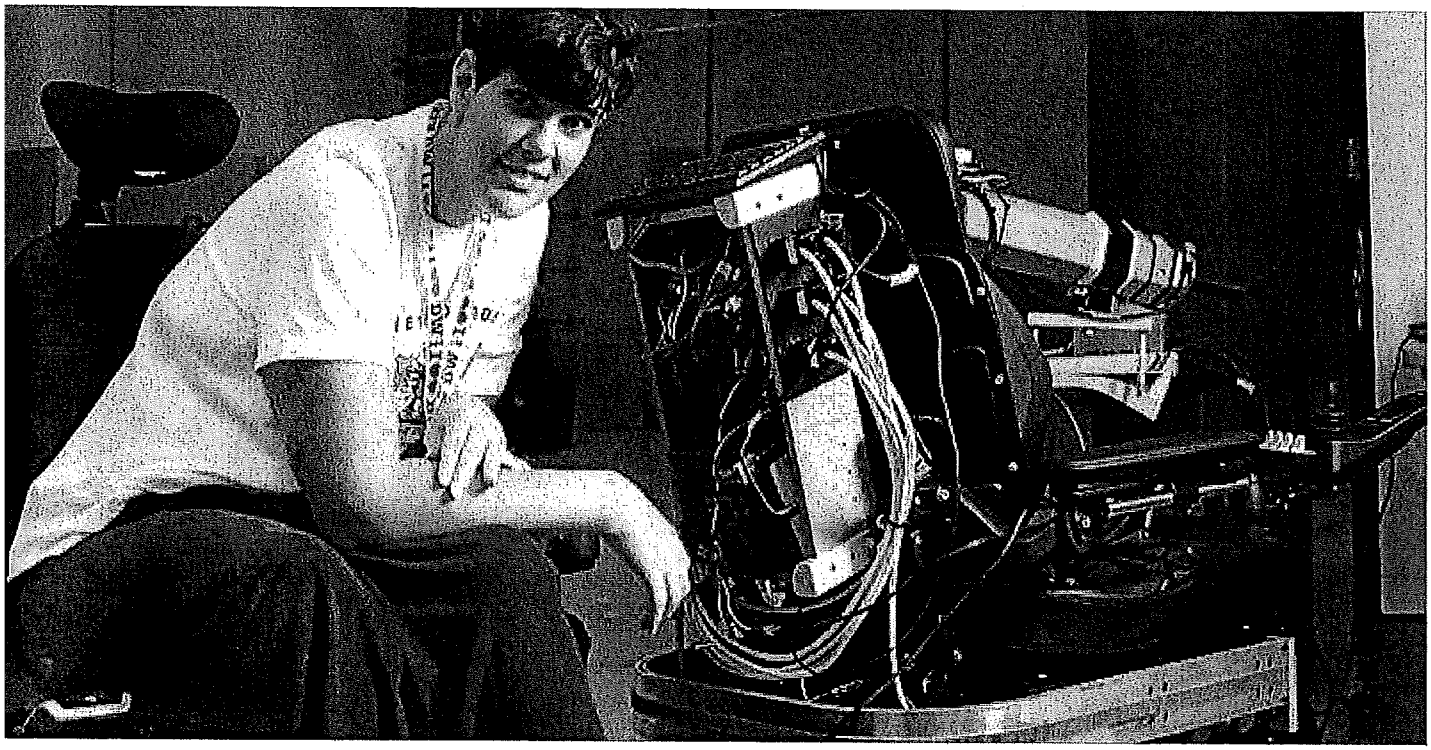
4 States can implement policies that optimize resources and services through interagency coordination, collaboration, and blending/braiding of funding and implementation of robust performance measures.

Preparing for Work

5 States can promote education and career-readiness policies and strategies that expect and prepare all youth, including those with disabilities, to enter the workforce.

6 States can facilitate skill development and job exploration opportunities—such as work-based learning—for youth and young adults, including those with disabilities, that align with education and career development planning and meet businesses' predicated workforce needs.

7 States can promote meaningful family engagement throughout the education and career-development process for youth and young adults, including those with disabilities.



Getting to and Accessing Work Opportunities

8 States are encouraged to ensure that transportation is widely available, reliable, affordable and accessible to people with disabilities in order to support access to the workplace.

9 States can adopt policies that support accessibility in the workplace, particularly related to accessible information and communication technologies, or ICT, and assistive technologies.

10 States can enact policies that support worker access to the *built environment*, including housing, public transportation, infrastructure and physical design.

Staying at Work

11 States can develop policies to support employee retention in the event of injury, illness or a change in status of an individual's disability. Stay-at-work and return-to-work policies can support all workers as they continue in their careers and as new challenges present themselves.

Supporting Self-Employment and Entrepreneurship

12 States are encouraged to ensure that state workforce development systems support entrepreneurship and self-employment as viable employment options for people with disabilities.

13 States can include disability-owned businesses in targeted state procurement, certification and financial incentive policies.

There are detailed, specific policy ideas attached to each of these main policy options. Pioneering states have used varying strategies to address these objectives and, at times, distinct flavors of similar solutions. Concrete examples are provided throughout the document.

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STATE OF OHIO

OHIO CONSTITUTIONAL REVISION COMMISSION

Recommendations for Amendments to the Ohio Constitution

FINAL REPORT
INDEX TO PROCEEDINGS AND RESEARCH

JUNE 30, 1977

Article VII, Section 1
Public Institutions

Present Constitution

Section 1. Institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the State; and be subject to such regulations as may be prescribed by the General Assembly.

Commission Recommendation

The Commission recommends that Article VII, Section 1 of the Ohio Constitution be retained without change.

History and Background of Section

Section 1 of Article VII was part of the 1851 Constitution. It requires the state to foster and support welfare institutions for the "insane, blind, and deaf and dumb." The 1873-1874 Constitutional Convention lengthened the section, providing for further specifics. It read:

> Institutions for the benefit of the curable and incurable insane, blind, deaf and dumb shall be supported by the State. The punitive and reformatory institutions of the state at large shall be a Reform School for Boys, a house of discipline, and a Penitentiary. An asylum for Idiotic and Imbecilic Youth, and a home for Soldiers' and Sailors' Orphans and a Girls' Industrial Home, shall be supported so long as the General Assembly shall deem them necessary. All public institutions shall be subject to such regulations as may be prescribed by law.

The proposed Constitution was not approved by the electorate. No changes in Article VII were considered at the 1912 Constitutional Convention. Thus the section remains unchanged from the 1851 language.

By a fairly recent count, 20 state constitutions provide for the establishment and support of institutions for the mentally handicapped and disabled, 19 contain similar provisions for the blind, and 21 do so for deaf mutes. Among the newer state constitutions, many do not contain a provision regarding public institutions. The Alaska Constitution, for example, states in Article VII, Section 5: "The legislature shall provide for public welfare." A survey of other state constitutions indicates that the issue of public welfare is dealt with in two ways: four states'[1] provisions contain a more extensive enumeration of recipients in the public welfare system: six state constitutions[2] broaden the constitutional statement into something beyond provisions for institutional-type systems. A study by the Temporary State Commission on the Constitutional Convention in New York contains an extensive discussion of whether the constitution should state any policy with respect to social welfare.[3] Proponents of a specific welfare provision argue that the provision would provide basic support for legislation and assurance of minimum programs, while opponents hold such a provision superfluous since the state could, under its inherent police powers, provide for social welfare.

In addition to state constitutional provisions dealing with public institutions and public welfare, state responsibility in this regard has been determined, to some extent, by federal court decisions concerning the right to treatment and rehabilitation of persons being cared for by the state in these institutions. The current dates on most of the cases cited below is some indication that legal, and perhaps social, obligations to persons needing care are currently in a state of evolution. Some lower federal courts have declared that persons committed to an institution through noncriminal proceedings have a constitutional right, under the Fourteenth Amendment, "to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve (their) mental condition." *Wyatt v. Stickney*, 325 F. Supp. 781 (1971). A U.S. District Court in Ohio held that "the state, upon committing an individual until he gains his sanity, incurs a responsibility to provide

[1] *Indiana, Kansas, Montana, North Carolina.*
[2] *Alaska, Hawaii, Louisiana, Missouri, Montana, New York.*
[3] *Mental Health, 1967.*

such care as is reasonably calculated to achieve that goal." *Davis v. Watkins*, 384 F. Supp. 1196 (1974) (N.D. Ohio, W.D.). The United States Supreme Court has not made an absolute declaration that mentally handicapped persons have a right to treatment. The court has said that "(d)ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed", *Jackson v. Indiana*, 406 U.S. 715 (1972), and that ". . . a state cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." *O'Connor v. Donaldson*, 422 U.S. 563 (1975). In that case, the Court refused to follow the broader holding of a right to treatment made by the 5th Circuit Court of Appeals in the case.

Under current provisions of the Ohio Revised Code, Section 5122.27 grants a right to the "least restrictive environment" to all mentally ill patients hospitalized under Chapter 5122, and makes this a responsibility of the head of the hospital or his designee. Under Section 5122.01, "patient" means a voluntary and involuntary patient admitted either to public or private facilities, clinics or hospitals. The right to treatment in the least restrictive setting is included in Division (E) of Section 5122.15, the involuntary civil commitment provision, as a duty of the court following a commitment hearing. Section 5123.85 provides the right to habilitation to mentally retarded persons institutionalized pursuant to Chapter 5123. This includes both voluntary and involuntary residents, and public and private facilities. Involuntarily committed patients, under Chapter 5123, are entitled to the least restrictive environment.

Comment

Several proposed amendments to Article VII, Section 1 were considered. The What's Left Committee worked with an ad hoc committee of persons from various social welfare agencies concerned with the rights of the handicapped and aged, sponsored principally by the Law Reform Project at The Ohio State University, to draft language which would have extended the state's commitment to the handicapped and disabled beyond mere custodial care. One of the initial drafts would have secured rights to persons requiring treatment and habilitation due to age, disability, handicap or behavior "in the least restrictive manner appropriate" to the individual as provided by law. This was the broadest, most inclusive alternative proposed, and would have applied to juveniles, prisoners, the aged and the developmentally (physically and mentally) disabled. The Committee felt, however, that the "least restrictive manner appropriate . . . " language was unclear and ambiguous, and raised many problems of interpretation, although it did replace the present term "institutions", since current treatment methods emphasize community-based and residential rehabilitation settings as an alternative to custodial and institutional-type care. Secondly, the Committee believed it not feasible to treat juveniles, aged, prisoners, and developmentally disabled under the same language since each class of persons had special needs. The Committee was also concerned that inclusion of some terms, such as "least restrictive alternative setting" or "manner" might raise such questions as whether the state had an obligation to construct new facilities of a type tailored to each individual, a burden the Committee was not willing to place on the state.

The What's Left Committee recommended the following language to the Commission as a substitute for Article VII, Section 1:

> "Facilities for and services to persons who, by reason of disability or handicap, require care, treatment, or habilitation shall be fostered and supported by the state. Disabled or handicapped persons shall not be civilly confined unless, nor to a greater extent than, necessary to protect themselves or other persons from harm. Such persons, if civilly confined, have a right to habilitation or treatment."

The Committee's proposal had three major objectives: (1) to state a generalized commitment on the state's part to provide facilities and services to the disabled and handicapped -- while leaving it up to the General Assembly to decide the scope of the state's commitment; (2) civil commitment would be limited to protecting persons from harm to themselves or others; (3) those persons civilly confined under the "harm" standard are guaranteed the right to treatment or habilitation.

The proposal was the subject of extensive debate in the Commission. Among the principal objections was the "disability or handicap" were not defined in the provision, and might broaden the state's responsibility beyond the intent of the provision. The question of the state's financial responsibility was explored at length. Would the state be required to provide more than custodial care to those civilly confined persons who would not benefit from other care? Since the "right to treatment" was now a constitutional right, what would be the remedy if the state could not afford to provide habilitation or treatment for civilly confined persons? Would they have to be released? To lessen some of the ambiguity, the proposal wa amended as follows:

> Facilities and treatment for persons who, by reason of disability or handicap, require care, treatment, or habilitation shall be fostered by the State. Such persons shall not be civilly confined unless, nor to a greater extent than, necessary to protect themselves or other persons from harm. Such persons, if civilly confined, have a right to appropriate habilitation, treatment, or care.

The proposal was approved by a majority of the Commission, but did not receive the necessary 2/3 and therefore did not become a recommendation. The major objections to the revision appeared to be grounded in the uncertainty of the state's obligation as a result of the language. The inclusion of "right to treatment" language in the provision seemed to some members to open the way to a greater burden on the state than the state could assume.

Minority Report
Article VII, Section I

The undersigned recommend to the General Assembly the amendment of Article VII, Section 1 as follows:

> Section 1. FACILITIES AND TREATMENT FOR PERSONS WHO, BY REASON OF DISABILITY OR HANDICAP, REQUIRE CARE, TREATMENT, OR HABILITATION shall be fostered by the STATE. SUCH PERSONS SHALL NOT BE CIVILLY CONFINED UNLESS, NOR TO A GREATER EXTENT THAN, NECESSARY TO PROTECT THEMSELVES OR OTHER PERSONS FROM HARM. SUCH PERSONS, IF CIVILLY CONFINED, HAVE A RIGHT TO APPROPRIATE HABILITATION, TREATMENT, OR CARE.

Since 17 members approved of the above language. we believe that it should be presented to the general assembly even though without Commission endorsement.

With respect to the first sentence, it states essentially the same principle as the present Constitution, substituting more modern, less stigmatizing language for "insane, blind, deaf and dumb" and "institutions". By itself, and by removing "support", it is not viewed as requiring a right to specific services or facilities, such as a right to classrooms for the learning disabled or a right to an intensive treatment center.

The second and third sentences grant more substantive rights, and we believe that these propositions, articulated by federal courts over the last ten years as constitutional principles, should be included in the Ohio Constitution. They have already been articulated in Ohio statutes. Dean Michael Kindred of the O.S.U. College of Law summarized the intent of the language in his testimony to the Commission: "The statement that one finds most commonly in the right to treatment cases is that a mental hospital without hospital is nothing more than a prison. And if a person is going to be placed in a prison, he should be convicted through the criminal process. . . If we view a commitment process that is less rigorous than the criminal commitment process, that is the civil commitment process, and we put them in places called hospitals, then I don't think that it is too much to say that the logical conclusion of that is that they must have treatment. And this is what the courts have said, that if you want to put them in prison, put them in prison. But if you are going to put them in hospitals, they have a constitutional right to treatment."[1]

[1]*Dean Michael Kindred, Testimony before the Ohio Constitutional Revision Commission October 5, 1976. pp. 18-19 of Commission Minutes*

We believe that the Ohio Constitution should contain a statement of the state's commitment to care for those who are unable to care for themselves, to offer them facilities and treatment to better their conditions, and in cases where a person has been deprived of his civil liberty because he may cause harm to himself or others, to guarantee him the right to appropriate care, treatment or habilitation. The proposed language is supported as the most acceptable statement of these purposes.

Craig Aalyson
R. H. Carter
Warren Cunningham
Tim McCormack
William H. Mussey
Linda U. Orfirer
Katie Sowle
John D. Thompson
Paul A. Unger

Article VII, Sections 2 and 3
State Institutions, Appointment of Directors and Trustees

Present Constitution

Section 2. The directors of the Penitentiary shall be appointed or elected in such manner as the General Assembly may direct; and the trustees of the benevolent, and other State institutions, now elected by the General Assembly, and of such other State institutions as may be hereafter created, shall be appointed by the Governor by and with the advice and consent of the Senate; and, upon all nominations made by the Governor, the question shall be taken by yeas and nays, and entered upon the journals of the Senate.

Section 3. The Governor shall have power to fill all vacancies that may occur in the offices aforesaid, until the next session of the General Assembly, and, until a successor to his appointee shall be confirmed and qualified.

Commission Recommendation

The Commission recommends that Sections 2 and 3 of Article VII be repealed.

Comment

The Commission concluded, after reviewing the What's Left Committee study of public institutions, that Sections 2 and 3 of Article VII are obsolete. No substantive change in the governance of state benevolent institutions or the penitentiary is intended by the Commission recommendaton for repeal.

History and Background of Sections

Sections 2 and 3 of Article VII were adopted by the 1850-1851 Constitutional Convention and have not been amended since their approval by the electorate. In the original Ohio Constitutional of 1802, nearly all appointing power was vested in the legislature, as part of a movement to create legislative supremacy and a weak executive in Ohio, a reaction to the oppressive experience under territorial government and the governorship of St. Clair. Article VII, Section 2, as drafted by the 1850-1851 Convention, represents a departure from the former practice of legislative appointment, by transferring some power to the Governor with the advice and consent of the Senate to make such appointments. No changes in these two sections were considered by the 1873-1874 Constitutional Convention or the 1912 Convention.

There has been little litigation concerning these sections. Section 2 states that the directors of the penitentiary shall be appointed or elected as directed by the General Assembly, and trustees of benevolent and other state institutions shall be appointed by the Governor with the advice and consent of the Senate. The language is obsolete with respect to the directors of the penitentiary since such an office no longer exists. In only one case is there a statutory provision concerning trustees of benevolent institutions. Section 5909.02 of the Revised Code provides for a five-member board of trustees to the Ohio Soldiers' and Sailors' orphans home, to be appointed by the Governor with the advice and consent of the Senate.

Section 3 provides for filling vacancies in the offices mentioned in Section 2. That section is obsolete since, as noted above, such offices have, for the most part, been abolished. A more recent constitutional provision, Article II, Section 21 specifies that all appointments to state office, when required by law, shall be subject to the advice and consent of the Senate. That provision is implemented by Section 3.03 of the Revised Code, whereby the Governor makes an appointment and reports to the Senate for confirmation when the house is in session, and when a vacancy occurs and the Senate is not in session, the Governor may make such appointment pending Senate confirmation.

Repeal of Sections 2 and 3 in Article VII is recommended to remove these two obsolete and unnecessary provisions from the Constitution.

Article IX, Sections 1,3,4,5
Article III, Section 10

Militia

Present Constitution

Article IX

Section 1. All citizens, residents of this state, being seventeen years of age, and under the age of sixty-seven years, shall be subject to enrollment in the militia and the performance of military duty, in such manner, not incompatible with the Constitution and laws of the United States, as may be prescribed by law.

Section 3. The governor shall appoint the adjutant general, and such other officers and warrant officers, as may be provided by law.

Section 4. The governor shall have power to call forth the militia, to execute the laws of the state, to suppress insurrection, to repel invasion, and to act in the event of a disaster within the state.

Section 5. The General Assembly shall provide, by law, for the protection and safekeeping of the public arms.

Article III

Section 10. He shall be commander-in-chief of the military and naval forces of the State, except when they shall be called into the service of the United States.

Commission Recommendation

The Commission recommends no changes in Article IX, Sections 1, 3, 4, and 5, and Article III, Section 10.

History and Background of Sections

Every state constitution contains a provision dealing with the military, usually providing that the governor is commander-in-chief of the state's military forces. Extensive constitutional provisions on the military date to the time when states were responsible for home defense because the national government did not assume full responsibility for defense due to the fears concerning a standing army. The provision in Section 1 of Article IX of the Ohio Constitution, providing that all citizens are subject to enrollment in the militia expresses the principle that the state would be prepared, through its militia, to defend itself against attack. The provision reflects the traditional concept of citizen service in the militia, with every man[1] being responsible for the defense of the state. This concept was especially prominent before a system of national defense was developed in the United States, and still remains in most state constitutions.

[1]*In earlier history, only men had the privileges and duties of citizenship.*

Education, Public Institutions, and Local Government Committee

Planning Worksheet
(Through December 2016 Meetings)

Article VI - Education

Sec. 1 – Funds for religious and educational purposes (1851, am. 1968)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved
Completed	**5.14.15**	**10.8.15**	**10.8.15**	**10.8.15**	**11.12.15**	**12.10.15**	**12.10.15**

Sec. 2 – School funds (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved
Completed	**5.14.15**	**10.8.15**	**10.8.15**	**10.08.15**	**11.12.15**	**12.10.15**	**12.10.15**

Sec. 3 – Public school system, boards of education (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved
Completed	**10.8.15**						

Sec. 4 – State board of education (1912, am. 1953)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 5 – Loans for higher education (1965)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved
Completed	**11.10.16**	**N/A**	**11.10.16**	**12.15.16**	**12.15.16**		

Sec. 6 – Tuition credits program (1994)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved
Completed	**11.10.16**	**N/A**	**11.10.16**	**12.15.16**	**12.15.16**		

Article VII - Public Institutions

Sec. 1 – Insane, blind, and deaf and dumb (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 2 – Directors of penitentiary, trustees of benevolent and other state institutions; how appointed (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 3 – Vacancies, in directorships of state institutions (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Article X - County and Township Organization

Sec. 1 – Organization and government of counties; county home rule; submission (1933)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 2 – Township officers; election; power (1933)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 3 – County charters; approval by voters (1933, am. 1957)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 4 – County charter commission; election, etc. (1933, am. 1978)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Article XV - Miscellaneous

Sec. 1 – Seat of government (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 3 – Receipts and expenditures; publication of state financial statements (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 4 – Officers to be qualified electors (1851, am. 1913, 1953)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 6 – Lotteries, charitable bingo, casino gaming (1851, am. 1973, 1975, 1987, 2009, 2010)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 7 – Oath of officers (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 10 – Civil service (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 11 – Marriage (2004)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Article XVIII - Municipal Corporations

Sec. 1 – Classification of cities and villages (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 2 – General laws for incorporation and government of municipalities; additional laws; referendum (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 3 – Municipal powers of local self-government (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 4 – Acquisition of public utility; contract for service; condemnation (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 5 – Referendum on acquiring or operating municipal utility (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 6 – Sale of surplus product of municipal utility (1912, am. 1959)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 7 – Home rule; municipal charter (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 8 – Submission and adoption of proposed charter; referendum (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 9 – Amendments to charter; referendum (1912, am. 1970)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 10 – Appropriation in excess of public use (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 11 – Assessments for cost of appropriating property (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 12 – Bonds for public utilities (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 13 – Taxation, debts, reports, and accounts (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 14 Municipal elections (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

2017 Meeting Dates

February 9

March 9

April 13

May 11

June 8

July 13

August 10

September 14

October 12

November 9

December 14