Ohio Constitution Modernization Commission
Judicial Branch and Administration of Justice Committee

Written Testimony of Michael E. Solimine

May 14, 2015

Re: Advisory Opinions, and Declaratory Judgment Actions in the Supreme Court

I am the Donald P. Klekamp Professor of Law at the University of Cincinnati College of Law, and have served on the faculty since 1986. I teach and write in civil procedure, federal courts, conflict of laws, and appellate procedure, among other things. Prior to my joining the UC law faculty, I clerked for U.S. District Judge Walter H. Rice in the Southern District of Ohio, and practiced law in this state. Thank you for the opportunity to discuss the topics of whether Ohio should adopt the advisory opinion process, or permit declaratory judgment actions, challenging the constitutionality of state legislation, to be directly filed in the Ohio Supreme Court.

1. Advisory Opinions

During the November 13, 2014, meeting of this Committee, when discussing with Justice Paul E. Pfeifer his proposal on declaratory judgments (addressed below), the issue of amending the Ohio Constitution to permit the Supreme Court to issue advisory opinions arose.[1] Professor Steven H. Steinglass subsequently provided this committee with a memorandum discussing the history of advisory opinions in federal and state courts, and detailed information about the current use of such opinions in ten states.[2] Professor Steinglass' excellent memo helpfully summarizes the prior rejection of the advisory opinion in Ohio, and its use elsewhere. I will concentrate here on the pros and cons of the device. My conclusion is that the latter outweigh the former and that Ohio should not adopt the advisory opinion.

Proponents of the use of advisory opinions have advanced several arguments. These include that it is the most efficient and expeditious use of resources for all branches of government if the constitutionality of state legislation is determined sooner rather than later. The government itself and the public may come to rely and plan their activities around a statute, and that can be disrupted if, through the ordinary litigation process, a statute is eventually declared unconstitutional by the Supreme Court, perhaps several or many years after enactment. Even if the statute is eventually upheld there may be years of uncertainty. An early judicial consideration of the constitutionality of a statute during the legislative process, at the request of another branch, can have the benefit of improving that process and fostering a healthy interbranch dialogue.[3]

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[1] Ohio Constitution Modernization Commission, Excerpt from Minutes of the Judicial Branch and Administration of Justice Committee, for Meeting of November 13, 2014.

[2] Memorandum from Steven H. Steinglass, Senior Policy Advisor, to Judicial Branch and Administration of Justice Committee, re: Advisory Opinions by State Supreme Courts (March 4, 2015).

[3] For further discussion of these benefits, see MEL A. TOPF, A DOUBTFUL AND PERILOUS EXPERIMENT: ADVISORY OPINIONS, STATE CONSTITUTIONS, AND JUDICIAL SUPREMACY 99-113 (Oxford U. Press 2011); Jonathan D. Persky, Comment, *"Ghosts that Slay": A Contemporary Look at State Advisory Opinions*, 37 Conn. L. Rev. 1155, 1172-77 (2005).

Opponents of the use of advisory opinions advance the following arguments. They contend that request for such opinions can undermine the separation of powers by in effect forcing state courts to become involved in the policymaking decisions of the other branches. Thus, with advisory opinions, the legislature might reject some laws it would have enacted without the mechanism, and enacted some it would have rejected without the mechanism.[4] This, in turn, can lead to a perceived, if not actual, politicization of the process to render a purported "advisory" opinion. There are also concerns that such opinions are often rendered in a factual vacuum, at a high level of abstraction, which is not conducive to appropriate judicial decisions. Rendering advisory opinions is difficult to reconcile with, and can be considered inferior to, the usual adversarial process involving a concrete dispute, litigated by parties and attorneys with a stake in the outcome. Finally, in some of the states that use them, advisory opinions are putatively just that, "advisory," and not technically binding on the other branches or in later litigation. But experience has shown that the other branches, the public, and courts themselves do not appreciate this distinction and invariably treat such opinions as binding.[5]

An additional set of complications is outlined in Prof. Steinglass' memo. The states that have advisory opinions are not uniform when it comes to the process of requesting a state high court for such an opinion. In various states, the governor, or one or both houses of the legislature, or some combination may ask for an opinion. Some states seem to require that the court respond, while others make it discretionary. Still other states provide that the court need only respond when an "important question" (or similar language) is raised by the request. Of course, Ohio could establish its own procedures, and could learn from yet not be bound by the experiences in other states. Nonetheless, these requirements have generated their own set of controversies, which would need to be confronted if Ohio were to adopt the advisory opinion.

In my view, this Committee should not recommend that the Ohio Constitution be amended to provide some version of an advisory committee. My opinion is not based on any lock-step notion that Ohio courts must always follow the procedures of federal courts, which has not issued advisory opinions since the beginning of the Republic. The U.S. Supreme Court has long held that states are free to follow their own notions of what cases are justiciable,[6] and our federal system permits experimentation on this issue, which has allowed ten states to employ the advisory opinion. And it may be appropriate for any given state to do that, given its own political and constitutional history.

That said, I perceive no special factors in Ohio that call for instituting this procedure. As Prof. Steinglass' memo notes, the Supreme Court in 1882 declined to issue an advisory opinion even when the General Assembly had requested the Attorney General to file a quo warranto action in the Court. The Court noted that such an opinion "would be of great value to the general assembly," but nonetheless declined because it would "be an unwarranted interference with the functions of the legislative department that would be unauthorized, and dangerous in its

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[4] James R. Rogers & Georg Vanberg, *Judicial Advisory Opinions and Legislative Outcomes in Comparative Perspective*, 46 Am. J. Pol. Sci. 379, 391 (2002).

[5] For further discussion of these criticisms, see Topf at 29-68, 129-84; Persky at 1177-81.

[6] E.g., ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989).

tendency."[7] The Court's judgment is still sound to me, over 125 years later. The constitutionality of legislation in Ohio is indeed an important question, but the present adjudicative process is sufficient to bring those issues to the Supreme Court. I am unaware of any important legislation in Ohio that has escaped judicial review because of the absence of an advisory opinion.[8]

Advisory opinions have not been without controversy in those states that utilize the device. Those 39 states (not to mention the federal system) that do not have the device have managed to survive without it. Indeed, as many as 19 states at one time have used advisory opinions, and the number is now down to 10.[9] The rationales in favor of the device have force, and may make sense for a particular statute in question. But overall the advisory opinion, given the extreme hypothetical nature of the question presented to the Court, is outside the tradition of adversarial litigation followed in almost all circumstances by the courts of this State, most other states, and the federal system. I would decline the opportunity to experiment with it in Ohio, absent some compelling reason, which I think is lacking.

2. Declaratory Judgment Filed in the Supreme Court

In this meeting with this Committee, Justice Pfeifer suggested that the following language be added to the list of actions in Article IV, Section 2(B)(1) of the Constitution, over which the Supreme Court has original jurisdiction: "Declaratory judgments in cases of public or great general interest." This proposal has some similarities to the advisory opinion, but some important differences as well, not least of which is that it contemplates true adversarial litigation, with plaintiffs who have standing to pursue the case. Justice Pfeifer stated that his proposal is separate from the standing issue, and so I assume he would not object to the traditional requirements that plaintiffs who bring a declaratory judgment action brought in trial courts must be injured in some way and present an actual controversy, i.e., have standing.[10] Nonetheless, I am skeptical of this proposal for many of the reasons to oppose the advisory opinion.

As explained by Justice Pfeifer, one of the reasons for his proposal was the experience of constitutional challenges to the JobsOhio Act. The challenge to the Act was on the basis that the power and state monies provided to JobsOhio violated at least seven provisions of the Constitution. Perhaps cognizant of (though not necessarily agreeing with) such questions, and perhaps desiring in any event that the questions be resolved quickly, the General Assembly in the Act provided that any constitutional challenge be brought exclusively in the Supreme Court. That was struck down as beyond the powers of the General Assembly, as improperly adding to the list

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[7] State v. Baughman, 38 Ohio St. 455, 459 (1882).

[8] It's not at all clear that had the advisory opinion been in place in Ohio, it would have led to consideration of the constitutionality of the JobsOhio Act, at issue in ProgressOhio.org, Inc. v. JobsOhio, 139 Ohio St.3d 520, 13 N.E.3d 1101 (2014), a concern of Justice Pfeifer (and others). The governor and majorities in both houses of the General Assembly supported the legislation and were of the same political party, and it's not clear to me that any of them would have been motivated, for "political" reasons, or legitimate concerns over the constitutionality of the Act, to ask the Supreme Court for an advisory opinion. The very uncertainty of whether and when the advisory opinion process might have come into play is it itself a reason, in my view, to not adopt the procedure.

[9] Rogers & Vanberg at 379. As Professor Steinglass points out in his memo, some sources refer to 11 states currently having advisory opinions, but in one (Oklahoma) the provision is so narrowly defined that it is virtually never used.

[10] See, e.g., Mid-American Fire & Cas. Co. v. Heasley, 113 Ohio St.3d 133, 863 N.E.2d 142 (2007).

of original actions in Article IV, Section 2(B)(1).[11] Then the Court rejected a mandamus action (which is on the list) brought by JobsOhio to consider the constitutional questions, on the basis that, properly understood, it was a declaratory judgment action which first had to be brought in the court of common pleas.[12] Meanwhile, the General Assembly amended the Act to provide that a constitutional challenge could be brought (albeit within 90 days of the law's passage) in the Franklin County Court of Common Pleas. Such a challenge was brought, but it was rejected by the trial, appellate, and Supreme Court on the basis that the plaintiffs lacked standing to challenge the Act.[13] Thus, as Justice Pfeifer stated in his dissent in the last case, the constitutionality of the JobsOhio Act had escaped constitutional review despite three trips to the Supreme Court.

Justice Pfeifer was understandably frustrated by the seemingly passivity of the Court regarding the challenge to the JobsOhio Act. I agree with him and Justice O'Neil in the dissent the constitutional challenges are not frivolous, though like them I at this time take no stand on the merits of that challenge. However, I agree with the result and reasoning of the majority in the third case. Ten years ago I authored a law review article that argued that Ohio should follow federal standing requirements, and not carve out what I considered to be an amorphous "public interest" or "public rights" exception to normal standing requirements.[14] Those arguments are reiterated in an amicus curiae brief of seven Ohio law professors, myself included, that the plaintiffs in the third JobsOhio case lacked standing.[15] As noted above, the declaratory judgment proposal differs from the advisory opinion, and I'm assuming it requires to be brought by a plaintiff with standing. Nonetheless, for many of the reasons outlined earlier in this memo, and in my article and amicus curiae brief, I am not in favor the declaratory judgment proposal.

First, start with the proposition that, as the Supreme Court has stated, "[c]onstitutional challenges to legislation are generally resolved in an action in common pleas court rather than in an extraordinary writ action filed here."[16] This is reflective of the normal litigation process, where constitutional challenges (and of course most other civil cases) are litigated in a trial court, with the availability of discovery, fact-finding where necessary by the trial court, and the resolution of the challenge in the normal course of the law suit, with appellate review thereafter. It is true that there is not a free-standing interlocutory appeal process currently in Ohio (like, say, 28 U.S.C. § 1292(b) in the federal system) which would permit a prompter appellate review of a constitutional challenge (though it might currently be possible under Ohio Rule of Civil Procedure 54(B) or in some other way). It is also true that the proposition is stated by the Supreme Court as a presumption, suggesting that in some circumstances a different and faster resolution of some kind is more appropriate. In my view, the legislature is best positioned

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[11] ProgressOhio.org, Inc. v. Kasich, 129 Ohio St.3d 449, 953 N.E.2d 329 (2011).
[12] State ex rel. JobsOhio v. Goodman, 133 Ohio St.3d 297, 978 N.E.2d 153 (2012).
[13] ProgressOhio.org, Inc. v. JobsOhio, 139 Ohio St.3d 520, 13 N.E.3d 1101 (2014).
[14] Michael E. Solimine, *Recalibrating Justiciability in Ohio Courts*, 51 Clev. St. L. Rev. 531 (2004). I was particularly critical of the Court's decision in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999), which used a "public right" exception to permit lawyers, who failed to satisfy traditional standing requirements, to bring a mandamus challenge to tort reform legislation directly in the Supreme Court.
[15] Brief of Amici Curiae Ohio Law Professors in Support of Defendants-Appellees JobsOhio, *ProgressOhio.org. Inc. v. JobsOhio*, 139 Ohio St.3d 520, 13 N.E.3d 1101 (2014).
[16] State ex rel. Satow v. Gausse-Milliken, 98 Ohio St.3d 479, 483, 786 N.E.2d 1289, 1292 (2003).

(perhaps advised by the judiciary, as Justice Pfeifer did with this Committee) to weigh the costs and benefits of swifter constitutional challenges (and swifter appellate review), and placing that in a statute.[17] This could be done for constitutional challenges as a whole, by amending Rev. Code § 2505.02 (defining final orders subject to appeal)[18] or for one statute in particular. I don't think an amendment to the Constitution is necessary to deal with this problem, if problem it is.[19]

Second, it is not clear that a proper record could be assembled in an action filed directly in the Supreme Court. Obviously the process available at the trial level to engage in discovery, and present (and cross-examine) lay and expert witnesses, fits awkwardly at best in an original action in the Court. In his discussion in November with this Committee, Justice Pfeifer did not see this as a particular problem, as he apparently saw constitutional challenges to statutes as mainly presenting legal issues, not factual ones where a record would be crucial. He has expressed similar views earlier.[20] I'm not as convinced as Justice Pfeifer that constitutional challenges are as a general matter unlikely to be fact-driven. Some may indeed present pure issues of law, while others would benefit from the development of a factual record at the trial level, not to mention how a statute affects actual plaintiffs and defendants. Whatever standard of review the Court uses, be it rational basis or some higher standard, the purpose and effect of a statute may not be obviously apparent from the face of a statute. Moreover, the Court may wish to consider historical and other evidence regarding the purpose of the provisions of the Ohio Constitution at issue. Lay and expert testimony, documentation, and other information found in a record developed at the trial level could inform the Court's decision on the merits of the challenge. I'm doubtful that all constitutional challenges can be characterized ex ante as not fact-driven. It will depend on circumstances and likely vary from case to case.[21] To be sure, Justice Pfeifer's generalization is more likely to be true for *facial*, as opposed to *as-applied* challenges, to statutes. And it is possible that good briefing and argument in an original action, perhaps augmented by helpful amicus curiae briefs, would be the functional equivalent of assembling a

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[17] Cf. Fed. Home Loan Mgt. Corp. v. Schwartzwald, 134 Ohio St.3d 13, 17, 979 N.E.2d 1214, 1218 (2012)(suggesting that normal standing requirements apply absent a "specific statute authorizing invocation of the judicial process"). For examples of Ohio statutes which permit plaintiffs to sue where they would otherwise very likely lack standing, see Rev. Code § 733.59 (permitting suit by municipal taxpayers under certain circumstances); Rev. Code §3734.101(A)("citizen-suit" provision permitting suit by "any person aggrieved or adversely affected" by violations of state hazardous and solid waste laws).

[18] Indeed, Rev. Code § 2505.02(B)(6), added in 2002, provides that a trial order "determining the constitutionality" of statutes governing medical malpractice actions passed in that year can be immediately appealed despite being an interlocutory order. It was further amended in 2004 to cover constitutional challenges to other tort reform measures passed in that year. See, e.g., Ruther v. Kasier, 134 Ohio St.3d 408, 983 N.E.2d 291 (2012)(utilizing this route of appeal to reach merits of constitutional challenge to medical malpractice provision).

[19] It is true and perhaps ironic that the General Assembly twice added different versions of a special review provision in the JobsOhio legislation. That neither provision has enabled a court at any level to reach the merits of the constitutional challenge is more a function of plaintiffs' lack of standing rather than an indictment of the usual litigation process.

[20] State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 86 Ohio St.3d 451, 515, 715 N.E.2d 1062, 1112 (1999)(Pfeifer, J., concurring)(arguing that original action in Court to challenge constitutionality of tort reform statute was appropriate because, among other things, the case was not "fact-driven"); ProgressOhio.org, Inc. v. Kasich, 129 Ohio St.3d 449, 452, 953 N.E.2d 329, 332 (2011)(Pfiefer, J., dissenting)(constitutional challenge to JObsOhio Act "does not involve a complex factual scenario that would benefit from the development of a record in a trial court.")

[21] I elaborate on these reasons in Solimine at 544-46, in the context of addressing whether the Court should follow the usual standing requirements for original actions.

record. But on balance we can't be sure, and indeed the items just mentioned can be utilized at the trial or intermediate appellate court levels. The better path would be to require suit to be filed in a trial court where a record, be it thin or thick, to be assembled.

Finally, there is the problem of applying Justice Pfeifer's proposal, which limits declaratory judgment actions to those of "public or great general interest." Note that it is not limited to constitutional challenges, and could encompass any civil or criminal case. In addition, the Justice seems to contemplate that it would be discretionary for the Court to hear the action; if the Court concludes the language is not satisfied, then it could dismiss the action (presumably including some constitutional challenges). Those states that permit advisory opinions have provisions with similar language, and that has proven to be a source of controversy in those states. Whether any given case is of "public or great interest" is often in the eye of the beholder.[22] I don't want to overstate the point. This very language is found in Art. IV, § 2 (B)(2)(d) of the Constitution, the provision granting the Court discretionary power to review decisions from the Courts of Appeals. Courts are often called upon to interpret and apply similarly vague language in many other settings, and the language proposed by Justice Pfeifer is not the worst offender in that regard. But it would immediately add an element of uncertainty to the operation of the proposed original action. In contrast, a proper plaintiff could file an action (by declaratory judgment or otherwise) in the trial court without the necessity of satisfying such language.

For all of these reasons, I would recommend that the Ohio Constitution not be amended in the way Justice Pfeifer describes. His concerns for rationalizing constitutional challenges to state statutes are not without merit, but I think they are better accomplished by statutory amendment, such as to Rev. Code § 2505.02, permitting immediate appeals of decisions by trial courts of such challenges.[23]

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[22] See Topf at 147-62 for an extensive and critical analysis of the advisory opinion case law on this point. See also Solimine at 544 (critical of Ohio cases which would carve out exception to standing requirements for cases that are "public actions" or affect the "public interest," given the subjectivity of those terms).

[23] Under the current Constitution, such a statute would likely be unable to provide for a direct appeal of such a challenge to the Supreme Court. The Constitution's reference to the Court's appellate jurisdiction in Art. IV, § 2 (B)(2), does not appear to encompass such direct appeals. But I would not advocate such an approach, whether or not a constitutional amendment would be necessary to permit it. The normal appellate process, i.e., an appeal to the appropriate District appellate court, with review thereafter by the Supreme Court, remains the optimal process. Cf. Solimine, *The Fall and Rise of Specialized Federal Constitutional Courts*, 17 U. Pa. J. Con. L. 115, 142-54 (2014)(critical of federal statutes which require some constitutional challenges to be brought before a special three-judge district court, with a direct appeal to the U.S. Supreme Court, in part because it prevents a possibly helpful percolation of an issue among several lower courts). But even a direct appeal of a trial court decision to the Supreme Court, in my view, would be preferable to an original action filed in the Supreme Court.