OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Legislative Branch and Executive Branch Committee

Frederick E. Mills, Chair
Hon. Paula Brooks, Vice-chair

September 10, 2015

South Meeting Room B & C, 31st Floor
Riffe Center for Government and the Arts

OCMC Legislative Branch and Executive Branch Committee

Chair	Mr. Frederick Mills
Vice-chair	Commissioner Paula Brooks
	Mr. Herb Asher
	Sen. Bill Coley
	Rep. Mike Curtin
	Speaker Jo Ann Davidson
	Rep. Nathan Manning
	Governor Robert Taft
	Ms. Petee Talley
	Sen. Charleta Tavares
	Ms. Kathleen Trafford

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

LEGISLATIVE BRANCH AND EXECUTIVE BRANCH COMMITTEE

THURSDAY, SEPTEMBER 10, 2015
2:30 P.M.
SOUTH MEETING ROOMS B & C, 31ST FLOOR
RIFFE CENTER FOR GOVERNMENT AND THE ARTS

AGENDA

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meeting of June 11, 2015

  [Draft Minutes – attached]

IV. Reports and Recommendations

- None scheduled

V. Presentations

- "Arizona State Legislature v. Arizona Independent Redistricting Commission"

  Steven H. Steinglass
  Senior Policy Advisor

  [Memorandum by Steven H. Steinglass titled "Arizona State Legislature v. Arizona Independent Redistricting Commission – The Use of Commissions for Congressional Redistricting," dated August 27, 2015 – attached]

- "Use of the Decennial Census for Drawing State Legislative Districts"

  Steven H. Steinglass
  Senior Policy Advisor

  [Memorandum by Steven H. Steinglass titled "Evenwel v. Abbott – Use of the Decennial Census for Drawing State Legislative Districts," dated August 28, 2015 – attached]

- "Ohio Supreme Court Jurisprudence Relating to the Single Subject Rule"

  Shari L. O'Neill
  Counsel to the Commission

  [Memorandum by Shari L. O'Neill and Stacia Rapp titled "Ohio Supreme Court Jurisprudence Relating to Article II, Section 15(D)," dated August 17, 2015 – attached]

VI. Committee Discussion/Next Steps

- Committee discussion regarding the next steps it wishes to take in preparing for upcoming meetings.

  [Planning Worksheet – attached]

  [Memorandum by Steven H. Steinglass title "Article II Issues," dated May 7, 2015 – attached]

VII. Old Business

VIII. New Business

IX. Public Comment

X. Adjourn

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE
LEGISLATIVE BRANCH AND EXECUTIVE BRANCH COMMITTEE

FOR THE MEETING HELD
THURSDAY, JUNE 11, 2015

Call to Order:

Chair Fred Mills called the meeting of the Legislative Branch and Executive Branch Committee to order at 2:50 p.m.

Members Present:

A quorum was present with Chair Mills, Vice-chair Brooks, and committee members Asher, Curtin, Manning, Taft, Talley, and Trafford in attendance.

Approval of Minutes:

The minutes of the May 14, 2015 meeting of the committee were approved.

Presentations:

"HJR2 – Congressional Redistricting"

Ann Henkener
League of women Voters

Chair Mills recognized Ann Henkener with the League of Women Voters of Ohio, who presented on the topic of HJR 2, Congressional Redistricting, which was recently introduced in the General Assembly by Representatives Kathleen Clyde and Michael Curtin, both of whom are Commission members.

Ms. Henkener began her presentation by stating that current congressional districts are more highly gerrymandered than the state legislative districts. She said that a good reform proposal should provide for strong input from both political parties when drawing maps, with the goal of having Ohio's General Assembly and Congressional delegations reflecting the even split between the parties in Ohio. She added that the districts should also be drawn to provide voters

choices in general elections, and to have geographical shapes and boundaries that make sense to voters. Ms. Henkener expressed her support for HJR 2, saying that the proposed resolution meets these goals, and that the similar plan for legislative districts has been accepted by large majorities in the General Assembly. She urged the Legislative Branch and Executive Branch Committee to approve the plan set forth in HJR 2, and to send a recommendation to the full Commission for its approval.

"HJR2 – Congressional Redistricting"

Richard Gunther
Professor Emeritus, Political Science
The Ohio State University

Professor Gunther expressed his support for the congressional redistricting plan described in HJR 2, describing the problems he sees with the current district lines, such as communities fragmented into separate districts, and the dilution of voting power of citizens by the creation of districts that are not compact. He also described that the current map does not satisfy the interests of fairness, and noted that Ohio's map is "one of the worst in the democratic world," because it "reflects a flagrant disregard of the core principle of representative fairness." Prof. Gunther reiterated statements he had made to this committee in 2013, in which he proposed that the redistricting process be reformed to "encourage and facilitate the representation of communities, to fairly reflect the preferences of voters, and to make it possible to hold elected officials accountable." He said that otherwise, voting power would be diluted by placing communities with very different and conflicting interests into one district. Prof. Gunther noted that his home district, the 15th District, represents people in 12 counties with little overlap between the suburban parts of Franklin County and the agricultural Ohioans otherwise in the district. Prof. Gunther argued for fairness, noting that in the 2012 election 52 percent of Ohioans voted for Republican candidates for Congress but that Republicans won 75 percent of the seats. He said the difference of 23 percent is among the worst in the democratic world.

According to Prof. Gunther, HJR 2 meets the goals he described because it uses much of the same criteria as was applied in HJR 12 (legislative redistricting),which passed with the broad support of legislators in both houses at the end of the 130th General Assembly. Prof. Gunther concluded by stating that he regards HJR 2 as "an excellent vehicle for achieving meaningful redistricting reform for the foreseeable future." Prof. Gunther also recommended that the resolution not be approved until after voter approval of HJR 12 (legislative redistricting) which was on the 2015 general election ballot as Issue 1, so that the congressional redistricting proposal would not "trigger intervention by forces outside the state" who would oppose and potentially bring about the defeat of both reform measures.

The committee then asked Prof. Gunther questions about his presentation. Vice Chair Paula Brooks said she was struck by the list of states and nations that were rated for the fairness of their district maps. She asked Prof. Gunther where the list came from. Prof. Gunther said his recommendation regarding fairness came from language in the Florida Constitution. He said the list of disproportionality scores grew out of his political science class, and that the index is used by political science experts. He said other countries are doing a better job of fairly representing

their voters than Ohio. He added that, with computer programs, it is possible to slice and dice so precisely that you can predict outcomes of elections for many years to come. He said the previous map created in 2001 had a score of 18; but Ohio now has increased that score to 23. He said the legislative redistricting reform plan in HJR 12 reverses that trend, and, if adopted, Ohio would "have a notion of representational fairness."

Governor Bob Taft asked about the word "attempt" appearing in Section 4 of the proposed resolution. He wondered if there has been other location research about how courts interpret the use of the word "attempt" in the context of attempting to achieve fairness. He wondered what would be sufficient to constitute attempt. Prof. Gunther said this is a slippery slope. He said in the case of Florida, a map was appealed to the Florida Supreme Court, which ruled twice that the map was unconstitutional, and sent it back to the legislature, which then moved lines a little without really creating a fair map. He said so long as we have a subjective notion such as "fairness," it is subject to different interpretations. He said that Ohio's map currently has 190 splits. According to HJR 12, now Issue 1, if a map has more than six splits it must be declared unconstitutional and sent back for redrawing. He said that requirement will reduce the possibility for gerrymandering. He said one reason using district boundaries is so useful is because it is unequivocal when boundaries are being split, and the question is how much is bad enough to require court intervention. Gov. Taft asked staff for research on how the word "attempt" is interpreted by the courts, or if there was other language possible.

Chair Mills said he is surprised that Prof. Gunther is recommending that a resolution reforming congressional redistricting not be attempted this year. Prof. Gunther said he is representing himself on this as a political scientist. He said putting it on the ballot this year could jeopardize Ohio legislative reform in Issue 1.

Senior Policy Advisory Steven H. Steinglass asked Prof. Gunther about the implications of *Arizona State Legislature v. Arizona Independent Redistricting Comm.*, currently pending before the U.S. Supreme Court. Prof. Gunther said the Ohio plan in HJR 2 is fundamentally different from the Arizona case. He said the U.S. Supreme Court in 1916, in the case of *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 36 S.Ct. 708 (1916), ruled precisely on this issue, holding that the legislative process is included in the provision allowing for a referendum. He said a second factor is that the Arizona plan provides for a board consisting of nonelected individuals. He said the Ohio plan provides for a majority of commissioners to be legislative representatives, with four of the seven members being legislators. He said this should meet the constitutional requirement that the state legislature determine the conditions for holding an election for congressional representatives.

Gov. Taft noted there is another U.S. Supreme Court case out of Texas, which asks about the criteria for the concept of "one person one vote." He suggested the committee receive some insight on that issue. He said the outcome of that case could require everyone to go back to the drawing board, but the decision might not come out until a year from now.

Prof. Gunther commented about the population size requirement in drawing maps, noting that, in 2012, the U.S. Supreme Court, in *Tennant v. Jefferson Cty. Comm.*, ___U.S. ___, 133 S.Ct. 3

(2012), upheld a West Virginia map in which the deviation from exact population equivalents was 0.7 percent.

Rep. Curtin said that he and Rep. Clyde appreciate the committee's willingness to continue to consider this issue.

Committee Discussion:

Sub. SJR 1 – Public Office Compensation Commission

Chair Mills asked for comment regarding SJR 1, a pending measure in the General Assembly that would create a public office compensation commission. No comments were offered.

Next Steps:

Chair Mills then directed the committee's attention to the question of what its next topic of review should be.

Chair Mills said that at the committee meeting in May, Mr. Steinglass presented a planning worksheet on the sections of Article II that the committee has not yet reviewed. He asked whether the committee had opinions about what topics should take priority at future meetings. Executive Director Steven C. Hollon then clarified for the committee that the planning worksheet is being instituted by staff to keep committees up to date. Mr Hollon said he is trying to plan out three meetings in advance.

Chair Mills said one provision that is difficult, but should be addressed, is the single subject rule. He said the Ohio Supreme Court has rendered several decisions in that area, and he would like to see some research and a presentation on where Ohio stands on the single subject rule, after which the committee would discuss it. Gov. Taft mentioned that Sections 33 to 41, adopted in the early 20th century to overcome some controversial rulings by the Ohio Supreme Court, might be a good topic for review.

New Business:

Chair Mills stated that the committee has been meeting every month, and that July is not the normally scheduled month for this committee to meet. He said that unless there is a strong sentiment to meet in July, the committee would go back to its regular schedule. Committee members expressed their support for this plan.

Adjournment:

There being no old business to come before the committee, Chair Mills said the committee will meet next month to discuss congressional redistricting, as well as to get input from committee members about their preferences in terms of future topics to be taken up by the committee. The meeting adjourned at 3:30 p.m.

Approval:

These minutes of the June 11, 2015 meeting of the Legislative Branch and Executive Branch Committee were approved at the September 10, 2015 meeting of the committee.

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Frederick E. Mills, Chair

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Paula Brooks, Vice-chair

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO: **Chair Fred Mills, Vice Chair Paula Brooks and Members of the Legislative Branch and Executive Branch Committee**

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

FROM: **Steven H. Steinglass, Senior Policy Advisor**

DATE: **August 27, 2015**

RE: ***Arizona State Legislature v. Arizona Independent Redistricting Commission* – The Use of Commissions for Congressional Redistricting**

On June 29, 2015, the United States Supreme Court decided *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S.Ct. 2652 (2015), and upheld the use of an independent redistricting commission to draw boundaries for congressional districts. The case involved a challenge by Arizona state legislators to an initiated constitutional amendment that transferred responsibility for congressional redistricting from the state legislature to a five-member commission. The commission consists of four members appointed by the legislative leadership from a list provided by the state Commission on Appellate Court Appointments and a fifth member appointed by the four other members.

Rationale

The suit alleged that the use of a congressional redistricting commission, which was adopted in Arizona in 2000 by an initiative, violated the Elections Clause of the United States Constitution, which provides: "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." Art. I, § 4, cl. 1.

The decision in the case turned, in part, on whether the word "Legislature" in the Elections Clause refers literally to the representative body that makes the laws, or more broadly to the legislative process.

In upholding the use of the initiative to create the redistricting commission, the Court found it significant that the statutory initiative was part of the Article of the Arizona Constitution that concerned the "Legislative Department."

> The initiative, housed under the article of the Arizona Constitution concerning the "Legislative Department" and the section defining the State's "legislative authority," reserves for the people "the power to propose laws and amendments to the constitution." Art. IV, pt. 1, § 1. The Arizona Constitution further states that "[a]ny law which may be enacted by the Legislature under this Constitution may be enacted by the people under the Initiative." Art. XXII, § 14. Accordingly, "[g]eneral references to the power of the 'legislature" in the Arizona Constitution "include the people's right (specified in Article IV, part 1) to bypass their elected representatives and make laws directly through the initiative."

Arizona State Legislature, 135 S.Ct. at 2660-61 (quoting J. Leshy, The Arizona State Constitution 8–9 (2d ed. 2013).

In addition to the procedural issue of whether the new congressional redistricting procedure could be adopted by initiative, the Court ruled that the delegation of congressional redistricting to an independent commission (no matter whether the delegation was by initiative or by the regular law-making process) was not a violation of the Elections Clause.

Supreme Court Precedents – What is the Legislature? – The Procedural Issue

In construing "Legislature" in the Elections Clause broadly, the Supreme Court relied on three of its decisions involving the relationship between state legislatures and the United States Constitution, two of which arose in Ohio.

In *Davis v. Hildebrant,* 241 U.S. 565 (1915), a 1915 case involving the use of Ohio's newly-minted referendum, the Court agreed with the decision of the Ohio Supreme Court that the referendum "was a part of the legislative power of the State," and held that "[f]or redistricting purposes, *** 'the Legislature' did not mean the representative body alone. Rather, the word encompassed a veto power lodged in the people." *Arizona State Legislature*, 135 S.Ct. at 2666 (quoting *Davis*, 241 U.S. at 569).

In *Hawke v. Smith,* 253 U.S. 221 (1920), which also involved the Ohio referendum, the issue involved Ohio's ratification of the Eighteenth Amendment (Prohibition). The Ohio General Assembly had ratified the Amendment, and the question before the Court was whether the referendum could be used to reject the ratification. In holding that the referendum could not be so used, the Court ruled that Article V, governing ratification, had lodged in "the legislatures of three-fourths of the several States" the sole authority to assent to a proposed amendment. *Id.* at 226. The Court contrasted the ratifying function, exercisable exclusively by a State's legislature, with "the ordinary business of legislation." *Id.* at 229. *Davis v. Hildebrant,* the *Hawke* decision explained, involved the enactment of legislation, *i.e.,* a redistricting plan, and properly held that

"the referendum [was] part of the legislative authority of the State for [that] purpose." *Id*. at 230.

Finally, in *Smiley v. Holm*, 285 U.S. 355 (1932), the Supreme Court addressed whether legislation that redistricted Minnesota's congressional districts was subject to the governor's veto. The Minnesota Supreme Court ruled that it was not, but the United States Supreme Court disagreed and held that the Elections Clause did not place redistricting authority exclusively in the hands of the State's legislature. Thus, the Court held that under the Elections Clause "Legislature" was not limited to the two houses of the legislature but also included the Governor. In so holding, *Smiley* pointed out that state legislatures performed an "electoral" function "in the choice of United States Senators under Article I, section 3, prior to the adoption of the Seventeenth Amendment," a "ratifying" function for "proposed amendments to the Constitution under Article V," *** and a "consenting" function "in relation to the acquisition of lands by the United States under Article I, section 8, paragraph 17." *Smiley*, 285 U.S. at 365-66 (footnotes omitted).

Delegation to a Commission – The Substantive Issue

The Supreme Court's decision in *Arizona State Legislature* focuses primarily on the procedural issue of whether the initiative may be used to adopt a commission-based process for drawing congressional district lines. But the decision also has a substantive leg, and the Court makes clear that state legislatures did not have exclusive authority for adopting policies concerning federal elections, including policies governing congressional redistricting.

Thus, whether states employ the initiative to create redistricting commissions or establish such commissions by legislatively-proposed amendments (or even by simple legislation), it is clear that commissions may be used to draw lines for congressional districts.

Implications on Other Uses of the Initiative

In holding that the Elections Clause did not bar the use of the initiative to draw congressional district lines (or to set up a commission-based procedure for drawing such lines) the Supreme Court pointed to the implications a contrary decision would have on other aspects of election laws.

> Banning lawmaking by initiative to direct a State's method of apportioning congressional districts would do more than stymie attempts to curb partisan gerrymandering, by which the majority in the legislature draws district lines to their party's advantage. It would also cast doubt on numerous other election laws adopted by the initiative method of legislating.

Arizona State Legislature, 135 S.Ct. at 2676.

The Court also noted that a ban on the use of the initiative to address federal election-related issues would call into question the use of the initiative to adopt polices for permanent voter

registration, to ban ballots providing for straight-ticket voting, and to adjust deadlines for voter registration. *Id*.

Finally, the Court pointed out the impact of a narrow reading of the Elections Clause on other (non-initiated) methods of constitutional revision.

> The list of endangered state elections laws, were we to sustain the position of the Arizona Legislature, would not stop with popular initiatives. Almost all state constitutions were adopted by conventions and ratified by voters at the ballot box, without involvement or approval by "the Legislature." Core aspects of the electoral process regulated by state constitutions include voting by "ballot" or "secret ballot," voter registration, absentee voting, vote counting, and victory thresholds. Again, the States' legislatures had no hand in making these laws and may not alter or amend them.

Id. at 2676-77 (footnotes omitted).

Significance of *Arizona State Legislature*

The decision in *Arizona State Legislature* removes an obstacle to the adoption of a commission-based method for drawing congressional district lines. Thus, the Ohio proposed joint resolutions delegating responsibility for drawing congressional district lines to a commission, *see* SJR 2 & HJR 2 (131st GA), would seem to pass constitutional muster.

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO:	**Chair Fred Mills, Vice Chair Paula Brooks and Members of the Legislative Branch and Executive Branch Committee**
CC:	**Steven C. Hollon, Executive Director**
FROM:	**Steven H. Steinglass, Senior Policy Advisor**
DATE:	**August 28, 2015**
RE:	***Evenwel v. Abbott* – Use of the Decennial Census for Drawing State Legislative Districts**

On May 26, 2015, the United States Supreme Court agreed to review *Evenwel v. Abbott*, 135 S.Ct. 2349 (2015), *noting prob. juris. to Evenwel v. Perry*, 2014 WL 5780507 (W.D. Tex. Nov. 5, 2014), for the purpose of reviewing a three-judge district court decision that held that the "one-person, one-vote" principle under the Equal Protection Clause allows states to rely exclusively on total population and does not require the use of *voter* population when drawing state legislative districts.

In the Jurisdictional Statement, the appellants defined the question presented as follows:

> In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that the Equal Protection Clause of the Fourteenth Amendment includes a "one-person, one-vote" principle. This principle requires that, "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970). In 2013, the Texas Legislature enacted a State Senate map creating districts that, while roughly equal in terms of total population, grossly malapportioned voters. Appellants, who live in Senate districts significantly overpopulated with voters, brought a one-person, one-vote challenge, which the three-judge district court below dismissed for failure to state a claim. The district court held that Appellants' constitutional challenge is a judicially unreviewable political question.

> The question presented is whether the "one-person, one-vote" principle of the Fourteenth Amendment creates a judicially enforceable right ensuring that the districting process does not deny voters an equal vote.

And in their Brief, the Appellants described their position in further detail.

> [T]he "population" States must equalize for one-person, one-vote purposes is the population of eligible voters. That does not mean that every State must cease using decennial Census figures to draw districts. Total population data often protect the one-person, one-vote rights of eligible voters because non-voters typically are evenly distributed throughout a given jurisdiction. But as this case demonstrates, that is not always true. When total population figures do not protect eligible voters, demographic data that ensures "the vote of any citizen is approximately equal in weight to that of any other citizen in the State" must be used in the apportionment process.

Appellants' Brief, at p. 15.

The case is presently being briefed, and the Appellees have until September 18, 2015, to file their brief. The Court has not yet scheduled oral argument.

Background

The Texas policy of drawing legislative district lines by looking to population is the same policy that is followed in most states. The Supreme Court, however, has never directly addressed whether the use of census-based population number must be supplemented with other population measurements such as the total numbered of registered voters.

In an effort to simplify the issues in *Evenwel*, Lyle Denniston has written the following on the SCOTUS Blog:

> The "overriding objective" in pursuing the "one person, one vote" mandate, the Court said in 1964, "must be substantial equality of population among the various districts so that the vote of a citizen is approximately equal in weight to that of any other citizen in the state." It would say later that absolute mathematical equality is not required, and that some departure from equality is permitted to serve other legitimate state policies or interests.
>
> Still, the starting point of the exercise is population — so far, population without a constitutionally binding definition. If practice were controlling, because this is how it's done in most states, the starting point would be a state's total population divided by the number of election districts, for state legislatures or for a state's delegation to the U.S. House of Representatives. The usual measure of whether the equality principle has been denied is to compare the numbers gap (technically,

the "maximum deviation") between the most-populated district and the least-populated district.

* * *

In a 1966 decision, in a Hawaii state legislative redistricting case, *Burns v. Richardson*, however, the Supreme Court found no constitutional fault with a state drawing new districts as measured by the number of registered voters, provided that this would not lead to a gap that is significantly different from the result if total population per district had been used instead. What remains most important, the Court indicated, was that the result satisfies "one person, one vote."

In 2001, the Court refused to hear a case, *Chen v. City of Houston*, in which voters challenged a citywide redistricting plan that started with total population. The result, the challengers said, was that some districts were unequal in their voter numbers, compared to other districts, with the result that their own votes were diluted in strength. Only Justice Clarence Thomas filed a dissent, saying that the Court would eventually need to take on a case to fill the gap on the population metric to be used.

The question of the starting point, of course, gets quickly into the democratic theory of who is supposed to be – or entitled to be – represented in elected chambers.

If total population is the measure, many people who can't vote at all are counted: children under the age of eighteen, prison inmates and others convicted of crime, non-citizens including those living legally in the United States. Are they entitled to have their interests taken into account by an elected official whom they had no role in choosing? Does counting them give them some clout?

If a state is a "red" state or a "blue" state, with heavier registration for voters in one major party or the other, is counting by registered voter totals true to "one person, one vote"? What about a state where one party has among its followers a lot of poor people who tend not to vote or even register: what measure is better for them? Among voters, what is a fairer measure: those who register, or those who are eligible to vote but some of whom don't register?

If a state is dominated by those in urban areas who vote more dependably, will the Democrats benefit most from one measure instead of another? Or how about a state dominated by voters in suburbia who are more likely to vote: will Republicans do better with one measure or another?

The Court *** has the option of simply concluding, in the end, that the choice should be left to the states themselves to pick a population metric, and then have that tested to see whether near equality does result. But if the Court is inclined to

> make one measure constitutionally binding, it would need a representation theory to back that up. The Constitution's text, of course, is not much help: it just insists on equality, period. And the constitutional doctrine of "one person, one vote" is not self-defining, so the Court has to make it functional.
>
> [The *Evenwel* case involves] *** the maps drawn up by the Texas state legislature in 2013, for filling the thirty-one seats in the state senate. Its starting point was total population, divided by thirty-one. It came close to equality: the largest-to-smallest numbers gap was 8.04 percent, definitely within the ten percent the Court has allowed.
>
> But those maps were challenged by two voters, Sue Evenwel and Edward Pfenninger, who regularly exercise their right to vote. They interpret "one person, one vote" to require equality of voters, so they argue that the Constitution requires voting-age population to be the starting point. Each of them lives in a district where the voting-age population is considerably larger than in some other districts, so they argue that their votes are diluted, comparatively. In other words, it takes more of them to decide an election in their district, so their votes are less weighty. If there is an "ideal" district in terms of numbers, Evenwel says, her district is thirty-one percent larger, and Pfenninger says that his is forty-nine percent larger.
>
> They sued in a three-judge federal district court, but lost. The judges ruled that the choice of the population starting point is one for the legislature to make. The starting point, that Court said, goes directly to "the nature of representation," and that should be a choice made by the elected representatives of the people.

Lyle Denniston, *The new look at "one person, one vote," made simple,* SCOTUS Blog (July 27, 2015). Available at: http://www.scotusblog.com/2015/07/the-new-look-at-one-person-one-vote-made-simple/ (accessed Aug. 25, 2015).

Implications for Ohio

Article XI, Section 2 of the Ohio Constitution relies on the federal decennial census for drawing district lines for the General Assembly, as does HJR 12 (130th GA), which will be on the November 2015 ballot. Likewise, the two joint resolutions that are pending in the 131st General Assembly, *see* SJR 2 (131st GA) & HJR 2 (131st GA), also use the federal decennial census for congressional redistricting.

If the Supreme Court required the use of voter registration to supplement the use of the decennial census, both the current and the proposed methods for drawing legislative district lines in Ohio based on the decennial census could be used initially but would have to be supplemented by voter registration data.

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO:	**Chair Fred Mills, Vice Chair Paula Brooks and Members of the Legislative Branch and Executive Branch Committee**
CC:	**Steven C. Hollon, Executive Director**
FROM:	**Shari L. O'Neill, Counsel to the Commission** **Stacia Rapp, Legal Intern**
DATE:	**August 17, 2015**
RE:	**Ohio Supreme Court Jurisprudence Relating to Article II, Section 15(D) (How Bills Shall Be Passed; One Subject)**

As an introduction to the Legislative Branch and Executive Branch Committee's consideration of the single-subject, or one-subject, rule, as set forth in Article II, Section 15(D), staff provides this brief review of Ohio Supreme Court cases interpreting the rule.

Article II, Section 15(D) provides:

> No bill shall contain more than one subject, which shall be clearly expressed in its title. No law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed.

Currently pending in the Ohio Supreme Court is *State ex rel. Ohio Civ. Serv. Emps. Assn. v. State*, 2013-Ohio-4505, 2 N.E.3d 304 (10th Dist.), Supreme Court Case Number 2014-0319 *("OCSEA")*.

In *OCSEA*, the plaintiff parties sued the state, arguing Am. Sub. H.B. 153 ("H.B. 153"), the budget bill enacted by the 129th General Assembly, violated the one subject rule because it contained a series of changes relating to state contracts for the operation and management of private prisons.

In reversing the trial court's ruling that the prison privatization provisions of the bill did not violate the one-subject rule, the Tenth District found there "appears to be no common purpose or relationship between the budget-related items in H.B. No. 153 and the prison privatization provisions." The court recognized that while the sale of state prisons certainly impacts the state budget, allowing provisions authorizing the sale to be included in an appropriations bill would "render the one-subject rule meaningless" because "virtually any statute arguably impacts the state budget, even if only tenuously." The court clarified that:

> A bill may "establish an agency, set out the regulatory program, and make an appropriation for the agency without violating the one-subject rule," but a general appropriations bill cannot constitutionally establish a substantive program related to the subject of appropriations only insofar as it impacts the budget. *Ohio AFL-CIO at 229*, quoting Rudd at 441; *see Ohio Civ. Serv. Emps. Assn. at ¶ 33*; *Simmons-Harris at 17*. The prison privatization provisions contained in *R.C. 9.06* and section 753.10 are significant and substantive. However, given that such provisions amount to approximately twenty of over three thousand pages in H.B. No. 153, they are "in essence little more than a rider attached to an appropriations bill." *Simmons-Harris at 16.*

OCSEA, supra at paragraph 21.

The court thus concluded that the record contained "no rational reason for the combination of the prison privatization provisions and the budget-related appropriations," a fact that suggested the combination was "for tactical reasons." *Id.* at paragraph 22, *citing Simmons-Harris at 16-17*, citing *Dix at 145*.

In June, 2014, the Supreme Court of Ohio accepted review, holding oral argument on May 20, 2015.

Background

One purpose of the one-subject rule is to prevent logrolling, occurring when two disharmonious proposals incapable of passing the General Assembly on their own merits are combined into one bill in order to garner the votes in favor of each. The theory behind logrolling is that when the votes from each independent bill are combined, the new bill will have enough votes to pass the General Assembly. But this approach can produce an "unnatural combination" of topics with dissimilar subjects. *Id.*; *State ex rel. Dix v. Celeste*, 11 Ohio St.3d 141, 142-43; 464 N.E.2d 153, 155 (1984).

The one-subject rule also is seen as eliminating "riders;" in other words, provisions incapable of passing the General Assembly on their own merits. *OCSEA, supra*, at paragraph 9; *Dix, supra*, 11 Ohio St.3d at 143, 464 N.E.2d at 155. Riders are especially present on the generally-passable appropriation bills, as occurred in *OCSEA*. *OCSEA, supra*; *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 1999-Ohio-77, 711 N.E.2d 203 (1999).

Because the one-subject rule is capable of invalidating any enactment fitting these descriptions, the Supreme Court of Ohio has declared that this rule cannot be "directory," but rather is mandatory. *In re Nowak*, 104 Ohio St.3d 466, 2004-Ohio-6777. In analyzing a possible violation of the one-subject rule, the court begins with the presumption that the statute is constitutional. *OCSEA, supra; Dix, supra,* 11 Ohio St.3d at 145, 464 N.E.2d at 155. This presumption ensures that the General Assembly has the ability to pass comprehensive legislation. Next, the court performs a "semantic and contextual analysis," which is conducted on a case-by-case basis. A bill does not violate the one-subject rule merely because it covers multiple topics; it violates the rule when its topics do not share a "common purpose or relationship." *OCSEA, supra,* at paragraph 11; *State ex rel. Ohio Civ. Serv. Emp. Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688, at paragraph 27. Simply lacking a "common purpose or relationship" is not enough, however – a violation of the one-subject rule must be "manifestly gross and fraudulent" for the provisions to be declared unconstitutional. *OCSEA, supra,* at paragraph 11; *Nowak, supra,* at paragraph one of the syllabus.

Ohio Supreme Court Case Precedent

State ex rel. Dix v. Celeste (1984)

In *State ex rel. Dix v. Celeste, supra,* the court ruled that Am. Sub. S.B. 227 did not violate the one-subject rule because the appropriations provision being contested was "reasonably necessary" for implementing the programs created in the bill. The statute in question replaced the Ohio Development Financing Commission, giving the duties to the Director of Development. The statute also contained an appropriations provision which provided direct funding for these activities and programs. Concluding that the appropriations related directly to the programs being created and established, the court held that the appropriations did not violate the one-subject rule because they were "simply the means by which the act is carried out." *Id.*, 11 Ohio St.3d at 146, 464 N.E.2d at 158.

Emphasizing that the one-subject rule is designed to prevent logrolling and the use of riders to pass provisions that otherwise would not have enough support to pass on their own, *Dix* nevertheless held that the rule is merely directory, not mandatory, with a purpose of creating a fair and orderly legislative process. The court noted that, by limiting bills to a single subject, the rule allows legislators to focus on a single issue without being distracted by extraneous questions. As a result, the goal of the rule is to enhance the legislative process, not to hamper it.

As the court explained, the General Assembly has the power to create laws, limited only by the Ohio and United States Constitutions. The legislative oath to uphold the constitution safeguards that legislators will follow this limitation, leading to a strong presumption that the laws passed by the General Assembly are constitutional. However, *Dix* recognized a caveat, stating that "a manifestly gross and fraudulent violation" of the one-subject rule would render a statute unconstitutional. *Id.*, 11 Ohio St.3d at 145, 464 N.E.2d at 157, following *Pim v. Nicholson*, 6

Ohio St.176, 180 (1856). Thus, a statute lacking "a common purpose or relationship between specific topics in an act," with "no discernible practical, rational, or legitimate reasons for combining the provisions in one act" would establish "a manifestly gross and fraudulent violation," suggesting that the statute was drafted for the tactical purpose of logrolling. *Id.*

State ex rel. Hinkle v. Franklin Cty. Bd. of Elections (1991)

In *State ex rel. Hinkle v. Franklin Cty. Bd. of Elections*, 62 Ohio St.3d 145, 580 N.E.2d 767 (1991), the court considered Am. Sub. H.B. 200, a bill that: (1) created an environmental division in the Franklin County Municipal Court and a judge for that division, amended related provisions, and created the Clermont County Municipal Court; (2) created a new judgeship for Lucas County; (3) made revisions to municipal and county court law; (4) changed the disposition of some fines paid to municipal and county courts; and (5) defined a "residence district" within the liquor control law in order to exercise the "local option privilege." Plaintiffs contended that the "residence district" definition provision violated the one-subject rule. Defendants argued that this provision was of the same subject as the judicial provisions because all of the provisions pertained to elections. The court held that this connection was "merely coincidental" and severed the "residence district" definition provision from the bill. *Id.*, 62 Ohio St.3d at 148-49, 580 N.E.2d at 770. Relying on *Dix*, the court upheld the directory nature of the one-subject rule and emphasized that assertions by the General Assembly that the provision complies with the constitution would be considered during court review. In so holding, the court reiterated that the one-subject rule will allow a plurality of topics but not a disunity of subjects. *Id.*, citing *ComTech Systems, Inc. v. Limbach*, 59 Ohio St.3d 96, 99, 570 N.E.2d 1089, 1093 (1991).

State ex rel. Ohio AFL-CIO v. Voinovich (1994)

In *State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St.3d 225, 631 N.E.2d 582 (1994), the bill at issue made structural changes to both the Industrial Commission of Ohio and the Ohio Bureau of Workers' Compensation, appropriated funds for these institutions, altered workers' compensation claims procedures, created an intentional tort for employment, and created a child labor exception for the entertainment industry. The court declared that the appropriations provision of the bill was allowed because it was the method by which the bill would be carried out, and it was still within the same subject as the rest of the bill. The court, however, invalidated the child labor provision and the intentional tort provisions as violations of the one-subject rule because they did not relate to the bill's common purpose.

Simmons-Harris v. Goff (1999)

Simmons-Harris v. Goff, supra, questioned the constitutionality of a biennial appropriations bill because it contained provisions establishing the "School Voucher Program." *Id.* at paragraph 17. The court deemed the provisions establishing the program to be a rider because they only accounted for ten pages of a more-than-one-thousand-page bill. The court then found that this rider established a substantive program, concluding that a substantive program created within an appropriations bill violates the one-subject rule.

State ex rel. Ohio Academy of Trial Lawyers v. Sheward (1999)

In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999), the court struck down Am. Sub. H.B. 350, a broad-ranging tort reform bill that the court said "mark[ed] the first time in modern history that the General Assembly has openly challenged this court's authority to prescribe rules governing the courts of Ohio and to render definitive interpretations of the Ohio Constitution binding upon the other branches." *Id.*, 86 Ohio St.3d at 459, 715 N.E.2d at 1073.

Applying the one-subject rule, the court held the bill unconstitutional *in toto*, despite the court's stated reliance on the strong presumption in favor of constitutionality and the "manifestly gross and fraudulent" caveat as outlined in *Dix*. *Id.*, 86 Ohio St.3d at 495-97, 715 N.E.2d at 1098-99. In enacting the legislation, the General Assembly had explained Am. Sub. H.B. 350 as changing "the laws pertaining to tort and other civil actions." *Id.*, 86 Ohio St.3d at 494, 715 N.E.2d at 1097. In addition, the General Assembly attempted to ensure the constitutionality of the bill by including in the title that "The General Assembly further recognizes the holdings in" *Voinovich* and *Dix*, "and finds that a common purpose or relationship exists among the sections, representing a potential plurality but not disunity of topics, notwithstanding that reasonable minds might differ in identifying more than one topic contained in the bill." *Id.* Undeterred by the legislature's attempt to endorse the bill's constitutionality, the court concluded that Am. Sub. H.B. 350 was an unconstitutional exercise of legislative authority, both under the one-subject rule and on the grounds that it violated the separation of powers doctrine. *Id.*, 86 Ohio St.3d at 499, 494, 715 N.E.2d at 1101, 1097.

Reflecting on syllabus law in *Dix*, the court stated that the one-subject rule is merely directory, but "it is within the *discretion* (emphasis added) of the courts to rely upon the judgment of the General Assembly as to a bill's compliance with the constitution." *Id.*, 86 Ohio St.3d at 494, 715 N.E.2d at 1097. Although the court continued to recognize the strong presumption in favor of constitutionality, it also acknowledged the potential presence of logrolling, explaining it as a separation-of-powers issue. As a result, the court struck down Am. Sub. H.B. 350 on the grounds that the connections between its multi-topic provisions were too tenuous to create a common purpose. *Id.*, 86 Ohio St.3d at 497, 715 N.E.2d at 1099.

The court reasoned that one could pick out two provisions from the bill with the goal of creating a common purpose, but that the bill as a whole had no common purpose. As an example, the court noted that the bill attempted to relate wearing seat belts to an employment discrimination claim, and tried to connect class action claims arising out of securities sales to limits on agency liability in a hospital suit. "The various provisions in this bill are so blatantly unrelated that, if allowed to stand as a single subject, this court would be forever left with no basis upon which to invalidate any bill, no matter how flawed." *Id.*, 86 Ohio St.3d at 498, 715 N.E.2d at 1100. The court explained the danger of this inability to uphold the constitutional restriction: "If we accept this notion, the General Assembly could conceivably revamp all Ohio law in two strokes of the legislative pen – writing once on civil law and again on criminal law." *Id.*, 86 Ohio St.3d at 499, 715 N.E.2d at 1101. Therefore, the court chose to declare the entire law unconstitutional

because it was deemed too large an undertaking to try to find a common purpose among the many provisions of the bill. *Id.*, 86 Ohio St.3d at 500, 715 N.E.2d at 1101.

State ex rel. Ohio Civ. Serv. Emp. Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd. (2004)

State ex rel. Ohio Civ. Serv. Emps. Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd., *supra*, involved whether the one-subject was violated when a bill loosely classifying itself as an appropriations bill included a provision that excluded Ohio School Facilities Commission employees from the collective bargaining process. The court declared this provision a violation of the one-subject rule because the bill did not explain how the exclusion of these employees would clarify or alter the appropriation of state funds, and so a common purpose or relationship between the provisions was absent. The court concluded that a provision's impact on the state budget does not automatically authorize its constitutional inclusion in an appropriations bill just because the other provisions in the bill also impact the budget.

In re Nowak (2004)

In *In re Nowak*, *supra*, the court held the inclusion of former R.C. 5301.234 in Am. Sub. H.B. No. 163 was unconstitutional under the one-subject rule. The case stands out as the first time the court concluded the one-subject rule is mandatory, not directory.

Again taking a separation-of-powers approach to the one-subject rule, the court reaffirmed a historical point noted in *Sheward*, that the one-subject rule was created in order "to rein in the inordinate powers that were previously lodged in the General Assembly and to ultimately achieve a proper functional balance among the three branches of our state government." *Nowak*, *supra*, at paragraphs 29-30. In addition, the court reviewed prior one-subject rule cases in light of this fact, finding that the court's prior holdings sent a mixed message. The court concluded its rulings over the years had failed to appreciate the "painfully obvious" fact that the rule could not be merely directory and yet, at the same time, be used to declare unconstitutional an enactment that is determined to be a "manifestly gross and fraudulent violation" of the rule. *Id.* at paragraphs 35, 36.

In *Nowak*, the court reviewed the definition of a "directory" provision, stating that these provisions do not give a court the power to invalidate a statute that violates the directory provision. *Id.* at paragraph 37. Therefore, by labeling the one-subject rule as directory while also allowing the invalidation of statutes that violate the caveat, the directory label was, as the court called it, "an oxymoron." *Id.* at paragraph 38. The court then reviewed dicta from *Dix* that acknowledged that both the court's goal of creating a strong presumption of legislative legitimacy and the goal of preventing logrolling could all be accomplished through a mandatory label of the rule and the use of the manifestly gross and fraudulent caveat. *Nowak* at paragraph 46; *Dix*, *supra*, 11 Ohio St.3d at 144, 464 N.E.2d at 156 ("While Ohio is the only state which holds its one-subject provision to be directory rather than mandatory, other states have achieved the laudable aim of judicial non-interference in the legislative process by holding that their one-subject constitutional provisions should be liberally construed or that they should be construed so

as not to hamper the legislature or to embarrass honest legislation."). Attempting to resolve the contradiction, the court held in *Nowak* that the one-subject rule is mandatory in nature because it is capable of invalidating a statute. Nevertheless, the court said its holding in *Nowak* did not reverse any other portion of the court's prior jurisprudence in the area of the one-subject rule. *Id.* at paragraph 55.

As for the statute at issue, the court described Am. Sub. H.B. 163 (the bill enacting R.C. 5301.234) as a large bill, amending, enacting, and repealing provisions relating to major utility facility certifications for aviation and construction, Department of Transportation regulations, liquor control, food stamp theft, and county auditor compensation. In addition to all of these provisions, the bill enacted the mortgage statute at issue in the case. The bill contained no title stating its overall subject matter. Petitioner sought to have the court recognize a two-part test for one-subject rule cases that would look first for a common purpose tying all of the topics together, and if that was missing, would look for direct evidence of logrolling before the statute could be invalidated. The court rejected that argument, stating that a court need not look to extrinsic evidence of logrolling because the text of the bill is enough to establish whether there has been a violation of the one-subject rule. Finding no common purpose to unite R.C. 5301.234 to the rest of the bill, the court held the statute to be unconstitutional and severed it from the bill, leaving the rest of the bill intact.

Conclusion

It is hoped that this review of Supreme Court jurisprudence relating to Article II, Section 15(D) will assist the committee's understanding of the one-subject rule, and will aid discussion on whether to maintain the one-subject rule as it is now written.

Staff will continue to monitor the progress of the *OCSEA* case, and will provide an update to the committee as soon as the court issues its decision.

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Legislative Branch and Executive Branch Committee

Planning Worksheet
(September 2015)

Article II - Legislative	
Sec. 2	Election and term of state legislators (1967, am. 1992)
Notes:	**Report and recommendation approved by committee (04.09.2015)**
Sec. 3	Residence requirements for state legislators (1851, am. 1967)
Notes:	
Sec. 4	Dual office and conflict of interest prohibited (1851, am. 1973)
Notes:	
Sec. 5	Who shall not hold office (1851)
Notes:	
Sec. 6	Powers of each house (1851, am. 1973)
Notes:	
Sec. 7	Organization of each house of the General Assembly (1851, am. 1973)
Notes:	
Sec. 8	Sessions of the General Assembly (1973)
Notes:	
Sec. 9	House and Senate Journals (yeas and nays) (1851, am. 1973)
Notes:	
Sec. 10	Rights of members to protest (1851)
Notes:	
Sec. 11	Filling vacancy in House or Senate (1851, am. 1961, 1968, 1973)
Notes:	
Sec. 12	Privilege of members from arrest, and of speech (1851)
Notes:	
Sec. 13	Legislative sessions to be public; exceptions (1851)
Notes:	
Sec. 14	Power of adjournment (1851, am. 1973)
Notes:	
Sec. 15	How bill shall be passed (1973)
Notes:	

Legislative Branch and Executive Branch Committee

Planning Worksheet
(September 2015)

Sec. 16	Bills to be signed by governor; veto (1851, am. 1903, 1912, 1973)
Notes:	
Sec. 17	Signing of all bills and joint resolutions by the presiding officer of each house (1851)
Notes:	**Repealed (1973)**
Sec. 18	Style of laws (1851)
Notes:	**Repealed (1973)**
Sec. 19	Exclusion of senators and representatives from appointment to any civil office of this state (1851)
Notes:	**Repealed (1973)**
Sec. 20	Term of office, and compensation of officers in certain cases (1851)
Notes:	
Sec. 21	Contested elections (1851)
Notes:	
Sec. 22	Appropriations (1851)
Notes:	
Sec. 23	Impeachments; how instituted and conducted (1851)
Notes:	
Sec. 24	Officers liable to impeachment; consequences (1851)
Notes:	
Sec. 25	When sessions commence (1851)
Notes:	**Repealed (1973)**
Sec. 26	Laws to have a uniform operation (1851)
Notes:	
Sec. 27	Election and appointment of officers; filling vacancies (1851, am. 1953)
Notes:	
Sec. 28	Retroactive laws (1851)
Notes:	
Sec. 29	No extra compensation; exceptions (1851)
Notes:	
Sec. 30	New counties (1851)
Notes:	

Legislative Branch and Executive Branch Committee

Planning Worksheet
(September 2015)

Sec. 31	Compensation of members and officers of the General Assembly (1851)
Notes:	
Sec. 32	Divorces and judicial power (1851)
Notes:	
Sec. 33	Mechanics' and contractors' liens (1912)
Notes:	
Sec. 34	Welfare of employees (1912)
Notes:	
Sec. 34a	Minimum Wage (2006)
Notes:	
Sec. 35	Workers' compensation (1912, am. 1923)
Notes:	
Sec. 36	Conservation of natural resources (1912, am. 1973)
Notes:	
Sec. 37	Workday and workweek on public projects (1912)
Notes:	
Sec. 38	Removal of officials for misconduct (1912)
Notes:	
Sec. 39	Regulating expert testimony in criminal trials (1912)
Notes:	
Sec. 40	Registering and warranting land titles (1912)
Notes:	
Sec. 41	Prison labor (1912, am. 1978)
Notes:	
Sec. 42	Continuity of government operations in emergencies caused by enemy attack (1961)
Notes:	

Legislative Branch and Executive Branch Committee

Planning Worksheet
(September 2015)

Article III - Executive	
Sec. 1	Executive department; key state officers (1851, am. 1885)
Notes:	
Sec. 1a	Joint vote cast for governor and lieutenant (1976)
Notes:	
Sec. 1b	Lieutenant governor duties assigned by governor (1976)
Notes:	
Sec. 2	Term of office of key state officers (1851, am. 1954, 1992)
Notes:	
Sec. 3	Counting votes for key state officers (1851, am. 1976)
Notes:	
Sec. 4	Returns of election made to the secretary of state when there is no session of the General Assembly in January after an election (1851)
Notes:	**Repealed (1976)**
Sec. 5	Executive power vested in governor (1851)
Notes:	
Sec. 6	Governor to see that laws executed; may require written information (1851)
Notes:	
Sec. 7	Governor's annual message to General Assembly; recommendations for legislators (1851)
Notes:	
Sec. 8	Governor may convene special session of legislature with limited purposes (1851, am. 1912)
Notes:	
Sec. 9	When he may adjourn the legislature (1851)
Notes:	
Sec. 10	Governor is commander-in-chief of militia (1851)
Notes:	
Sec. 11	Governor may grant reprieves, commutations and pardons (1851, am. 1995)
Notes:	
Sec. 12	Seal of the state, and by whom kept (1851)
Notes:	

Legislative Branch and Executive Branch Committee

Planning Worksheet
(September 2015)

Sec. 13	How grants and commissions issued (1851)
Notes:	
Sec. 14	Who is ineligible for governor (1851)
Notes:	
Sec. 15	Succession in case of vacancy in office of governor (1976)
Notes:	
Sec. 16	Duties of Lieutenant Governor (1851)
Notes:	**Repealed (1976)**
Sec. 17	If a vacancy shall occur while executing the office of governor, who shall act (1976)
Notes:	
Sec. 17a	Filling a vacancy in the office of lieutenant governor (1989)
Notes:	
Sec. 18	Governor to fill vacancies in key state offices (1851, am. 1969)
Notes:	
Sec. 19	Compensation of key state officers (1851)
Notes:	
Sec. 20	Annual report of executive officers (1851)
Notes:	
Sec. 21	Appointments to office; advice and consent of Senate (1961)
Notes:	
Sec. 22	Supreme Court to determine disability of governor or governor elect; succession (1976)
Notes:	

Legislative Branch and Executive Branch Committee

Planning Worksheet
(September 2015)

Article IX - Militia	
Sec. 1	Who shall perform military duty (1851, am. 1953, 1961)
Notes:	
Sec. 2	Election of certain officers (1851)
Notes:	**Repealed (1953)**
Sec. 3	Appointment of militia officers (1851, am. 1961)
Notes:	
Sec. 4	Power of governor to call forth militia (1851, am. 1961)
Notes:	
Sec. 5	Public arms; arsenals (1851)
Notes:	

Legislative Branch and Executive Branch Committee

Planning Worksheet
(September 2015)

Article XI - Apportionment	
Sec. 1	Persons responsible for apportionment of state for members of General Assembly (1967)
Notes:	
Sec. 2	Ratio of representation in house and senate (1967)
Notes:	
Sec. 3	Population of each House of Representatives district (1967)
Notes:	
Sec. 4	Population of each Senate district (1967)
Notes:	
Sec. 5	Representation for each house and senate district (1967)
Notes:	
Sec. 6	Creation of district boundaries; change at end of decennial period (1967)
Notes:	
Sec. 6a	Additional senators for districts with a ratio of representation greater than one (1956)
Notes:	**Repealed (1967)**
Sec. 7	Boundary lines of House and Representatives districts (1967)
Notes:	
Sec. 8	Determination of number of House of Representatives districts within each county (1967)
Notes:	
Sec. 9	When population of county is fraction of ratio of representation (1967)
Notes:	
Sec. 10	Division of state into house districts; standards (1967)
Notes:	
Sec. 11	Senate districts; formation (1967)
Notes:	
Sec. 12	Term of senators on change of district boundaries of Senate (1967)
Notes:	
Sec. 13	Jurisdiction of Supreme Court, effect of determination of unconstitutionality; apportionment (1967)
Notes:	

Legislative Branch and Executive Branch Committee

Planning Worksheet
(September 2015)

Sec. 14	Continuation of present district boundaries (1967)
Notes:	
Sec. 15	Severability provision (1967)
Notes:	

Article XIV - Ohio Livestock Care Standards Board	
Sec. 1	Ohio Livestock Care Standards Board (2009)
Notes:	
	Prior article XIV: Jurisprudence, §1 – 3, Repealed – provided for the appointment of three commissioners by the General Assembly to revise the practice, pleadings, forms and proceedings of the courts of record of the state and to provide a uniform mode of proceeding (1851, rep. 1953)
Notes:	

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

TO: **Chair Frederick E. Mills, Vice Chair Paula Brooks, and Members of the Legislative Branch and Executive Branch Committee**

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

FROM: **Steven H. Steinglass, Senior Policy Advisor**

RE: **Article II Issues**

DATE: **May 7, 2015**

At the December 11, 2014 meeting of the Legislative Branch and Executive Branch Committee, I provided a general overview of the provisions contained in Article II of the Ohio Constitution and identified issues that might merit further consideration by the committee. This memorandum builds on that presentation and provides additional information about Article II issues that the committee might wish to review. Attached to this memorandum is a summary of the highlights of my December 11, 2014 presentation.

This memorandum will not address issues already considered or being considered by the committee, including congressional redistricting, term limits, and the creation of a public office compensation commission.

1970s Review of Article II

One of the major accomplishments of the 1970s Ohio Constitutional Revision Commission ("1970s Commission") was its thorough review of Article II and the recommendations that it made concerning approximately 10 sections of this Article. The committee may wish to learn more about not only what was accomplished as a result of this legislative review, but also which proposals did not make it out of the Commission and which recommendations, if any, never made it to the ballot.

Sections 1 and 1a to 1g - Plenary Power, Initiative and Referendum

These sections were assigned to the Constitutional Revision and Updating Committee.

Section 2 - Length of Legislative Terms

The committee recently has approved a report and recommendation that would extend the existing term limits for state legislators from eight years to twelve years.

Section 3 - Residency Requirements for State Legislators

The one-year residency requirement adopted in 1851 permitted legislators to live outside their district as long as they lived within the county in which their district was located. The 1973 amendment required legislators to live in their districts.

Section 4 - Dual Office and Conflict of Interest Prohibited

This provision was revised as a result of the 1970s Commission's review of Article II.

Section 5 - Embezzlers Holding Public Office

This provision that has not changed since its adoption in 1851 prohibits persons convicted of embezzlement from holding public office. This provision was the subject of two attempted repeals in the 1970s. A recommendation by the 1970s Commission to repeal this provision was part of a three-issue joint resolution the Ohio Supreme Court removed from the ballot in 1972 for violating the "one amendment" rule of Article XVI, Section 1. A stand-alone proposal to repeal Article II, Section 5 was rejected by the voters on May 8, 1973, by a vote of 848,743 to 530,232.

The constitution has two related provisions on the ability of those convicted of felonies to hold public office. Under Article XV, Section 4, "no person shall be elected or appointed unless possessed of the qualifications of an elector." Article V, Section 1 establishes the qualifications of an elector, and Article V, Section 4 gives the General Assembly the power to exclude from the privilege of voting, or of being eligible to office, any person convicted of a felony." Thus, with the exception of the special provision for "embezzlers," the right to serve in the General Assembly (and in other public offices) tracks the right to vote.

The committee may want to review the continued presence in the constitution of a provision specifically barring only those convicted of embezzlement from holding "any office in this state." The committee may also want to examine the relationship of the embezzlement provisions with other provisions dealing with eligibility for service in public office.

Section 6 - Powers of Each House

This provision was revised as a result of the 1970s Commission's review of Article II.

Section 7 - Organization of each House of the General Assembly

This provision was revised as a result of the 1970s Commission's review of Article II.

Section 8 - Annual Sessions and Special Sessions

Under the 1802 constitution, sessions of the General Assembly were annual, but the 1851 constitution sought to reduce the power of the General Assembly by creating biennial sessions. By 1857, however, the General Assembly was again meeting in annual sessions through a parliamentary device; they would "recess" at the end of the regular session and a second session would be held in "adjournment" during the second year. This practice continued until 1973, when this section was amended to conform the constitution to the prevailing practice. Under the new section, the General Assembly is able to have annual sessions by convening the first regular session in odd-numbered years and a second regular session in the following year.

The second part of this section defines special sessions of the General Assembly. Before 1973, only the governor (in accordance with Article III, Section 8) could call special sessions of the legislature. The 1973 amendment to this section allows either the governor or the presiding officers of both houses, acting jointly, to convene special sessions. The proclamation convening special sessions under this section may, but need not, limit the purpose of the session. The delegation to the General Assembly of the power to convene special sessions came largely in response to a report of the Citizens Conference on State Legislatures in the early 1970's. The report ranked Ohio forty out of the fifty states in the control the legislature had over its own activities and in its independence from the other branches of government. One of the reasons given in the report was the General Assembly's lack of power to call special sessions.

Section 9 - House and Senate Journals

This provision was revised as a result of the 1970s Commission's review of Article II.

Section 10 - Rights of Members to Protest

Adopted in 1851, this provision gives any member of either house the right to protest against any act or resolution and to have the protest and the reasons for it entered without alteration in the journal.

Section 11 - Filling Vacancy in House or Senate Seat

This provision was revised as a result of the 1970s Commission's review of Article II.

Section 12 - Privilege of Member from Arrest

Adopted in 1851, this provision provides that members of the General Assembly are privileged from arrest while going to and from the General Assembly.

Section 13 - Legislative Sessions to Be Public

Adopted in 1851, this provision requires legislative sessions to be public unless two-thirds of those present conclude that secrecy is required.

Section 14 - Power of Adjournment

This provision was revised as a result of the 1970s Commission's review of Article II.

Section 15 - How Bills Shall Be Passed

This provision was revised as a result of the 1970s Commission's review of Article II.

Section 15(D) - One-Subject Requirement

Article II, Section 15(D) provides that "[n]o bill shall contain more than one subject, which shall be clearly expressed in its title." This provision has been the subject of much litigation during the last 35 years, including an important case now pending before the Ohio Supreme Court. *See State ex rel. Ohio Civil Service Employees Association v. State*, No. 2014-0319 (accepting discretionary appeal and cross appeal of a Tenth District Court of Appeals decision holding that a claim that prison privatization provisions in the budget bill stated a claim for a violation of the "one subject" rule and remanding the case for further proceedings and a determination of the appropriate relief) (to be argued May 20, 2015). *See State ex rel. Ohio Civil Service Employees Association v. State*, 2 N.E.3d 304, 2013-Ohio-4505 (2013).

Section 16 - Bills to Be Signed by Governor; Veto

This provision was revised as a result of the 1970s Commission's review of Article II.

Section 17, 18 & 19- Signing of Bills; Style of Laws; Appointment to Civil Office

These provisions were repealed as a result of the 1970s Commission's review of Article II.

Section 20 - Term of Office and Compensation

Adopted in 1851, this provision gives the General Assembly the power to fix the compensation of officers, but bars any change during the term of office.

Section 21 - Contested Elections

Adopted in 1851, this provision gives the General Assembly the authority to determine how the trial of contested elections shall be conducted.

Section 22 - Appropriations

Adopted in 1851, this provision requires an appropriation to draw money from the treasury and bars appropriations for longer than two years.

Sections 23, 24, and 38 - Impeachment and Removal of Officers for Misconduct

Section 23, and its companion Section 24, gives the House sole power of impeachment of state officials, with the Senate responsible for impeachment trials and impeachment and removal of public officials. In addition, Section 38 permits the General Assembly to pass laws providing for the prompt removal of state officials for "any misconduct involving moral turpitude or for other causes." In addition, under Article IV, Section 17 both judges may be removed with notice and an opportunity to be heard by concurrent resolution of supported by two-thirds of the members of both houses of the General Assembly.

Section 25 - When Sessions Commence

This provision was repealed as a result of the 1970s Commission's review of Article II.

Section 26 - Legislative Submissions/Referenda

Article II, Section 26, which is best known as the provision that requires the uniform operation of laws throughout the state, also contains a provision by which, in limited circumstances involving education, the General Assembly may submit proposed statutes to the voters for their approval. The text of Section 26, with the legislative submission italicized, is as follows:

> All laws, of a general nature, shall have a uniform operation throughout the state; *nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the General Assembly,* except, as otherwise provided in this constitution. [Emphasis added.]

As far as I have been able to determine, this referendum procedure has only been used on one occasion. In 1998, the General Assembly, in response to the Ohio Supreme Court's decision in *DeRolph v. State*, 78 Ohio St.3d 193, 677 N.E.2d 733 (1997), presented the voters with a proposal to increase the sales tax and other taxes to support education. The court upheld this use of a legislative submission/referendum, *see State ex rel. Taft v. Franklin County Court of Common Pleas*, 81 Ohio St.3d 480, 482, 692 N.E.2d 560, 562 (1998) ("[T]he general prohibition in Section 26, Article II against enactment of legislation whose effectiveness is dependent upon approval of another authority does not apply to legislation relating to public schools."), but the voters rejected the proposal by a substantial margin. Unlike Ohio, some states, especially California and Washington, have broad provisions for submitting proposed legislation to the voters and make frequent use of this procedure.

Section 27 - Election and Appointment of Officers; Filling Vacancies

This provision addresses the power of the General Assembly to determine the manner for the appointment of officers (not otherwise provided for in the constitution), but denies the General Assembly the power to make appointments itself.

Section 28 - Retroactive Laws

Adopted in 1851, this provision has been the subject of much litigation. Unlike the prohibition on ex post facto criminal laws, this provision broadly bars the adoption of civil laws including but not limited to retroactive laws that impair contracts.

Section 29 - No Extra Compensation

Adopted in 1851, this provision limits the circumstances in which extra compensation may be made after the services have been rendered.

Section 30 - New Counties

Adopted in 1851, this provision outlines the procedures for creating new counties, none of which may contain less than 400 square miles of territory.

Section 31 - Compensation of Members and Officers of the General Assembly

Adopted in 1851, this provision addresses the compensation for members of the General Assembly.

Section 32 - Divorces and Judicial Power

Adopted in 1851, this provision prohibits the General Assembly from granting divorces; it also bars the General Assembly from exercising the judicial power.

Section 34a - Minimum Wage

Adopted in 2006 by initiative, this provision establishes a state minimum wage and provides for an automatic annual increase

Section 36 - Conservation of Natural Resources

In addition to authorizing the passage of laws to encourage forestry and agriculture, this provision permits non-uniform taxation of land devoted exclusively to agricultural use.

Constitutional Overrides of Supreme Court Decisions

Several provisions of Article II have their origin in the efforts of the 1912 Constitutional Convention to override decisions of the Ohio Supreme Court (or to avoid future decisions that the delegates feared would be forthcoming). Most of these decisions called into question the power of the General Assembly to adopt social or employee welfare legislation. Typically, these provisions only authorized the General Assembly to do that which it could do under its plenary power.

These provisions include:

Section 33	Mechanics' and Contractor's Liens
Section 34	Welfare of Employees
Section 35	Workers' Compensation
Section 37	Workday and Workweek on Public Projects
Section 39	Regulating Expert Testimony in Criminal Trials
Section 40	Registering and Warranting Land Titles
Section 41	Prison Labor

Two of these provisions, Section 33, and Section 34, have supremacy clauses that immunize statutes enacted under their authority from all state constitutional requirements. *E.g.*, "No other provision of the constitution shall impair or limit this power."

Section 42 - Continuity of Government Operations in Emergencies Caused by Enemy Attack

Adopted in 1961, this provision requires the General Assembly to pass laws to provide for the continuation of government in the event of an enemy attack.

Unicameralism

Only one of the 50 states, Nebraska, has rejected the use of a bicameral legislature. This issue did not arise during the 1970s Commission proceedings, and to date no member of the current Commission has expressed interest in considering the abandonment of a bicameral legislature. A leading authority on state constitutional law has observed that the "contemporary case for bicameralism, in the wake of *Reynolds v. Sims* [the one-man, one-vote case], is weaker than it has been in the past." *See* Alan Tarr, Bicameralism or Unicameralism? (Testimony before the Majority Policy Committee, Pennsylvania Legislature) (April 2010). Nonetheless, there has been little interest throughout the country, and voters in Montana and North Dakota defeated proposals for unicameral legislatures. *Id.*

ATTACHMENT

SUMMARY OF DECEMBER 11, 2014, PRESENTATON

OVERVIEW OF ARTICLE II AND ITS HISTORY

SUMMARY OF DECEMBER PRESENTATION

This summary is an expansion of my December 11, 2014 presentation.

Plenary Power

In adopting a constitution, the people of Ohio delegated all legislative power to the General Assembly subject only to other constitutional limitations. This grant of legislative power differs fundamentally from the grant of legislative power to Congress under the federal constitution. Unlike the U.S. Constitution, which grants Congress specific, enumerated powers, the Ohio Constitution "is primarily a limitation on the legislative power of the General Assembly." *See State v. Warner*, 55 Ohio St.3d 31, 564 N.E.2d 18 (1990). Thus, the General Assembly may enact any law not prohibited by the state or federal constitutions, and a law passed by the General Assembly is presumed constitutional unless it is incapable of a fair reconciliation with the constitution.

Separation of Powers

Ohio does not have a constitutional provision expressly regulating the separation of powers among the branches of government, and is one of a minority of states without such a provision. Nonetheless, the Ohio Supreme Court has held that the doctrine of separation of powers "is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of government."

History of Article II

1802 Ohio Constitution

- The Legislative Article was Article I, reflecting the importance of the General Assembly
- General Assembly appointed judges as well as the secretary of state, the treasurer, the auditor, and the chief military officers
- Almost no limitations on the power of the General Assembly
- General Assembly operated primarily though special legislation/private bills
- Governor did not have the veto power

1851 Ohio Constitution

- General Assembly lost the power of appointment
- Voters were given the right to elect judges and other statewide officials (auditor, attorney general, secretary of state, treasurer)
- Governor still lacked the veto power
- Introduced limitations on the power of the General Assembly

Post-1851 Amendments

- 1903 Governor given the veto
- 1912 Direct democracy proposals from the 1912 Constitutional Convention gave the people the power of the initiative and referendum
- 1973 Major review and re-organization as a result of the work of the 1970s Ohio Constitutional Revision Commission
-

Overview of Changes in Article II of the 1851 Constitution

- Article II is one of the most frequently amended Articles of the Ohio Constitution
- Originally, Article II had 32 sections
- 15 of the original sections have never been amended
- 5 of the original sections were amended in 1973 as part of the legislative reorganization that resulted from the recommendations of the 1970s Commission
- 4 of the original sections were amended (apart from the 1973 reorganization) some multiple times
- 4 of the original sections were repealed in 1973 as part of the legislative reorganization that resulted from the recommendations of the 1970s Commission
- 6 new sections that were adopted as a result of the recommendations of the 1912 Constitutional Convention have never been amended
- 4 new sections that were adopted as a result of the recommendations of the 1912 Constitutional Convention were subsequently amended

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Remaining 2015 Meeting Dates

October 8
November 12
December 10

2016 Meeting Dates (Tentative)

January 14
February 11
March 10
April 14
May 12
June 9
July 14
August 11
September 8
October 13
November 10
December 8